



Are problem-solving courts the way forward for justice?

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Abstract

Problem-solving courts are not a new innovation, but their use and implementation appears to be growing across a number of jurisdictions, including the UK. This development suggests there is belief in the 'therapeutic jurisprudence' approach that underpins this style of criminal court adjudication; moreover their growth fits within the discourse which points out traditional criminal justice mechanisms too often leave the offender out as an uninvolved actor in the process (Nolan, 2001; Berman and Fox, 2009; Braithwaite, 1989). Processes that draw people in more closely, making them accountable for their actions, and playing an active role in their rehabilitation are more likely to achieve success at reducing reoffending and assisting people to live altered and reformed lives (Hoyle, 2012). This working paper provides some background detail on problem-solving courts and the central guiding principle of therapeutic jurisprudence, and argues court structures that assist people to construct positive self-identities and reintegrate into purposeful lives, and which empower people to play a role in their rehabilitation demonstrate a criminal justice model that has well-being at its core, and puts a human face to the delivery of justice.

Introduction

Problem-solving courts are not a new innovation, but their use and implementation appears to be growing across a number of jurisdictions, including the UK. This development suggests there is belief in the ‘therapeutic jurisprudence’ approach that underpins this style of criminal court adjudication; moreover their growth fits within the discourse which points out traditional criminal justice mechanisms too often leave the offender out as an uninvolved actor in the process (Nolan, 2001; Berman and Fox, 2009; Braithwaite, 1989). Processes that draw people in more closely, making them accountable for their actions, and playing an active role in their rehabilitation are more likely to achieve success at reducing reoffending and assisting people to live altered and reformed lives (Hoyle, 2012). This working paper on problem-solving courts and whether they are the way forward for justice is produced from a paper presentation given at the Howard League’s *What is Justice?* conference in October 2013. It provides some background detail on problem-solving courts and the central guiding principle of therapeutic jurisprudence, and argues court structures that assist people to construct positive self-identities and reintegrate into purposeful lives, and which empower people to play a role in their rehabilitation demonstrate a criminal justice model that has well-being at its core, and puts a human face to the delivery of justice. It goes to the heart of the question *What is Justice?* To me, this is what it is.

Problem-solving courts

There is a vast literature on problem-solving courts. This includes the history of their development in the US since the 1980s, their growth in popularity across other common law jurisdictions such as Canada, Australia, New Zealand and the UK (King, 2011); the variety of these courts in the range of issues they focus on tackling, for example drug and alcohol courts, domestic violence courts, mental health courts, homelessness courts, indigenous sentencing courts etc.; and evaluation research, which shows different results, but evidence they are effective at helping people to make positive changes (Harwin et al., 2011; Rossman et al., 2011).

Various types of problem-solving courts have emerged, but the most typical, with the longest history, are drugs courts (Nolan, 2001). The first drug court in Miami in the US was set up in 1989 at the time of the crack cocaine epidemic (Transform Drug Policy Foundation, 2013), and grew out from there. According to information posted on the Transform Drug Policy Foundation’s website, in 2011 there were over 2644 drug courts operating in different US states. In line with policy transfer mechanisms, other countries borrowed the drug court idea but went further, implementing the model to address a broad range of social and health issues that are found to definitively impact on peoples’ offending. As such, varying degrees of development and application of these courts can be seen in different countries depending on ideologies of punishment and belief in alternative adjudications. This paper is not going to re-rehearse the detail about problem-solving courts that other commentators have produced (see McIvor, 2010; Booth et al., 2012; Thom et al., 2013; Berman and Fox, 2009; Plotnikoff and Woolfson, 2005; Cook et al., 2004 among others). Instead it gives an overview of the concept ‘therapeutic jurisprudence’ and how these principles are incorporated into the design of problem-solving courts. Some of the problems and criticisms that have been levelled at

these courts are noted and some commentary on the need to implement this style of justice more comprehensively within the current criminal justice system in England and Wales is given.

