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Purposes of Courts Reformulated

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In the winter 2016 edition of the *Court Manager*, Kent Batty challenged us to a discussion of Ernie Friesen's classic "Purposes of Courts."[1] In light of the evolving role of courts, it is indeed time that these Purposes be reviewed and reconsidered.

Mr. Batty makes an admirable start at adding new purposes to accommodate the evolving functions courts are now performing, and his call for more discussion is well taken. Mr. Friesen reportedly developed and synthesized the original Purposes by many, many discussions with judges and attorneys

throughout the country and hoped they would serve as a guide for members of the legal profession to contemplate their responsibilities as individual stewards of the law. The Purposes reflected the state of the court reform movement at that time, which was focused on the legal profession and not on the public and other court stakeholders.[2] Moreover, the Purposes need to be reexamined in the context of the advancements that have been made in court administration since the Purposes were first advanced, not the least of which has been the Trial Court Performance Standards, NACM Core Competencies, and the prominent work on procedural justice.[3]

The original Purposes are a list, which ranges from the aspirational, “to do individual justice in individual cases,” to the more mundane, “to make a formal record of legal status.” Who can object to doing “individual justice in individual cases”? But who determines that justice was done in individual cases, and how can accomplishment of that ideal be evaluated, even approximately? Philosophers have been debating the meaning of justice since before the time of Plato. Indeed, Oliver Wendell Holmes’s succinct response to a lawyer who sought justice for his client, “This is a court of law, young man, not a court of justice,” became so popular that it is now found on t-shirts. The closest we come to justice in practice is following law and the ancient principle of rule of law, treating “like cases alike.” In criminal cases that means people who commit similar crimes receive similar sentences, and in civil cases that means a consistency of result in similar cases so that business can be conducted with some notion of predictability.

Here is an attempt at reformulating Friesen’s Purposes, taking into account Mr. Batty’s critique, as well as the new developments that have occurred since the Purposes were originally formulated.

Purpose 1. To provide a forum for the IMPARTIAL resolution of legal disputes.

This is one of the original Purposes of courts that has held up well over time. This key purpose is clear, relevant, and understandable. A court is a place where disputes can be resolved IMPARTIALLY.[4] The addition of the word *impartial* is critical because it distinguishes how court decision making differs from decision making in other branches of government. The concept of impartiality is the “heart of the judicial process.”[5] Courts provide a forum where people can present their case, have their side of the argument thoughtfully considered, and have an impartial decision rendered.

Unlike other branches of government, where decision makers are expected to respond to constituent pressure, and may respond to lobbying influence, campaign contributions, etc., court decisions are based upon arguments and evidence presented in court by the parties. To be impartial, judges must be free to decide cases based upon the laws and facts of the case without any internal bias or external pressure. Ideally, a judge should be able to set aside his or her own personal beliefs, prejudices, and predilections and to make decisions based solely upon the law.

Impartiality is impossible unless judges are free from the external pressures of threats, intimidation, or fears of sanctions based upon the content of their decisions. In some places in the world, threats to impartiality can be direct and drastic, such as threats on a judge’s life. Other pressures may be more subtle, such as denial of salary increases, denial of promotions, or a lack of staff or equipment needed to do the job.

Purpose 2. To protect individuals and society from the abuse of power.

Mr. Batty’s expansion of the original Purpose, “to protect against arbitrary use of government power,” is well taken because it shows that in modern society the threat to individual liberty and freedom comes not only from government, but from other powerful societal entities, as well.

What I would like to add here is a tie between this purpose of courts and the first one. Courts can be a bulwark against overbearing government power because they are impartial decision makers, as noted above, but more importantly, because they base decisions on reasoned arguments publicly made. Consequently, the side with the best case should win, not the party with the most power, money, or influence. The two sides in a lawsuit may be unequal in terms of power, e.g., government versus an individual, a multinational corporation versus an individual, or a government agency versus a small business. Courts fill the need for an impartial forum to level the playing field. For a society with a commitment to political freedom, the fact that we put the state to an extreme burden of proof, and guarantee defendants access to fiercely independent lawyers, means we can generally prevent the state from imprisoning those whom it distrusts or fears. Similarly, a competitive society will look to forms of trial as the best means of enforcing compliance with contractual commitments and of deterring fraud.[6]

Impartiality is the connection with judicial independence that Mr. Batty struggled to reconcile with the original Purposes. Independence is not a way for courts to avoid accountability, but it is essential to preserve the courts' ability to make impartial decisions, a necessary precondition to have decisions made solely on facts and the law. Standard 3.3 of the Trial Court Performance Standards requires that court decisions be based on legally relevant factors consistently applied.[7]

Purpose 3: To provide a forum for the reconciliation of relationships and the rehabilitation of individuals.

