

JAMES L. NOLAN, JR.

**LIBERTY AND
THE THERAPEUTIC STATE.
COURTS AND CULTURE
IN COMPARATIVE PERSPECTIVE**

Revisiting themes first addressed in his book The Therapeutic State, James L. Nolan, Jr., in this article, considers the extent to which the international problem-solving court movement is a phenomenon that either inhibits or enhances the realization of individual liberty. Based on a comparison of problem-solving courts in six different common law countries (England, Ireland, Scotland, Australia, Canada, and the United States), Nolan finds that countries outside of the United States demonstrate greater concern with preserving due process, open and natural justice, the dignity of the criminal court, and the protections of individual rights and liberties. However, inasmuch as these courts first emerged in an American cultural context with pronounced therapeutic tendencies, there are signs that the borrowing countries may be importing more of American legal culture than they realize or wish for—a development that bears directly on issues of individual liberty as well as the very legitimacy of the court system.

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At the end of my book *The Therapeutic State* I reflect on the effects of a therapeutically oriented state on matters of individual liberty. In the book I pose the question: does a therapeutic orientation foster the kind of liberty that it often promises or does it inhibit individual liberty, if only unwittingly? I note that state actors at the helm of therapeutically oriented processes often see themselves as advancing programs that are beneficial and liberating for individuals. I also observe that these programs sometimes have unintentional consequences that are anything but liberating.

In the past decade, scholars have continued to explore these and related questions as it concerns the consequences of the advancement of a therapeutic culture on state processes. Of particular interest, in this regard, is Daniel F. Priar's recent examination of therapeutic influences on American constitutional law. Priar observes the extent to which the "triumph of the therapeutic has transformed the role of law in American life." As he puts it, "If law once was reason, logic, or experience, it is now good feeling, individual fulfillment, and therapeutic healing." Priar notes both the promises and dangers of this development. On the one hand, the therapeutic approach offers to expand "the roster of constitutionally protected liberties, making the modern age ostensibly one of

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great personal freedom.” On the other hand, “such freedom has its price, for the therapeutic culture ironically risks fostering dependence in the name of self-fulfillment.”¹ Thus, therapeutically oriented law may actually “have the effect of increasing state power at the expense of the self-reliance and personal autonomy necessary for true democratic freedom.”²

The impact of the therapeutic culture on legal practices, however, has extended far beyond the realm of constitutional law the focus of Priar’s work. In fact, in the past two decades a new legal theory has emerged that specifically refers to itself as Therapeutic Jurisprudence (TJ). Though the theory was first developed in the area of mental health law, it has since spread to a variety of other areas of law.³ As Ian Freckleton observes:

Therapeutic jurisprudence as an approach to the law has proved extraordinarily successful within a surprisingly short time. It has influenced thinking on law across an extremely wide range of areas, including mental health law (its *fons et origo*), health law generally, criminal law, civil law, family law, human rights law, disability law, tort law, probate law, labor law, workers’ compensation law, industrial law, evidence law, coronial law, regulatory law, and many other areas.⁴

Freckleton notes further than “in excess of 900 articles” and “some forty-two books” have been “published on the area of therapeutic jurisprudence.”⁵ As is perhaps self-evident, the main purpose of therapeutic jurisprudence is to identify and enhance legal processes determined to be therapeutic and alter or reduce legal processes determined to be antitherapeutic.⁶

An important legal expression of therapeutic jurisprudence, according to both Priar and Freckleton, is the development of new “problem-solving” courts: an important international phenomenon to which this article gives particular attention.⁷ Criminal courts represent an important venue for exploring the influence of the therapeutic culture on the state and on the application of state power. Inasmuch as the state is defined by a monopoly of the legitimate use of force, a courtroom is an arena where state power, as such, is readily observable. Gianfranco Poggi speaks of how the modern state has a

¹ Daniel F. Piar, “A Welfare State of Civil Rights: The Triumph of the Therapeutic in American Constitutional Law,” *William and Mary Bill of Rights Journal*, 16, March 2003, no. 3, p. 652.

² *Ibidem*, p. 673.

³ See, for example, David B. Wexler and Bruce Winick (eds), *Essays in Therapeutic Jurisprudence*, Durham: Carolina Academic Press, 1991, and David B. Wexler and Bruce Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, Durham: Carolina Academic Press, 1996.

⁴ Ian Freckleton, “Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence,” *Thomas Jefferson Law Review*, 30, Spring 2008, pp. 580-582.

⁵ *Ibidem*, p. 582.

⁶ Bruce J. Winick, “The Jurisprudence of Therapeutic Jurisprudence,” in Wexler and Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, p. 646.

⁷ Freckleton observes that TJ “has played a major role in the emergence of problem-solving courts” (“Therapeutic Jurisprudence Misunderstood and Misrepresented,” p. 582). Priar notes the extent to which courts “are increasingly asked, and are increasingly willing, to exercise therapeutic authority over diverse aspects of American life” (“A Welfare State of Civil Rights,” p. 673).

“monopoly of legitimate coercion” that is characterized by “sophisticated and formidable” uses of power. Importantly, according to Poggi, coercive power in the context of the modern democratic state is less “pervasive and visible.”⁸ In other words, one does not typically detect the force that rests behind state processes and programs (at least as it concerns domestic policies and programs). The criminal courtroom is one place where the state’s monopoly of the legitimate use of force is more conspicuously on display. In criminal courtrooms, security guards are present and typically armed. At arraignment and sentencing hearings, offenders are escorted into court, sometimes in handcuffs. The judge has the power to find someone guilty and impose a prison term. The symbols and realities of state power, in this context, are more pronounced.

Thus, it is an area of state activity that is particularly well suited for evaluating the liberating (or nonliberating) qualities of therapeutically justified power. One of the arenas of state activity I explore in *The Therapeutic State* and then more comprehensively in *Reinventing Justice* is the American drug court movement, a therapeutically oriented court-based program aimed at helping repeat drug offenders to free themselves from drug addiction. The program is deliberately therapeutic in orientation. Judges behave as therapists, regularly engaging “clients” in counseling-like exchanges. The program is also therapeutic in the sense that “expert” treatment providers play a central role in the adjudication process—advising the judge, running treatment programs, and counseling drug court participants. Clients, moreover, are encouraged to grow their self-esteem, to get in touch with their emotions, and to identify the patterns that “trigger” their drug use. Judges in these courts, in fact, sometimes proudly refer to themselves as therapeutic judges.⁹

The drug court movement eventually spawned the initiation of a number of other therapeutically oriented “problem-solving” courts, including domestic violence courts, community courts, and mental health courts. Like drug courts, these other specialty courts are therapeutic in orientation, involve close and ongoing judicial monitoring, are team-oriented, alter the traditional roles of courtroom actors, and emphasize solving the problems of individual offenders. In problem-solving courts, then, one finds an arena of state activity (where the reality of force is more readily on display) directly linked to a therapeutic orientation. As such, problem-solving courts represent an ideal venue for investigating the extent to which therapeutically oriented state processes foster liberation or, alternatively, compromise individual rights and due process protections.

