

FAMILIES AND PROBLEM-SOLVING COURTS

“(Our court system) must deal with new and troublesome problems, involving much more than increased caseloads and limited resources. While these problems cannot be solved they must be faced. Change for the sake of change is meaningless, but change to meet the needs of our citizens in the future is totally worthwhile.”

*- The Commission on the Future of Maryland
Final Report, December 15, 1996*

PROBLEM-SOLVING COURTS UNDER A DIFFERENT LENS

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When viewed from a historical perspective, it is clear that courts were never the ideal forum to address certain types of problems, including those that contained multiple issues that are difficult to fit into a dichotomous adversarial framework and those issues that require diagnosis of a problem and a search for a solution, rather than a winner or loser, or a finding of guilty or not guilty. Problem-solving approaches should flourish in these areas of law and can be easily “mainstreamed” to the post-adjudication phase of criminal cases after guilt has been established.

Problem-solving courts have emerged on the scene as an alternative to traditional courts.¹ Problem-solving courts originated not in academia but from the efforts of “practical, creative, and intuitive judges and court personnel, grappling to find an alternative to revolving door justice, especially as dispensed to drug-addicted defendants.”² From their creation with the opening of the first drug court in Dade

County, Florida in 1989,³ drug courts spread rapidly based upon anecdotal reports of success in reducing recidivism, as well as the infusion of federal dollars. By the end of 2004, there were 1,621 drug-court programs in the United States, with another 215 in the planning stages.⁴ Adding problem-solving court programs in other areas of the law, such as domestic violence, mental health, and DWI, to drug courts brings the number of problem-solving courts in the United States up to 2,558, as of 2004.⁵

On August 3, 2000, the importance of problem-solving courts was recognized by the Conference of Chief Justices and the Conference of State Court Administrators in a resolution in support of problem-solving court principles and methods, a resolution that was confirmed by a second resolution passed on July 29, 2004.⁶ Point 4 of the original resolution called upon state courts to

[e]ncourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims, and the community.

Perhaps in the zeal to encourage the benefits of problem-solving courts, advocates tend to focus on the differences between problem-solving courts and their more-traditional options, almost as if the choice is dichotomous—pick one or the other.

One basic function of courts is to settle disputes, and the processes by which American courts resolve disputes evolved from English law, which relies on an adversary process. The key characteristics of the adversary process are:

1. it is self initiated by the parties, whether civil litigant or public prosecutor. The court does not seek business. It is up to the parties to come forward with the evidence. The judge is passive.
2. it is objective in the sense that the decision is based upon the evaluation of materials presented by the parties.
3. it is an all or nothing outcome.
4. it is authoritative in that judgment carries force of law.⁷

The basic characteristics of problem-solving courts are “(1) immediate intervention; (2) nonadversarial adjudication; (3) hands-on judicial involvement; (4) treatment programs with clear rules and structured goals; and (5) a team approach that brings together the judge, prosecutor, defense counsel, treatment provider, and correctional staff.”⁸

Roger Warren, president emeritus of the National Center for State Courts, provides a succinct summary of the differences between this traditional conception and transformed court processes.

A Comparison of Transformed and Traditional Court Processes

Traditional Process

Dispute resolution
Legal outcome
Adversarial process
Claim- or case-oriented
Rights-based
Emphasis placed on adjudication
Interpretation and application of law
Judge as arbiter
Backward looking
Precedent-based
Few participants and stakeholders
Individualistic
Legalistic
Formal
Efficient

Transformed Process

Problem-solving dispute avoidance
Therapeutic outcome
Collaborative process
People-oriented
Interest- or needs-based
Emphasis on post-adjudication and ADR
Interpretation and application of social science
Judge as coach
Forward looking
Planning-based
Wide range of participants/stakeholders
Interdependent
Common-sensical
Informal
Effective

Source: R. K. Warren, “Reengineering the Court Process,” presentation to Great Lakes Court Summit, Madison, Wisc., September 24-25, 1998, reprinted in Rottman and Casey, “Therapeutic Jurisprudence,” p. 14.