This has not been a traditional purpose of courts, but it is certainly becoming one. It is not the resolution of disputes that courts are called upon to do, but the resolution of problems. Indeed, it is difficult to conceive of a societal problem that does not wind up in court for resolution. Many of these social issues have resulted in the creation of specialized courts to address them. Mr. Batty mentions these in conjunction with juvenile courts and at-risk youth, but this goes way beyond juveniles to what I would argue is a de facto new purpose of courts: the resolution of problems as opposed to providing justice in individual cases. Problem-solving courts seek to broaden the focus of courts from simply adjudicating cases to changing the future behavior of litigants and ensuring the well-being of the communities they serve.

Providing justice in individual cases emphasizes determining responsibility and then meting out consequences and punishment in criminal cases. The new problem-solving approach aims at the underlying problems that led to the crime. It focuses on protecting public safety by attacking directly the root causes of behavior, including alcohol and substance abuse. The NACM Core Competencies puts it this way:

> To promote coordination with justice, public health, social service, and other agencies to address common problems underlying the court's criminal and civil caseload, including substance use and mental health.[8]

Although it can be argued that the first problem-solving courts were created to deal with issues involving the family, particularly juvenile courts, these courts have experienced a resurgence in popularity with drug courts.[9] A second category of problem-solving courts focuses on other issues, though substance abuse may also be involved. These include courts dealing with mental illness, domestic violence, prostitution, gambling, illegal handguns, homelessness, truancy, and reentry.[10] Problem-solving courts have grown rapidly, and a recent survey of 960 court officials said it was "likely" that problem-solving courts would "abound" within the next ten years.[11]

Providing a neutral forum for the resolution of problems, without the fear and connotation of justice, is the flip side of protecting citizens from the abuse of power. It is the protection of vulnerable populations, which include not only the at-risk children mentioned by Mr. Batty, but the elderly and mentally disabled, who require assistance. While it is true that courts in these situations do not provide the addiction, counseling, and other services required to rehabilitate individuals or reconcile dysfunctional families, the authority of the court is absolutely essential to seeing that services are being provided to individuals in need. Research has shown that requiring treatment, even against the will of drug offenders, is effective, and courts provide the “hammer” (threat of punishment) to ensure that addicts attend treatment programs and that families of at-risk children receive counseling.

One more example of the differences in adjudication styles is presented to illustrate this proposed new purpose of courts. The traditional legal approach to handling caregivers suspected of abusing or neglecting their children would be to have police investigate, make an arrest if warranted, and then have the prosecutor charge the alleged perpetrator or perpetrators. The role of the court in this scenario is to determine guilt or innocence, based upon a high standard of proof, and to sentence the offender if guilt is established. The medical, or problem-solving, approach would view abuse more broadly as one of family dysfunction, and treat the entire family to determine if alternative coping mechanisms would improve interactions and reduce violence. The alleged perpetrator must be assured that admitting guilt will not lead to punishment, but to treatment, and that the treatment will be kept confidential. The purpose of the court here is not the traditional legal goal of adjudicating guilt or innocence and perhaps punishing the offender, but correcting the problem — in this case, creating the skills and access to support services to improve family harmony. The role of the court may also be expanded to ensure compliance with the agreed-upon treatment program, perhaps with the implied threat that if treatment is not completed successfully, other sanctions will be imposed.

Purpose 4. To separate persons convicted of serious offenses from society.

This is one of the original Purposes that remains as is. It focuses on court sentencing behavior derived from the concept of justice called “just deserts.” Although framed as protection of society, it is usually associated with punishment of the offender and comports well with doing justice in individual cases.

With punishment of the offense as the goal, consistency in sentencing is essential to ensure fairness among offenders convicted of similar offenses. This is one reason sentencing guidelines were established. Sentencing disparity detracts from the deterrent effect of sentences and reduces the potential for behavioral change. More importantly, the inconsistent application of penalties creates a public perception of unequal justice. Though accepting this purpose of sentencing as written, the original purpose, “to deter criminal behavior,” should be rejected. Unless we are defining deterrence as deterring further offenses by the same individual while incapacitated, how effective is harsh sentencing as a deterrent to others? More importantly, if the sentence is designed to “make an example” out of one offender in an attempt to deter others from committing similar offenses, how does that comport with doing “individual justice in individual cases?”

Purpose 5. To help rehabilitate persons convicted of a crime.