PROBLEM-SOLVING COURTS: A COMPARATIVE PERSPECTIVE

Given that problem-solving courts have become an international phenomenon during the past decade, these programs represent an important development by which to compare the adoption of therapeutic programs in different national contexts. Problem-solving courts have not only spread across the United States (there are more than

⁸ Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction*, Stanford: Stanford University Press, 1978, p. 108.

⁹ James L. Nolan, Jr., *Reinventing Justice: The American Drug Court Movement*, Princeton: Princeton University Press, 2001, p. 48.

3,000 problem-solving courts operating in the U.S.) but have been transplanted to a number of other countries around the world, including England, Scotland, Ireland, Australia, and Canada.¹⁰ The varying ways in which the courts have been developed in these contexts are instructive as it concerns understanding the trade-offs between the protection of individual rights and liberties and the exercising of state power as inspired by a therapeutic sensibility.

Interestingly, what one finds in a comparison of problem-solving courts between the six common law countries—the United States, England, Scotland, Ireland, Australia, and Canada—is that some countries appear more willing to embrace therapeutic jurisprudence as a justification for problem-solving courts than are others. Additionally, some countries are more vigilant about the protection of individual liberties and due process rights than are others. In general, the United States presents itself as the boldest and most willing to experiment with therapeutically inspired court processes in ways that clearly depart from the practices of the other countries, even those that have embraced therapeutic jurisprudence as a guiding judicial philosophy.

In her book *A Nation Under Lawyers*, Mary Ann Glendon identifies two types of judges: what she calls classical judges and romantic judges. The classical judge is characterized by “modesty, impartiality, restraint, and interpretive skill,” whereas the romantic judge is “bold, creative, compassionate, result-oriented, and liberated from legal technicalities.”¹¹ While these are clearly ideal types in the Weberian sense, it is fairly safe to say that American problem-solving court judges tend toward the romantic, while judges in the five other regions (at least in the earlier years of importing problem-solving courts) tend toward the classical. What follows below is a brief examination of some of these contrasting tendencies as they are represented in the six cases.

The American Example

Judicial boldness, an important feature of the romantic judge, is apparent in the words and actions of American problem-solving court judges. American problem-solving court judges are activist judges. They are the leaders of the movement, directing initiatives both inside and outside the courtroom. As it concerns their actions in the courtroom, judges are bold in the sense that they recognize that the format of problem-solving courts affords them a great deal of power and discretion (beyond what they would have in a regular criminal court), and they are not afraid to use this increased power to “solve the problems” of the individuals who come before them.

American judges are aware of the influence that is theirs in such a novel judicial context. Judge Judy Harris Kluger, who served as a community court judge in New York, reflects on the kind of authority given to the problem-solving court judge.

¹⁰ For a fuller discussion of this international movement see James L. Nolan, Jr., *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement*, Princeton: Princeton University Press, 2009. Much of the discussion in this article is drawn from work in this larger book project.

¹¹ Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society*, New York: Farrar, Straus and Giroux, 1994, p. 152.

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.¹²

Judge Rosalyn Richter, another former New York community court judge, agrees with Kluger; she recalls a meeting at the Midtown community court in which "defendants said that having a judge monitor what they were doing affected them almost as much as having a sentence over their heads."¹³

Florida judge Cindy Lederman reflects more specifically on the substance of the new form of judicial monitoring. As a problem-solving court judge, says Lederman, "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." It's a role, she says, that requires "courage" and a willingness to move beyond the role of "referee or spectator" and become a "participant in the process." Given this format, Lederman believes that the wrong type of judge could be a "disaster." That is, she concedes that potential harm could come from the increased discretion given the judge in the context of problem-solving courts. Contrasting her role with that of a judge in a conventional criminal court, Lederman acknowledges, "So 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."¹⁴

As reflected in Lederman's comments, the kind of judicial monitoring found in problem-solving courts is often characterized by a personal and informal style of engagement. Physical contact between judge and clients is not uncommon. Not a few American judges are comfortable with offering hugs. American judges, in fact, engage in a range of unusual judicial behaviors. One California judge, who strongly endorses hugging, also allows clients to visit with her in her judicial chambers. In order to be seen as more approachable and caring to clients, a Kentucky judge doesn't wear his black robe and has even appeared in court with acupuncture needles in his ears as an advertisement for a form of treatment common in American drug courts. A North Carolina judge literally does cartwheels when clients successfully attend "90 meetings in 90 days." Thus, in a number of ways, problem-solving court judges boldly step beyond the parameters of their traditional roles. As one American problem-solving court judge put it: "We are the judges who get to color outside the lines."

Not all judges in new American specialty courts think that these boundaries should be so eagerly transgressed. A domestic violence court judge in Minnesota believes the "judiciary is backsliding in terms of what are appropriate boundaries." In reference to some of the actions of other problem-solving court judges, she says, "I do not want to be a chemical dependency counselor. I don't want to run AA meetings in my courtroom

¹² Judy Harris Kluger, "Judicial Roundtable: Reflections of Problem-Court Justices," *Journal* (New York State Bar Association), 72, June 2000, no. 5, p. 11.

¹³ Rosalyn Richter, "Judicial Roundtable: Reflections of Problem-Court Justices," *Journal* (New York State Bar Association), 72, June 2000, no. 5, p. 11.

¹⁴ Cindy Lederman, "What Is a Traditional Judge Anyway? Problem Solving in State Courts," *Judicature*, 84, September-October 2000, no. 2, pp. 80, 82.

and sing ‘Kumbaya’.” She makes clear that she is not opposed to therapy: “I’m all for therapy. I’m all for treatment.” It’s just that in her view, it is not the role of the judiciary to function in a therapeutic capacity. As she puts it: “Judges need to be judges and need to have a certain distance from what’s going on ... If we get too involved in cases, how do we fairly and impartially dispense justice? How do we maintain our credibility?.” She adds that she is “all for society solving its problems,” but she does not believe “the courts should be in the mix of trying to solve society’s problems.” In spite of her personal reservations about a therapeutic, problem-solving orientation she recognizes that she is “clearly in the minority,” that she goes “against the tide,” and that, irrespective of her views, “the train has left the station.”

