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## ESSAY

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### PROBLEM-SOLVING COURTS AND THE PSYCHOLEGAL ERROR

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#### INTRODUCTION

It has been more than a decade since I began railing against the therapeutic jurisprudence movement in general and drug courts in particular.<sup>1</sup> Much has changed in the world of therapeutic courts in that decade. Every two-stoplight town now has a drug court, and every three-stoplight one, a veterans court.<sup>2</sup> Every town big enough to claim to be a community must have a community court. And every court everywhere dealing with low-level crimes must be called a “problem-solving court.” I guess that makes my felony court a “problem-creating court.”

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<sup>1</sup> See, e.g., Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1440 (2000) [hereinafter Hoffman, *The Drug Court Scandal*]; see also Morris B. Hoffman, *A Neo-Retributionist Concurs with Professor Nolan*, 40 AM. CRIM. L. REV. 1567, 1567-71 (2003); Morris B. Hoffman, *The Rehabilitative Ideal and the Drug Court Reality*, 14 FED. SENT’G REP. 172, 172-77 (2002); Morris B. Hoffman, *A Reply to Messrs. Meyer and Ritter*, 14 FED. SENT’G REP. 186, 186-87 (2002); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2083-85 (2002); Morris B. Hoffman, *Drug Courts Don’t Work*, USA TODAY, Oct. 21, 2008, at 10A.

<sup>2</sup> I suggested to my chief judge recently that our newly minted veterans court, which we deftly shuffled off onto our drug court, which in turn we deftly shuffled off years ago onto our lower-level courts, be divided between an officer’s court and an enlisted man’s court. No word back yet.

Much, though, has stayed the same in those ten years. Most of these courts still do not “work” by any reasonable recidivism-based measure of that term; they often make things worse by many reasonable measures. Their therapeutic subset relies on a whole addiction industry that is more snake oil than science or medicine, populated largely by recovering addicts rather than trained behavioral professionals. These courts have changed parts of the judiciary from a co-equal branch of government to a bureaucratic thirteenth step along a road to social recovery.

But we just celebrated Thanksgiving, my favorite of all holidays, so I have decided not to dwell on these negatives.<sup>3</sup> Instead, I want to examine the question of why it is that these kinds of courts appeal to so many otherwise perfectly sane and insightful people, and especially to sane and insightful judges. There seem to be several explanations.

Part of the impetus is the simple desire not to be the last kid on the block without one. This is a version of the rush to the bottom phenomenon that we have seen with presumptive drunk driving blood alcohol levels plummeting nationally, or really with any legislative response to the social problem *du jour*. But at least these legislative responses are legislative. We *expect* the vicissitudes of politics to drive legislation. By contrast, the therapeutic jurisprudence movement has almost exclusively been judge-driven. Yet the politics of problem-solving courts are just as bare-knuckled as attempts at legislative solutions. Mental health advocates, veterans’ groups, and special interest

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<sup>3</sup> Besides, the problem-solving machine has persisted despite a fairly robust body of criticism. See, e.g., JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* (2001) [hereinafter NOLAN, *REINVENTING JUSTICE*]; Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L. REV. 1205, 1252-69 (1998) (discussing the challenges defense attorneys face defending clients in drug treatment court); Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 786 (2008) (arguing that drug courts are least effective at helping the people they are designed to help the most—genuine addicts); Tamar M. Meekins, “*Specialized Justice*”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 47-50 (2006) (highlighting concerns of losing the defense attorney as advocate in problem-solving courts); James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1554-62 (2003) (investigating the unexpected consequences of problem-solving courts); Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL’Y 57, 62-68 (2009) (noting concerns of the criminal defense bar relating to problem-solving courts, and questioning the courts’ efficacy); Jane M. Spinak, *Reforming Family Court: Getting It Right between Rhetoric and Reality*, 31 WASH. U. J.L. & POL’Y 11, 33-38 (2009) (questioning the efficacy of problem-solving family courts); *Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1917-19 (1998) (expressing concern over the lack of procedural safeguards in drug courts).

agglomerations of all kinds relentlessly lobby chief judges and other local officials to create courts for whatever is the latest problem-solving fad for the latest self-described victims' group.

