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# **FORGIVENESS AS A PROBLEM-SOLVING TOOL IN THE COURTS: A BRIEF RESPONSE TO THE PANEL ON FORGIVENESS IN CRIMINAL LAW**

*Derek A. Denckla\**

I have been invited to draft this response in order to provide an additional perspective — centered on courts' role in providing forgiveness in criminal law. Let me begin by responding to the question posed to the panel: Can the criminal law make room for forgiveness? Like everyone on the panel that addressed this question, I, too, believe that the answer is a firm "yes." The simplicity of that question allows for an affirmative answer. What remains to be explained, however, is how to answer some more pointed questions on this issue: Is there room for forgiveness in the criminal courts? If so, how does forgiveness manifest itself there? This response seeks to answer these questions generally by exploring the opportunities for forgiveness provided by "problem solving" courts.<sup>1</sup>

Over the past decade, courts, administrators and judges, out of frustration with the pitfalls of "business as usual," have considered and tested practices aimed at providing greater effectiveness and efficiency in the criminal justice system. One such solution has been to develop court programs and courts address the significant non-legal problems that arise along with the legal issues in a given case.<sup>2</sup> These "problem-solving" courts include drug courts, com-

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1. This response is not intended to provide an extensive or exhaustive essay into the topic of forgiveness. Rather, this response is a commentary on the panel on forgiveness in the criminal law from a court-building perspective that I have gained through my work and research at the Center. Additional work should be undertaken to investigate the gaps opened and questions raised herein. *See* Symposium, *The Role of Forgiveness in the Law*, 27 *FORDHAM URB. L.J.* 1347 (2000).

2. *See* Chief Judge Judith S. Kaye, *Making the Case for Hands-On Courts*, *NEWSWEEK*, Oct. 11, 1999, at 13.

munity courts, family treatment courts, mental health courts and gun courts. All of these courts can use the power and authority of the judiciary to change the behavior of litigants and even, in some cases, the behavior of governmental systems. In their various attempts to change the behavior of litigants, many problem-solving courts have hit upon the strategic use of forgiveness.

### I. THE COURTS AS A SOURCE OF FORGIVENESS

At first blush, it may seem that, of the various institutions that comprise the criminal justice system, the courts would be an unlikely source of forgiveness. The court's traditional role — through the person and the office of the judge — is to apply the law in a fair and impartial manner to the accused at trial and during sentencing and, in the absence of a jury, make factual findings that will determine culpability. Based on this description, the court's ability to impart forgiveness seems limited to showing mercy to a defendant by exercising discretion and, perhaps, reducing a sentence.

For various political and social reasons, however, courts are being forced to deal with a whole range of social, psychological and medical issues that they have never had to face before and with which they have little or no expertise. For instance, a traditional court is poorly equipped to help a substance-addicted person obtain treatment.<sup>3</sup> Yet the research into drug courts suggests that courts have something unique to bring to the table when it comes to successful treatment and accessing other services: coercion. Without the coercive power of a court and its threat of potential punishment, social services agencies are usually unable to effectively treat substance-addicted or certain chronically mentally ill persons. Thus, when someone is accused of committing a crime, the courts often become the place where the accused's substance addiction is first identified as a serious problem, ripe for treatment.

### II. THE CREATION OF "PROBLEM-SOLVING" COURTS

Sweeping changes in the social structure of society have had a deep impact on the functioning of the criminal courts, causing judges to re-think their roles and consider the place of problem-solving in the criminal justice system. At the same time, the public (such as the victim's movement) has been calling for the courts to

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3. Traditionally, criminal courts are meant to address the legal issues of a case. Courts are not designed nor are judges trained in treating the medial, social or psychological problems of defendants.

solve persistent social problems.<sup>4</sup> Like the prosecutors and defense attorneys on the panel, judges and court administrators have grown frustrated with “milling cases,” “repeat players” — defendants who return to court again-and-again on the same charges — rising caseloads and new and different types of cases that elude traditional judicial responses.

Problem-solving courts have not been associated with any particular philosophy of the law or jurisprudence. They tend to use whatever works, borrowing from many new approaches to the law that have surfaced over the years. This search for new and more effective approaches to court procedures and practices is motivated by the desire to make the court system more results-driven and outcome-oriented. In general, however, problem-solving courts share the following five characteristics: (1) an expanded scope of non-legal issues are presented to the court; (2) the use of judicial authority to solve both legal and non-legal problems that arise from an individual’s case; (3) the consideration of outcomes that go beyond merely applying the law, such as increased sobriety for addicts; (4) increased collaboration between government and non-government partners to help achieve shared goals; and (5) the modification of traditional rules by casting judges and attorneys in new roles.

