

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

---

Court Review: The Journal of the American Judges  
Association

American Judges Association

---

2009

# Problem Solving and Prevention by General- Jurisdiction Judges ©

Thomas D. Barton

*California Western School of Law*

Follow this and additional works at: <http://digitalcommons.unl.edu/ajacourtreview>

---

Barton, Thomas D., "Problem Solving and Prevention by General-Jurisdiction Judges ©" (2009). *Court Review: The Journal of the American Judges Association*. 299.

<http://digitalcommons.unl.edu/ajacourtreview/299>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

# Problem Solving and Prevention by General-Jurisdiction Judges<sup>©</sup>

Thomas D. Barton •

**S**tate court systems have done much in recent years to deepen their “problem-solving” qualities. Across the country, courts have adopted court-annexed mediation programs and developed a variety of specialty courts tailored to drug and alcohol abuse, domestic violence, mental health, homelessness, and sexual offenders.<sup>1</sup> These innovations have broadened the scope in which legal problems are understood and deepened the level of engagement between legal system personnel and claimants/defendants. They have spawned thoughtful reflections by judges and lawyers about the impact and effectiveness of legal institutions and methods as exemplified by the Therapeutic Jurisprudence<sup>2</sup> and Comprehensive Law<sup>3</sup> movements.

“Preventive Law” could be considered the next frontier for American courts. Although Preventive Law is making steady progress within the practicing Bar, implementation of its concepts are especially challenging for the judiciary. Yet its simple truths are enduringly appealing for every part of the legal system. Why should the pain and expense of an injury be endured if it could have been averted? It is almost always easier and cheaper to prevent a dispute than to fight over it. This essay explores the prospects and obstacles for general-jurisdiction judges to participate in the movement toward preventing legal problems as well as in resolving them well and creatively.

The essay begins by connecting problems with procedures generally, describing the importance of a good fit. Part II suggests, however, that in recent years, legal problems have taken on new shapes that strain the seams and buttons of traditional adjudication. ADR and Problem-Solving Courts may have evolved precisely as a way of grafting new procedures onto changing legal problems. Part III identifies how Preventive Law differs from Problem Solving, and some rule-of-law obstacles that confront judges who may wish to employ stronger preventive methods. Finally, the essay explores how judges might participate in Preventive Law within their traditional powers and jurisdictional authority.

## I. THE CO-EVOLUTION OF PROBLEMS AND PROCEDURES

Problem Solving and Preventive Law have much in common. They share the premise that the demands made by problems shape the procedures that evolve to solve those problems.<sup>4</sup> Both ways of thinking, in other words, assume that procedures develop their particular methods so as to respond to the features of particular sorts of problems. Ideally, for every human problem, a procedure has been developed that will provide an effective, efficient, and just resolution of that problem.

Here is an example of a procedure that is nicely adapted to a problem.<sup>5</sup> Most sporting events face the initial question of whom should begin the action, and whom should respond to that starting initiative. Which team, in other words, should kick off and which team should receive? One procedure for addressing this problem is broadly accepted: an umpire flips a coin at the center of the field, while being observed by representatives of both teams. The coin-flip is effective because although the procedure produces only a crude outcome (either Team A or Team B kicks off), *that is all the problem demands*. However humble, the procedure of flipping a coin adequately addresses the demands of this simple problem. It is also efficient: it requires little time and is available even in sand-lot games by children. It is fair, just, and trustworthy because it uses a transparently generated random selection that cannot readily be manipulated.

Flipping a coin works well for starting athletic events, but obviously is not suitable for all problems nor all problems that require a solution with a clear selection between two opposing possibilities. The choice of electing the President of the United States demonstrates the limitations of the appropriateness of the coin-flip procedure. Although (realistically) choosing a President is a binary choice between the Republican and the Democratic party candidates, no one would imagine a coin-flip to be appropriate in addressing this particular problem. We instead rely on another breakthrough in the invention of procedures to address problems: Democracy.

