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A Circumspect Look at Problem-Solving Courts

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Drug treatment courts have become commonplace in virtually every jurisdiction in the United States and have been established in Canada, Australia, the United Kingdom, and elsewhere.[1] The success of these courts has combined with at least two other factors to spur the creation of a new generation of therapeutic or problem-solving courts. One factor has been the growing influence of "therapeutic jurisprudence" and "restorative justice," theoretical perspectives that offer consequentialist critiques of existing legal regimes and that identify alternative practices thought to be capable of producing more positive outcomes for participants.[2] A second, intersecting dynamic is the growing recognition by judges and others that traditional judicial processes are ill-suited to dealing effectively with the multiple social pathologies that have found their way inevitably into courthouses as a consequence of the failure of other institutions that in the past have helped to socialize individuals, construct communities, and perform basic functions related to social control.[3]

The result of this confluence of practice (the hundreds of operating drug treatment courts around the country), perception (the growing recognition that judges increasingly are being required to manage cases in which litigants bring to court a broad range of often intractable underlying pathologies), and theory (the spread of therapeutic jurisprudence and restorative justice from a few academics to scores of influential judges and other policy makers) has been the creation of a number of other problem-solving courts, including community courts, mental health courts, domestic violence courts, and others.

The claim that drug treatment courts have a solid theoretical grounding and demonstrable efficacy has been central to advocates, academics, and others who have worked to develop a "second generation" of problem-solving courts built on the foundation of the drug treatment court experiment.[4] The project of this chapter is to provide a circumspect assessment of this claim, and to suggest that the problem-solving court model, like the drug treatment court model upon which it is based, while useful in some circumstances, has important limitations.

Advocacy in support of drug treatment courts in particular and problem-solving courts more generally is part of a broader "post-welfarist crime control" narrative.[5] This narrative places strong emphasis on pragmatic efficacy, and on the construction of "the offender as a 'responsibilized' and 'accountable' agent who is given privileged 'opportunities' for rehabilitation" through his or her participation in the court process.[6] A central feature of this narrative is that the criminal justice system is understood as an appropriate site for the building of institutional and professional partnerships between law-trained actors oriented toward adjudication and punishment and others whose primary goals are to provide treatment and other social services. This narrative of collaboration between and integration of the justice and human services systems generally takes as a given that the harmonization of these disparate worlds is both desirable and practicable.

In a variety of ways, however, the melding of justice and treatment is potentially problematic. This uneasy partnership can be explored by examining the ways in which individual defendants are conceptualized in drug treatment courts and other problem-solving courts, and by examining the roles assumed by judges, defense lawyers, and other actors in these hybrid settings. At least with respect to defendants who have substance use disorders, the group that is the principle focus of drug treatment courts and a significant subset of all the defendants in problem-solving courts, the problems of coherent conceptualization are considerable. On the one hand, these actors are understood as suffering from a chronic, relapsing disorder that requires the intervention of therapeutic measures in order to interrupt a pathological pattern over which they are unable to exercise meaningful control. On the other hand, these same individuals are constructed as responsible moral agents who are capable of autonomous decision making and who are to be held responsible for their choices. The mechanism that mediates this apparent tension is the use of "legal coercion," the threat of legally sanctioned punishment as a device for encouraging treatment readiness and treatment retention.[7]

A close consideration of the role played by legal coercion in the context of problem-solving courts is warranted because it presses focus on a series of concerns that have been raised by critics. First is the concern that the mandated treatment and supervision typical of these courts represents an unnecessary expansion and dispersal of behavior control and surveillance. A second concern is that problem-solving courts too often cause a misallocation of scarce social services resources. A third concern is that the therapeutic objectives animating

practice in these courts sometimes become debased and are lost within the broader punitive norms of the criminal justice system. Finally, some critics suggest, the attempt to deliver therapeutic interventions in problem-solving courts risks undermining the values of procedural fairness and open justice that ordinarily attach to our formal criminal justice blaming practices. Each of these concerns is considered below.

THE MERGING OF TREATMENT AND PUNISHMENT

While there are research data suggesting that legal coercion may be effective in getting substance-abusing defendants into treatment and lengthening their retention in treatment,[8] there are questions about both the longer term benefits and the costs of such a regime. In addition to an examination of these costs and benefits from the defendants' point of view, it is worth considering as well the costs that a reliance on legally coercive practices places on other actors in the system and on the system itself.

The argument for leveraging the compulsory elements of the criminal system as a means of improving treatment outcomes, and its embedded critique of voluntary treatment, has been very influential. In 1999, two early drug treatment court judges, Peggy Hora and William Schma (along with a third co-author), published a detailed article in the *Notre Dame Law Review* that explicitly made the case for drug treatment courts on the basis of the therapeutic value of criminal system coercion.

