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# Never the twain shall meet?

## Why Problem-Solving Principles Should Not Be Grafted onto Mainstream Courts

By Victor E. Flango

**The success of drug courts and other problem-solving courts has spurred a movement to graft problem-solving principles onto all courts. *Surely,* if these principles work in one set of courts, shouldn't they be adopted by all? But principles well suited to problem-solving courts with their specialized jurisdictions *are not* well suited to cases that are more appropriate to resolution by the adversarial process. Many prominent organizations, including the Conference of Chief Justices and the Conference of State Court Administrators, have issued a call to "encourage" the institutionalization or "taking to scale" of the problem-solving approach. *Here,* Victor Flango explains why proposals to graft problem-solving principles onto mainstream courts *should be* reconsidered.**

Problem-solving courts seek to broaden the focus of courts from simply adjudicating cases to changing the future behavior of litigants and ensuring the well-being of the communities they serve. Advocates of problem-solving courts can be justifiably proud of their accomplishments. The number and types of problem-solving courts have grown exponentially since the first drug court was established in Dade County, Fla., in 1989.[1] The movement spread rapidly on the basis of anecdotal reports of success in reducing recidivism and an infusion of federal dollars.[2] While governor of Arkansas, Bill Clinton visited the Miami drug court, and Janet Reno, his appointee as attorney general, played a major role in creating the court.[3] The George W. Bush administration also supported drug courts enthusiastically, as has the Barack Obama administration. By the end of 2009, there were 2,459 drug courts and an additional 1,189 problem-solving courts in the United States.[4] This rapid growth has been attributed to four factors: leadership, salesmanship, legislation, and federal funding.[5]

Although many types of specialized problem-solving courts, from mental health courts to veteran's courts, have been established too recently to have been evaluated for effectiveness, drug courts have passed the initial test. A recent, extensive evaluation of drug courts concluded they are effective for two primary reasons: Participants were significantly less likely to relapse back into drug use, and if they did relapse, they used fewer drugs; and participants reported significantly less family conflict.[6]

## REPLICATING SUCCESSES

Despite their success, problem-solving courts reach only a small proportion of litigants. Advocates have suggested two methods of increasing their reach: either increase the number of specialized courts or apply the core principles of problem-solving courts to traditional courts. The first approach of increasing the sheer number of problem-solving courts is

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feasible, but expensive. Indeed, a California focus group favored that option of increasing the number of "small boutique courts" as the most practical option.

The problem-solving approach works for these specialized courts precisely because caseloads are so small that intensive attention can be focused on a relatively small number of cases. Adding a significant number of cases would change the very nature — and perhaps the secret to the success — of problem-solving courts, hence diminishing their effectiveness. Therefore, it seems increasing the number of problem-solving courts is a better way to expand their reach.

Nonetheless, demonstrated and perceived successes in the drug courts have created pressure to apply problem-solving principles in all courts, which raised fears among its advocates that this option would return specialized courts to the inconsistent practice and loss of treatment resources that caused the creation of specialized courts in the first place. Despite these fears, the Conference of Chief Justices and the Conference of State Court Administrators put their weight behind a "mainstreaming" option in a resolution passed on Aug. 3, 2000, and confirmed it by a second resolution passed on July 29, 2004. Point 4 of the original resolution calls 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.[7]

This resolution should be reconsidered, at least until the empirical consequences of mainstreaming can be determined. There also is a more theoretical objection to mainstreaming these specialized cases. Problem-solving processes and traditional court processes are both appropriate for resolving certain kinds of cases, but they should not be mixed. Each has different goals, different procedures, and different underlying models. Linking the two processes will weaken both.

Past experiences with mixing the competing goals of rehabilitation and punishment in criminal cases have not been successful. The focus on treatment reflects a much earlier debate on sentencing: Should the punishment fit the crime or fit the criminal?

In a sense, this is really a much broader debate between a legal approach and a medical approach to crime. (For a fuller discussion of the differences between the legal and medical models, *see* Victor E. Flango and Thomas M. Clark, *Reimagining Courts* (Temple University Press, 2015).)