Most judges involved in the movement, thus, are more willing to color outside the lines—which involves, among other things, employing a wider range of judicial options for dealing with clients. Freed from the sometimes frustrating constraints of mandatory minimum sentence guidelines, problem-solving court judges now have greater discretion. They can impose a variety of sanctions, including community service, increased attendance at 12-step meetings, involvement in “quality of life” groups, compulsory participation in anger management classes, and short periods in jail. As community court judge Rosalyn Richter explains, “problem-solving courts have broadened the judicial horizon” and have “given judges more choices than [they] have ever had.”¹⁵ Comparatively, the U.S. is unique in the variety of sanctions that judges can impose in the context of problem-solving courts.

Given the missionary manner in which problem-solving court judges have advanced the movement and acquired these expanded powers, it is not surprising that problem-solving court judges—particularly the movement’s early leaders—were described as “mavericks ... dynamic individuals ... free-thinking, charismatic, and well-connected,” for whom “salesmanship” was a defining quality of their leadership.¹⁶ In keeping with this orientation, Michael Shrunk, a district attorney in Portland, Oregon, seeks a certain type of person when recruiting new problem-solving court judges, as commissioned by his presiding judge. Among other qualities, Shrunk looks for a “risk-taker,” someone who is “non-traditional,” a “proactive judge rather than a reactive judge.”¹⁷

The proactive nature of problem-solving court judges finds expression outside the courtroom, as well.¹⁸ In this sense, problem-solving judges are a far cry from the clas-

¹⁵ Richter, “Judicial Roundtable: Reflections of Problem-Court Justices,” p. 11.

¹⁶ Aubrey Fox and Robert V. Wolf, “The Future of Drug Courts: How States are Mainstreaming the Drug Court Model,” Center for Court Innovation Think Piece, New York: Center for Court Innovation, 2004, pp. 5-6.

¹⁷ Michael Schrunk, as cited in Greg Berman (ed.), “What is a Traditional Judge Anyway?,” *Judicature*, 84, September-October 2000, no. 2, p. 81.

¹⁸ Berman and Feinblatt observe, “Problem-solving courts tend not to confine their reformist energies to the four walls of the courthouse. In addition to re-examining individual case outcomes, problem-solving courts also seek to achieve broader goals in the community at large, using their prestige to affect [sic] change outside the courtroom without compromising the integrity of the judicial process within the courtroom ... Outside the courthouse walls, problem-solving courts have asked judges to reach out to communities, to broker relations with government and non-profit agencies and to think through the real-life impacts of judicial decisions. As judges have performed this work, they have called into question the independence and neutrality of the judiciary and even the separation of pow-

sical judge Tocqueville observed in early nineteenth-century America. Tocqueville identified as one of the “essential” characteristics of the American judge that “he cannot act until the cause has been duly brought before the court.” Tocqueville described American judicial power as “devoid of action,” in that the judge “does not pursue criminals, hunt out wrongs, or examine evidence of its own accord.” Such action would “do violence to the passive nature of his authority.”¹⁹ The problem-solving court judge, in direct contrast, is full of action. Community court judges, for example, regularly meet with local residents and are often very visible in the community. Consider judge Alex Calabrese’s description of his role as judge of the Red Hook Community Justice Center:

I enjoy walking through Red Hook and talking with the residents about their concerns. I make a point of attending community meetings on a regular basis to hear residents’ concerns about specific crime issues, such as drug dealing or prostitutions at certain locations ... The meetings keep me informed about every problem location.²⁰

Calabrese tells the story of the time when he was the “grand marshal of a local waterfront arts festival” and a local resident “whispered in [his] ear” about a candy store that was selling illegal drugs. With this information, he set in motion law-enforcement action that led to the eventual closing of the “candy” store.²¹

Drug court judges are also activist judges. Actions of drug court judges outside the courtroom have included visiting clients at their place of work, lobbying Congress for funding, pulling together various resources to support the court’s treatment and education programs, promoting the courts via the local media, and even raising funds to support their local programs.²² The latter is an activity that judges in other countries find particularly worrying.

Common Law Contrasts

In contrast to American boldness, problem-solving court judges in other countries exercise a great deal more judicial restraint, one of the features of the classical judge in Glendon’s typology. Glendon identifies three types of restraint with respect to this classical orientation: structural, interpretive, and personal.²³ All three are evident in the judicial mentality and practices among the non-U.S. problem-solving court judges. Consider examples from the comparative cases to illustrate each.

Structural restraint refers to those limits placed on the judge by the other branches of government, by the federalist system (e.g., in the U.S.), and by the court’s place in

ers doctrine” (Greg Berman and John Feinblatt, “Judges and Problem-Solving Courts,” Center for Court Innovation Think Piece, New York: Center for Court Innovation, 2002, pp. 5, 24).

¹⁹ Alexis de Tocqueville, *Democracy in America*, vol. 1, New York: Vintage Books, 1945, pp. 103-104.

²⁰ Alex Calabrese, “The Red Hook Community Justice Center,” *The Judges’ Journal*, Winter 2002, p. 9.

²¹ *Ibidem*.

²² Nolan, Jr., *Reinventing Justice: The American Drug Court Movement*, pp. 94-99.

²³ Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society*, p. 118.

the hierarchy of the judiciary. The development of problem-solving courts in Scotland, Australia, Ireland, Canada, and England demonstrate greater deference by the judiciary to the direction and guidance of the other branches of government. Court officials are reluctant to initiate programs independent of the executive and legislative branches. Structural restraint, as such, is perhaps most pronounced in England.

British domestic violence court judges and magistrates, for example, do not have the authority to bring defendants back to court for ongoing judicial reviews, which are typically a central feature of problem-solving court programs (particularly in the U.S.). Those working in British domestic violence courts are very clear that, even if they wished to implement this feature, such a practice could only be realized if granted by the legislature. According to a review of the Leeds domestic violence court, movement toward this kind of judicial authority would require “legislative changes.” It could only be achieved “through a new legislative framework.” An official at the Leeds domestic violence court states that the court cannot bring clients back for review because “there is no statutory basis for that.” To add reviews or other forms of more proactive judicial engagement would “really need to be parliamentary-driven.”

Deference to the legislature is also evident in Australia, where a variety of problem-solving courts have been created through acts of parliament. Judge Gay Murrell, Australia’s first drug court judge, makes very clear that the Sydney drug court is a “legislatively based court.” The 1998 Drug Court Act, which passed on “a bipartisan basis,” specifies in some detail the purpose, processes, and parameters of the court. For example, it spells out who is eligible for the program, it provides a legislative basis for rewarding and sanctioning participants, and it sets the standards for participant termination from the program. The act also specifies that any “final sentence” imposed on a participant “cannot be greater than the initial sentence”—which, again, according to Murrell, is clearly and specifically spelled out in the “statute under which I operate.” Legislatively determined standards are important, according to Murrell, because, though she believes Australian judges exercise more personal restraint than do American judges, “it’s desirable to have other restraints, which are not simply reliant on the personalities of each individual judge.” Thus, for a number of reasons, judge Murrell feels strongly that “the fact that it is legislatively based is significant.”