Planners of problem-solving courts — particularly community courts — appear to have an approach that meshes with planners of restorative justice programs on many significant levels. In his remarks to the panel, David Lerman suggested permitting approaches in the criminal law that leave room for forgiveness, such as restorative justice. He went on to define restorative justice as “viewing crime in its aftermath,” which is essentially forward-looking, as opposed to seeking punishment for past wrongs. Lerman stated that restorative justice “asks a different set of questions [than traditional criminal justice]: first and foremost, what is the harm that has been caused; secondly, how do we fix that harm; and third, who is responsible for that repair?” Similarly, problem-solving courts are focused on the causes and consequences of criminal behavior, not just the moment of criminal behavior itself.

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4. See, e.g., U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (1998) (setting forth statistics on public frustration with courts); see also John Greacen, *What Standards Should We Use To Judge Our Courts?*, 72 JUDICATURE 23 (1988).

### III. FORGIVENESS IN THE "PROBLEM-SOLVING" MODEL

Forgiveness fits into the problem-solving approach in two important ways. First, problem-solving courts emphasize treatment and services in solving the non-legal problems that underlie the legal difficulties that bring people into court, such as addiction, mental illness or homelessness. The second way that problem-solving courts draw on the concept of forgiveness is by creating new vehicles for community residents to participate in the criminal justice system and its processes.

#### A. Solving Non-Legal Problems

The example that best demonstrates the way in which problem-solving courts address a defendant's non-legal problems is found in the drug courts, created to sentence addicted defendants to long-term, judicially-supervised drug treatment instead of incarceration. The first "drug court" began in Dade County, Florida in 1989. The results of the Dade County experiment have been provocative. A study by the National Institute of Justice revealed that Dade County drug court defendants had fewer re-arrests than comparable non-drug court defendants.<sup>5</sup> Subsequent studies have shown that retention rates for court-ordered treatment are much greater than the retention rates for treatment clients in general.<sup>6</sup> Following Dade County's example, a number of drug courts and other specialized courts have arisen that aim to combine counseling, treatment and social services as alternatives to incarceration with defendant accountability and compliance monitoring.<sup>7</sup>

In drug courts, compliance with a treatment regime is closely monitored by the drug court judge, who responds to progress or

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5. See U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, *ASSESSING THE IMPACT OF DADE COUNTY'S FELONY DRUG COURT*, Executive Summary (1993).

6. For an overview of the research on drug courts, see Steven Belenko, *Research on Drug Courts: A Critical Review*, NATIONAL DRUG COURT INSTITUTE REVIEW (Summer 1998).

7. Currently, 444 drug court programs are operating in 46 states. In addition, 277 new drug courts are in the planning stages. See Office of Justice Programs Drug Court Clearinghouse and Technical Assistance Project at American University, *Summary of Drug Court Activity by State & County*, <<http://gurukul.ucc.american.edu/justice/DRCTCHAR1.htm>> (last modified January 10, 2000); Telephone Interview with Caroline Cooper, Office of Justice Programs Drug Court Clearinghouse and Technical Assistance Project at American University (February 2, 2000). For a general description of drug courts, see OFFICE OF JUSTICE PROGRAMS DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT AT AMERICAN UNIVERSITY, *LOOKING AT A DECADE OF DRUG COURTS 3* (1999). The Department of Justice has funded many of these drug court programs.

failure with a system of graduated rewards and sanctions. The type of forgiveness that drug courts offer is not unconditional. Forgiveness is offered in return for the accused accepting responsibility for his or her criminal behavior and taking concrete and successful steps to address underlying problems that may have caused that behavior. Thus, problem-solving courts couple the “stick” of punishment with the “carrot” of assistance and forgiveness.

### B. Community Involvement

The creation of ways for community residents to participate in the criminal justice system and its processes implicitly honors and acknowledges the harm done to neighborhoods and their residents by substance abuse and chronic low-level offending. The best example of this approach to forgiveness may be found in community courts. In 1993, the first community court in the United States was launched in New York City — the Midtown Community Court.<sup>8</sup> The Midtown Court targets misdemeanor quality-of-life crimes committed in and around Times Square.<sup>9</sup> Offenders are sentenced to perform community restitution by performing such acts as sweeping the streets, painting over graffiti, or cleaning local parks in an effort to pay back the community they had harmed through their criminal behavior.<sup>10</sup> The Court also links offenders to on-site social services, including health care, drug treatment and job training. Further, the Court has tested a variety of new mechanisms for engaging the local community in the criminal justice process, including advisory boards, community mediation, victim-offender impact panels and townhall meetings.

