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Transforming Criminal Justice?

Problem-solving and court specialisation

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'In *Transforming Criminal Justice?*, Dr Jane Donoghue packs crucial information and insights into a well-written and extremely manageable volume on problem-solving approaches to criminal justice. With a UK focus, but rich in discussion of US, Australian and other systems, Donoghue presents a sensible and balanced analysis that comes to life, with meaningful quotes from magistrates working with this material in the real world. The book should be of great interest to academics, policy-makers and practitioners alike.'

David B. Wexler, Professor of Law and Director, International Network on Therapeutic Jurisprudence, University of Puerto Rico, Puerto Rico

'*Transforming Criminal Justice?* offers a rigorous and even-handed examination of an important criminal justice reform movement. By taking a hard look at both the theory and practice of problem-solving justice, Jane Donoghue makes a significant contribution to the field. This is the place to start for anyone interested in understanding problem-solving courts, not just in the UK, but around the world.'

Greg Berman, Executive Director of the Center for Court Innovation, New York, USA

'There is much talk of "transforming" this and that within criminal justice, but rarely on transforming justice itself. This brave book, putting problem-solving at the heart of the justice process, will further enhance Jane Donoghue's reputation as one of the most original and intrepid new voices in criminology.'

Shadd Maruna, Professor and Director of The Institute of Criminology and Criminal Justice, Queen's University Belfast, UK

Transforming Criminal Justice?

Why is punishment not more effective? Why do we have such high re-offending rates? How can we deal with crime and criminals in a more cost-effective way? Over the last decade in particular, the United Kingdom, in common with other jurisdictions such as Canada, the United States (US) and Australia, has sought to develop more effective ways of responding to criminal behaviour through court reforms designed to address specific manifestations of crime. Strongly influenced by developments in US court specialisation, problem-solving and specialist courts – including domestic violence courts, drugs courts, community courts and mental health courts – have proliferated in Britain over the last few years. These courts operate at the intersection of criminal law and social policy and appear to challenge much of the traditional model of court practice. In addition, policymakers and practitioners have made significant attempts to try to embed problem-solving approaches into the criminal justice system more widely.

Through examination of original data gathered from detailed interviews with judges, magistrates and other key criminal justice professionals in England and Wales, as well as analysis of legislative and policy interventions, this book discusses the impact of the creation and development of court specialisation and problem-solving justice.

This book will be essential reading for students and academics in the fields of criminology, criminal justice, criminal law, socio-legal studies and sociology, as well as for criminal justice practitioners and policymakers.

Jane Donoghue is Reader in Law at the University of Lancaster. She has previously worked at the University of Oxford's Centre for Criminology and the School of Law at the University of Sussex. Her research interests are multidisciplinary and span criminology, criminal justice and criminal law.

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For my wonderful brother Jamie

Foreword

Some perspective on problem-solving

Professor Eric J. Miller

Problem-solving justice is one of the fundamental innovations in criminal justice over the past quarter of a century (Husak 2011). Originally located in certain specialised courts in the United States of America, it has outstripped these marginal spaces, and now seeks its home in more traditional locations, (Berman and Feinblatt 2002; Nolan 2003) in courts around the globe, (Nolan 2009a) often spurred by the need for new forms of criminal justice surveillance and regulation.

What is problem-solving justice? As Jane Donoghue defines it, 'a problem-solving approach prioritises efforts to change the behaviour of offenders; provide better support and aid to victims; and improve public safety in neighbourhoods' (Donoghue 2014). For the most part, however, the emphasis has most consistently been on the first of these features: problem-solving courts are primarily a means of supervising offenders in the community by monitoring compliance with conditions of release. Some policy-makers – including judges as well as legislatures – have emphasised victims and the community. But such a focus has been somewhat patchy, often operating more at the level of aspiration than implementation (Fagan and Malkin 2002).