Most adjudicated legal problems are resolved by a binary judgment between plaintiff/prosecutor and defendant. In that

© Thomas D. Barton, 2009. All rights Reserved

### Footnotes

- Portions of this article are excerpted from or otherwise based on the author's book PREVENTIVE LAW AND PROBLEM SOLVING: LAWYERING FOR THE FUTURE (Vandeplas Publishing, 2009) (hereafter “LAWYERING FOR THE FUTURE”).
- 1. For fine descriptions and analyses of Problem Solving Courts, see SUSAN GOLDBERG, JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH (National Judicial Institute of Canada, 2005) (hereafter “JUDGING FOR THE 21ST CENTURY”); DAVID B. WEXLER AND

BRUCE J. WINICK, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (2003) (hereafter “JUDGING IN A THERAPEUTIC KEY”).

2. See, e.g., DAVID B. WEXLER AND BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); JUDGING IN A THERAPEUTIC KEY, *supra*, note 1.
3. See Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPP. DISP. RESOL. L. J. 1 (2006).
4. See LAWYERING FOR THE FUTURE at 205–225.
5. This example is discussed *Id.*, at 33–36.

respect we could employ a coin-flip. But of course we do not do so because just as in the election of our leaders, we value the quality of information and deliberation that a coin-flip cannot supply. For problems traditionally set before our courts, the rules of civil procedure have evolved so as to resolve those problems accurately, fairly, and transparently.

Traditional litigation is an especially elaborate and refined procedure. It addresses an immensely broad swath of human problems and is a foundation for the rule of law. Like democracy, the rule of law is a seminal achievement in the history of human governance. And judges are its primary guardians. To my mind, procedural experiments in addressing legal problems must always heed this cautionary warning: they must not compromise the operation or social trust in the rule of law.<sup>6</sup>

Also to my mind, the developments in ADR and Problem-Solving-Courts have not undermined the general-jurisdiction courts. If anything, both of these developments have arguably *advanced* the rule of law. I shall return to this touchstone issue at the end of the essay, but for now I will simply assert that recent procedural innovations respond appropriately to a changing mix of problems presented to the legal system.

## II. PROBLEMS PRESENTED TO COURTS: THEY AIN'T WHAT THEY USED TO BE

The legal system has been expanding its capacity and flexibility in responding to human problems and has done so in ways that have preserved the public trust in the rule of law. ADR and Problem-Solving Courts are characterized by stronger reliance on consent of the parties than on state power; by informal narratives for problem-identification and information rather than formal pleadings and rules of evidence; by understanding problems and solutions within broader contexts than those suggested by a strict application of legal rules; by more orientation toward workable relationships for the future than exclusive concern for the etiology of past injuries; and by remedies that depend more on personal accountability than on transfer payments or incarceration.<sup>7</sup> All of these qualities arguably cope better with the demands of many (not all) of the sorts of problems that increasingly make their way to the legal system.

### A. Changing Attributes of Legal Problems

Make no mistake: more and more, we are asking our judges to resolve problems that are harder and harder to resolve. As I elaborate below,<sup>8</sup> legal problems are increasingly *volatile*, *novel*, *intimate*, or *recurring*. Or, they require *complex choices among regulatory alternatives*. All of these properties make a problem harder to decide, especially with the methods of traditional litigation. That is because traditional courtroom procedures evolved in response to the problems of simpler times and places: transactions in agrarian or gradually industrializing

societies in which customary beliefs were stronger and more widely held. ADR and Problem-Solving Courts are being developed and accepted because they have procedural features that cope better with these structurally challenging problems that increasingly characterize modern life.

### 1. VOLATILITY AND NOVELTY

More contemporary problems are *volatile* or *novel* simply because the rate of social, economic, and technological change continues to accelerate. To demonstrate this, imagine the sorts of legal problems that are likely to be more prevalent 20 years from now. How should, or can, the judicial branch respond to legal issues raised by global warming; severe misallocations of water; natural resource depletion; severe immigration pressures on national boundaries and human trafficking; genetic manipulation; terrorists armed with weapons of mass destruction; the effects of the steady disintegration of extended and even nuclear families; and the demands for access to effective and affordable health care, especially among baby boomers who by then will be entering frail old age?

Where the background conditions to a problem are volatile, a judgment rendered based upon the conditions prevailing at any given moment is like characterizing a video according to a few still-shots out of the moving context. Capturing the truth out of any given moment risks failing to see recurring patterns. Worse, it risks failing to perceive how the justness in applying legal rules might fluctuate from party to party. And yet the methods of traditional adjudication are better designed for discrete transactions, for snapshots rather than dynamic environments. Further, where issues are novel, the legal rules that ground the authority of the court may be sketchy, vague, or even absent.