Why problem-solving courts?

A basic premise for this different approach for dealing with offenders is the reality that some people who offend are found to appear in courtrooms on a repeat and frequent basis. King (2011) writes in his paper on therapeutic jurisprudence of the actuality that courtrooms are becoming 'dumping grounds' for people with drug addiction problems, mental health problems, homelessness issues etc. He notes other factors leading to the popularity and development of these courts, such as dissatisfaction from the judiciary and community members at the 'revolving door' nature of the formal criminal justice system, and 'the recognition that courts could be a vehicle for offenders to address their underlying issues' (ibid.: 21). Indeed, over the last decade and more strong arguments have been put forward regarding the known lifestyle factors that strongly correlate with offending, and that people with these conditions benefit more from therapeutic, health treatment type responses, as opposed to punishing, law enforcement ones.

Problem-solving courts in England and Wales

The extent of problem-solving courts in England and Wales is not as developed as in other jurisdictions, but there are some examples, and reports note positive results for the groups involved (Cook *et al.*, 2004; Kerr *et al.*, 2011; Harwin *et al.*, 2011; Winstone and Pakes, 2010; Mclvor, 2011).

Specialist Domestic Violence Courts (SDVC) were the first of the problem-solving courts to be introduced in the UK. These have been in place since 2005 following governmental recognition that greatly improved criminal court services for victims bringing cases against perpetrators were needed. This was on top of recognising the complex psychological aspects of domestic violence and the need for a specialist multi-agency co-ordinated approach in bringing prosecutions. There are now more than 100 SDVC operating across England and Wales. These function as separate sessions within existing courtrooms (Crown Prosecution Service, 2014).

The first drugs court opened in Cardiff in 2009. Following its considered success at treating people's addictions, and in preference to expensively incarcerating drug addicted low-level offenders, pilots were set up in Bristol, Leeds, and West London. These courts have likewise reported positive results (Kerr *et al.*, 2011).

There has also been an attempt to copy the community court model famously associated with the Red Hook justice centre in New York. The North Liverpool Community Justice Centre opened in 2005 housing various criminal justice services under the same roof as the court room, with the intention of linking offenders into services to help get their lives back on track. However, the court was closed in 2013 due to a reported falling-off of referrals; a lack of anticipated community involvement, and high cost implications (Ministry of Justice, 2013). The closure was not without dissenting voices (BBC news 23rd Oct. 2013) who expressed the contradiction in

government wanting more community justice, while at the same time closing the centre. More recently there has been the Plymouth Community Justice Court, also developed according to the community court model. This is currently the focus of Economic and Social Research Council evaluation funding.

Therapeutic jurisprudence

'Therapeutic jurisprudence' is the guiding construct that underpins problem-solving courts (King, 2011). It was first conceived as a theory by David Wexler and Bruce Winkler as an approach emanating from psychology and mental health law. A common definition given to it is its focus on 'the therapeutic and anti-therapeutic consequences of laws, legal rules, and legal actions' (Nolan, 2001: 185). In essence, this appreciates there are aspects of the legal process that can both facilitate a person's reform and rehabilitation, as well as processes that work to impede improvement. It is put to us in considering the application of the law within the criminal justice system that we need to be sensitive to these consequences (Wexler and Winick, 1996: xvii).

Nolan (2001) provides the background to the merging of the therapeutic jurisprudence theoretical framework and an understanding of the way the law impacts on well-being with the drugs courts movement. He notes these were movements that were developing in parallel with each other in the US in the 1990s. Psychology scholars were mounting a theoretical construct of 'the role of the law as a therapeutic agent' (Nolan, 2001: 185), and drug court practitioners were implementing working practice that had these values and principles at their core. The dovetailing of this approach has underpinned the subsequent emergence of specialist courts across a range of areas. In writing about problem-solving courts more generally, King (2011) states therapeutic jurisprudence as well as restorative justice principles informed their development (ibid.: 19) – 'the concepts and practices of therapeutic jurisprudence and restorative justice have significantly influenced the development of court and legal practice associated with these programs' (ibid.: 19).