Problem-solving justice emerges out of, but seeks to outstrip, the problem-solving court movement. The original problem-solving court is the drug court, which first appeared against the background of the massive increase in criminal caseloads experienced by the American criminal justice system starting in the 1980s. The court model developed by Judge Klein of the Florida Eleventh Judicial Circuit in 1989 was slow track, court-based and treatment oriented (Bean 1996). It set the model for future developments in problem-solving justice: mandatory treatment backed up by a vigorous programme of in-court judicial supervision of the offender (Hora *et al.* 1998). Rather than rely upon the periodic reports of probation officers, drug courts constitute the judge, treatment provider, lawyers and other treatment officials and social workers into a 'team' that reviews each case on a regular basis and provides detailed information to the judge about the offender's compliance with conditions of release (Bean 1998; Miller 2004; Hora and Stalcup 2010). These conditions, in drug court at any rate, include attending drug-counselling sessions, interviews with probation services and in-person appearances status hearings before the judge. Other types of

problem-solving courts may vary the frequency of reporting and testing, but the court will usually require offenders to appear at least once a month. Failure to comply with the rehabilitation programme results in a series of sanctions that eventually result in short periods of jail time, or removal from the programme (Bozza 2007; Nolan 2009b; Burns and Peyrot 2008).

The politics of problem-solving justice has proven polarising; much of the contemporary literature studying the courts reflects this ideological division, falling into sometimes shrill 'camps' that toss back-and-forth overblown claims about the merits of their own position and the pitfalls of the others. In part, the debate gains much of its heat from the claim, associated with the therapeutic justice movement, that problem-solving justice is treatment-oriented (Hora 2011; Winick and Wexler 2001; Wexler 2012) (a different version of problem-solving justice avoids the putting all its eggs in the treatment basket (Berman 2004b) at 1314). In part, the debate concerns the protections available for criminal defendants through problem-solving justice (Quinn 2000; Meekins 2007). And in part, the debate concerns the methods used to achieve the court's rehabilitative and community justice ends (Hoffman 2001; Miller 2009).

The polarisation produced by the proponents and opponents of problem-solving justice replicates, even if it does not reflect, some other oppositions in the various literatures in which the study of problem-solving justice is embedded. Are the current trends in the management of criminal populations best described in globalist or localist terms? Is the state's focus on 'victims' or the consequences of crime incompatible with its attention to 'criminals' or the causes of crime? Does judicial intervention in the social welfare aspects of sentencing channel offenders out of the system or 'widen the net' to catch more within it?

A further feature complicating the study of problem-solving justice is the way in which the American criminal justice system, its practices and policies, dominate the discussion. The American model takes incarceration as the core penal practice against which problem-solving institutions are understood and evaluated. Advocates and opponents tend, by and large, to take for granted a particular historical period, (a notable exception is Mae Quinn's recent work (Quinn 2006)) and a particular political climate: the more-or-less general move to mass incarceration of American criminal policy (at the federal – and more patchy at the state – level, in particular Florida and California (Barker 2009)) against which the first drug courts emerged in 1989.

Jane Donoghue's expert study adroitly avoids the major vices of the current problem-solving literature: partisanship and parochialism. It holds out the promise and possibility of a calmer and conciliatory discussion surrounding problem-solving justice, in large part because she clearly identifies the core function of the problem-solving court, and allows for a more objective assessment of its virtues. In particular, by stepping outside the American context, she demonstrates that problem-solving justice is not a form of adjudication, operating at the trial (or in the American context, plea-bargaining) stage of the criminal justice process. Rather, problem-solving justice applies to the sentencing stage, after (or

in some cases, before!) adjudication has run its course (Hora *et al.* 1998; Miller 2004). It is thus a form of justice that applies to the conditions of release of offenders who acknowledge their criminal responsibility, but identify some underlying medical or psychological factor causing their criminal conduct.

Having established that judicially monitored, de-incarcerative supervision is the central feature of problem-solving justice, we can then consider its relation to state penal policies with new clarity.

American penal policy, at least at the federal level, is usually presented as determined to increase the size and impact of the penal state at the same time as shrinking the welfare state (Garland 2001). Problem-solving justice then appears as a subversive counter-trend bucking this narrative. Problem-solving courts set out to mitigate the penal consequences of arrest and prosecution, while offering access to scarce resources, including medical and social services (Hora 2011). Whether or not the courts are as successful as some proponents claim, they are better (so the story goes) than the dominant regime (Berman and Feinblatt 2002). They provide individualised attention to criminal defendants, increasing the dignity afforded them within the system; and they provide them with access to services that are unavailable or unaffordable outside the problem-solving court. The goal, after all, is not to incarcerate, but to ameliorate the underlying social and personal factors leading the defendants down the path to crime. They are, at the least, a promising alternative to the severity state, and at worst, the only alternative, given the absence of (again, so the story goes) moderate penal policies in the United States. (For a slightly different take, see (Barker 2009; Lynch 2011).)