Reliance on legislative guidance is also evident in Scotland, where problem-solving court sheriffs would not impose intermediate sanctions until given legislative authority to do so. Until June 27, 2003, participants on a Scottish drug court order could not be sent to jail as an intermediate sanction for noncompliance with an order. To send a participant to jail would be to terminate the order. Nearly two years after the statute first authorized interim sanctions, a group of Scottish sheriffs said they had rarely used it. In fact, at that time, only one claimed he had imposed a prison sentence. Interestingly, he did not justify his imposition of a short jail term by employing therapeutic nomenclature (e.g., calling it “shock therapy”), as sometimes occurs among American drug court practitioners. Instead, he described the action as a punishment that the defendant deserved. “It’s just a judgment call,” he said. “You feel that they deserve punishment that will hopefully make them think, and they’ll come back in a better condition to deal with the order, but they need a punishment. They have just over stepped the mark.”

Therapeutic justifications for problem-solving courts, much less a general therapeutic orientation in new specialty court programs, are conspicuously absent in Scottish courts. Some Scottish officials, in fact, argue that judicial preoccupation with engaging defendants therapeutically can foster neglect of traditional legal considerations, if only unwittingly. In her own observations of U.S. drug courts, Gillian Oghene, coordinator of the Fife drug court, notes, “there didn’t seem to be any concept of punishment equating with crime.” In Scotland, there is a much stronger sense that jail is punishment and that a person’s punishment should be commensurate with a crime that has been committed in the past, even if it is imposed as an interim sanction for a problem-solving court client.

Oghene is also concerned that court mandated counseling, of the self-help variety popular in the U.S., can actually be damaging to individual clients. Speaking specifically about such 12-step groups as AA and NA—which are much less commonly found in Scotland than they are in the U.S.—Oghene notes that she has not been pleased with what use she had made of these programs for past clients. Were she to consider referring any future clients to such meetings, she “would want to make sure that it wasn’t going to be more damaging.” Speaking of therapeutically oriented groups more generally, Oghene worries that “if you are going to get people to expose themselves emotionally ... we have to be careful that we don’t damage them more than they already are damaged.” She has “grave concerns” about such “heavy, intense, therapeutic groups.” Instead, group work in the Fife drug court aims for a more “collective-learning and education” type of focus. In the case of Scotland, then, we find the inverse of the American situation. Instead of a preoccupation with TJ leading in some instances to the neglect of due process considerations, we find demonstrable concerns about preserving due process rights positively related to a disregard for therapeutic jurisprudence.

The second type of restraint—interpretive restraint—refers to those limits required by judicial deference to constitutional precepts, statutory law, and legal precedent. Consider several examples of interpretive restraint from non-U.S. problem-solving courts. In Britain’s first community court—which has been in operation since the end of 2004—judge David Fletcher has considerable authority and discretion. However, he recognizes the limits within which he must operate. Like other British judges, he realizes that he is “hidebound by maximum sentences,” and he can only “use the tools that government” gives him. As with magistrates and judges in other British problem-solving courts, he is limited by statutory law in terms of his power to impose intermediate sentences. As one Liverpool official observed, “Judge Fletcher is very limited on what he can actually impose.”

The ongoing interpretation of statutory law is also evident in Australia. Not only were courts set up by the legislative and executive branches of government, as noted above, but judges continue to consult the particularities of statutory law as they attempt to run their programs. An official in the Sydney drug court describes going back to the Drug Court Act “over and over” to make sure “we are on the right track.” The first judge of the Perth drug court had to work within existing bail legislation, which in her view seriously limited the court’s effectiveness. Only later did the Parliament of Western Australia give the court greater discretion and leverage. Such judicial deference to the dictates of

statutory law is also found in Victoria, where magistrates essentially refused to send offenders to a certain diversion program because, according to their interpretation, statutory justification for such action did not exist.

In Canada, the very genesis of aboriginal courts (a variety of problem-solving courts unique to Canada and Australia) can be traced to the 1999 amendment to the Canadian Criminal Code, 718.2(e), and the two Supreme Court interpretations of this legislation. Officials make clear that without 718.2(e), the Gladue courts in Toronto simply would not exist. And while other problem-solving courts in Canada did not come into being as a direct result of parliamentary acts, problem-solving court judges have made considerable efforts to justify new initiatives through reference to existing statutory law, and many hope for the eventual passage of legislation that would expand problem-solving court powers.

The final type of restraint identified by Glendon is personal restraint, which refers to the limits the judge places on herself in her efforts to be fair, impartial, objective, and dispassionate. Arguably, this is the type of restraint that, when exhibited, most clearly reveals the habits of mind of a local legal culture. Particularly in the United States, as noted above, problem-solving courts give judges greater power and discretion. In some places—such as England—this expanded authority is limited by structural restraints, e.g., the strength of probation and the limitations of the magistracy.²⁴ Both in England and in other countries (where such limitations do not exist), however, judges and magistrates still intentionally hold themselves in check, even when they could, if they wished, act with more discretion.

Given the expanded parameters of problem-solving courts, some even recognize that personal restraint, as such, is all the more important. This kind of understanding is particularly evident in Australia, where judges both acknowledge and worry about the potential for a blurring of boundaries inherent in the problem-solving court format. Australian judges may agree with American judges that problem-solving courts provide a setting in which judges can “color outside the lines,” but they believe that precisely because of this freedom, judges should be all the more careful to curb their own artistic license (pushing this metaphor a bit further) so that the final “drawing” is still recognizable as a court of law.

Problem-solving court officials in both Canada and Australia express this basic view. Judge Gay Murrell, for example, says that “despite a lack of protective conventions,” in problem-solving courts, judges must strive to “maintain judicial impartiality and ensure that participants receive procedural fairness.”²⁵ Tina Previtiera of Queensland similarly observes that the “evolving nature” of problem-solving courts means that the “richness and history” that previously “safeguarded” a “defendant’s legal protection” is not as

²⁴ As discussed more fully in Chapter 3 of *Legal Accents, Legal Borrowing*, included among the structural factors that constrain or place limitations on the particular form that problem-solving courts assume in England are “Britain’s unique and widespread use of lay magistrates; the more prestigious, centralized, and better-funded British probation service; and the top-down quality of the British political system. These traits clearly distinguish the British from the American political and legal systems and play an important role in determining the unique features of problem-solving courts in England” (Nolan, Jr., *Legal Accents, Legal Borrowing*, p. 43).