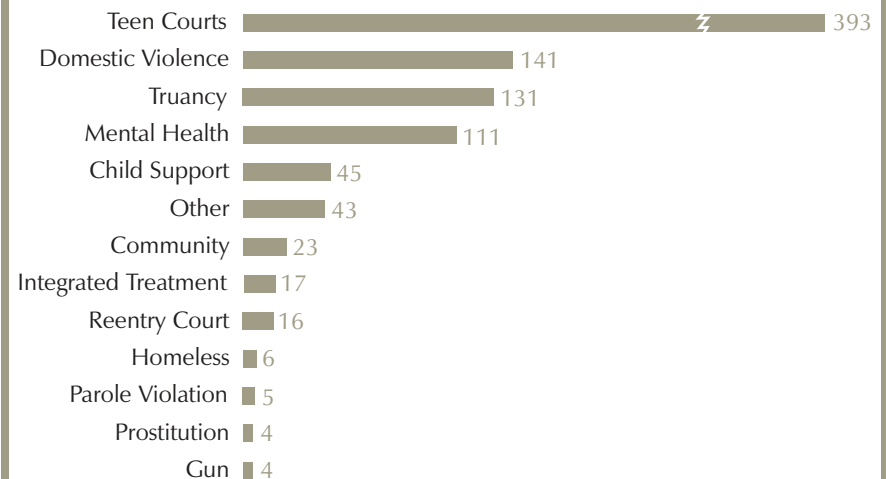
The summary itself, however, does imply that the choice is between two distinct approaches. The contrast is especially acute with respect to the role of the judge. Problem-solving courts require judges to be personally engaged with each offender, and this personal involvement creates a tension with the traditional role of the judge

as a detached, neutral arbiter. This tension provides the base for the charge that problem-solving judges need to become “social workers” or “therapists.”⁹

By changing the lens with which we examine the role of problem-solving courts, I would argue that the tension over judicial role and, indeed, the role of problem-solving courts would be mitigated. The question needs to be reframed as, “What type of cases or court proceedings are most appropriate for resolution by problem-solving courts or by using problem-solving principles?”

My premise is that the speed with which the problem-solving courts spread was an indicator of the need for an alternative court process *for certain types of cases and proceedings*. I further contend that this innovation is part of a much larger cycle, whereby specialized courts are created to handle certain types of cases, the number and type of specialized courts grow until jurisdictions become fragmented, and then specialized courts are merged and consolidated into divisions of more-unified courts.

Number and Type of Non-Drug Operational Problem-Solving Court Programs in the United States, December 2004



Source: The National Law Journal

As the brief history below will indicate, some types of “polycentric” or multiple-issue problems,¹⁰ as well as problems that require “diagnosis” of the problem and selection among treatment options, are not well suited for traditional adjudication and never have been. Thomas Henderson and his colleagues identified one type of case where disposition does not depend upon applying the facts to law but, rather, on clarifying the issues and fashioning appropriate remedies.¹¹ The decision process needed for these types of cases, examples of which were drawn primarily from juvenile and family law, was called “diagnostic adjudication.”

Law Cases, Equity Cases, and Family-Law Cases

As early as 1340 in England, a disappointed litigant could petition the king for “justice” or relief when common law provided no remedy.¹² The king typically referred these petitions to his chancellor, who, until the Reformation, was always a cleric and often the king’s confessor. Unlike courts of law, which were based upon formal causes of action, the lord chancellor could decide cases according to equity or fairness rather than on the strict letter of the law. Ultimately, the volume of these petitions led to the establishment of the Court of Chancery.

Law, in contrast to equity, was developed as a public process, hence oral, and retrospective in that it provides a remedy only after a wrong has been done. The most common remedy in a court of law is a pronouncement of guilt or innocence in criminal cases and a winner or loser in civil cases, with money damages being a common remedy. Jury trials are used along with bench trials to make decisions. Equity was developed from canon law and is a more private process, written and judge based. In equity, judges can order preventive measures and even remedial ones, such as injunctions or restraining orders. For example, a plaintiff threatened with a state use of eminent domain to remove a historic oak tree may want the tree preserved, rather than money damages after the tree has been cut down.

In the early history of the United States, many states had separate courts of equity, called chancery courts. Most of these were merged into courts of general jurisdiction in the trend toward court unification so that court clients would be able to seek equitable relief and legal relief in a single court. Chancery courts still exist as separate entities in Delaware, Mississippi, and Tennessee. The point is that such family matters as adoptions and guardianships, marriage and divorce, child-support enforcement, and probate, as well as mental illness and corporate law, were

originally placed in chancery courts, not “law” courts. It is therefore not surprising that these types of family cases are good candidates for problem-solving courts.

Because juveniles have not fully developed emotionally and cognitively and are dependent upon adults, cases involving juveniles did not seem to fit well into the traditional law-court framework. Consequently, separate courts for juveniles were created, the first in Chicago in 1899.¹³ Professor Sanford Fox argues that what sets these courts apart from other courts is not only the philosophy of protecting children from the criminal justice system, but also “the development of a personal rapport between the judge and the child before the court.”¹⁴ This is clearly one of the key attributes of problem-solving courts.