> The question of whether coerced treatment provides an individual with the proper incentives to successfully complete a treatment program stands as a traditional point of concern with treatment providers. Through the years, many experts in the drug treatment field have questioned the effectiveness of legally coerced treatment due to a belief that individuals must enter a program voluntarily in order to have the requisite state of mind for recovery . . . Recent studies and findings by several researchers and treatment specialists serve to dispel and debunk this notion . . . "[T]he 'coercion' actually improves the substance abusers' chances of overcoming their addiction."[9]

The sharp elbows approach of the drug treatment court model is grounded in a research literature that seeks to demonstrate that outcomes related both to substance abuse relapse and to criminal recidivism are correlated with a client's length of stay in treatment, and that individuals who are coerced into treatment by the criminal system tend to remain longer than do voluntary patients.[10] As others have pointed out, however, "a body of literature on the psychology of choice suggests that if the defendant experiences [the choice to enter treatment] as coerced, his or her attitude, motivation, and chances for success in the treatment program may be undermined."[11] Consistent with this more skeptical view of coerced treatment, other researchers have found mixed results with respect to the therapeutic pressure employed by drug treatment courts.[12]

At bottom, the question whether to force treatment compliance through the threat of criminal punishment is framed by a larger tension between two distinct public policy approaches to drug use disorders. One perspective, the strict prohibition model, is reflected in the federal Controlled Substances Act and most corresponding state statutes, and is operationalized primarily through the criminal enforcement process. "Under the paradigm of strict prohibition, proscribed drugs and their use are subject to control by the criminal justice system and only complete abstinence is permissible under the law." [13] The drug treatment court movement, although in some respects a hybrid practice standing between traditional criminal punishment and a pure public health strategy, is still, on these terms, squarely within the prohibition framework.

These courts are innovative because their design and operation acknowledge the chronicity of drug use disorders and the frequency with which persons in treatment suffer relapse on the road toward recovery. Thus, by employing graduated sanctions to respond to treatment setbacks, this approach avoids the on/off switch of probation or parole revocation proceedings characteristic of more traditional settings. Nevertheless, the drug treatment court approach is still squarely within the strict prohibition framework because it operates on the premise that abstinence from drug use is the only acceptable outcome and that clients should seek to become abstinent under a schedule driven by underlying criminal justice system benchmarks.[14]

> The drug court model, however, while stressing rehabilitation over retribution, still does not represent a fundamental departure from the federal legal framework. The use and sale of selected psychoactive substances, which are prohibited and punished under federal law, continue to be uniformly prohibited and punished in all of the states, and the federally-subsidized drug courts use the threat of criminal sanctions to coerce abstinence, sanctions which are often imposed; many, if not most, drug court participants are still confined to jail or prison for failure to complete treatment requirements.[15]

The alternative approach, although not necessarily incompatible with prohibition, focuses less on abstinence and the strict enforcement of controlled substances provisions and relies instead on the voluntary involvement of individuals in treatment. This alternative is guided by the principle of "harm reduction," and adopts "a non-judgmental and non-coercive approach, rendering services to assist drug users in reducing the attendant harm from drug use and often in reducing drug use itself." [16]

Supporters of the drug treatment court model point to extraordinarily high attrition rates for most voluntary treatment programs and argue that an addict's involvement with the criminal system through arrest creates a unique window of opportunity, and that his or her continuing potential criminal liability creates treatment leverage that should be exploited to ensure satisfactory treatment outcomes. By contrast, supporters of more voluntary approaches who start with

the premises of the harm reduction perspective point out that many persons with drug use disorders require several attempts at treatment before accomplishing a sustained recovery. From their point of view, arguments based upon the high attrition rates associated with drug treatment facilities potentially are misleading because they fail to acknowledge this clinical reality.[17] Thus, a program with an attrition rate of 50 percent may not, in fact, be experiencing a one-half failure rate, if some or most of its clients return for second, third, or fourth attempts at treatment at a later time (or enroll successfully in a different program at a later date).

At stake in this choice between these two alternative approaches is the question whether it is wise to maintain a regime of comprehensive surveillance and behavior control for this population of defendants. Although the architects of drug treatment courts and many other problem-solving courts frame their interventions in therapeutic language, the range and intensity of measures that are coercively imposed in order to create "positive lifestyle change,"[18] which run the gamut from alcohol and other drug treatment obligations, to parenting classes, to employment monitoring and the like, are considerable. Regular urine testing, frequent and periodic court appearances, and detailed reporting to the court and to prosecutorial officials from treatment providers all serve to control and monitor the individual's daily routine in a fashion potentially more invasive and coercive than a traditional sentence of incarceration.[19] As one writer has explained, drug treatment courts (as well as other problem-solving courts) present "an instructive illustration of a dispersed, yet comprehensive and pervasive regime of behavioural 'discipline' acting upon the offender from many sides ... As such, D[rug] T[reatment] C[ourts] may be viewed as a microcosm of late modern governmentality, in which singular expressions of punishment have been replaced with a dispersed regime of disciplinary tools and technology."[20]

