

## The Punishment and Treatment is the Process

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Wendy Bach, [Prosecuting Poverty, Criminalizing Care](#), 60 *Wm. & Mary L. Rev.* 809 (2019).

In *The Punishment is the Process*, Malcolm Feeley famously documented that in New Haven, Connecticut's low-level criminal courts, pretrial detention, and its impact on work and family responsibilities, drove plea bargains. In *Prosecuting Poverty, Criminalizing Care*, Professor Wendy Bach demonstrates that, in Eastern Tennessee's low-level problem solving court, the threat of pretrial detention may drive access to opioid treatment through "diversion" into drug courts.

Problem-solving courts, including drug courts, are one of the fundamental innovations in criminal justice over the past quarter of a century. These courts purport to change the behavior of offenders by providing intensive supervision and treatment for non-violent offenders whose offending derives from particular social, medical, or psychological causes. Their distinctive approach depends upon the claim that the criminal justice system must respond to the problem of drug addiction, as well as their non-custodial, inter-disciplinary, team-oriented and court-centered model of continuous judicial monitoring.

One reason for the popularity of problem-solving courts is that they provide an opportunity for the criminal justice system to monitor the provision of drug treatment services both directly and intensively. These courts thus enable a sentencing judge to retain control over the process of recovery, rather than simply receiving periodic reports from defense counsel or probation services. The promise of direct supervision and control has proved especially attractive for dealing with drug addicts, who frequently relapse, cycle through courtrooms, and clog up dockets, but who often present a low risk of harm to others.

If the features of problem-solving courts are, by now, relatively familiar, the politics of problem-solving justice remains somewhat opaque. There has been little research discussing the interaction between the substantive criminal law and problem-solving courts. It is at this point that Professor Bach's research steps in to fill the void, with a study that is both theoretically sophisticated and empirically rich.

The problem-solving model of intensive supervision, Professor Bach reveals, has proven particularly attractive for Tennessee lawmakers seeking to provide some fix for the opioid crisis. In particular, Tennessee prosecutors identified as particularly troubling the number of babies born with Neonatal Abstinence Syndrome, suffering withdrawal symptoms from drugs prenatally ingested by their mothers. Professor Bach persuasively reveals that a major justification for a new law targeting drug addicted pregnant women for criminal prosecution for the crime of fetal assault upon the birth of their children was the availability of problem-solving courts as a core justification for the law. The legislature created the crime of fetal assault to require treatment, but through the criminal justice system rather than an alternative to it.

Professor Bach's article breaks new ground in the problem-solving paradigm. It builds on prior work showing that the problem-solving courts do not divert from the criminal justice system, or really seek to ameliorate the impact of the criminal justice system. Instead, she suggests that the courts have gone along with generating a new criminal law—or at least operate in the same justificatory space as those criminal laws.

Her study of the Tennessee fetal assault statute shows that problem-solving justice does not simply preserve existing sanctions but is compatible with creating new substantive crimes. Bach's study fits with the actions of those problem-solving judges who challenged California Propositions 36 and 47 or Ohio Issue 1 (which sought to decriminalize drug possession) as undermining the power of these courts to impose jail time as a form of therapeutic sanction. In California and Ohio, problem-solving judges sought to maintain the penal status quo, rather than accede to new limits on drug criminalization. In Tennessee, problem-solving courts went along with legislators who sought to expand the criminal justice system. Rather than simply fighting a negative or rearguard action to prevent changes in the law (and in the law of sanctions at that), Tennessee problem-solving justice embrace the positive creation of new, substantive criminal law to drive new clients into their courts. Whilst this is not the whole story that Professor Bach tells, it is a novel and important insight.

The politics of problem-solving punishment and criminalization is shocking, but not surprising. Shocking, because the rhetoric of problem-solving justice presents itself as an oppositional alternative to mass incarceration. Not surprising because, soon after the creation of drug courts, judges and academics pointed to their "net-widening" effect: they increased, rather than decreased, contacts with the criminal justice system. Professor Bach has identified a special and insidious type of net-widening: creating new offenses with drug courts in mind.

I believe that the problem-solving court intervention produces an important psychological and political effect for the officials that staff these courts. The intensive, persistent judicial supervision of offenders enables the judge (and other officials) to treat isolated, individualized, episodic successes as representative of systemic criminal justice reform. These isolated successes mask systemic injustice in the way the state uses the criminal justice system to target and control specific communities. One way they do so is by viewing addiction treatment as the business of criminal supervision, with the threat of punishment regarded as a necessary tool of treatment success.

By emphasizing criminality as caused by individualized, micro-social behavioral problems, the court, and in particular, the judge, addresses herself to the rehabilitation of discrete offenders, one at a time. This atomistic approach gives disproportionate attention to the success of individualized offenders, rather than the operation of the program as a whole. The judge becomes dependent upon the individualized, personal success of the offenders appearing before her to mask her participation in a systemically unjust criminal justice system. The success of discrete participants enables the judge to redirect the concept of evidence-based outcomes from the program or the group, to the success individual clients.

Some of that injustice is revealed through the problem-solving courts' attitudes towards punishment and criminalization as an alternative to medical treatment. Given the limited provision of opioid treatment through the public healthcare system, the Tennessee criminal justice system has colonized the provision of treatment by its ability to prioritize the criminal justice route to accessing limited sources of opioid care. Punishment provides access to scarce treatment resources. On the other hand, state reporting requirements place pregnant women at-risk of criminal charges. Seeking treatment for drug addiction renders poor, rural, pregnant women vulnerable to punishment.

Crucially, Professor Bach demonstrates that punishment and treatment are not alternative modes of intervention, but are strongly linked in the minds of lawmakers and prosecutors. In the new regime of punishment-and-treatment, punishment is internal to treatment. Punishment is the form that treatment takes when treatment is conceived of as behavior-modification for irresponsible mothers. The goal is a form of "responsibilization" (to use a term coined by criminologist David Garland) in which the offender not only alters her behavior, but is made responsible for effecting that change by being held personally accountable for it. Punishment becomes the method of prodding the vulnerable addict to change her ways. Stripped of its negative consequences, punishment-and-treatment becomes a necessary boon to

judges and lawmakers seeking to “help” and “treat” addicted individuals.

There are plenty of other interesting insights in Professor Bach’s article, not least in her linking of criminal justice, healthcare, and social services; or in her recognition that the criminal justice system uses indigent, addicted women to pay for its services in deeply problematic ways. Indeed, her research fits within some of the recent work done on the ways poor women are targeted for criminalization by police and prosecutors based on their gender. For anyone wishing to understand the insidious world of problem-solving justice, her article is essential reading.

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