Another distinctively American feature of the current debate is the mostly bottom-up, fragmented, ad hoc, and low level operation of much problem-solving justice. (The exception is in New York state, which has its own problem-solving justice policymaking, court-supporting, and evaluation branch, the Center for Court Innovation (Berman 2004).) New York aside, in the American context, problem-solving courts are low-level and insurrectionary institutions, for the most part set up by local judges or court jurisdictions rather than by (and sometimes in opposition to) state legislation (Miller 2004; Burns and Peyrot 2008). These two features – fragmentation and oppositionalism – render the American experience, if not exceptional, then certainly exaggerated, even in the context of neo-liberal democracies.

Removed from the American context, however, Donoghue allows us to recognise that the use of problem-solving justice as a sentencing technique need not be dominated by the shadow of the incarcerative state, whether helping or hindering its policies. Penal policy at the state level could, after all, take a more welfarist cast (Lacey 2008; Garland 2001). In that case, the options are not between severity and some more-or-less ad hoc attempt to mitigate its impact. Instead, the options are between state-level policies that promote penal severity (responding to the consequences of crime) and policies that support social welfare interventions (responding to the causes of crime).

A less America-centric view allows us to consider what a top-down policy of problem-solving justice might look like. Problem-solving justice need not

operate against the background of a state that rejects social welfare for criminals. The experience of problem-solving justice in England (Nolan 2009a) and Scotland (McIvor 2009), presents, to different degrees, an important loosening of the anti-welfare animus that goes along with American penal policy. Accordingly, changing the relationship between the state and punishment may change the nature of the justice provided.

If there is to be a clear analysis of problem-solving justice, then, it must take account of two features that Donoghue's book clarifies: the sentencing and surveillance orientation of problem-solving justice; and the relation between this type of penal policy and the more general penal goals promoted by the state. Understood in this way, there is an opportunity to find at least some common ground between proponents of problem-solving justice and those critics who believe that the problem-solving court is the handmaid of the incarcerative system. These critics point out that problem-solving justice widens the net to channel more individuals through the criminal justice system, with a longer and more intense contact with that system than their peers in other sentencing regimes, and punishing the sizable minority who flunk out of the court more harshly than they would have been had they avoided the court in the first place (Bowers 2008). Viewed from afar, however, these negative features may turn out to be more parochial than universal, a creature of the American context in which the court emerged, rather than inherent in problem-solving justice itself.

Furthermore, exploring the relationship between the style of sentencing monitoring and other features of sentencing policy may mitigate some of the overblown claims made by proponents and opponents alike. The battle over the meaning of the courts' recidivism statistics, for example, is heightened by the willingness of American problem-solving proponents to go beyond the conclusions that their mostly geographically and temporally limited studies warrant, to make universal claims about the success of the courts. We know that the courts tend to reduce recidivism during the course of the programme, and (for successful graduates) for two years after the programme ends (Belenko 2001). We do not know much more than that, in large part because there is a paucity of studies evaluating long-term client recidivism. Nonetheless, and dependent upon the goals of a penal policy, that limited period of success (approximately four years from entry into the programme to the end of most recidivism study periods) could be enough to justify this form of sentence-monitoring. But this sort of success does not demonstrate that long-term recidivism disappears, nor that participants are cured of addiction or aggression, or their inability to stay on mental health medication.

I have so far avoided the major worry raised by opponents of problem-solving justice: the attack on due process. In part, that is because I believe that, in the American context at least, structural features render this worry doctrinally marginal. It turns out that, since problem-solving justice is a form of pre- or post-adjudication monitoring of conditions of release, judicial discretion and judicial advocacy impacts many fewer constitutional rights than critics generally suppose. But doctrinal gaps may cover moral shortcomings that we ought to

address, and in a hurry. Be that as it may, there are nonetheless a variety of worries, grouped under the heading of due process or the rule of law or judicial neutrality, that we might consider inimical to the judicial role.