Notwithstanding this dispersion of coercive control, problem-solving courts still employ traditional forms of criminal punishment as well. Offenders who fail to comply with one or more of the requirements that the court has imposed may receive short jail sentences, and others who fail more fundamentally and are discharged from the program may end up serving full sentences in jail or prison. In the end, from the point of view of the defendant, drug treatment courts and other problem-solving courts may be "more difficult to complete, more onerous and far more intrusive on liberty" than traditional criminal court dispositions.[21]

In addition, drug treatment courts and many other problem-solving courts serve to extend the reach of the criminal system, by retaining in the system defendants who otherwise might not be subject to criminal justice control and by failing to divert a significant number of other offenders—often those facing more serious changes—into alternative treatment-based dispositions. Drug treatment courts thus may produce a "net widening" effect by channeling into the system defendants who would otherwise have avoided a criminal justice system disposition. According to one writer, treatment courts in many jurisdictions engage in "cherry picking the low-risk candidates who would have been screened

out of a traditional diversion system and channeling up and into the criminal justice system the high-risk candidates they were originally designed to serve."[22] As a consequence, these courts and others based on the treatment court model do not necessarily function as diversion mechanisms limiting the impact of the prohibition approach; rather, they sometimes serve as adjuncts of that social control system, extending and diversifying the range of measures available to support that policy and expanding the pool of individuals enmeshed in it.

COMMUNITY COURTS AND THE PROBLEM OF ALLOCATING SCARCE SOCIAL SERVICES RESOURCES

Both of the tendencies noted above, the dispersion of surveillance and behavior controls and the widening of the criminal justice system's net, are especially present in the case of community courts. Like many other problem-solving courts, community courts seek to provide responses to a wide range of problems, including child neglect, mental illness, drug abuse, and domestic violence. They employ many of the same mechanisms for monitoring and controlling defendants' behavior that were developed by drug treatment courts, and, like drug treatment courts, transform detention and surveillance functions, often moving them outside the jail and into community-based settings.[23]

Beginning with the first community court, which was established in New York City through the collaborative efforts of the Center for Court Innovation and the Chief Judge of the New York Court of Appeals, Judith Kaye, it has been clear that these courts were designed to implement the "zero tolerance" and "quality-of-life" policing tactics at the heart of the "broken windows" theory of law enforcement, under which police are encouraged to increase the number of arrests for minor criminal offenses.[24] The first New York community court and others like it have been designed to handle a wide range of low-level misdemeanor offenses that generally were not prosecuted at all prior to the adoption of the broken windows philosophy and the establishment of these new courts. As Anthony Thompson has explained, "[t]he types of cases addressed in these new courts have come to include those 'victimless' crimes once considered outside the jurisdiction of traditional criminal courts. What had once been minor infractions or low-level misdemeanors became the principal focus of this new judicial effort."[25]

Thompson makes it clear that a central goal of many community courts has been to address the persistent problem of homelessness, and the related problem of undertreated mental disabilities, through the provision of much needed social services. He argues, however, that this approach is flawed both because its focus on individual defendants fails to address "the structural and systemic causes of homelessness" and because "the root causes of many of the perpetual problems in low-income areas and communities of color a[re] far too nuanced to be addressed by means of court adjudication." He suggests that, while underserved communities often are quite attracted to the array of social services made available through community courts, community members might well prefer to gain

access to those resources "without the threat of the criminal justice system hanging in the balance." [26]

This critique about the allocation of scarce social services resources has been made by a number of other observers, and even some participants, in the problem-solving court movement. Victoria Malkin, for example, has noted that the communities typically served by community courts are those most in need of new services and programs. She ponders whether problem-solving courts are "the proper arena to develop" these resources, in light of the mainstream institutional affiliations and political power of the actors who establish and direct these courts. Malkin's concern is that these affiliations and power dynamics give community courts and their supporters "advantages over smaller grassroots organizations in terms of their political and cultural capital," thereby steering resources away from these smaller community-based entities. [27]

A related set of concerns have been raised in the context of mental health courts and domestic violence courts. Mental health courts are a direct response to the problem of large numbers of persons with mental disabilities coming into the criminal justice system as a consequence of a history of deinstitutionalization and the failure of the community mental health system. Some experts have observed that these problem-solving courts, while essential in dealing with this influx in the short term, absorb resources that could be directed toward ameliorating the problems more systematically. Indeed, some writers have suggested that "effective community intervention could prevent the need to find and treat mentally ill citizens in the criminal justice system" altogether. [28] The reservations expressed by some about the allocation of treatment resources to defendants in domestic violence courts are even more focused. These observers are especially concerned about "the use of valuable domestic violence resources on services for perpetrators . . . when doing so diverts limited funds away from services for battered women." [29]

THE PREDOMINANCE OF PUNISHMENT

The effort to meld punishment and treatment in the problem-solving court model risks reinforcing the "hegemony of punishment over therapeutic values and practices" in the broader effort to manage problems related to substance use disorders and other, related social pathologies. [30] In part, this risk is inherent in the well-documented tendency of rehabilitative regimes that rely on coercion to devolve over time into increasingly punitive enterprises. As the liberal critics of the rehabilitative ideal pointed out more than a quarter century ago, "the natural progression of any program of coercion is one of escalation." [31] As a consequence, and without regard to the good intentions of court officials, therapeutic problem-solving courts are always at risk of becoming debased over time. [32]