²⁵ Gay Murrell, “Breaking the Cycle: NSW Drug Court,” *Reform*, 77, Spring 2000, pp. 23-24.

available to a judge in this context. Without the binding influence of “tradition and precedent,” says Previtera, “we must charge ourselves with the responsibility therefore to ensure that therapeutic considerations do not over-ride long standing freedoms and rights.”²⁶

Melbourne magistrate Jelena Popovic, a strong supporter of therapeutic jurisprudence, also worries that in all the enthusiasm of implementing and operating these new courts, something important may be getting lost. She warns: “In the excitement to ‘progress’ the practice of therapeutic jurisprudence in our courts of summary jurisdiction ... attention must be paid to basic principles of justice to ensure the rights of court participants are not eroded.”²⁷ Popovic cautions her fellow practitioners to be sure “that we are not trampling on the rights of court users.” In particular, she is concerned that “the overarching principles of open justice and natural justice” might be “sacrificed in our keenness for reform.” She cites, for example, the practice of pre-court meetings, or what she calls “case conferences,” where the drug court team meets before court to go over the cases of participants who will be appearing in court that day. She is concerned that these “in camera” meetings, which do not include the defendants, may violate the principle of open justice.²⁸

Popovic is also concerned about the informality of problem-solving courts. She admits that even in her “own practice of therapeutic jurisprudence,” she has “to a large extent abandoned the ‘arm’s length’ approach (and the protection it offers),” but she is not sure that such informality and flexibility “is in fact a good thing.” She has even become a bit nostalgic for some of the advantages of greater judicial formality. For one, she believes a more formal court appropriately signifies the “solemnity and seriousness of what is occurring.” It also helps to ensure a higher level of “predictability of the proceedings,” so that “defendants know what to expect and are not taken by surprise.” Moreover, according to Popovic, the kind of dressing-down that occurs in problem-solving courts may convey the wrong message. Instead of setting defendants at ease, as is the stated hope for such practices, it may come across as “patronizing” and give defendants the “impression that they are second-class citizens” for whom it is not necessary to look the proper part.²⁹

Concerns about too much informality and familiarity in problem-solving courts are evident in Canada as well. A summary statement issued by conferees at a problem-solving court conference in Toronto, for example, notes that “one of the risks of a less traditional posture is that the boundaries between individuals can become blurred.” Conferees thus warned Canadian problem-solving court judges to “in spite of the informality ... maintain sufficient detachment.” Maintaining such detachment and reserve is certainly important to judge Richard Schneider of the Toronto mental health court, who believes that the judge should guard against too much familiarity. “By becoming

²⁶ Tina Previtera, “The Queensland Drug Court: Therapeutic Jurisprudence in Practice,” paper given at the State Legal Educator’s and Young Lawyers Conference, Brisbane, Queensland, June 9, 2006.

²⁷ Jelena Popovic, “Court Process and Therapeutic Jurisprudence: Have We Thrown the Baby Out with the Bathwater?,” *eLaw Journal*, Special Series, 1, 2006, p. 61.

²⁸ *Ibidem*, pp. 61-65, 76.

²⁹ *Ibidem*, pp. 61-66.

too intimate with the procedure,” says Schneider, “you lose that distance and therefore the impact that you have when you do get involved. The closer you get, that sort of impact I think is reduced.”

In Scotland, similarly, youth court judges who, though encouraged to relate with clients in a more personal and interactive manner, resisted such engagement, believing that it is not “really part of a judge’s job to get too close to the accused.” An Irish judge who was encouraged to speak to a drug court client in open court about the use of contraception ultimately refused, believing such interaction to be patronizing and unfair to the accused. Judges in all five non-U.S. regions, with only a few exceptions, resist engaging in the expressive, theatrical, and emotive form of courtroom behavior one finds in many American problem-solving courts. Not only do nearly all non-U.S. judges interviewed in this study find the prospect of hugging clients “appalling” behavior for a judge, but many are also against clapping in the courtroom, holding graduation ceremonies, interacting in an overly personal manner, or even expressing emotions. Judicial reticence to engage in this manner often has more to do with cultural dispositions than it does with any kind of formal legal and structural restrictions. Many non-U.S. problem-solving court judges simply see such behavior as nonsensical, beyond the pale, inappropriate, and unbecoming of a judicial officer.

Over time, however, this resistance has begun to fade in some places. That is, in several courts outside of the U.S. some of the American features—once openly disparaged—are now becoming more evident. Such an evolution is directly relevant to discussions of globalization and American cultural imperialism. Though this broader dimension of the problem-solving courts movement is outside the scope of this paper, I will cite one example of the manner in which some of the American features of problem-solving courts have crept into the legal cultures of other countries. Consider the behavior of a British judge in the West London drug court, a program initiated in 2005. For review hearings, judge Justin Philips will literally change clothes to look more informal. He makes clients sit near to him, on his level. That is, clients stand not before an elevated bench, but side-by-side just a few feet from the judge. Philips speaks in familiar terms, often calling clients by their first names, and is not afraid to make physical contact. Consider his own description of his behavior in the courtroom:

I do my reviews in a completely and utterly informal way. I pick a shirt or T-shirt or football shirt or whatever it is, and the most revolting socks ... And it breaks down the ice. And I call them by their first names, and if they come in and call me Justin, I actually say, “As long as you give me negative [urinalysis] tests, I don’t mind.” ... And the language I use—well ... I’m correctly quoted as saying to one guy, “If you give me another positive [urinalysis test], I’ll kick you out on the ass.” And this is my way of doing things.³⁰

British magistrates involved in the early Drug Treatment and Testing Order (DTTO) programs (the immediate antecedent to drug courts in the UK) were explicitly disap-

³⁰ The quote to which judge Philips refers in this interview was cited in the following article: Ben Leapman, “In Session: London’s First Drugs-Only Court,” *Evening Standard*, 23 December 2005. Judge Philips was speaking to Rodney, “a van driver who lost his job due to crack addiction.” Leapman quotes judge Philips as having said to Rodney, “If I see any positive test results next time you come here, I’m going to kick your arse.”

proving of the American proclivity for physical contact with clients.³¹ Judge Philips has no such misgivings. In fact, he regularly shakes hands with and/or hugs drug court participants. As Philips puts it, “I’ve got no problem, if someone’s done well, whether it’s a woman or a man, in giving them a hug and a kiss. Because I think it is absolutely essential that we show them 1) we’re human, 2) we care, and 3) if they’ve done well, they’ve got to be told.”

In spite of new developments such as these, therapeutic jurisprudence, as a legal theory, has largely been ignored or rejected in England, Scotland, and Ireland, though it has had a more significant impact in Australia and Canada. One also finds, in some instances, that justifications offered for the development of U.S. problem-solving courts have found their way into other countries as well. For example, in the U.S. it is often argued that the judicial system suffers from a deficit of legitimacy and that problem-solving courts will help to restore confidence in the judiciary. Other countries—England and Canada in particular, and Ireland to a lesser extent—have adopted this justificatory rhetoric, even though there is little evidence of comparatively low and declining levels of confidence in their respective court systems.