The historical genius of the common law is its ability to propose and test proposed solutions to changing circumstances through a flexible but guiding *stare decisis*. Yet it is sometimes difficult for the common law to keep pace. Of course, modern legislative and executive branch regulations carry much of the load in dealing with newly emerging problems. Nonetheless, the judiciary sees its share of these swirling problems, and they may be without precedent.

### 2. INTIMACY

More legal problems also now seem *intimate*, i.e., embedded in long-standing basic human relationships. Many components contribute to this: the decline of the family harmony doctrine, higher divorce rates, the rise of more complex standards for awarding child custody, and an increased willingness within our culture to address problems such as sexual abuse, domestic violence, and elder abuse.

These problems are more difficult on a number of dimen-

6. The tension between Problem-Solving Courts and “core judicial values—certainty, reliability, impartiality and fairness” is identified and well explored by Greg Berman and John Feinblatt in *Problem-Solving Courts: A Brief Primer*, originally published in 23 LAW AND POLY #2, excerpted in JUDGING IN A THERAPEUTIC KEY, *supra* note 2, at 81–85. As the authors caution, these core values “have been safeguarded over many generations largely through a reliance on

tradition and precedent. As a result, efforts to introduce new ways of doing justice are always subjected to careful scrutiny.” *Id.*, at 81.

7. See generally, LAWYERING FOR THE FUTURE at 252–278.

8. The changing nature of legal problems is discussed *Id.*, at 254–256.

sions. First, it is harder to take in appropriate evidence on these problems because the witnesses may be underage or intimidated. Further, evidentiary relevance and materiality are problematic because of the give-and-take and emotional episodes that occur within most intimate relationships. Unlike judging criminal episodes or singular tortious interactions, judging the relative health or pathology of relationships is unreliable when the judge has evidence of only a tiny percentage of the interactions in a long-term or dense relationship. Finally, often the task at hand in resolving these problems is to create an environment for moving forward. Judges are being asked to manage relationships for the future, entailing predictions and interventions that are far more within the normal realm of psychologists than judges.

### 3. CHRONIC OR RECURRING PROBLEMS

Although I lack data, my impression is also that more problems are being presented to the judiciary that are *recurring*. Examples would be criminality and civil-disorder problems stemming from drug or alcohol addiction, mental illness, gang membership, homelessness, or sexual predation. Obviously illegal behaviors are being performed, and these are the direct prompts for legal system involvement. But the people engaging in these illicit activities are doing so for reasons that are particularly resistant to traditional legal remedies. The courthouse and jailhouse become revolving doors for these folks to enter and leave repeatedly. Addressing the underlying causes of these problems is a very different enterprise than traditional legal judging. Once again they are more in the realm of therapy, social work, or perhaps urban planning.

### 4. PLANNING DECISIONS: PROBLEMS OF THE REGULATORY STATE

The mention of urban planning leads me to speculate on one final category that may be increasing in trial court dockets. These are problems that stem from *the initiatives of the modern regulatory state*. Examples would include the siting of a new highway, or preservation of wetlands and open spaces, or the planned allocation of medical resources. These problems are especially tricky for the judiciary because they cannot easily be reduced to yes or no answers about liability. The nature of the problems demands a processing of information and a form of resolution that do not correspond to structures traditionally available in adjudication. Planning decisions entail multiple variables that play against one another to produce multiple possible outcomes.<sup>9</sup> Problems like this are better suited to the expertise of planners or the decentralized valuations of the market.<sup>10</sup>

### B. Changing Attributes of People Who Have Legal Problems

The paragraphs above explain the emergence of ADR and Problem-Solving Courts by focusing on the *attributes of the problems* modernly presented to the courts. The same phenomenon could be explained instead by looking at the *people*

*who have those problems*, and asking whether the underlying assumptions of traditional adjudication will lead to just outcomes for those people.<sup>11</sup>

### I. RATIONALITY

For example, the law assumes in its resolution of problems that the people before them are *rational* in their choices and ability to comport with the law. The law has special provisions for those who are mentally ill, but the underlying compulsions of drug or alcohol addiction also impair rationality. The widespread acceptance of drug courts reflects the law's attempt to fashion a procedure that better matches these challenges. But what about problems held by people who are involved in intensely emotional relationships like sexual intimacy or parenting? Do they display the detached rationality that is necessary for informed choice? Family courts may represent an institutional response to these situated human qualities, as well as to particular legal aspects of marital dissolution and child custody.