But it's not just politics. Problem-solving courts of all types have infected appointed judiciaries as much as elected ones.<sup>4</sup> Drug courts have even found their way into the federal system, albeit belatedly.<sup>5</sup>

Another explanation is darker. Drug courts in particular are popular with judges and with judicial bureaucrats because drug courts typically drive case numbers up, and come budget time there is nothing sweeter to a chief judge than a big fat caseload. Filings go up because most drug courts trigger a phenomenon called net-widening: the existence of the drug court itself stimulates more case filings. The mechanisms of net-widening are not always clear, and they probably differ across jurisdictions and maybe even over time. But the effects can be significant. In Denver, where I preside, drug filings almost tripled one year after the institution of our drug court compared with one year before.<sup>6</sup> A big part of the net-widening phenomenon is pretty straightforward: police and prosecutors are no longer trying to detect crime; they are trolling for patients. Arrests that might never be made in the shadow of a truth-finding system get regularly made when guilt and truth are irrelevant. Cases that prosecutors would never have filed if they actually had to be proved beyond a reasonable doubt are regularly filed in therapeutic systems, where a not guilty plea is called denial, and proof is all back-loaded to the question of whether a defendant complied with required therapy.<sup>7</sup>

My guess is that the uptick in case filings is more than offset by a decrease in the time the therapeutic judge devotes to each case. That's because a cadre of other actors typically helps the therapeutic judge push the cases through, from magistrates and designated court staff, to designated probation staff, and even to counsel themselves, who are forced to abandon their traditional adversary role to become

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<sup>4</sup> There are drug courts in all fifty states, thus including the states that are purely appointment states. *Drug Courts*, NAT'L INST. JUST., <http://nij.gov/topics/courts/drug-courts/welcome.htm> (last visited Nov. 15, 2011). As of June 30, 2010, a total of 2559 drug courts existed in the United States.. *Id.*

<sup>5</sup> As of June 30, 2010, there were fifty-seven federal drug courts. *Id.*

<sup>6</sup> See Hoffman, *The Drug Court Scandal*, *supra* note 1, at 1502 n.260 (showing that drug filings grew from 1047 in 1993, the first full year before implementation of our drug court, to 2661 in 1995, the first full year after implementation of our drug court).

<sup>7</sup> See generally NOLAN, REINVENTING JUSTICE, *supra* note 3, at 201-04.

part of the treatment “team.”<sup>8</sup> All of this means that, despite the fact that drug court judges spend untold hours cajoling and cheerleading their “clients” toward the promised land of recovery, their time per case probably goes down significantly because they have so much help from everyone else, help that judges in regular problem-creating courts do not have. More cases, less judge-time per case. What looks better to a chief judge fighting other chief judges for shares of the budget pie?

But these explanations are not just unduly cynical, they probably miss the heart of the matter. I suspect that the deepest and most complete explanation of the problem-solving phenomenon is pretty simple: every day we see people in our courtrooms with profound problems, and we naturally want to help. We know that punishment alone does not solve any of these problems and that the crimes that bring these people into our courtrooms seem to be the tip of an iceberg of dysfunction. It is terribly tempting for judges to use the coercive power of the judicial branch to try to help the people who come before us. I cannot count the numbers of times I have heard treatment court judges say things like, “We finally have their attention; now we can help them.” I know many colleagues, both in my own court and in courts across the country, who believe sincerely and passionately in the curative power of their therapeutic mission; indeed, this movement owes its incubation and sustenance to a core of truly remarkable and dedicated judges.

But that doesn’t make them right. In fact, if the simple human desire to help explains the growth of the therapeutic jurisprudence movement, then it strangely fails to explain the movement’s sharp limitations. There are no aggravated robbery courts where we try to solve the social problems of armed robbers, or community rape courts where we encourage rapists to apologize to victims so we can heal the community’s wounds.<sup>9</sup> We do not give pedophiles serial probation and community service until they either reform or call our bluff. Our veterans courts do not seem too interested in veterans who kidnap and murder. Why the oddly truncated reach of a movement with such seemingly unbounded and hopeful activism?