In its simplest (perhaps oversimplified) terms, the medical model as applied to corrections assumed the offender to be "sick" (physically, mentally, and/or socially); his offense to be a manifestation or symptom of his illness, a cry for help. Obviously, then, early and accurate diagnosis, followed by prompt and effective therapeutic intervention, assured an affirmative prognosis — rehabilitation.[8]

Under the medical model as applied to corrections, diagnosis was the function of the presentence investigation, therapeutic intervention was decreed in the sentence and made specific in the treatment plan, and the parole board decided when the offender was "cured" and could be released back into the community. The medical model also assumed: 1) a triage process to disqualify offenders who would pose a danger to the community, 2) a wide variety of treatment alternatives, and 3) a large staff of probation and parole officers as well as social-services officers to monitor and supervise treatment.

Ironically, many "new penologists" at that time advocated a return to a legal model based on individual responsibility that would impose uniform penalties for similar crimes and abandon indeterminate sentencing, wide judicial discretion, and coerced participation in rehabilitation.[9] Can courts learn from the corrections experience?

Actually, courts can look to their own experience for a cautionary tale of how problem-solving courts may be transformed over time. Some would consider the first stand-alone juvenile court, estab-

**VICTOR E. FLANGO** recently retired as executive director of program resource development at the National Center for State Courts. He is the author of more than 100 publications on court-related issues.

lished in Cook County, Ill., in 1899, to be the first problem-solving court. Juvenile courts were created to focus on treating and rehabilitating individual adolescents. But over time, they reacquired some of the characteristics of a traditional court, resulting in a hybrid that was neither fully treatment-oriented nor sanctions-oriented. One reason was that judges who presided over juvenile courts did not change practice as much as originally envisioned.[10] Critics note, "[a]side from a few celebrities, juvenile court magistrates did not share the therapeutic orientation"[11] and juvenile courts "provided new bottles for old wine."[12] Treatment orientation in juvenile courts declined until the U.S. Supreme Court's 1967 decision *In re Gault* restored most due-process rights to juvenile defendants.[13] As the Court noted a year earlier in *Kent v. United States*, "[T]here may be grounds for concern that the child receives the worst of both worlds: [T]hat he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[14]

## DIFFERENT MODELS: LEGAL AND MEDICAL

The problem-solving movement in courts is defined by two characteristics: a focus on treating the problems of the individual defendant, and the relaxation of the adversarial process in favor of increased cooperation among court participants.[15] The problem-solving approach is based on the medical model of treating each patient — or case — individually.[16]

The traditional adversarial process in criminal cases is based on the legal premise that like cases should be treated alike. The traditional legal model assumes that humans are all equal before the law. In practice, that means treating "like cases alike" — that is, fairness requires that everyone who commits a similar offense receives a similar consequence.[17] Conditions for finding an accused person at fault should be the same for all individuals in similar circumstances. To do otherwise would undermine citizen respect not only for courts but for law and government as well.

In contrast, the medical model treats the individual. A doctor may not prescribe the same medicine to two people even if they exhibit the same symptoms because of different individual reactions. For example, one patient may be allergic to a medicine that is perfectly suitable for the other. Successful treatment requires the doctor to diagnose the problem and develop an individualized treatment plan. In medicine, treating like cases alike could have dire consequences.

The procedural implications of these two models for courts are very different. Consider these different approaches as applied to abuse and neglect cases. The strict legal adversarial approach to handling parents who are suspected of abusing or neglecting their children would be for police to investigate and make an arrest if warranted, and then for prosecutors to charge the alleged perpetrator or perpetrators. The role of the court in this scenario is to establish guilt based on a high standard of proof (e.g., "beyond a reasonable doubt") and to sentence the guilty as it would in any other type of criminal case. This is a very public process that could result in incarceration, job loss, and formal dissolution of the family.

The medical approach might view the problem more broadly as one of family dysfunction. The court may require the entire family to participate in treatment to see whether alternative coping mechanisms might improve interactions and reduce violence. Most treatment programs begin with an admission that a problem exists, and in this scenario it is often difficult for the alleged perpetrator to take this first step. Consequently, the alleged perpetrator must be assured that admitting "guilt" will not lead to punishment but to treatment for the problem, and that the treatment will be kept confidential, as any medical issue should be. Incentives to encourage treatment would be couched in terms of being able to avoid incarceration, retaining a job so that the family would be supported, and keeping the family unit together. "Treatment focus" describes the purpose of these proceedings, because the search for a remedy certainly goes beyond diagnosis and extends to treatment.

The legal approach is more limited. It seeks the status quo ante — that is, the restoration of things to where they were before the crime was committed or the injury was inflicted. The legal remedies, then, are more narrowly limited to punishing someone or awarding compensation.