Separate juvenile courts preceded the development of family courts. Indeed, the family court in Delaware had its origins in juvenile court.¹⁵ One of the key conclusions of a national symposium on families in court was that child- and family-related proceedings are “distinctively different” from other court proceedings and, therefore, required either separate specialized family courts or family-court divisions of general-jurisdiction courts.¹⁶ Separate juvenile courts may have been appropriate for delinquency cases, but they do not address all of the family dynamics inherent in child abuse and neglect cases. Family courts were created to coordinate and deal with issues affecting all of the individuals in the family, not just the one individual or one issue that brought that matter to the attention of the courts. A unified family court typically has jurisdiction over juvenile cases, such as delinquency and dependency, as well as domestic-relations cases ranging from divorce to domestic violence, child support to child custody.¹⁷ Here again, it is not surprising that some family cases, notably domestic-violence cases, are good candidates for problem-solving courts.

Conclusion and Implications

Despite the fact that problem-solving courts are “effective for certain types of cases and seem to be having a positive impact on their communities,” at least one informed observer is not ready to call them “mission critical” yet.¹⁸ Alex Aikman argues that problem-solving courts as they exist in 2006 or even 10 or 20 years from now will remain “one tool among many being used by only a fraction of all trial judges on a fraction of the caseload.”¹⁹ The reality of this statement is the reason the CCJ/COSCA resolution called for “mainstreaming” the problem-solving

approach to traditional courts. Bruce Winick and David Wexler illustrate how this will occur:

The new problem solving courts have served to raise the consciousness of many judges concerning their therapeutic role, and many former problem solving court judges, upon being transferred back to courts of general jurisdiction, have taken with them the tools and sensitivities they have acquired in those newer courts.²⁰

Even a brief examination of issues brought before courts reveals that some types of cases and proceedings were never a good fit for traditional adjudication. What does that history lead us to expect for the future of problem-solving courts?

- From their origins in drug courts, problem-solving courts will not only spread to other areas of the country, assuming the continuation of federal support, but also continue the process of specialization to juvenile drug courts, campus drug courts, and reentry drug courts (see “Drug Courts” article in this publication).
- More evaluations of drug courts and all problem-solving courts are needed to determine the types of offenders who would most benefit from their services. For example, recent drug court evaluations have revealed the counterintuitive finding that drug courts have been most effective with “high-risk” offenders who had more-severe criminal histories and drug problems.²¹
- Problem-solving courts will affect the development of unified family courts. The problem-solving approach has changed the dynamics of juvenile and family issues that have always been candidates for specialized treatment. The unified-family-court movement already began the process of looking beyond the individual case that brought the family to court to consolidate multiple family issues into a single “case” that could be addressed with a coordinated response.²² The problem-solving approach further expands the range of issues that need to be handled in family court to include drug, alcohol, and anger-management issues. This combination of specialized family and drug courts are called “family treatment courts.”²³ (In 2006 the Substance Abuse and Mental Health Services Administration announced a three-year, \$9.9 million program to fund juvenile and family drug-treatment courts.²⁴) At the same time there has been a further

specialization of “courts” (rather, specialized dockets) dealing with family issues, such as teen courts, truancy courts, and domestic-violence courts.

- Problem-solving courts have expanded and will continue to expand in areas of criminal law that do not involve significant deprivation of liberty but focus on preventing repeat offenses by focusing on individuals and the conditions or addictions that brought them to court. These include community courts for “quality-of-life” crimes, gun courts for weapons offenses, gambling courts, homeless courts, and mental-health courts to handle the overrepresentation of people with mental illness in criminal courts.²⁵ One judge summarized the appropriate use of problem-solving courts for criminal case types as “where the level of punishment required is diminished by the need to solve the underlying problem and so you’d rather solve the problem than punish the behavior.”²⁶
- Problem-solving approaches are also appropriate to serious criminal cases, but only for the sentencing phase. Feinblatt, Berman, and Denckla cogently stated: “Problem solving courts emphasize traditional due process protections during the adjudication phase of a case and the achievement of a tangible, constructive outcome post-adjudication.”²⁷ Especially in criminal cases with a substance-abuse component, such as DWI cases, the full adversary process with all of its due-process protections could be employed until guilt has been established. After guilt is established, problem-solving principles designed to prevent repeat offenses could be used to select the best sentencing options, whether therapeutic or punitive. This should at least mitigate the role conflict between judges with a traditional orientation toward law and advocates of the more “transformed” process of problem-solving courts.