Additionally, the very design of these courts tends to reinforce the primacy of the criminal justice components over the therapeutic/helping elements. Although the judge, attorneys, probation and parole officials, and service providers often

are described as functioning as a "treatment team," [33] it is significant that the team is headed by the judge, who, by training, professional culture, and role definition, is bound to enforce legal norms. Thus, unlike treatment services provided voluntarily in the community, fundamental decisions made in problem-solving courts, including decisions about whether a violation of conditions should be met with a therapeutic response or a more punitive imposition of shock incarceration or expulsion from the program, are made authoritatively by an actor bound to a larger institutional system that takes as its goals deterrence, retribution, and incapacitation.

An interesting observational study of drug treatment courts in Las Vegas provides some perspective on this problem of the debasement of rehabilitative impulses in problem-solving courts.[34] The authors of the study were attempting to explain the relatively high recidivism rates for drug court participants that they had observed and that have been documented by a number of other researchers.[35] Their observations were framed by the theoretical work of John Braithwaite, an Australian criminologist and leading restorative justice theorist, whose work on "reintegrative shaming" is well known.[36] The researchers found that the drug treatment courts they observed actually were more stigmatizing than conventional courts, and were insufficiently reintegrative to overcome the punitive effects produced by their structure and processes.

Braithwaite's theory has several elements. First, it contemplates the use of an initial public proceeding or ceremony designed to certify the offender's deviance, which is followed eventually by a termination ceremony intended to decertify that deviance and return the offender to his or her community. The theory also requires that the offender's conduct be met with disapproval communicated within a relationship of respect and social interconnectedness, and finally, it requires that expressions of disapproval be directed at the offender's conduct and not at the offender himself or herself.[37] The study authors' initial hypothesis was that the drug treatment court model would contain many of the features required by Braithwaite's theory, and thus would function well as a reintegrative shaming process. Unfortunately, their observational data suggested just the contrary.

While the initial appearance of participants before the drug treatment court judge was clearly a public degradation ceremony, as the theory would expect, the "field observations of [subsequent] court sessions revealed a clear preponderance of stigmatizing rather than reintegrative comments directed at most offenders. The individual defendant, not the act itself, was clearly the focal point of the judge's common 'tongue lashings.' These comments were usually of the type, 'Don't you know what this stuff does to your brain!', 'I'm tired of your excuses,' and 'I'm through with you.' " In addition, upon graduation, little effort was made by the court to reintegrate participants into the broader community. Although graduates did receive a T-shirt and key chain stating that they were "2 smart 4 drugs," the decertification ceremony was "largely symbolic and perfunctory," and the provision of ongoing transition help was limited or nonexistent. Thus,

"[b]y moving from a rigid and highly structured environment to a potentially chaotic and unstable environment in a matter of weeks, it should not be surprising that drug court graduates experience[d] high rates of relapse and recidivism." Finally, and perhaps most importantly, the researchers found that the defendants' relationship with the drug treatment court judge was not marked by respect and interdependence, as Braitwaite's theory requires. Their research demonstrated instead that because of the rough handling they had experienced along the way, these defendants "did not generally regard court officials, including the judge, as persons they highly respect[ed]." [38]

In light of these findings with respect to defendants' perceptions of drug treatment court judges, it is instructive to look at other research that focuses specifically on the defendant-judge interactions that are at the center of the problem-solving court process. This research is part of a larger effort to open up the "black box" of treatment courts in order to begin learning what effects the specific design features of these courts have on identified subgroups of clients.[39] In one series of studies researchers randomly assigned one cohort of drug court clients to be intensively supervised by judges at regularly scheduled status hearings, while a comparison group of clients was monitored by nonjudicial treatment personnel and received judicial status hearings only in response to "sustained noncompliance or serious infractions." [40] Regularly scheduled judicial status hearings, it should be noted, are a virtually nonnegotiable feature of the drug treatment court model as it has evolved, and of virtually all other problem-solving courts designed on the drug treatment court template.

The researchers found that for the clients as a whole regularly scheduled status hearings had no impact on retention in treatment, rates of alcohol or other drug use, or criminal activity. When the researchers categorized the study subjects by "risk factors" such as prior exposure to drug treatment or having received a diagnosis of Antisocial Personality Disorder, however, they found that the use of regular judicial status hearing had a positive effect on "high risk" clients and a negative effect (that is it increased drug use and recidivism) among "low risk" clients. The researchers explained that "[t]he not-so-simple fact is that drug courts are neither successful nor unsuccessful. They 'work' for some clients under some circumstances but are ineffective or contraindicated for others." [41]

This research only examined the impact of one feature typically found in problem-solving courts, judicial status hearings, and only measured outcomes in relationship to two variables, prior treatment and Antisocial Personality Disorder. It is likely that variations in outcomes depend not only on participants' exposure to judges in regular status hearings, but also upon other features that could be dialed up or down to have greater or lesser coercive force and punitive impact. Moreover, these features could be, but generally are not currently, tailored to a whole range of characteristics that determine clients' risk levels, including gender, employment status, and pattern of substance misuse.