The medical approach works to correct the problems that led to the crime. The goal of the medical approach in family cases, for example, is to restore or perhaps create family harmony, not necessarily to punish the offender. In the words of the Governor's Task Force in Maryland:

> The goal of a court dealing with family disputes should be more than simply resolving the particular issues before them. Rather, such resolution should leave the family with the skills and access to support services necessary to enable them to resolve subsequent disputes constructively with minimum need for legal intervention.[18]

These goals require different implementation than do sanctions applied using an adversarial process. The court must closely monitor offenders to ensure that the agreed-upon treatment regimen is followed, with the implied, if not explicit, threat that if treatment is not completed, more public sanctions will be imposed.

## DETERMINING RESPONSIBILITY

The legal approach assesses blame: It seeks to determine who is responsible for an offense. The law is not looking for what caused the wrongful behavior — for example, was a child abuser also abused as a child? A trial is designed to be a narrow inquiry into whether the defendant is to blame. The key questions are (1) "Did he do it?" and (2) "Did he mean to do it?" because it is difficult to prove guilt without showing motive. The law assumes that individuals have the capacity for rational choice and the opportunity to choose whether to break the law.

There are exceptions within the legal framework. People without the capacity to make rational choices are to be treated differently. For example, offenders with frontotemporal dementia may bring lawyers, doctors, and family members to court to explain that the perpetrators were not at fault, because their brains have degenerated and medical science has no remedy.[19] Advancements in neuroscience

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with its changing understanding of the human brain may shed yet more light on a defendant's culpability that must be taken into account in both legal and medical models. David Eagleman attributes the shift from blame to biology to the effectiveness of pharmacology, which has shown that some symptoms can be controlled by medication.[20] He quotes Tom Bingham, Britian's former senior law lord, with saying that the law makes several working assumptions, including that adults have free will, act rationally in their best interests, and can foresee the consequences of their actions. "Whatever the merits or demerits of working assumptions such as these in the ordinary range of cases, it is evident that they do not provide a uniformly accurate guide to human behavior."[21]

The prospect of using incarceration as a deterrent is viable only for people with normally functioning brains, and, increasingly, criminal behavior can be attributed to mental illness. Consider this example:

> When Sol Wachtler, the chief judge of New York State's highest court, was arrested for extortion and threatening to kidnap the 14-year-old daughter of his ex-lover, many New Yorkers were under the impression that some crimes may have been committed. Not so, according to John Money, a prominent sexologist and medical psychologist . . . [who] wrote that Wachtler "was manifesting advanced symptoms of . . . Clerambault-Kandinsky Syndrome (CKS) . . . a devastating illness. The law-and-order treatment of people with CKS is the equivalent of making it a crime to have epileptic spells.[22]

Prisons have become "our de-facto mental-healthcare institutions — and inflicting punishment on the mentally ill usually has little influence on their future behavior."[23] The development of specialty "mental-health courts" based on the drug-court model combines treatment with confinement in a structured environment. As the criminal-justice system becomes more informed by science, more emphasis will be placed on customized sentences, incentives for good behavior, and opportunities for rehabilitation.

Toward this end, the medical approach would apply an expansive view of "people without the capacity to make rational choices" and would look to causes that may be genetic, environmental, social, or economic — in other words, almost always beyond the control of the individual. Indeed, prominent psychiatrist Dr. Karl Menninger advocated treating all offenders as mentally ill.[24]

Eagleman suggests dispensing with the concept of blameworthiness altogether and focusing on likely future behavior. Are criminal actions likely to be repeated? Can incentives be structured to deter future offenses? Dispensing with the concept of blame comports well with Douglas B. Marlowe's suggestion that the treatment versus punishment dichotomy be abandoned. He contends that the critical question is how to match offenders to the best programs that meet their needs, protect public safety, and do so at least cost.[25] He recommends blending the two using a four-fold classification scheme to guide intervention based on the two dimensions of "need" — the offender's clinical diagnosis and need for treatment — and "risk," or the offender's amenability to treatment.

## WHY THE TWO PROCESSES MUST BE KEPT SEPARATE

Solving the problems that underlie criminal behavior is a worthy endeavor. The question is whether it can appropriately be combined with processes that exist to determine guilt. What is the point of treatment-oriented adversarial proceedings or sanction-oriented problem-solving courts? Can we force technically innocent people into treatment programs before guilt has been adjudicated? Can judges be detached and engaged or expected to be detached in some cases and engaged in others? Can court processes be both austere and formal as well as welcoming and informal at the same time?