The two traditional concerns – partisan interventionism and lack of accountability – present genuine problems for problem-solving justice. On the one hand, the judge is supposed to operate as advocate for the offender as they progress through the treatment programme. On the other hand, the judge is often supposed to operate as a surrogate for the community – as Donoghue's work shows, this can be to the extent of soliciting community sentiment on residents' experiences of and concerns about local crime problems (Donoghue 2012). These two interests – defendant-centred and community-centred – may on occasion conflict.

Yet another source of conflict is the judge's sense of his or her own institutional role and competence. Problem-solving justice often (though not always) asks the judge to step away from a posture of neutrality, one that gives Donoghue a certain cover and comfort when meting out criminal sentences. The individualising and interventionist posture of some forms of problem-solving justice may require the judge to undertake the role of advocate, a role that certain judges – Donoghue's example is the English magistracy – are sometimes ill-equipped to fill (in part because of inadequate governmental support for this new role).

The attempt to bring problem-solving justice into traditional courtrooms and criminal-justice settings requires a transformation in nature of authority wielded by the judge. The judge moves from having detached authority *over* others (as an umpire in adversarial contest) to a model of engaged authority *with* others (as a collaborator in team process). Furthermore, this change in the nature of authority is accompanied by a move from procedural justice to consequential justice; that is, from ensuring optimal procedures to producing optimal outcomes. The traditional judge is measured by success in administering fair process; the problem-solving judge is measured by success in producing long-lasting rehabilitative change. And often the court moves from a traditional notion of disinterested neutrality (as umpire) to what might be called evidence-based neutrality. On the evidence-based model, the guarantee of appropriate judicial decision-making is intended to be achieved through the wealth of social scientific data, including self-studies of the court's process, to measure of effective results.

Donoghue's central question – and her focus on problem-solving *justice* rather than problem-solving *courts* – concerns whether the sort of judicial intervention many regard as central to the problem-solving movement is transferable out of specialised courts and into the courtroom more generally. It is generally assumed that American judges, being more experimental and informal, are more receptive to the interpersonal and rehabilitative aspects of problem-solving judicial engagement than foreign judges, and especially those in the more 'stuffy' courts of England, Wales and Scotland (Nolan 2009a).

Donoghue's work, both in this book and elsewhere (Donoghue 2012), reveals that this picture is overly simplistic. Donoghue has hitherto engaged in detailed ethnographic studies of English magistrates' courts. These studies both jibe and

jar with the conversion narrative many American judges currently working in problem-solving courts tell: of being initially unreceptive to the idea of problem-solving, but once assigned to problem-solving courts, transformed by the experience. Yet – so Donoghue reveals – many judges remain unconverted and uncomfortable with the new role that problem-solving justice demands.

Donoghue's prior work on English Magistrate Courts, expertly integrated into her book, provides a fascinating account of the operation of the English and Welsh magistracy in running a community-court model of problem-solving justice. Donoghue engaged in a detailed empirical study that is unique in accessing and recording the operation of the magistrates' court to observe the government's attempt to embed a problem-solving approach to cases in these courts. In England and Wales, the British government attempted to require widespread adoption of problem-solving practices by political directive, from the top down, without any real training for the magistrates required to implement the policy. Lacking any specific direction, Donoghue found that magistrates generally resisted the informal aspects of the court – particularly interaction with communities to assess the problems presented both individually and locally by anti-social behaviour – and the formal aspects of repeat monitoring – the ability of a single magistrate within the court to track repeat offenders through the sentencing process. Instead, the magistrates reasserted their role of disinterested neutrality and detached authority and characterised the scientific and engaged aspects of the new process as requiring them to act as 'social workers' instead of 'judges'.

Donoghue's research reveals that, on the ground, impartiality and authoritarianism may be precisely the parts of the professional role that low-level court officials regard as central to their professional identity. These findings match some studies indicating that problem-solving courts are highly dependent upon the attitudes of individual judges, independent of the structure of the court (Nolan 2009b). Building upon her research into the English magistracy, Donoghue sets the stage for introducing structural solutions to the problem of judicial resistance, as well as describing the consequences of failing to properly train recalcitrant or ambivalent judges for problem-solving court practice.