Mclvor (2010) also applies the therapeutic jurisprudence framework to problem-solving courts, noting how the more welfarist correctional approach of 'rehabilitation' is central to the model. She writes 'Under traditional court models rehabilitation may be an *aim* [author's emphasis] of criminal justice processing, but within a model of therapeutic jurisprudence it is *intrinsic* [author's emphasis] to the process' (ibid.: 135).

Central features of problem-solving courts

Although there are different models of problem-solving courts in the social issues they address, as well as the design of them, there are some core elements that make up their operation. King (2011) uses Berman and Feinblatt's summary (2005) to explain the core features. These are judicial review and monitoring; addressing the interconnectivity between offending and other life circumstances; multi-disciplinary team working; consensual decision-making, and to this King adds empowering people who have offended to participate in their own rehabilitation (King, 2011: 22).

One of the most lauded elements of problem-solving courts is 'judicial monitoring' through the court judge overseeing and reviewing a person's progress through the correctional package assigned to them. It is their 'judicial authority' in the assessment process that is seen as powerful, both in being consistently interested over time in the person, but also since non-compliance or breach of the set conditions of the treatment package permits the judge to assign an alternative, more restrictive punishment as a result.

Another core feature is the way problem-solving courts recognise the range of life circumstance issues that can interact with and impact on a person's law breaking. As such the interconnection between social, economic, psychological and housing needs and interpersonal issues are all considered, and endeavours are made to work at these problem areas in conjunction with confronting the offender's illegal behaviour.

Multi-disciplinary team co-ordination is another defining feature of problem-solving courts, where a person's treatment plan inevitably involves input from a range of help services that helps set them on the road to recovery. Typical examples might be community-based health services, drug and/or alcohol services, the involvement of probation and social workers, and child welfare and education specialists.

The concept of consensual decision-making is also pivotal to the problem-solving court model, since it is recognised that success or compliance is more likely to be achieved if the person is in agreement with the decisions being made regarding their treatment reform plan. In this way the model is often referred to as non-adversarial, compared to that of regular criminal justice administration.

King (2011) added to Berman and Feinblatt's (2005) synopsis of the core elements of problem-solving courts saying that the empowerment of participants should be an additional feature of them. King argues the US literature on these courts places the court centre stage in solving the offender's problems, when it should be the participant, thus being the 'active agent' in resolving their issues. Specifically King says the 'participant should be empowered to understand their weaknesses and strengths so they can positively engage in formulating their own rehabilitation with the assistance of the court team'. (ibid.: 22). It is these combined, well-being centred elements of adjudication that sees the praise and success of problem-solving courts.

Criticisms, problems and questions

Commentary on problem-solving courts is mixed, with some positive accounts, as well as more critical overviews. Broadly, these express offender satisfaction with the more personalised and encouraging approach directed at their reintegration, as opposed to the usual court-based adversarial sanctions. But conversely points are made that some programmes are flawed in the way participants are 'cherry-picked', with people who are more likely to succeed being selected for this more privileged problem-solving style justice, and those with more complex life situations being left out and exposed to traditional punishment sanctions. Another criticism put forward but specifically from the case of US drug courts, is the fact that drugs treatment programmes are often

abstinence-based with failure to comply being met with expulsion from the programme (Transform Drug Policy Foundation, 2013). There is not space in this working paper to re-rehearse the targeted evaluations of problem-solving courts that variously praise and criticise them, therefore in this section I focus on just a few points of applause, as well as contentions that need to be considered when assessing their value.