### *1. Courts Cannot Be Both Adversarial and Reconciling*

The problem-solving approach is purposefully not adversarial, and it therefore requires a different processing track from most other mainstream cases. The goal of problem-solving proceedings is

to achieve justice not by finding guilt or liability but by fashioning an appropriate remedy. The prosecution, defense, judges, and other court participants share an interest in treating the condition that has caused the defendant to commit criminal offenses. Defendants are either diverted from standard court processing before guilt or innocence is determined or encouraged to plead guilty in order to be admitted into a problem-solving court (post-adjudication treatment program). This characteristic of the problem-solving approach has led one scholar to state, "[I}t is not a court if you have to plead guilty to get there."[26] Because the defendant must admit culpability to be ready for treatment, post-adjudication treatment is the more appropriate model and preferable to deferred prosecution.

With regard to sentencing, the adversarial process by its very nature must try to harmonize sentences among offenders so that all are treated fairly. In the problem-solving process, sentencing is explicitly tailored to the needs of the individual, regardless of how others similarly situated were sentenced. Addiction patterns, mental health, and other individual-based characteristics must all be factored into the proposed treatment plans if those treatments are to be effective.

*2. Courts Cannot Both Treat and Sanction*

Bruce Winick and David Wexler contend that traditional courts benefit from judges familiar with problem-solving techniques. 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.[27]

But it is not possible for courts to be both helper and punisher — which is why treatment should be offered only after an admission of guilt. These are clearly two separate and distinct roles, which is why courts should triage cases into separate, distinct, and well-defined adversary or problem-solving processes — so that litigants as well as court participants know which set of rules is being applied and which role the judge is playing.

Again, the concern here is that grafting problem-solving practices onto traditional courts contaminates the integrity of both processing tracks. Obviously the two separate tracks can interact, but the integrity of each track should be maintained so that consistent focus is on either sanctions or treatment. Can we design a system where people who would benefit from treatment could be transferred from a traditional court to a problem-solving court? This would be a parallel to the triage now done in problem-solving courts, which includes 1) setting criteria to determine whether someone is eligible to participate in the program, and 2) removing participants from treatment who are either not suitable or are not successful in completing a treatment program. This seems a far better solution than tinkering with the integrity of the case-processing tracks and creating a hybrid process with mixed objectives.

## IS TREATMENT A COURT RESPONSIBILITY?

Of course, the larger question underlying this whole discussion is whether treatment should be a function of courts at all. Should courts' responsibility end at the determination of guilt, or do they have a responsibility to rehabilitate or at least monitor the rehabilitation of offenders? Or, should the rehabilitation function be a responsibility of probation departments perhaps with court oversight?

The Pew Charitable Trusts' Public Safety Performance Project, the American Probation and Parole Association, and the National Center for State Courts jointly sponsored a conference on effective administrative responses in probation and parole supervision in December 2012[28] and concluded that the strategies of "swift, certain, and proportionate sanctions" to respond to violations and the use of incentives to promote and reinforce compliance were needed, but that the authority to issue sanctions and reward compliance could be given to courts or to the probation departments.

The best response to why courts need to be involved is found in a description of the key elements of a reentry court: Ex-offenders require a powerful intervention to change their behavior; the judge as an influential authority figure can influence behavior; and the reentry court, through rigorous monitoring, can hold collaborating agencies and offenders to a higher level of accountability than other interventions can.[29] Another unspoken reason for court involvement is that courts have been more successful at attracting and sustaining funding for problem-solving courts, including a significant amount of federal funding.

On the other hand, the historic mission of probation departments has been to engage in the type of monitoring and service provision that the treatment approach recommends. How is judicial monitoring of a problem-solving process different from intensively supervised probation,[30] with monitoring done by the probation departments under the state department of corrections?

Probation departments and agencies claim that their programs are effective and affordable. They could perhaps monitor treatment progress with the proviso that they bring to the court's attention those clients who are not participating in the prescribed, perhaps court-ordered, treatment plans, are not making sufficient progress in the treatment programs, or have repeatedly been unsuccessful in achieving treatment goals. Probationers could also have the right to bring grievances to court after exhausting administrative remedies.

Regardless of who does the supervision, treatment requires an investment of resources.[31] If done administratively, implementation of this program would increase the workload of probation and parole officers, though it may reduce court staff time. Moreover, if administrative proceedings were used, the state may not be required to provide counsel. Courts and their supporting organizations are equally adamant that the participation of judges is a critical success factor to successful treatment. This can be determined empirically.