LEGITIMATING PROBLEM-SOLVING COURTS

As it concerns legitimation, one discovers two basic types of justifications offered for the adoption and proliferation of these courts. One vision argues that therapeutically oriented problem-solving innovations will help restore the legitimacy of the court. Such a view is particularly pronounced in the U.S., and increasingly in England and Canada as well. One example of this essential perspective is offered by Greg Berman and John Feinblatt from the Center for Court Innovation in New York. They assert that “no civic institution has experienced a greater loss of public faith in recent years” than the American criminal justice system.³² Judges, therefore, feel pressure to improve their standing with the public and, along with other supporters of problem-solving courts, “are united by the common belief that courts need to reassert their relevance in society.”³³ Problem-solving courts are put forth as a solution to this perceived problem. As Judith Kaye, chief judge of the New York State Court of Appeals, puts it, “problem-solving courts can help counter the erosion of public trust and confidence in justice that we have experienced in recent generations.”³⁴

³¹ Consider the following comments on the issue of hugging from several West Yorkshire magistrates in the early years of the DTTO programs. “One said, ‘We won’t hug’. Another added, ‘That is where we draw the line’. Still another: ‘I’m not in favor of that’. He went on to add that ‘these are really criminals at the end of the day. The decency of the court must be upheld’. Another noted: ‘I haven’t gotten that close’” (Nolan, Jr., *Legal Accents, Legal Borrowing*, p. 54).

³² Greg Berman and John Feinblatt, *Good Courts: The Case for Problem-Solving Justice*, New York: The New Press, 2005, p. 3.

³³ *Ibidem*, p. 3.

³⁴ Judith S. Kaye, “Delivering Justice Today: A Problem-Solving Approach,” *Yale Law and Policy Review*, 22, Winter 2004, p. 146. It is a view shared by other supporters of problem-solving courts. Greg Berman, for example, observes, “Advocates of problem-solving courts hail ... enhanced public confidence in justice” (in “What is a Traditional Judge Anyway?”, p. 78). Indeed, problem-solving courts are often justified on the grounds that they will re-engender public confidence in the American

The second perspective, more pronounced in Australia and Scotland, holds that protecting the due process rights of defendants and maintaining the dignity, fairness, transparency, and formality of courtroom processes will sustain the legitimacy of the court. As noted above, at least some judges in Australia and Scotland are cognizant of the potential dangers of judicial overreaching that problem-solving courts may foster, and are thus more vigilant to, as judge Gay Murrell puts it, “maintain judicial impartiality and ensure that participants receive procedural fairness, despite a lack of protective conventions.”³⁵ This commitment to open and natural justice, says Melbourne magistrate Jelena Popovic, is what “promotes and maintains public confidence in the judicial process.”³⁶ This second vision is certainly the understanding of legitimacy put forth in Jerome Bruner’s discussion of legal storytelling. As Bruner sees it, legal legitimacy rests on the principles of procedural fairness, judicial neutrality, and ritualism.³⁷ The latter, according to Bruner, refers to the “steadying role” of the court’s solemnity and traditions. In Western courts, for example, the judge’s “priestly black robe” signifies the judge’s “metaphoric elevation beyond the contentiousness of everyday life.”³⁸

Invocations of legitimacy call to mind David Beetham’s trenchant analysis of the concept. In his revised formulation of Max Weber’s work on legitimacy, David Beetham argues that there are three important components of legitimation in any political or legal order: justification, the manner in which laws are justified according to dominant cultural sensibilities; validity, the exercising of power based upon written laws and rules; and consent, the extent to which individuals agree with or consent to the exercise of state power. “These factors,” says Beetham, “successively and cumulatively, are what make power legitimate. To the extent that they are present, it will be legitimate. To the extent that they are absent, it will not.”³⁹ Discussions about confidence in the criminal justice system, then, have mainly to do with matters of consent. That is, reported levels of confidence can be viewed as one measurement of the degree to which citizens of a given country willingly accept and consent to state authority. The manner in which advocates defend problem-solving courts, on the other hand, has more to do with what Beetham means by justification.

Included among the types of justifications put forth in defense of problem-solving courts is the argument that specialty courts *work*. That is, it is argued that these courts are more effective and more successful than conventional criminal courts. Justifications of this sort typically cite evaluation studies showing reduced recidivism rates among participants, reduced costs to the state, and so forth. Problem-solving courts are also defended on the grounds that they are therapeutic. Specialty courts are said to be

judicial system. It sometimes seems their very *raison d’être* is to “re-legitimate legal institutions at the local level” (Jeffrey Fagan and Victoria Malkin, “Theorizing Community Justice Through Community Courts,” *Fordham Urban Law Journal*, 30, March 2003, p. 950).

³⁵ Murrell, “Breaking the Cycle: NSW Drug Court,” pp. 23-24.

³⁶ Popovic, “Court Process and Therapeutic Jurisprudence: Have We Thrown the Baby Out with the Bathwater?”, p. 63.

³⁷ Jerome Bruner, *Making Stories: Law, Literature, Life*, New York: Farrar, Straus and Giroux, 2002, p. 44.

³⁸ *Ibidem*, pp. 45-46.

³⁹ David Beetham, *The Legitimation of Power*, Atlantic Highlands: Humanities Press International, p. 13.

more humane, holistic, caring, and responsive to the needs and problems of individual offenders and victims. Therapeutic jurisprudence is sometimes invoked as the theoretical basis for this justification. Finally, the courts are also defended on the grounds that they are tough on crime. It is sometimes defensively asserted that problem-solving courts are not a “soft-option,” but are instead much tougher than the alternative. “Tough” and “therapeutic” are not mutually exclusive categories but can often work in a complementary fashion.⁴⁰ It has become commonplace in the United States, for example, to argue that coerced treatment is as effective as voluntary treatment.⁴¹ Thus, the courts are at the same time, tough, effective, and therapeutic. It’s this combination of justifications that gives problem-solving courts, at least in the United States, their broad appeal. As Eric Miller puts it, problem-solving courts “appear all things to all people.”⁴²

These, anyway, are the types of justifications one finds in the United States. If justifications are offered in accordance with dominant cultural sensibilities, then we should expect to find particular cultural inclinations reflected in these justifications. A number of indicators, in fact, point to the pervasiveness of therapeutic and pragmatic tendencies in American culture. To cite just one example, in their important work, *Habits of the Heart*, Robert Bellah and his colleagues found expressive and utilitarian individualism to be the defining languages of modern American culture. Thus, therapeutic jurisprudence and legal pragmatism are theories that, like their practical and legal applications, fit the American cultural context. The fact that legal scholars can assert with credibility that the law should be made more therapeutic and more effective—while offering little explanation for why this should be the case—suggests that the assertions are made in a cultural context where therapeutic and pragmatic orientations are taken for granted.