### 2. SEPARATION

As it addresses problems and pronounces remedies, the law also assumes that people can be *separated* one from another. That is, the law assumes that people are free to move from whatever troubled relationships may have brought them to court. These assumptions about the dissolution of social ties are not always warranted, however, and if so the legal judgment or remedy may be neither effective nor just. This is another reason why child custody issues, for example, are so difficult. The court is pronouncing a legal separation of one (or both) parents from some or all aspects of the child's life. Emotionally, however, separation is not so easy. This same limitation on separation also accounts for some of the difficulty of domestic violence cases. Separating the parties through a restraining order is a primary tool of what the law has to offer, but it may not be what either party really wants. Or, more commonly, separation may not be economically feasible.

In yet other cases, pronouncing a separation may paradoxically undermine the reasons why people sought legal help for the problem. Immigration and asylum issues may be examples, or problems that arise within religious organizations or within indigenous ethnic groups. The parties may be seeking more peaceable affairs within a relationship—a relationship of location or a relationship of religious or tribal belonging—rather than a severing of that relationship. But the traditional methods of adjudication are not easily suited to supply that. They lack the proper techniques for getting at the truth within the relationship, or the power to order or supervise an effective remedy.

### III. HOW PREVENTIVE LAW AND PROBLEM SOLVING DIVERGE

#### A. Moving Earlier in the Life-Cycle of a Legal Problem

For the sorts of problems described within Part II above, the techniques of ADR and Problem-Solving Courts may be effective

9. *Id.*, at 223–225.

10. See generally Thomas D. Barton, *The Common Law and Its Substitutes: The Allocation of Social Problems Among Alternative*

*Decisional Institutions*, 63 N.C. L. REV. 519 (1985).

11. See *LAWYERING FOR THE FUTURE* at 177-180

tive and appropriate. These innovations differ from traditional litigation in how issues are defined, information gathered, decisions reached, and remedies effected.<sup>12</sup> Even though they rely less on legal rules and employ different understanding of the truth and how it is achieved, neither ADR nor Problem-Solving Courts seem to conflict with the meaning or strength of the rule of law. Preventive Law shares much with Problem Solving, but what *separates* the two helps to explain why acting preventively is easier for practicing lawyers than for sitting judges.

Preventive Law seeks to address *risks* before they become problems. Preventive Law differs from Problem Solving, in other words, by intervening earlier in the life cycle of a problem.<sup>13</sup> To do so, the preventive thinker must understand the underlying causes of problems. Those causes are often complex and subtle, emerging from systemic interactions of personal, social, and nonsocial environments. Ironically, the more complex the system that generates a risk, the more alternative initiatives might be available to disrupt that potential pathology.<sup>14</sup>

A biological analogy may be helpful. If a cold virus has infected Person A, then Person B who is in close contact with Person A is at risk of sneezing in the near future. If Person B recognizes the risk in time, however, preventive measures may be taken that will stave off actual illness. Even in this simple example, however, a variety of interventions could be effective. Person B could ask that Person A cover his or her mouth when coughing. Person B could wear a mask, or simply move out of range of Person A. Person B could take steps to build up his or her immune system.

For the preventive thinker, every human problem is nested originally in a set of interacting connections. The deeper the understanding of the various social, financial, civic, organizational, moral, or physical connections, the earlier and easier prevention becomes. Prevention depends on knowledge. The mechanisms of risks must be understood, the seriousness of the risks must be assessed, and alternative possible interventions must be generated and attempted.