Recent research has raised troubling questions about the universal need for intensive addiction treatment services for all the defendants assigned to drug

treatment courts. Indeed, one published paper has suggested that "roughly one third of drug court clients do not have a clinically significant substance use disorder." [42] The existing treatment court model is animated by a conception of substance use disorders that has been termed the "dispositional disease" perspective. Although this perspective has been extremely useful in terms of encouraging the development of effective treatments for persons with alcohol and other drug dependency, it is not especially effective in identifying and providing needed interventions to the much larger group of persons who may suffer from intermittent or mild-to-moderate problems with substances of abuse.

In the context of drug treatment courts and other problem-solving courts that emulate them, the coercive imposition of intensive addictions treatment and monitoring in the case of defendants whose drug use problems do not call for such services is not only contraindicated and a waste of limited resources but is also likely to be experienced as unnecessarily punitive. The package of treatment and monitoring obligations typically required in the treatment court setting may not be punitive in the same way that traditional incarceration is, but it is still "inherently incapacitatory and require[s] the offender to remain under observation in a designated place, such as a probation center or drug clinic, for more or less extended periods of time." [43] Thus, to the extent that individuals who do not need intensive treatment are forced into receiving therapeutic services and submitting to compliance monitoring regimes, this set of practices is a perfect example of treatment collapsing into punishment.

PROCEDURAL FAIRNESS AND OPEN JUSTICE

Although there is considerable variation among different problem-solving courts, there are certain features that characterize virtually all of these undertakings and that raise questions of procedural fairness and challenge the values of open justice. These features include the integration of treatment services with close and ongoing judicial monitoring and case management of defendants, the use of a multidisciplinary or team-based approach to provide both treatment to and supervision of participants, the use of decision-making processes that are characterized by flexibility and role informality, and an emphasis on measuring the success of outcomes pragmatically rather than by reference to notions of formal justice.

Traditional criminal courts in the United States, by contrast to those that have adopted the problem-solving approach, are organized according to an adversarial system paradigm, under which the judge is assigned a more passive and neutral role, the prosecution and defense assume a greater responsibility for setting the forensic agenda by presenting facts and legal arguments, and the interactions that take place between the parties and the judge are governed by highly stylized formal procedural rules. From a theoretical point of view, these features have been adopted out of a recognition that the interests of the state and the individual criminal defendant are adverse and that both the perception and the concrete

reality of fairness are advanced by a decision-making process that is characterized by openness and transparency. Finally, to a greater or lesser degree depending on the precise sentencing approach adopted within a given jurisdiction, the imposition of coercive measures (criminal punishments) by judges in traditional criminal courts is the result of the exercise of limited judicial discretion bounded at the outside by principles of desert and proportionality.[44]

There is little doubt that the structural and procedural characteristics of problem-solving courts confer greater power on judges than they enjoy within the traditional criminal justice setting. Indeed, in their study of drug treatment courts, Kassebaum and Okamoto found that the authority and range of discretion held by drug court judges is "unprecedented" in the criminal justice system.[45] The flexibility and informality of practice in these courts is coupled with a shift in the nature of the judicial role. Instead of functioning as a neutral facilitator, the judge is now a social services coordinator and the leader of a treatment team that may include the prosecutor, public defender, human services professionals, probation and parole officials, and others. Instead of overseeing an adversarial process between parties with competing interests, the judge is now charged with ensuring that all team members work together to further the therapeutic interests of the defendant (and perhaps the interests of individual and community victims as well). This shifted role carries risks, and judges who practice in these courts are not unaware of these risks. One has written about her experience in the following terms:

> I'm not sitting back and watching the parties and ruling. I'm making comments. I'm encouraging. I'm making judgment calls. I'm getting very involved with families. I'm making clinical decisions to some extent, with the advice of experts . . . [Consequently,] I have much greater opportunities, I think, to harm someone than I would if I just sat there, listened, and said guilty or not guilty.[46]

The lack of procedural formality and professional distance in problem-solving courts, their replacement of the retributive justice principles of desert and proportionality with therapeutic and pragmatic goals, and their assumption that the various actors all have consistent interests conspire together to increase the chances of procedural irregularity and of the perception of unfairness. The informality of the interactions between judges, defendants, and others in open court is especially troubling. As Judge Jelena Popovic, a problem-solving court judge in Australia, has explained, there are at least three reasons to insist on some degree of formality in court proceedings. First, she writes, formality emphasizes the "solemnity and seriousness of what is occurring." This feature is especially important in the setting of a therapeutic court, because the very fact that treatment and punishment are intermixed raises the possibility that defendants will not sufficiently appreciate the legal and practical jeopardy they face. The second feature of procedural formality observed by Popovic is its role in lending predictability to the proceedings, so that lawyers and defendants "know what to expect and are not

taken by surprise." Finally, Popovic explains, formality helps to ensure that defendants in problem-solving courts do not perceive themselves as "second class citizens" receiving a watered-down form of justice.[47]