The design of the Midtown Community Court reflects the belief that there is no such thing as “victimless” crime. The Court acknowledges that communities can be victimized just as individuals can. The planners of the court consulted community residents and businesses. These consultations revealed that members of the community were upset by the criminal behavior in their neighborhood. They wanted restoration. The community also saw, however, that those engaged in criminal behavior needed help to change their ways. In effect, the community advocated for a court

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8. Many of the current officers of the Center helped New York State Unified Court and the Midtown Community Court.

9. Shoplifting, prostitution and subway fare evasions and graffiti were the main categories of quality of life crimes.

10. See John Feinblatt et al., *Neighborhood Justice at the Midtown Community Court*, in CRIME AND PLACE: PLENARY PAPERS OF THE 1997 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION, National Institute of Justice (1998).

structured, in part, around forgiveness — a court that combined punishment and help together.

An evaluation by the National Center for State Courts found that Midtown had helped speed case processing, improve compliance with alternative sanctions and reduce local crime.<sup>11</sup> In its wake have come nine replications; an additional two dozen community courts are in the works.<sup>12</sup>

#### IV. IMPACT OF FORGIVENESS IN PROBLEM-SOLVING COURTS

Essentially, notions of forgiveness in courts arise from a desire to reach more durable and constructive results in criminal justice. Generally, forgiveness in the courts is found in the increasing emphasis on using the crisis of arrest as an opportunity to re-connect the accused to society and vice versa. Many judges have been searching to insert forgiveness into the criminal justice system in an effort to engage the accused and the community in a healing process that may be more effective in stemming future crime than merely putting someone behind bars. Thus, re-connecting the accused with the community may reduce the risk of recidivism. Furthermore, forgiveness is a central element present when a judge announces a sentence that restores the victims to their pre-crime state, mandates community service or engages the accused in a discussion of the impact of his or her crimes on society and the victims.

Court-based programs and procedures that emphasize forgiveness have two primary positive impacts. First, victims are granted some type of power to forgive the accused, giving them a pivotal role to play in shaping criminal justice. This new role can be seen in the growth of victim-offender reconciliation panels. By extension, when society is seen as a victim of every crime through the proxy of the government, then society also has the collective power to forgive. The second impact is that the accused is viewed as having the potential to be forgiven by the victim and society. Thus, forgiveness elevates the accused in the eyes of society, deeming him or her worthy of forgiveness. This powerful shift in perspective allows for government to investigate the accused as a whole person with a past history and a potential future, rather than nar-

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11. See MICHELE SVIRIDOFF ET AL., *DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT* (1997).

12. See *Community Courts* (visited Apr. 6, 2000) <<http://www.communitycourts.org>>.

rowly conceiving of the accused as a criminal who only exists in the moment of criminal behavior.

Viewing the accused as someone who can be "treated" is more than just semantic. While the provision of treatment may be seen as a form of punishment because a person is detained in a treatment facility and faces sanctions for leaving, treatment is also an act of sympathy, a gesture of forgiveness. Treatment sends a powerful message to the accused that says: "We forgive you for committing your crimes because we understand that you committed those crimes under the influence of circumstances beyond your control. If you agree to complete treatment, we will forgive you for your crimes in whole or in part. If you refuse treatment or fail to complete it, we will punish you for your crimes." Providing treatment acknowledges that the accused is capable of change. Society's positive investment in forgiving the crimes of addicted defendants arises from the defendant's success in completing treatment.

#### CONCLUSION

For courts and, by extension, for the whole criminal justice system, forgiveness may not be an end unto itself. Forgiveness is instrumental for courts attempting to have more effective and lasting results by addressing the non-legal causes and consequences of crime, rather than merely sentencing based on the crime itself. Bringing elements of forgiveness into the practices and procedures of criminal courts has produced some interesting and provocative results. For instance, the rise of the problem-solving courts, which use forgiveness as one of a number of new tools to address criminal behavior more effectively, suggests that the place of forgiveness in criminal law has been established and is ripe for further academic study and practical experimentation.