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<sup>8</sup> For an engaging and thoughtful discussion of the ethical issues this presents to defense counsel, see Boldt, *supra* note 3, at 1286-1300.

<sup>9</sup> I should clarify that I am not talking about so-called “reentry courts,” which address the problem of reintegration rather than the social dislocation that caused offenders to commit the crime in the first place. I think such courts are great, though they are really just making up for what corrections officials should be doing.

It is not enough just to say that problem-solving courts are to justice what the broken-windows theory is to policing,<sup>10</sup> though there are some tempting similarities. It is entirely plausible that cleaning up low-level crime might have a positive impact on more serious crimes, whether that low-level cleanup comes from police activity or therapeutic court activity.<sup>11</sup> But that is very much *not* the goal of most problem-solving courts.<sup>12</sup> To their credit, they do not set out to save the world or even their own communities. The problems they are interested in solving are on a much smaller scale. They are just trying to save the people who come before them from the impacts of the social problems that brought them into court—problems that if left unsolved will just keep them coming back.

And that is one of the impossible challenges of the movement. No self-respecting treatment judge would be so smug as to claim to be able, let alone authorized, to solve all of modern society's ills. We cannot order teenagers to refrain from getting pregnant at thirteen, or fathers and mothers to avoid abandoning their children, or schools to teach, or parents to parent. But once all these social failures coalesce into an individual drug user or graffiti artist or shoplifter, some judges suddenly think they can "fix" the individuals whose behavior is a product of these failed systems.

I chuckle at problem-solving enthusiasts who claim they are getting at the "causes" of the problems, while we in problem-creating courts are just dealing with the "effects." It is simply not true. One link in the causal chain does not a cause make. No teen court judge

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<sup>10</sup> The broken-windows theory postulates that reducing the incidence of low-level crimes like vandalism will have norm-setting signaling effects that will reduce more serious crimes. See James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, ATLANTIC, March 1982, at 29, 34.

<sup>11</sup> The broken-windows theory is not without its detractors. See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 304-07 (2006) (arguing that, under the broken-windows approach, serious crime simply relocates). Though therapeutic courts are famous for their grossly overly optimistic recidivism statistics, I am unaware of any studies that claim they also have a positive impact on the frequency of more serious crimes, which may itself say something about whether the proponents of therapeutic jurisprudence really see themselves as broken-windows warriors.

<sup>12</sup> For example, here's the Minnesota Judicial Branch's published statement about the purposes of its problem-solving courts: The problem-solving court "works closely with prosecutors, public defenders, probation officers, social workers, and other justice system partners to develop a strategy that will pressure an offender into completing a treatment program and abstaining from repeating the behaviors that brought them to court." *Problem-Solving Courts*, MINN. JUD. BRANCH, <http://www.mncourts.gov/?page=626> (last visited Nov. 15, 2011).

thinks he can solve the aching loneliness inherent in adolescence, even though a nice judicial pep talk might make everyone feel good for a while. Even the boldest of veterans court judges do not think they have a mandate to end war in an effort to stop war-related post-traumatic stress disorder. These courts are dealing exclusively in effects, not in causes; they just happen to be focusing on a different set of effects than the one that brought their patient to them (and I might add, the only one that gives the court the power to act). But I also think that this claim about dealing with “causes” may be the key to understanding our addiction to problem-solving courts.

### I. THE PSYCHOLEGAL ERROR

My friend Professor Stephen Morse coined a fantastic term—the “fundamental psycholegal error”—to describe the powerful temptation we all seem to have to equate cause with excuse.<sup>13</sup> But of course cause is not excuse. Everything has a cause, and every cause has an antecedent cause. If cause were excuse, then all wrongs would be excused. But nothing about the chain of causation, precisely because such a chain lies behind every action, can ever in and of itself inform us about *responsibility*. Knowing that the defendant was abused and tormented by her spouse makes us feel like we understand the mind that decided to kill him while he was sleeping, but understanding that such a killing has such a “cause” does not excuse the killing any more than understanding that you needed money for your heroin habit excuses you from robbing the grocery store.