The degree of discretion that characterizes judicial decision making in problem-solving courts only adds to the procedural and substantive risks. The judge quoted above reports that she is not "sitting back," she is "making judgment calls."[48] The problem here is that the expanded duties and broad discretion accorded judges in these courts raise legitimate concerns about both the appearance and the impact of bias. Popovic worries, for example, about the practice in many problem-solving courts of conducting *in camera* meetings or "case conferences," where members of the treatment team meet to discuss the progress of defendants scheduled for upcoming status hearings. For Popovic, these closed meetings, which take place without the defendant in attendance, are inconsistent with the principles of open justice because they provide the judge with information that has not been subject to the rigorous adversarial testing that ordinarily accompanies the presentation of evidence in formal court proceedings, and yet that may be determinative in the judge's exercise of broad discretion.[49] Anthony Thompson has raised a parallel set of worries about bias infecting the discretionary judgments of community court judges. "As community court judges participate in community meetings," he writes, "they are subject to influence by various constituencies. Some judges have raised concerns about the potential for making decisions based in part on community sentiment, something the judicial oath prohibits."[50] Finally, even if problem-solving court judges do not gain access to untested or improper information, their discretionary judgments may still be influenced by, perhaps unconscious, personal considerations triggered by the characteristics of an individual defendant or the interpersonal dynamics of an ongoing relationship with a defendant. As one scholar has explained:

> [D]rug court is fertile ground for the unfolding of psychological drama. Perhaps, for example, the judge is a recovering alcoholic or has loved a one who is addicted to drugs. This could stir up inappropriately strong feelings of sympathy, impatience or even hostility toward a participant who happens to remind him of his or her former self (or his or her loved one). Consider the participant who casts the judge in the parental role. He or she may elicit deep feelings in the judge, rooted in the latter's own experience as a parent or a once-needed child. Or consider the participant who related to the judge in a provocative manner—or, more precisely, in a manner that the judge finds provocative—stemming from an unconscious desire to be punished or controlled or to elicit concern through censure.
>
> These kind of psychodynamic scenarios are more likely to get played out in a drug court, with its somewhat relaxed structure, than in a standard court where proceedings, expectations and personnel roles are clear, traditional and fairly predictable.[51]

All of these forms of potential bias are troubling in the context of problem-solving courts because of the nature of the authority exercised by the judge. In

addition to the ability to mandate formal control measures such as prison or probation, and in addition to structuring and overseeing the coercive imposition of treatment and monitoring, these judges also exercise psychological authority. As one community court judge has explained:

> I've found that we as judges have enormous psychological power over the people in front of us. It's not even coercive power. It's really the power of an authority figure and a role model. You have power not only over that person, but over their family in the audience, over all the people sitting in that courtroom.[52]

The augmented judicial power, broad discretion, and informality of problem-solving courts likely would raise questions of procedural fairness and challenge the values of open justice even under ordinary circumstances, but these courts are characterized by an institutional culture that intensifies such risks by weakening the external checks against arbitrary decision making that do remain. This institutional culture, a shared psychology that begins with problem-solving court judges and works its way throughout these institutions, is very much a product of the history under which these courts were conceived and developed. The genesis of the drug treatment court movement is a complex story, but the important protagonists in this story were the "hardworking and charismatic" judges who pushed for the development of these institutions in response to the overwhelming impact of the War On Drugs upon the day-to-day functioning of the criminal justice system, and the systematic effects of mandatory minimum sentencing policies and the like.[53] A similar story can be told about the entrepreneurialism of the founders of the first community courts, including those in midtown Manhattan and in Red Hook, New York, and about the roots of the mental health courts movement in the innovations of individual judges worried about the problems of homelessness, deinstitutionalization, and the flood of defendants with mental disabilities coming into the criminal justice system.[54]

Eric Miller, borrowing the provocative vocabulary of Charles Ogletree, has characterized this institutional culture as both "heroic" and "empathetic."[55] Ogletree originally deployed these terms in his work on the motivation of public defenders to persist in their advocacy efforts notwithstanding enormous contrary systemic pressures, explaining that heroism is a self-directed psychological feature that supports "the desire to take on 'the system' and prevail, even in the fact of overwhelming odds." Empathy, he explained, is an other-directed psychological dynamic in which the actor "[identifies] with another person in distress," the criminal defendant clients in the case of Ogletree's defenders.[56] In Miller's creative transposition, drug treatment courts are described as both heroic and emphatic undertakings, in which the judicial leaders and other supporters of these enterprises see themselves as intervening to rescue addicts and other defendants weighed down with an array of social pathologies. In his telling, this is an

> expressly empathetic and heroic enterprise. The therapeutic posture of the drug court permits the judge[s] to envision themselves as risk-taking administrators at the forefront of the struggle to undo the damage of both drug abuse and the War on Drugs . . . In all of these courts, as a hero of the oppressed, the legal agent finds reasons for attacking or disregarding social or legal norms that prevent her succeeding in this mission; as an empathic individual, she justifies such reasons in terms of her client's needs or goals, as a necessary component of ensuring that the client succeeds against the system.[57]