ENDNOTES

¹ The conventional term “problem-solving courts” has passed into the language even though most are not separate courts but separate dockets or calendars of larger courts or divisions. In most instances, they involve a single judge handling a single type of case on a periodic schedule.

² David B. Wexler, “Therapeutic Jurisprudence: It’s Not Just for Problem-Solving Courts and Calendars Anymore,” in C. Flango, N. Kauder, K. Pankey, and C. Campbell (eds.), *Future Trends in State Courts 2004* (Williamsburg, VA: National Center for State Courts, 2004), and citing Bruce J. Winick

and David Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Durham, NC: Carolina Academic Press, 2003), p. 6.

³ Greg Berman and John Feinblatt, "Problem-Solving Courts: A Brief Primer," *Law and Policy* 23 (2001).

⁴ C. West Huddleston III et al., *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* (Washington, DC: Bureau of Justice Assistance, 2005), p. 2.

⁵ *Ibid.*, Figure 6, at 17.

⁶ See <http://ccj.ncsc.dni.us/CourtAdminResols.html>.

⁷ William P. McLauchlan, *American Legal Processes* (New York: John Wiley and Sons, 1977), p. 18.

⁸ David Rottman and Pamela Casey, "Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts," *National Institute of Justice Journal* (July 1999): 15. P. F. Hora, W. G. Schma, and J. T. A. Rosenthal, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America," *Notre Dame Law Review* 74 (1999): 453.

⁹ See Leslie Eaton and Leslie Kaufman, "In Problem-Solving Court, Judges Turn Therapist," *New York Times* (Apr. 26, 2005): "Now, in drug treatment courts, judges are cheerleaders and social workers as much as jurists." Online at <http://www.nytimes.com/2005/04/26/nyregion/26courts.html?pagewanted=2&ei=5070&en=17fc6df08c9c39e6&ex=1186632000>.

¹⁰ Lon Fuller distinguished between the dichotomous types of issues that the adversary system was designed to solve and "polycentric" problems unsuited to solution by adjudication. See "Forms and Limits of Adjudication," *Harvard Law Review* 92 (1978): 353.

¹¹ Thomas A. Henderson et al., *The Significance of Judicial Structure: The Effect of Unification on Trial Court Operations* (Washington DC: U.S. Department of Justice, 1984), p. 62.

¹² Henry J. Abraham, *The Judicial Process* (New York: Oxford University Press, 1975), p. 15.

¹³ Carol S. Stevenson et al., "The Juvenile Court: Analysis and Recommendations," *The Future of Children* 6, no. 3 (Winter 1996): 5-6.

¹⁴ Sanford J. Fox, "The Early History of the Court," *The Future of Children* 6, no. 3 (Winter 1996): 37.

¹⁵ See <http://courts.state.de.us/Courts/Family%20Court/?history.htm>.

¹⁶ National Council of Juvenile and Family Court Judges, *Families in Court: Recommendations from a National Symposium* (Reno, NV: National Council of Juvenile and Family Court Judges, 1989).

¹⁷ See discussion in Victor Flango, "Creating Family Friendly Courts: Lessons from Two Oregon Counties," *Family Law Quarterly* 24 (Spring 2000).

¹⁸ Alexander B. Aikman, *The Art and Practice of Court Administration* (Boca Raton, FL: CRC Press, 2007), p. 352.

¹⁹ *Ibid.*

²⁰ Winick and Wexler, *Judging in a Therapeutic Key*, *op. cit.*, note 2, at 87.

²¹ See, for example, D. B. Marlowe, "Judicial Supervision of Drug-Abusing Offenders," *Journal of Psychoactive Drugs, SARC Supplement* (2006): 323-31.

²² Carol R. Flango, Victor E. Flango, and H. Ted Rubin, *How Are Courts Coordinating Family Cases?* (Williamsburg, VA: National Center for State Courts, 1999).

²³ Judge Leonard P. Edwards and Judge James A. Ray, "Judicial Perspectives on Family Drug Treatment Courts," *Juvenile and Family Court Journal* (Summer 2005): 1-27.

²⁴ See http://www.samhsa.gov/news/newsreleases/060928_courts.aspx.

²⁵ Huddleston et al., *op. cit.*, note 4, at 10-14.

²⁶ Quoted in Donald J. Farole, Jr. et al., "Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts," *Justice System Journal* 26 (2005): 65.

²⁷ J. Feinblatt, G. Berman, and D. Denckla "Judicial Innovation at the Crossroads: The Future of Problem-Solving Courts," *Court Manager* 15, no. 3 (2000): 28-34. Note that Carolyn Cooper in her article "Drug Courts" in this publication also noted the "shift to a post-adjudication focus for many drug courts."