True excuse, of the insanity variety, involves the brain’s profound loss of rationality.<sup>14</sup> And a “cause” is seldom so rationality-distorting as to be an excuse. Andrea Yates was excused because her actions were caused by a profoundly distorted view of the world—her children would be consigned to hell if she did not kill them.<sup>15</sup> When is sheer anger, fear, or craving so rationality-distorting as to amount to an excuse? There is no easy answer to that question, except to say that the law’s an-

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<sup>13</sup> Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 350-53 (1998).

<sup>14</sup> See, e.g., Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1096 (2007) (“People are found legally insane because they lack rational capacity or, more controversially, because they cannot conform their behavior to the requirements of law.”).

<sup>15</sup> *Jury Finds Yates Insane, Not Guilty*, HOUS. CHRON., July 26, 2006, at A1.

swer is “almost never.”<sup>16</sup> And so far that has been a wise answer, because to engage any more broadly in this inquiry risks the problem that none of us really knows what “causes” any of our decisions, and that all of us could therefore claim to be relieved of responsibility altogether.<sup>17</sup>

So what has all of this to do with problem-solving courts? Everything, since the “problems” that problem-solving courts are trying to solve are the immediately antecedent causes of criminal behavior. In problem-creating courts like mine, we just punish people for their wrongs.<sup>18</sup> But problem-solving courts try to get at least one level deeper in the cause-and-effect chain, and then treat that cause instead of punishing its effect, because in problem-solving courts the antecedent cause excuses the crime. Problem-solving courts literally institutionalize the psycholegal error. When Johnny tags the local church, he is not just tagging a church. He is acting out because of something going on in his life. When our problem-solving courts discover that something—dysfunctional family, drugs, problems at school, all of the above—and Johnny takes steps to cure himself, albeit with a little bit of coercion, we excuse the tagging.

This is not only a wholly unprecedented expansion of the doctrine of excuse, but it is all being done quite silently in the alternate universe that is therapeutic jurisprudence. Treatment courts do not admit that they are “excusing” their “clients,” but that is exactly what they are doing, particularly in courts where, as is very common, the treatment component is enforced by way of conditions to a deferred

<sup>16</sup> Short of insanity, that answer is embedded, on the excuse side, largely in what is left of the doctrine of irresistible impulse, and on the justification side, in doctrines like self-defense and duress.

<sup>17</sup> This problem of the end of responsibility is coming to a head, so to speak, as neuroscientists dig deeper and deeper into the neuronal chain of causation. Some legal philosophers have argued that what neuroscience will ultimately discover is that none of us is a responsible moral agent and none of us can therefore hold anyone else morally responsible, though most admit that we should nevertheless remain steadfast in holding to the illusion. See, e.g., DANIEL M. WEGNER, *THE ILLUSION OF CONSCIOUS WILL* 334 (2002). Thankfully, the law has held fast to its compatibilist traditions. A neuroscientist once complained to me about how I could punish anyone for anything, when we all knew that our decisions were just neurons all the way down and that no one could really help themselves. I replied that I in turn could not help myself. He did not seem satisfied, but in fact there is a rich psychological, primatological, and now even neuroscientific literature suggesting that we all have powerful and evolved instincts to punish. See, e.g., Ernst Fehr & Urs Fischbacher, *Third-Party Punishment and Social Norms*, 25 *EVOLUTION & HUM. BEHAV.* 63, 85 (2004).

<sup>18</sup> Yes, yes, even problem-creating courts engage in the fiction of probation, which many of my drug court friends would claim is just a less informed version of treatment courts. No doubt there is a continuum between the rehabilitative aspects of ordinary probation and its most robust form as a treatment court.

judgment. When the miscreant successfully completes treatment, we absolve him completely of his responsibility, because you see *he* did not commit a wrong; it was those other causes that did it.