Importantly, this transposition has moved the heroic and empathic actors from "the context of an adversarial contest in which the legal agent is pitted, on behalf of his or her client, against another legal agent" [58] to a relatively informal, nonadversarial context where the most heroic and most empathic actors are the judges, decision makers who have no significant formal restraints on their exercise of discretionary authority. Their heroic efforts extend beyond their conduct in the courtroom and include going into the community to raise private funds for their efforts, soliciting support from health care providers, job training organizations, and educational institutions, and pressing the case for these innovative undertakings in the media.[59] The empathic elements in their practice are evident both in the courtroom and beyond. Thus, one problem-solving judge has described his relationship with the defendants before him as akin to "parenting." [60] Another judge reports that "[w]e smile and laugh at them [defendants]. We have them turn around in the courtroom and give speeches. I read the poems they write for me. I play the songs that they record for me. I show pictures." [61]

But empathy is more than friendliness and cheerleading, it involves the adoption of the other's interests, and an identification with his or her distress.[62] For some problem-solving court judges, this empathic response takes them out of the courtroom and into the spaces where the defendants under their jurisdiction live. Because of the psychology of empathic heroism, this judicial reaching out can be relatively unmodulated and unrestrained. Indeed, this is one of the ways in which coercion and control becomes dispersed and expanded into the community. For example, social scientist James Nolan has described an instance in which a drug court judge arranged a job for a defendant backed by the threat of jail:

> A participant in Judge McKinney's Syracuse, New York drug court lost his job. McKinney called the employer and learned that the client was regarded as a "damn good employee" and that the boss would "hire him back in a heartbeat" if the judge could guarantee that he was drug free and wouldn't miss any work. So the judge made a deal with the employer. He said to him: "Okay, I'll make a deal with you, you take him back and I'll add another weapon to your arsenal. If he doesn't come to work when he is supposed to, doesn't come to work on time, if he comes to work under the influence . . . , I'll put him in jail, on your say so." [The judge told the client about the deal.] "I'll get your job back for you, but you've got to promise you'll be at work when you are supposed to and not take any drugs. Your employer is now

on the team of people who are reporting to me. When he calls up and tells me that you are late or that you're not there, I'm going to send the cops out to arrest you." [63]

In these circumstances it is crucial to understand that problem-solving court judges acting heroically and empathically exercise enormous power to "solve problems," even if their actions do not comport with due process or other notions of formal justice. There is an ongoing discussion among academics who write in the fields of therapeutic jurisprudence and restorative justice about just what role considerations of due process and natural justice should play in limiting therapeutic or restorative judicial decision-making processes,[64] but the practitioners in these courts tend to be more attentive to the pragmatic needs of individual cases than to the broader implications of theory or justice. In the end, the combination of heroic and empathic dynamics in the person of judges who are situated in these informal and highly discretionary settings leads them to prioritize "getting the drug court client well" over the competing goals of "consistency and impartiality." [65] As Miller puts it: "problems arise when the self-directed and other-directed aspects of the legal agent's reconstituted identity do not check each other, but combine to provide justifications for bending or ignoring rules of behavior, legal practice or ethics." [66]

CONCLUSION

The proliferation of problem-solving courts has been driven by the claimed successes of drug treatment courts, by a pragmatic sense on the part of judges and other advocates that courts must offer practical solutions to the myriad social pathologies that have found their way into the criminal justice system as a consequence of the failure of other institutions of social control, and by the growing influence of therapeutic jurisprudence and restorative justice. Rhetorically, supporters have sought to make the case for expanding the number and range of problem-solving courts by arguing that the criminal justice system will suffer a loss of legitimacy if it fails to adjust by becoming more pragmatic and more therapeutic.

Generally, the legitimacy of legal institutions that deploy the power of the state depends upon the perception that they operate according to established legal principles and formal legal rules, that they are founded on the basis of consent, and that they are transparent and procedurally fair.[67] Timothy Casey has argued that drug treatment courts and the second generation of problem-solving courts that have built upon the treatment court model derive their legitimacy not from their claims of pragmatic efficacy but from the fact that they are courts thought to be characterized by "neutrality, procedural justice, fairness, and ritualism." [68] Casey suggests that, to the extent these courts undermine these claims to neutrality, due process, and open justice, they are likely to exhaust and not enhance the legitimacy of the system. In this sense, he argues, problem-solving courts are

operating on "borrowed legitimacy." From this perspective, "[a]s soon as the smoke clears," these courts

> will have to justify their exercise of authority without reference to the traditional courts. This will be a difficult, perhaps impossible, task. The problem-solving courts change the basic nature of the courts. They demonstrate none of the characteristics that would ordinarily add to the rational basis of legitimacy. They are not fair. They are not neutral. In some instances, they are not legislatively enacted. Without a rational basis to exercise authority, the tradition of following the authority of the court, merely because it is a court, will deteriorate. The problem-solving courts are headed for a crisis of legitimacy.[69]

The procedural fairness and open justice concerns that Casey and others have raised about these courts are inherent in the very enterprise of merging treatment and punishment. These concerns are further catalyzed by the heroic and empathic psychology that has resulted from the particular history of this movement and that attends the practice of its leaders. They may or may not be insurmountable, and they may or may not produce a crisis of legitimacy, as Casey predicts. What is clear, is that these characteristics call for a good deal of circumspection in order to determine whether a more limited field of application can safely be identified.