The entire preventive inquiry and intervention is done ahead of any injury. This is crucial for general-jurisdiction judges and the extent to which they can act preventively because for *legal* problems, effective prevention would precede *any claim that a legal rule has been violated*. In that respect, Preventive Law diverges from ADR and Problem-Solving Courts. ADR assumes the existence of a dispute, which typically erupts out of a claim of the breach of some legal duty. Problem-Solving Courts similarly presuppose that a problem exists. Indeed, the problem may have long persisted before the defendant cooperates with a Problem-Solving Court.

This is not to say that ADR mechanisms and Problem-Solving Courts do not prevent problems. They do.<sup>15</sup> Frequently, they address an immediate injury, claim, or criminal behavior in such a way that the problem does not recur.<sup>16</sup> Problem-Solving Courts especially make a conscious effort to address the deeper

causes of the addiction or violence.<sup>17</sup> These courts then attempt to open up opportunities to break the destructive cycle in which the defendant seems trapped. The court may put the defendant in touch with social services, therapists, and potential employers. The court will monitor progress (or backsliding) by periodic reappearances to the court.

But something—a proper legal claim or criminal arrest—must initially prompt the courts to exercise their jurisdiction. In both court-annexed mediation and Problem-Solving Courts, the state has properly invoked its power. Thereafter, the matter is diverted to an alternative format that almost invariably is accompanied by some form of consent by the defendant or parties.

The traditional aim of Preventive Law, by contrast, is to gain some ability to examine and intervene in an environment at the risk stage before any matter is brought before the court. That is what Louis M. Brown, the father of Preventive Law, referred to as getting the matter while the facts were still “hot.” By that he meant that the environment was still manipulatable, so as to avert the path that seems to be leading to actual injury. When the facts grow cold, generally following actual injury, the range of possible alternatives shrink. They shrink in part because at this stage the damage has been done: a cognizable legal claim has been created.

To some extent, facts are always cold by the time they make it to a court. How could a court otherwise exercise jurisdiction? If the facts are still hot, a “case or controversy” may not yet have arisen. And if Preventive Law is effective, it never will.

Preventive Law is traditionally practiced within a law office as a lawyer counsels a client based on far-ranging conversations between lawyer and client.<sup>18</sup> When those conversations begin, neither the lawyer nor the client may have any idea about any *particular* legal risk. Indeed, there may be none. Brown advocated “periodic legal check-ups” between lawyer and client in which the lawyer would regularly be brought up to date with all of the client’s affairs. Much like regular medical check-ups, no risk may be detected. The inquiries of the physician and accompanying routine blood tests may turn up no areas for concern. Or, they may identify early warning signs for which preventive measures would be warranted. The point, of course, is to have the risk identified as early as possible so that treatment can be less intrusive and less expensive.

Preventive Law thus stresses the need for early consultation between lawyer and client. But it also emphasizes the importance for the lawyer to inquire as *broadly* as possible about the client’s affairs. The lawyer, by reason of training and experience, can spot legal risks far ahead of when they may be perceived by the client. But to be effective in fashioning suggestions for interventions that may avert the injury, the lawyer’s knowledge about the client’s larger environments must be broad. The preventive lawyer must understand legal risks not in isolation, but as part of a broader system of connections in the client’s world.

12. For a comprehensive comparison of traditional versus therapeutic or problem-solving courts court procedures and officers, see the chart at page 5 of JUDGING FOR THE 21ST CENTURY, *supra* note 1.

13. See LAWYERING FOR THE FUTURE at 49–54.

14. See *Id.*, at 55–78.

15. See JUDGING IN A THERAPEUTIC KEY, *supra* note 1, at 9.

16. Berman and Feinblatt, *supra* note 6, as *quoted Id.*, at 79.

17. *Id.*, at 18

18. LOUIS M. BROWN AND EDWARD A. DAUER, PLANNING BY LAWYERS: MATERIALS ON A NON-ADVERSARIAL LEGAL PROCESS 49–52 (1976).

## B. Obstacles to Preventive Actions by General-Jurisdiction Judges

This traditional practice of Preventive Law is not readily available to a general-jurisdiction judge. Judges in Problem-Solving Courts have, through consent of the parties, assumed a broad vision over the problem, its resolution, and the prevention of its recurrence. But the original legal jurisdiction of these judges under state or federal constitutional authority is not in question. If we set aside Problem-Solving Courts and focus on general-jurisdiction judges, the scope of preventive practices is not so broad.