Which brings us to the puzzle of addiction. Like most aspects of human behavior, and especially human decisionmaking, very little is really known about the neurology of addiction. Yes, neuroimaging has made important inroads—there seems to be no doubt that addiction is bound up with the brain's risk/reward circuits, and more particularly with problems in the ways that various neurotransmitters, especially dopamine, give us our sense of pleasure.<sup>19</sup> An addict needs more and more of his drug because his dopamine is responding less and less.<sup>20</sup> Genes have also been discovered that reduce the effect of dopamine, confirming that there can be a genetic predisposition to addiction.<sup>21</sup> But as is often the case with discoveries about the brain, what we learn about a narrow area seems only to open more questions in larger ones.

In the case of the dopaminergic model of addiction, the problem is that these same dopamine-driven risk/reward circuits are involved in *all* of our decisionmaking behaviors.<sup>22</sup> Every time we decide to listen to pleasing music or eat a bag of potato chips or have an orgasm, these same circuits not only gin up our dopamine in the same basic way that anticipating a snort of cocaine does, but there also seems to be the same tolerance phenomenon of increased use requiring increased amounts of dopamine for the same kick. We get “addicted” in some fundamental way to every pleasurable experience we have, which of course, within limits, makes perfect evolutionary sense. It is

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<sup>19</sup> See generally Steven E. Hyman et al., *Neural Mechanisms of Addiction: The Role of Reward-Related Learning and Memory*, 29 ANN. REV. NEUROSCI. 565, 570-75 (2006) (analyzing the central role of dopamine in understanding addictive behavior).

<sup>20</sup> See Nora D. Volkow et al., *Role of Dopamine, the Frontal Cortex and Memory Circuits in Drug Addiction: Insight from Imaging Studies*, 78 NEUROBIOLOGY OF LEARNING & MEMORY 610, 611 (2002) (noting that drug addiction may result from the repeated perturbation of the dopamine system).

<sup>21</sup> See B. Le Foll et al., *Dopamine D<sub>3</sub> Receptor Agents as Potential New Medications for Drug Addiction*, 15 EUR. PSYCHIATRY 140, 140-41 (2000) (analyzing the effect of defects in the D<sub>3</sub> receptor gene).

<sup>22</sup> Marc N. Potenza, *Should Addictive Disorders Include Non-Substance-Related Conditions?*, 101 ADDICTION (Supp. 1) 142, 142, 148 (2006). On the other hand, there are indications that the dopamine released by anticipated drug use is released in a slightly different location than the dopamine released in anticipation of nondrug behaviors. Valentina Bassareo et al., *Differential Adaptive Properties of Accumbens Shell Dopamine Responses to Ethanol as a Drug and as a Motivational Stimulus*, 17 EUR. J. NEUROSCI. 1465, 1471 (2003).

nature's way of helping us remember certain experiences and increasing the likelihood we will repeat them, since things like having orgasms would have been really important evolutionary things to do.

Somehow, most of our brains are able to maintain a satisfying level of pleasure without having to overindulge. But others of us, across a whole array of pleasurable behaviors, not just using drugs, and also at different times in our lives depending on factors such as our levels of stress, need more and more indulgence to maintain the same level of dopamine-driven satisfaction. We need to eat a whole bag of potato chips, or have eight drinks instead of two. At the extreme, addicts are not getting any pleasure at all from their drug of choice—they just need it to get to sleep or avoid convulsions. For them, the reward part of the risk/reward circuit has become so muted that they cannot get their levels of dopamine up to pleasurable amounts, no matter how much of their drug they take. Their pleasure circuits have become dopamine-starved pain circuits.<sup>23</sup>

But because we know so little about what really makes cocaine different from, say, sex or potato chips, we likewise know very little about when one kind of behavior should be treated as a “choice” for purposes of responsibility and another kind treated like the product of an excused cause—the excuse of addiction.