Judicial review and monitoring

What emerges from reviewing the commentary on problem-solving courts is the role of the judge in overseeing a person's success and rehabilitation. This is consistently found to be the key strength of the courts. Mclvor (2010:151) in her overview of drug courts in the UK, centres on the evidence that points to their specific success and states there are different views 'but one emerging one is the involvement of judges in an offender's personal life and achievements in improvement'. She goes on to cite the work of Makkai (2002) to support this contention saying 'the most significant change brought about by drug courts has been the linking of treatment directly with the judge whereby the notion of an impartial arbitrator is replaced with a caring, authoritarian guardian' (Mclvor, 2010: 151).

Samuels' 2013 paper on 'sentencer supervision', also delivered at the *What is Justice?* conference, picks up on these themes. From his previous experience as a Crown Court judge combined with anecdotal evidence he states the great satisfaction when a person expresses their self-improvement is in part down to the interest the judge has taken in them as a person. He argues persuasively that more of this needs to be incorporated into the sentencing of offenders and the supervision of their progress. Samuels (2013) and others (Cavadino, Dignan and Muir, 2013) acknowledge that certain community penalties such as the Drugs Rehabilitation Requirement (DRR) introduced under the Criminal Justice Act 2003 have this aspect of review hearing within them, but that there could be more of it.

Given judicial monitoring is found to be one of the real benefits of the problem-solving court approach, short cutting on this element would seem to undermine success. Mclvor's evaluation of Scottish and English and Welsh drugs courts found some differences in the English and Welsh model whereby the contact between the court judge and the individual person was less frequent in England and Wales than in the Scottish courts, and the judicial review that did take place was by members of the different teams the defendant was working with, rather than the judge. Mclvor noted an important part of the steps towards motivating a person's change was the frequent meetings in the early stages of the treatment plan, such as fortnightly or more frequent arrangements. In Mclvor's assessment, this less regular structure omitted a key aspect of the drug court relationship central to its success; that being consistent meetings with the judge to gauge and oversee a person's progress (Mclvor, 2010: 143).

Measuring success

Key to the acceptance of problem-solving courts will be seeing reductions in offending. An evaluation of the North Liverpool Community Justice Centre carried out for the Ministry of Justice found reoffending rates to be no different when compared with a

sample of people who had not had the benefit of the services and support received by those engaged in the community justice programme (Booth et al., 2012). This, added to the lack of community involvement which the project was supposed to attract, and its material and resource expense (Faulkner, 2012: 19) were behind the view of its limited success (Ministry of Justice, 2013). It is vitally important when measuring the success of an initiative such as problem-solving courts not to use the standardised measure of reoffending rates or unchanged offending as the sole measure for success. It is important to take on the small but cumulative gains a person might be making within their lives that contribute to getting them on track to a more participatory existence. Drug and alcohol addiction in particular, are difficult health issues to address and it needs to be acknowledged that time is required for a person to make the significant life changes that need making. Lord Causfield (2004) in his review of community penalties made mention that the two year reoffending measure was too crude, and that the small achievements a person makes compared to their former lives needs to be commended. It is a sad reality that many people who find themselves entwined with the criminal justice system have grown up with deprivation, limited schooling, and with little routine or discipline. A part of reforming people to live crime free lives is working on these deficits, and these take time and concerted investment, both practical and financial. Problem-solving courts might not reveal quick results but in all probability well-being focused participant engagement is likely to yield greater results over the long term.

Of course resource intensity and costs are going to be at the fore of assessments of these courts, but sometimes these priorities need to be put aside. The different personnel required to make up effective multi-disciplinary teams is resource intensive and costly, however it is not always the case that an economic cost can be put onto the repair of social problems, which in large part stem from the structural inequalities that exist in modern society and the prevalence of low socio-economic groupings that emerge as a result. Problem-solving courts, or indeed court structures that seek to assist transgressing people to construct positive self-identities and reintegrate into living purposeful lives, that provide continued support and encouragement to drug and alcohol affected people etc., must surely be a sound investment when compared to the costs of offender incarceration.