The magistracy's experience in England may be symptomatic of a more general problem: the lack of training in both the theory and skills required to engage in 'social work' (Wexler 2012). The American experience is one of little or no state-sponsored training; the judiciary gets most of its induction into drug or mental-health treatment practices at annual meetings sponsored by professional associations of problem-solving judges. Often the repeated experience of engaging with drug or mental health or homelessness cases is cited as sufficient to sensitise the judge to the relevant problems (if not therapeutic techniques). Yet, with the model of problem-solving judge as engaged expert, the sheer volume of such courts – together with the 'mainstreaming' of problem-solving justice to other sites within the criminal justice – suggests that the number of judges practicing problem-solving vastly outstrips the opportunities for training (and certainly, for quality control).

The worry then becomes that problem-solving judges simply mimic the dominant disciplinary practice of traditional judges, as much as (if not more than) they introduce new therapeutic techniques (Miller 2009; Burns and Peyrot 2003). And that their claims to community participation and treatment success are overblown (Fagan and Malkin 2002; Boldt 2010).

Increased sensitivity to the problems of the drug addicted or mentally ill is indeed a positive boon. Yet, while some critics of problem-solving justice call for more training, one likely result is the domination of the judiciary over the various cognate service providers and treatment specialists that is another of the important innovations of problem-solving justice. Judicial domination of social services risks the 'courtification' of service provision in ways that undermine the independence of the service provider and remove the checks that these co-equal experts can exert over the court. Call this the problem of institutional net-widening.

The checks-and-balances aspect of treatment-team authority over sentencing dispositions is one of the most promising and least comfortable aspects of problem-solving justice. Most promising because, in the ante-chamber and the courtroom, the judge is required to shed some of his or her authority and promote a more egalitarian and understanding interaction with criminal defendants, often guided by insights – or even virtual scripts – generated by treatment specialists. A positive cycle of legitimation develops, in which the offender feels 'heard' by the judge, and that the system is finally working with him; while the judge feels engaged with the offender, and gains a sense that they are indeed affecting change in the offender's life (Tyler 1992). Much of the 'legitimacy' literature addresses the positive effects of this process on the offender. Certainly, increasing access to justice has important egalitarian and democratic benefits. But a hidden subject in the cycle of legitimation is the state official (in much of the literature, the police officer; in problem-solving justice, the judge) whose sense of institutional legitimacy is also increased (Chase and Hora 2009). True believers become even more passionate about their mission and their success, increasing their willingness to push the discretion and authority inherent in such courts to the limits.

A core problem of the current system of problem-solving justice is that many judges do so without adequate institutional oversight. That worry, Donoghue suggests, is shared by judges to whom problem-solving justice is a political imperative, rather than a natural judicial style. Without institutional support, judges are cast adrift on this new wave of social monitoring and interaction, without the tools to adequately undertake their mission.

One solution – I have hinted at it, above – is to ensure that the cognate treatment professionals share decision-making power to provide checks on judicial discretion. The problem is that, as a matter of law, split decision-making power between judge and others is prohibited – to the extent that if this happens in practice, it does so under the table (Portillo *et al.* 2013). Put differently, the legal requirements of the model may have the effect of promoting 'courtification' and undermining inter-agency regulation. Because informal, such regulation must depend upon the personality of the judge.

A central danger of the courtification of social service provision is that, in order to increase their prestige with the court, social workers and other treatment providers will translate therapeutic concepts into legal, and in particular, criminal justice ones. The dominance of the criminal threatens to colonise these coordinate professions at the point of problem-solving provision, resulting in a novel form of net-widening, focused on institutions rather than individuals. Here, the worry is not simply that more individuals are transformed into offenders, having been caught within the criminal justice 'net' (Cohen 1985; Hoffman 2000). Rather, the worry is that access to, and the nature of, social welfare or medical treatment becomes dependent upon criminal justice concepts such as punishment, sentencing, and the amorphous and contested concept of 'risk' (O'Malley 2008; Donoghue 2008).

These may well be design issues primarily. They need not go to the heart of problem-solving justice. How things are now are not how things have to be; and the American model need not be the English (or the Scottish, or the Dutch or the Belgian and so on). What is desperately needed, and what Jane Donoghue provides, is a vision of problem-solving justice that is not beholden to the received wisdom on the American side of the Atlantic, but instead can provide more dispassionate and less parochial evaluation of the benefits and burdens of problem-solving justice.

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