NOTES

1. Winick and Wexler, 2003.

2. Braithwaite, 2002. David Wexler, a founder of therapeutic jurisprudence has suggested that this theoretical perspective can be divided into "four overlapping areas of inquiry. These involve (1) the role of the law in producing psychological dysfunction, (2) therapeutic aspects of the law, (3) therapeutic aspects of the legal system, and (4) therapeutic aspects of judicial and legal roles." David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (1990). Problem-solving court advocates have focused both on the psychological dysfunction of the traditional criminal justice system, especially in the case of defendants with otherwise untreated substance use disorders, and on the positive therapeutic potential of the problem-solving court's use of treatment resources and on the positive therapeutic role played by the problem-solving court judge as leader of a treatment team.The meanings and definitions of restorative justice are more contested and less clearly defined. Nevertheless, a consistent theme among restorative justice theorists has been the importance of using legal processes "to repair the harm caused by criminal behavior," by "restoring" the victim to his or her pre-offense status, by "reintegrating the offender" into the community, and by "repairing the breach" between the offender and the victim and between the offender and the broader community. Richard Young and Carolyn Hoyle, "Restorative Justice and Punishment," in *The Use of Punishment* (S. McConville, ed., 2003).

3. Berman, 2000.

4. Robinson, 2005, p. 1539.

5. Fischer, 2003, p. 236.
6. Fischer, 2003, p. 236.
7. Gregoire and Burke, 2004.
8. Marlowe, 2002.
9. Hora, Schma, and Rosenthal, 1999, at 526.
10. Marlowe, 2003.
11. Winick and Wexler, 2002, p. 483.
12. Farabee, Predergast, and Anglin, 1998.
13. Kings County Bar Association Drug Policy Project, 2005, p. 32.
14. Bakht and Bentley, 2004.
15. Kings County Bar Association Drug Policy Project, 2005, p. 62.
16. Kings County Bar Association Drug Policy Project, 2005, p. 36.
17. Boldt, 1998.
18. LaPrairie, Gliksman, Erickson, Wall, and Newton-Taylor, 2002, p. 1539.
19. Miller, 2004.
20. Fischer, 2003, pp. 237–38.
21. Chiodo, 2002, p. 83.
22. Miller, 2004, p. 1553.
23. Thompson, 2002.
24. Thompson, 2002, p. 83.
25. Thompson, 2002, p. 82.
26. Thompson, 2002, pp. 90–91.
27. Malkin, 2003, p. 1590.
28. Goldkamp and Irons-Guynn, 2000, p. xv.
29. Tsai, 2000, p. 1314.
30. Fischer, 2003, p. 240.
31. American Friends Service Committee, 1971, p. 25.
32. Boldt, 1998, p. 1240.
33. Boldt and Singer, 2006, p. 87.
34. Miethe, Lu, and Reese, 2000.
35. Sanford and Arrigo, 2005.
36. Braithwaite, 1989.
37. Braithwaite, 1989.
38. Miethe, Lu, and Reese, 2000, pp. 537–38.
39. Bouffard and Taxman, 2004.
40. Marlowe, Festinger, Lee, Dugosh, and Benasutti, 2006.
41. Marlowe, DeMatteo, and Festinger, 2003, p. 4.
42. DeMatteo, Marlowe, and Festinger, 2006, p. 115.
43. Miller, 2004, p. 1560.
44. Boldt, 1998.
45. Kassebaum and Okamoto, 2001.
46. Lederman, 2000, p. 82.
47. Popovic, 2006, p. 66.
48. Lederman, 2000, p. 82.
49. Popovic, 2006, p. 63–65.
50. Thompson, 2002, p. 93.
51. Satel, 1998, pp. 54–55.
52. Kluger, 2000, p. 11.

53. McCoy, 2003, p. 1525.
54. Thompson, 2002.
55. Miller, 2004, p. 1563.
56. Ogletree, 1993, pp. 1243, 1268.
57. Miller, 2004, pp. 1564–65.
58. Miller, 2004, p. 1565.
59. Nolan, 2002, p. 33.
60. Nolan, 2002, p. 35.
61. Nolan, 2002, p. 34.
62. Miller, 2004, p. 1563.
63. Nolan, 2002, p. 32.
64. Nolan, 2003.
65. Nolan, 2002, p. 36.
66. Miller, 2004, p. 1565.
67. Beetham, 1991.
68. Casey, 2004, p. 1495.
69. Casey, 2004, pp. 1503–4.

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