The role of probation services

Some would argue the way the probation service is presently deployed within the courts to assess people for community-based treatment, and the offender monitoring role they carry out, is in effect the same as that being put forward in arguments for enhanced judicial monitoring and review. Some commentators would argue the probation service, offender management services, and Youth Offending Teams are in place to provide this supervisory and offender management role. However, we are aware that probation services have undergone major transformations where the human connection and relationship between the offender and the probation officer/offender manager has increasingly become one of monitoring rather than befriending and assisting. Thus, the point being made here is, yes probation services do already play a role in this, but it is not enough to argue this if we know the real nature of the relationship has become increasingly distanced. Moreover, with new plans on the table for the probation service

and the increased involvement of the private sector, this trend is not likely to be reversed.

Extended monitoring

One criticism that can be levelled at these court-based interventions is the extended period of time a person may be required to engage with a programme before it is viewed they have been sufficiently corrected to spend their lives without monitoring and review. In the past when rehabilitation and treatment type punishments were assigned to people as a form of reform, there was evidence to show that prison sentences became longer (Davies et al., 2010). The notion of proving a person has been rehabilitated is open to different interpretations and flexibility and offenders who are under mental health treatments and reviews are seen to be subjected to some of the most powerful punishment regimes available because of the open-ended nature of them (Prior, 2007). It is therefore important that an acceptance of the programme is required for participation, and the person is supported and helped to make changes and exit the programme, so they do not feel that they are under protracted surveillance and monitoring and not trusted to make another go of things.

A re-imagining of penal policy

It is the case that problem-solving courts working in the way they are supposed to, where the individual person is encouraged and assisted to make positive steps in changing their behaviour and constructing reformed self-identities so that they can reintegrate into family, community and wider societal lives, are forward thinking. They are a human and 'just' approach to resolving issues of criminality that are underpinned by disadvantage and health and welfare problems. If these courts and the approach they take to working with offenders are as successful as the evidence suggests, then they should be used more extensively in England and Wales. In re-imagining the penal landscape in England and Wales we need to take on the reported success of these courts, and find more ways of implementing them within the current court structure and legal system. As King (2011) states 'they are not a panacea, but therapeutic values should be considered in the mix' (ibid.: 33).

It does appear that the setting up and running of problem-solving courts in other jurisdictions has taken the initiative of certain individual court judges, who in countries such as the US, Australia and New Zealand preside over the bulk of lower criminal court work and who through their court work see reoccurring problems that fundamentally affect the lives of families, the well-being of children, the life chances of young people, repeat prison sentences, and the removal of children into state care because of parental drug and alcohol addiction.

Given England and Wales has a lower court system that is mainly run by volunteer lay magistrates as opposed to single sitting legally qualified District Judges, it is vitally important that a way is found to utilise the skill and expertise magistrates have and can offer in these problem-solving court developments. A way needs to be found to invite longer serving more senior magistrates to play a role in these important innovations, and it may be that more experienced magistrates can be promoted to positions of

judicial monitoring and review. The current government in the *Swift and Sure Justice White Paper* (Ministry of Justice, 2012) set forward ideas for magistrates to adjudicate alone out in community settings. It may be that this idea can be extended so that magistrates can sit alone and encourage and monitor a person's road to reform in the same way a single sitting professionally qualified court judge does. It will be a greatly wasted resource if magistrates are left out of this therapeutic jurisprudence and well-being approach to offender rehabilitation.

In a time of fiscal tightening that is impacting on all public services in the UK, including the Ministry of Justice and HM Courts and Tribunal Service, it is difficult to imagine that court models such as problem-solving courts are going to find a smooth passage, especially if they are judged on cost efficiency and are found to be more costly than current criminal court approaches. Yet, Samuels' (2013) paper on 'sentencer supervision' claims it would cost 'virtually nothing' to implement the sentencer supervision aspect of the problem-solving court model. If this is the case, acting to implement these changes is the way forward for justice.

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