It may be too late to change the course of development for problem-solving courts and responsibility for treatment, but the

discussion should at least clarify the respective role of courts and the role of probation services in providing treatment. For now, it seems clear that traditional court and problem-solving processes have different goals and require different methods of decision making, different support staff, different monitoring practices after sentencing, and so forth. Grafting problem-solving treatment processes onto mainstream courts is likely to reduce the effectiveness of specialized courts and weaken the adversarial process of mainstream courts. These conflicting characteristics are the reason why the two processes cannot be merged. Problem-solving principles simply cannot be grafted onto traditional courts without doing damage to each process. Before pressing forward with recommendations to expand problem-solving principles to mainstream courts, court leaders should pause to examine the assumptions underlying each process.

[1] Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & Pol'y 115 (2001).

[2] Candace McCoy, *The Politics of Problem Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 Am. Crim. L. Rev. 1526 (2003).

[3] Michael Isikoff & William Booth, *Miami 'Drug Court' Demonstrates Reno's Unorthodox Approach*, Wash. Post, Feb. 20, 1993, A1, A8.

[4] West Huddleston III & Douglas B. Marlowe, Nat'l Drug Ct. Inst., Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States (2011).

[5] Aubrey Fox & Robert V. Wolf, Ctr for Ct. Innovation, The Future of Drug Courts 5 (2004).

[6] For these and other related findings, *see* Shelli B. Rossman & Janine M. Zweig, The Multisite Adult Drug Court Evaluation, Nat'l Ass'n of Drug Ct. Professionals (May 2012).

[7] CCJ Resolution 22, COSCA Resolution IV (2000).

[8] Donal E.J. MacNamara, *The Medical Model in Corrections: Requiescat in Pace*, 14 Criminology 439 (1977).

[9] MacNamara lists some of the new penologists as Norval Morris, Ernst van den Hagg, Andrew von Hirsch, and James Q Wilson.

[10] Lawrence Baum, Specializing the Courts 29 (2011).


[11] Andrew J. Polsky, *The Odyssey of the Juvenile Court: Policy Failure and Institutional Persistence in the Therapeutic State*, 3 Stud. in Am. Pol. Dev. 176 (1989).

[12] Robert M. Mennel, Thorns and Thistles: Juvenile Delinquents in the United States 1825–1940 144 (1973).

[13] *In re Gault*, 387 U.S. 1 (1967).

[14] *Kent v. United States*, 383 U.S. 541, 556 (1966).

[15] James L. Nolan, Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement 10–11 (2009).

[16] The philosophical basis of the problem-solving movement is "therapeutic jurisprudence," unquestionably a medical approach. *See* Bruce J. Winick & David R. Wexler, Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts (2003); McCoy, *supra* note 2.

[17] This concept, central to the notion of justice and the rule of law, has been traced back to Book 5 of Aristotle's *Nicomachean Ethics*.

[18] Governor's Task Force on Family Law, Recommendations and Proc. for Establishing a Family Ct. in Maryland, Final Rep. (Oct. 1992).

[19] David Eagleman, *The Brain on Trial*, The Atlantic (July/Aug. 2011).

[20] *Id.* at 118

[21] *Id*.

[22] William Doherty, *Bridging Psychotherapy and Moral Responsibility,* 5 Responsive Community 42 (1995); Amitai Etzioni, The New Golden Rule 135 (1996).

[23] Eagleman, *supra* note 19 at 114.

[24] Dr. Karl Menninger, The Crime of Punishment (1968).

[25] Dr. Doug Marlowe on a Vision for the Future of U.S. Drug Policy, All Rise: A Publication of the Nat'l Ass'n of Drug Ct. Prof. 4 (2012).

[26] Candace McCoy, *"Review of Good Courts: The Case for Problem-Solving Justice by Greg Berman and John Feinblatt,"* Law and Politics Book Review 16 (2006): 964.

[27] Winick & Wexler, *supra* note 16, at 87.

[28] Am. Probation & Parole Ass'n, Effective Responses to Offender Behavior: Lessons Learned for Probation and Parole Supervision (2013).

[29] Robert V. Wolf, Ctr for Ct. Innovation, Reentry Courts: Looking Ahead 5 (2011).

[30] McCoy, *supra* note 2, at 1528.

[31] *Id.* at 10.