If justificatory strategies are culturally rooted, then we would expect certain justifications to be more readily embraced in some cultures than in others. David Nelken observes that concerns with efficiency are less pronounced in Italy than they are in England or the United States. Because of this, according to Nelken, Italians are not so alarmed by their country’s notoriously long delays in legal trials (e.g., in 1999, the first stage of civil case trials in Italy took five years on average and the appeal stage over

⁴⁰ See Nolan, Jr., *Reinventing Justice: The American Drug Court Movement*, pp. 51-57.

⁴¹ Jeffrey Tauber, for example, told an audience at the COSLA conference in Scotland: “For a long time criminal justice practitioners thought that they could successfully deal with a drug offender on their own, as did, quite frankly, treatment providers. They felt the only way to deal with drug abuse was to do so with the persons who entered drug treatment programs voluntarily, that they [drug abusers] had to be ready for treatment, that coercion was inappropriate. We know now—after 20 years of data, statistics, and scientific surveys and studies—that coercion is not only as effective, but it is in fact more effective in dealing with the drug-using offender than voluntary entry into a program.” Similarly, a Department of Justice document states: “Research indicates that a person coerced to enter treatment by the criminal justice system is likely to do as well as one who volunteers.” See “Defining Drug Courts: The Key Components”, Drug Courts Program Office, Office of Justice Programs, U.S. Dept. of Justice, January 1997, p. 9, citing R. Hubbard, M. Marsden, J. Rachal, H. Harwood, E. Cavanaugh, and H. Ginzburg, *Drug Abuse Treatment: A National Study of Effectiveness*, Chapel Hill: University of North Carolina Press, 1989. For a comprehensive discussion of the efficacy of coerced treatment, see Sally Satel, *Drug Treatment: The Case for Coercion*, Washington, AEI Press, 1999.

⁴² Eric J. Miller, “Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism,” *Ohio State Law Journal*, 65, 2004, p. 1503.

nine years). Italian views on trial delays, as discussed at a 2003 conference in Padua on the topic, are revealing in this regard. At the gathering, Italian jurists spoke derisively of “utilitarianism, managerialism, and pragmatism,” and they “greeted with laughter” the “mention of some trials in Denmark taking no more than twenty-three days.”⁴³ In Italy, efficiency is not sacrosanct. Indeed, Italians believe a preoccupation with efficiency would “sideline questions of ideal aims into sordid questions of costs and benefits.” Italian jurists “see it as a pre-eminent task for law not to compromise its ideals and procedures.”⁴⁴ Given this attitude, it is not surprising that there are far fewer measurements of recidivism rates in Italy than in the United States or the UK. In fact, an international literature review of the outcomes of “quasi-compulsory treatment of drug dependent offenders” (including U.S. drug courts) found no systemic studies of outcomes for such programs in the Italian literature.⁴⁵

Given this cultural predilection, it would make little sense to approach an Italian judge or politician about problem-solving courts on the grounds that the innovative court programs would help to make the Italian system more efficient. Why is efficiency, the Italian might respond, so important for a justice system? Justifying legal programs on the grounds of efficiency might make more sense in other common law countries—though views about what constitutes success vary between countries. However, some countries essentially reject therapeutic justifications for these programs. As it concerns the defense of these courts on the grounds that they will restore confidence in the judiciary, we find that some countries reject this rationale and some accept it (even when it is not entirely clear that the diagnosis is accurate or the proposed remedy warranted).

As noted above, in some countries legitimacy is associated with protecting due process rights, natural and open justice, a solid legislative foundation, and the traditional ritualism of courtroom practices. It is even feared that problem-solving courts might, if only unwittingly, undermine traditional protections. Interestingly, several recent critiques of U.S. problem-solving courts raise similar concerns.⁴⁶ Among these, Timothy Casey’s work is of particular interest, in that he reflects on problem-solving courts and the protection of due process rights in the context of a discussion about legitimacy. In so doing, Casey offers a perspective more in keeping with the views of a number of Australian and Scottish officials.

⁴³ David Nelken, “Using the Concept of Legal Culture,” *Australian Journal of Legal Philosophy*, 29 (2004), p. 21.

⁴⁴ *Ibidem*.

⁴⁵ A. Stevens, D. Berto, W. Heckmann, V. Kersch, K. Oeuvray, M. van Ooyen, E. Steffan, and A. Uchtenhagen, “Quasi-Compulsory Treatment of Drug Dependent Offenders: An International Literature Review,” *Substance Use and Misuse*, 40, 2005, pp. 269-283.

⁴⁶ See Mae Quinn, “An RSVP to Professor Wexler’s Warm Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged,” *Boston College Law Review*, 48, 2007, pp. 539-595; Timothy Casey, “When Good Intentions are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy,” *Southern Methodist University Law Review*, 57, 2004, pp. 1459-1519; Eric Miller, “Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism,” *Ohio State Law Journal*, 65, 2004, pp. 1479-1576; and Morris B. Hoffman, “Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous,” *Fordham Urban Law Journal*, 29, June 2002, pp. 2063-2098.

Casey argues that the court's legitimacy rests not on the court's therapeutic or problem-solving promises, but rather on the court's commitment to and demonstration of such foundational principles as "neutrality, procedural justice, fairness, and ritualism."⁴⁷ Casey questions whether problem-solving courts actually protect these traditional judicial values in practice. As it concerns the larger legitimation equation, he addresses matters that David Beetham would refer to as validity—the exercise of power in accordance with written rules and codified laws and procedures. He rightly notes that in the U.S. most "problem-solving courts are the creation of judges. There is no enabling legislation or mandate: courts simply open shop."⁴⁸ This tendency is more pronounced in the U.S. than in any other country considered here.

Because the U.S. courts are, in the main, not legislatively based and because they do not typically emphasize such traditional judicial concepts as neutrality, fairness, impartiality, etc., they are, according to Casey, riding on "borrowed legitimacy." Casey, therefore, accepts neither that courts are suffering from low public confidence nor that problem-solving courts are the obvious antidote to this ostensible condition. In keeping with the second proposed vision discussed above, he does not believe that problem-solving courts will restore legitimacy in the courts. Rather, problem-solving courts "rely on the existing cache of legitimacy held by the court." As in the case of the juvenile delinquency courts of the first part of the twentieth century, Casey believes the illegitimacy (i.e., lack of validity) of problem-solving courts will eventually become evident.