The law has always been conflicted over these difficult concepts of choice and compulsion. Voluntary intoxication is traditionally not a defense, either affirmatively or to negate general mens rea, even though the drunk killer's state of mind is probably the same whether he is a teetotaler and achieved that state of mind from his first-ever drink or he is an alcoholic and achieved that state of mind after twelve drinks. The law, in its wisdom, has generally recognized that to excuse an addict's drug use as “involuntary” might open up the floodgates of excuse and risk the end of responsibility. Even modern law, after having been schooled for decades about the “disease” of addiction, does not recognize it as an excuse, instinctively and quite rightly appreciating what neuroscience only now seems to be confirming: that all “decisions” are a complex integration of emotion, cognition, risk-taking and pleasure-seeking, that addiction may just be a way of describing one end of that continuum, and that without knowing

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<sup>23</sup> For a comprehensive, current, and enjoyably accessible introduction to the neurobiology of addiction, see DAVID J. LINDEN, *THE COMPASS OF PLEASURE: HOW OUR BRAINS MAKE FATTY FOODS, ORGASM, EXERCISE, MARIJUANA, GENEROSITY, VODKA, LEARNING, AND GAMBLING FEEL SO GOOD* (2011).

more about the neurology of decisionmaking, excusing one end of that continuum may require us to excuse the whole of it.

So when it comes to the criminal decisions of addicted minds, the law has remained fairly unimpressed with the therapeutic movement, and largely resistant to the lure of the psycholegal error. When an addict rapes a coworker, his addiction is not the “cause” of the rape—even if we could be metaphysically sure that the rape never would have happened if he were sober—and it is almost never an excuse.<sup>24</sup> And yet, when that same addict is charged with the crime of possessing the drug to which he is addicted, the addiction suddenly becomes the cause of his possession, and in therapeutic courts a complete excuse, as long as he plays the game and responds to our treatment. But if the addict in both cases does not “choose” to use, then how can the addict-rapist’s use be ignored under the rubric of voluntary intoxication? In both cases, under the therapeutic model, the addict had no choice but to use. Yet our problem-solving courts excuse the crime of continued use but not the crime of drug-induced rape. Why?

## II. LEGALIZATION BY JUDICIAL FIAT

The answer seems clear: therapeutic courts treat an addict’s drug use as “involuntary” when considering the crime of drug use, but “voluntary” when considering any sort of more serious general intent crime, simply because therapeutic courts do not believe drug use should be a crime. That is a perfectly reasonable belief, and in fact is an approach that seems to be gaining traction with many thoughtful people. But of course it is not typically the judicial branch that decides what should and should not be a crime. Despite the constant haranguing about of the disease theory of addiction, our legislatures have by and large remained unmoved. Drug use remains a crime, but it has been functionally decriminalized by a segment of the judiciary that simply disagrees with that approach.

The same is true for almost all manner of problem-solving courts. These courts are not just meant to treat the underlying problem that caused the minor crime, they are in fact meant *only* to treat the underlying problem and not the crime itself. Thus, when defendants in problem-solving courts are punished, they generally are punished for failing our proffered treatment, not for engaging in the underlying act. Here again, judges have decided that shoplifting or vandalism or

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<sup>24</sup> There may be extreme cases where an addiction has progressed to the point of other serious and potentially excusable mental disorders, like substance-induced psychoses.

other low-level crimes are simply not serious enough to warrant punishment on their own, even though legislative bodies have criminalized these activities. Like police and prosecutors, these courts do not care about the crimes that bring their defendants to them; the crimes are just a useful vehicle by which the court can gain these diseased people's attention, and, by using the threat of punishment, try to cure their social problems.<sup>25</sup>

So the answer to the troubling question of why there are no problem-solving kidnapping or pedophilia courts is that there is just not a large body of judges that believes kidnapping or pedophilia should be legalized. That is, all this judicial falderol about how nothing we are doing seems to be working, and how judges need to be more proactive in helping their communities, is largely just a cover for legalization. When problem-solving judges say traditional courts do not work for some of these special crimes, what they are really saying is that criminalization is not working. They may or may not be right about that, but they are not members of the branch authorized to make that judgment.

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<sup>25</sup> Not all problem-solving courts are so purely therapeutic. Some mete out punishment in parallel to their therapeutic efforts. I applaud those courts. Most DUI courts are of this variety, presumably because few, if any, judges think driving drunk should be legalized or excused by addiction—even though, right across the hall, a heroin addiction is certainly viewed as excusing the crime of heroin possession.