First, as suggested above, traditional general jurisdiction courts react to claims that summon their authority. That authority is based on plausible legal rights, as stated in a complaint. Until a legally cognizable claim is stated—which most often must be based on some actual or imminent injury—courts may not act. This contrasts with lawyers who, in the private confines of their law offices, may freely counsel the client. The lawyer may investigate broadly and recommend a variety of legal and nonlegal preventive measures. In so doing, the private lawyer may communicate directly with potential adversaries or their attorneys.

A judge who became involved in a matter before the proper lodging of a claim about legal rights or duties would challenge several assumptions about the rule of law. First, a foundational principle of the rule of law is the *limitation* on state authority in making people answer to courts. That nexus is established through the idea of due process. How can a general-jurisdiction judge become legitimately engaged at the stage of legal risk rather than legal injury? The private lawyer is not an agent of the state; the judge is clearly part of its embodiment.

Second, Preventive Law is done best through conversations that are broad as well as early. The lawyer seeks to understand the client's affairs as fully as possible. But unfocused inquiries by a general-jurisdiction judge could further violate traditional understandings of the relationship between citizen and state. One important function of formal pleadings is to narrow legal inquiries as well as provide notice of the proceedings. Tying a judge's authority to pleadings avoids Star Chamber-style interrogations.

Relatedly, the adversarial system is still employed within general-jurisdiction courts. Unless a matter is diverted from that system, the articulation of legal issues and the application of legal rules are still premised on the arguments of opposing counsel. The inquisitorial processes of civil-law judges can create a strong rule of law. But that is simply a different judicial model from the Anglo-American heritage.

A final challenge to the rule of law stems from the premise that Preventive Law can intervene in multiple ways in a broadly envisioned system so as to disrupt pathological interactions or to enhance the connections to work better toward a client's

goals. Where *public* issues become involved, expansive proactive measures would not only challenge the court's supervisory capabilities, but also raise division-of-powers issues about the relationship of the judicial branch of government to the legislative and executive branches.<sup>19</sup>

## IV. HOW MAY A GENERAL-JURISDICTION JUDGE PARTICIPATE IN PREVENTIVE LAW?

The goals of Preventive Law have always been worthy. And as our society becomes more sophisticated about the complex systems in which risks are born and injuries erupt, Preventive Law is an idea whose time has come. How, therefore, may a general-jurisdiction judge participate? Convinced by the logic of prevention, how can judges act in ways that address risks before they cause injury?<sup>20</sup>

Some powers that are traditionally available to judges may be used for preventive purposes. This assumes, of course, that a case is properly before the judge. But once that happens, the judge has inherent powers that can help to uncover the precursors of additional problems. The judge can discover and act upon some sources of risk, friction, overreaching, and poor communication. The judge has powers of investigation, referral of issues for public prosecution or to Bar authorities, sanctioning attorneys, dismissal of unworthy claims, and persuasive authority in judicial-chambers settlement conferences. These powers may not work as easily or comprehensively as those available to the private lawyer counseling a client, but they nonetheless could be helpful and can be exercised well within the rule of law.

Acting preventively may not always feel comfortable, however, even where exercised under powers that are legitimately available to judges. In the examples below, consider whether you would feel authorized, and if so, whether you would feel at ease in taking the actions suggested.<sup>21</sup>

### Example 1:<sup>22</sup>

A judge is hearing the fifth example of the same sort of tort claim; each claim was brought by unrelated plaintiffs, but each claim was brought against the same industrial defendant. In each case, the plaintiff has lost, and the judge comes to believe it is because the individual plaintiffs will not be able to muster expert witnesses of the same caliber as those testifying on behalf of the defendant. Would it be appropriate for the judge to order the appointment of an independent neutral expert?

Now suppose that the judge were to attempt to make such an appointment, but several potential experts contacted had to refuse on conflict-of-interest grounds: They had previous connections with the defendant or had been contacted about the case already by the defendant. Would it be appropriate for the judge to order an

19. *But see* Berman and Feinblatt, *supra* note 6, as quoted in JUDGING IN A THERAPEUTIC KEY, at 82.

20. One significant step, although related only indirectly to prevention, could be to consider the courtroom demeanor eloquently described in JUDGING FOR THE 21ST CENTURY, *supra* note 1.