This "borrowed legitimacy" is not based on the problem-solving court's current action. Instead, the problem-solving court has authority because it is a "court." As soon as the smoke clears, however, the problem-solving 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.⁴⁹

Thus, Casey believes that, as occurred with the earlier juvenile courts, problem-solving courts' lack of validity will eventually become evident. The smoke will clear. Rather than restoring legitimacy, then, problem-solving courts threaten to undermine the legitimacy of the judiciary. However, Casey also notes that problem-solving courts change the "basic nature of the courts." This is a crucial point. If the court system is so fundamentally transformed by a problem-solving orientation (as many advocates hope), and the transformation is in keeping with dominant cultural values, then on what grounds will people object to problem-solving courts? Casey observes that U.S. problem-solving courts, informed as they are by therapeutic pragmatism, introduce

⁴⁷ Casey, "When Good Intentions are Not Enough," p. 1495.

⁴⁸ *Ibidem*, pp. 1500-1501.

⁴⁹ *Ibidem*, pp. 1503-1504.

into the court system a new paradigm—a paradigm that invites a very different set of evaluative criteria.

Treatment is judged only by efficacy. For example, a treatment is not judged by whether it is fair, or deserved, or proportional. When a child is immunized, there is no discussion about whether she deserves the pain from the needle's prick. The inquiry is only whether the vaccine is effective in preventing the disease. Ideas of liability, fault, guilt, and fairness are irrelevant in a treatment regime. Accordingly, the imposition of the same fifteen to life term perceived as unfairly disproportionate would be fitting if it were deemed part of a "treatment" and not a punitive "sentence."⁵⁰

"Fitting" may not be the best choice of word here in that it suggests the notions of proportionality and desert. Rather, one could say that treatment (and all that occurs under its aegis) is viewed as more acceptable or plausible simply because it is called treatment. Casey notes further that because "problem-solving courts operate primarily on the treatment model," they are open to the criticism that they are "unfair." However, if cultural sensibilities are commensurate with therapeutic pragmatism, then why would anyone wish to challenge the courts on the grounds of fairness? In other words, if the courts appear to operate in accordance with the same ideals that are regarded as commonsensical in the broader culture, then on what grounds will people find them objectionable? In a time and place characterized by the predominance of therapeutic pragmatism, reasoning based on such notions as fairness and desert become increasingly irrelevant—both in the culture and in the courts.

As we have seen, however, ideas of desert, fairness, and proportionality are still resonant in some of the countries that have borrowed problem-solving courts from the U.S. In the non-U.S. countries, there is less evidence of a crusade to change the basic nature of the courts. Rather, systems with legal accents characterized by deliberation, moderation, and restraint are less inclined toward the bold and enthusiastic reinventions of justice proposed in the United States, and they are more disposed to sustain justice's classical tenets and preserve the liberties and rights sustained by traditional due process protections.

LADY JUSTICE'S BLINDFOLD

Consider, in this regard, a 2004 exchange between American and British officials on the topic of community courts and community justice. The exchange, set up in London by the New York based Center for Court Innovation, addressed, among other issues, the establishment of England's first community court in Liverpool. Judge David Fletcher was among those who participated in the forum. In the course of the day's discussion, one participant defined community justice as "removing the blindfolds from Lady Justice."⁵¹ The image of Lady Justice—situated as she is above many courtrooms

⁵⁰ *Ibidem*, p. 1497.

⁵¹ "Community Justice: A US-UK Exchange," a summary report of a meeting convened by the Center for Court Innovation and the Office for Public Management at the latter's London headquarters on 22 October 2004, available at www.opm.co.uk/download/papers/CCI_UK_OPM_report.doc.

throughout the United States and Europe—represents several themes central to classical understandings of justice. Her scales convey notions of fairness and proportionality; her sword, the power of the court to impose a punishment and act decisively; and her blindfold, the ideas of neutrality and impartiality and the absence of prejudice and bias. In community courts, the judge is actively engaged with—and directly receives input from—the community. The judge (in the U.S. anyway) also meets regularly with team members in pre-court sessions to discuss in detail the lives of defendants participating in the court program. In this sense, the community court judge is decidedly not blind to a considerable amount of information—information he or she would not normally be privy to in a conventional criminal court. Lady Justice without her blindfold, therefore, is a fitting iconic representation of community courts (and other problem-solving courts).

During the 2004 meeting in London, not all British officials agreed with this revised image of justice: “Several participants stated concerns that offering community input in sentencing could ultimately erode the traditional British legal protection of due process and encourage community ‘vengeance.’”⁵² Such resistance is not surprising. As discussed above, restraint is one feature of problem-solving courts in the five non-U.S. countries that distinguishes them from those in the U.S. Robert Cover, in fact, sees in Lady Justice’s blindfold an act of self-restraint. “The blindfold (as opposed to blindness) suggests an act of self-restraint,” he posits. “She could act otherwise and there is, thus, an everpresent element of choice in assuming this posture.”⁵³ As we have seen, even when the structure of specialty courts allows for increased judicial activism, judges and magistrates outside of the U.S. still restrain themselves in a manner consistent with this understanding of the blindfold’s import. Judge Fletcher, for example, unlike his American counterparts, does not attend pre-court meetings in the Liverpool community court.

Importing countries often speak of adaptation and are openly critical of elements of American culture found in U.S. problem-solving courts. Yet it is not always clear that these countries are successful in either identifying the disagreeable elements of American culture or in jettisoning those features that they view as problematic. A deeper understanding of the relationship between law and culture may prove instructive to importing countries. If citizens in countries around the world loathe America as much as they say, then understanding the law/culture dynamic will aid them in avoiding the importation of the very things they say they don’t like. Importers in all five non-U.S. countries speak of careful selection and adaptation. The nature and extent of their selectivity has varied. Just how successful importing countries will ultimately be in rejecting those elements of the American programs that don’t fit their local cultures remains to be seen. As illustrated in the example of judge Justin Phillips of London, there are signs that overtly American features of problem-solving courts—once openly denigrated by early importers—have crept into the receiving legal cultures.

Only time will tell whether and to what extent these cultural infiltrations—be they welcomed or regretted—will result in further homogenization or some kind of subtle yet transformative legal irritation. Importing countries wishing to maintain such qualities as

⁵² *Ibidem*.

⁵³ As cited in Dennis E. Curtis and Judith Resnick, “Images of Justice,” *The Yale Law Journal*, 96, 1987, p. 1728.

moderation and restraint in their local legal cultures do well to recognize the difficulty of disentangling law from its cultural roots. Embedded in problem-solving courts are the very features of American culture that many say they don't like. To import problem-solving courts is to import elements of the particular culture out of which the programs first emerged—and from which they are not easily extricated. A fuller appreciation of the culturally embedded nature of law, as such, might prevent borrowers from losing the valued and defining features of their local legal accent and help them more successfully avoid letting “therapeutic considerations ... over-ride long standing freedoms and rights.”