21. *See* LAWYERING FOR THE FUTURE at 297–299.

22. The author is indebted to retired Federal Magistrate James F. Stiven for his most helpful consultation on all of listed examples. Several of the alternative possibilities explored in these examples were supplied and developed by Judge Stiven.

investigation of the terms and practices by which research money has been funneled by the defendant over the past three years into academic institutions whose employees are now testifying for the defendant or unable to act as a neutral expert for the court?

*Example 2:*

In a private-nuisance case, mediation has been tried and failed. The case is scheduled for trial. When the judge reads the papers and is sitting in a pretrial settlement conference, the judge gets the strong impression that this is a grudge match: that the parties are being vindictive and self-destructive; that it is not about the plaintiff needing a remedy, but instead about each party wanting to secure a pronouncement that the other person is wrong. Suppose, however, that the plaintiff's claim has some technical legal merit. Is it appropriate for the judge in that instance to declare, off-the-record in chambers, that either the parties come to some compromise, or the judge will dismiss the complaint? Short of that, is it appropriate for the judge to schedule multiple settlement conferences? Delay the trial?

*Example 3:*

During a medical-malpractice trial, the judge comes to the suspicion that the defendant, a physician who was never called to testify, was impaired due to drug abuse. Before the trial is concluded, a settlement is reached that the judge is asked to approve. The consequences of the settlement are that the physician will remain in practice. Would it be appropriate for the judge to order a physical or mental examination of the defendant to determine drug dependency? Could the judge instead require the defendant, as a condition to the judge approving the settlement, to provide a sealed/confidential certification from a medical board that the defendant is fit to practice medicine?

*Example 4:*

Suppose that a plaintiff has been pursuing a civil action for sexual discrimination by her medium-sized business employer on a disparate-treatment theory. The jury awards damages to the plaintiff. In hearing the testimony, however, the judge believes that the work environment is hostile even though that theory was never pursued by the plaintiff's attorney. Would it be appropriate for the judge, following entry of judgment for money damages in favor of the plaintiff, to further order that every employee of the defendant undergo gender-sensitivity training on the theory that the risk of future sexual discriminations should be prevented?

Most of us, judges or lawyers, will reach a point of discomfort in considering the examples.<sup>23</sup> Most would see the worth of preventive action and the legitimacy of the judge's proposed action. And yet we know that the stakes are high. The rule of law is a treasure, and judges have a vital role in its maintenance.

Every society must construct some device for simultaneously advancing two vital social functions: facilitating human interaction, and protecting people from one another. Both functions are required for social existence. Historically, however, the two functions have been seen as conflicting: the more dense the human interaction, the greater the threat to self-protection. This may be conceived as the fundamental social dilemma. Our society has chosen to balance or manage these two functions through the rule of law: people are empowered to interact freely without constraints of caste or inherited role. But they are strongly protected in those interactions by being equipped with individual rights, which can be vindicated through carefully constructed and constrained legal rules and judicial determinations.

If we broaden the contexts by which the legal system evaluates human problems and accord greater discretion in general-jurisdiction judges to frame, investigate, and remedy problems, will the protective function of law be compromised? Or the human-interaction function? Or both?

But could such a broadening of our understanding of the general judicial role actually *strengthen* both functions, as arguably ADR and Problem-Solving Courts have done? It seems a possibility. Preventive Law imagines that human relationships inside as well as outside of the official legal system can, as they deepen or intensify, augment human protection. As Preventive Law presents itself to the judiciary alongside Problem Solving, these questions are worthy, even if as yet unanswerable.



Thomas D. Barton is the Louis and Hermoine Brown Professor of Law at the California Western School of Law in San Diego, where he serves as director of the Louis M. Brown Program in Preventive Law and as the coordinator of the National Center for Preventive Law. Barton teaches contracts law and problem-solving topics, and he has published articles in the fields of legal and political philosophy, legal sociology, and problem solving. He received his J.D. from Cornell University and a Ph.D. in law from Cambridge University.

23. The adversarial mentality runs deep within our culture, writes David B. Wexler, in *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263 (1999), as cited in William G. Schma, *Judging for the New Millenium*, 37 CT. REV. 4, 6 (2000).