Again, this is one of the original Purposes left as is. It is interesting that it was prescient in that this Purpose anticipated the broader role of courts in rehabilitating individuals, which I have labeled Purpose 3.

Unlike the criteria of consistent sentencing used in Purpose 4, consistency cannot be used to measure effectiveness of treatment programs. By their very nature, treatments must be tailored to the individual to be successful, regardless of how others similarly situated were sentenced. Treatment and rehabilitation of

individuals requires diagnosis of the problem and development of an individualized treatment plan, which by its very nature is antithetical to treating like cases alike.[12] Treatments may be very different depending upon the individual, and rehabilitation may take different paths. A doctor may not prescribe the same medicine to two people even if they exhibit the same symptoms. For example, some individuals may be allergic to a medicine that is perfectly suited to another individual.

Reduction in recidivism is the primary way to evaluate the effectiveness of sentencing to treatment. Courts require feedback on the success rates of various treatment programs if they are to improve sentencing effectiveness.

Purpose 6. To promote public trust and confidence in the courts.

This is not a purpose of self-promotion, but a recognition of the basic fact that courts have neither the "sword nor the purse"[13] and so must rely upon their powers of persuasion and public respect to be viable as courts. Without that respect, court decisions would not be recognized as legitimate, and court orders would be difficult to enforce.

NACM recognizes public trust and confidence as a core competency fostered by transparency, integrity, and accountability. Courts encourage respect by being respectful to clients themselves, presiding over a forum where disputes can be resolved by having a transparent process open to the public so that the "appearance of justice in individual cases," as advocated by Friesen, is observed.

In a white paper for the American Judges Association, Judges Burke and Leben argue that, while continuing to pay attention to fair outcomes, judges should also "tailor their actions, language, and responses to the public's expectations of procedural fairness. By doing so, these judges will establish themselves as legitimate authorities."[14] Procedural fairness encompasses the concepts of:

- **Voice:** litigant opportunity to participate in the case and present their side of the issue;
- **Neutrality:** impartial decision makers consistently applying accepted legal principles transparently;
- **Respect:** judges treating all participants with dignity and respect;
- **Trustworthiness:** judges sincerely trying to help litigants by listening to individuals and explaining decisions.[15]

In rural areas, transparency may still be achievable by having people sit in courts to watch justice being done. In urban areas, that is not as easy to accomplish so the public must rely on media reports of court proceedings. To that end, many courts employ court information officers. Information officers must walk a thin line between reporting court proceedings and being seen as propagandists for the courts.

Standard 4.4 of the Trial Court Performance Standards calls for trial courts to inform the communities they serve about court programs, and all of Standard 5 looks at public perceptions of court accessibility, expedition, fairness, and independence.[16] User-satisfaction surveys are used in leading courts to help courts evaluate how they are perceived and how they might improve. The point is that courts need to foster constituent support to do their job effectively.

Purpose 7. To develop the law by clarifying principles and reconciling conflicting rulings.

Friesen's original Purposes did not consider how courts advance the development of law. Trial courts do this by the accretion of millions of decisions over time that sometimes produce new doctrines and de facto new law. Appellate courts try to harmonize conflicting trial-court rulings to make law more consistent and

predictable and, thus, a better guide to behavior. In this way, the accumulation of individual decisions in individual cases leads to the development of law itself in a way that is very different from enacting legislation.

Kent Batty has done us all a great service by calling for the expansion of the original Purposes. However, rather than simply adding additional purposes to the original ones, the Purposes need to be reformulated. I hope that this preliminary effort further encourages the thoughtful reexamination of the Purposes that Mr. Batty challenged us to reconsider. The reformulated Purposes themselves will need to be edited deliberately, not only for content, but also for style. As David Steelman observed in a personal communication, one of the reasons Ernie Friesen's Purposes lasted so long is that they are pithy, easily understood, and easily remembered.

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Victor E. Flango is the former vice president of Research and Technology at the National Center for State Courts, now retired. The author is indebted to Alexander Aikman and David Steelman, former National Center colleagues, for their insightful and thoughtful comments on the first draft of this article.

Notes

1. Kent Batty, "It's Time to Expand the Traditional "Purposes of Courts," *Court Manager* 31, no.4 (2016): 6-9.
2. In the words of Bob Tobin, "The reform agenda of the twentieth century was conservative, firmly rooted in the legal-judicial culture, and very introverted." Robert W. Tobin, *Creating the Judicial Branch: The Unfinished Reform* (Williamsburg, VA: National Center for State Courts, 1999), p. 195.
3. National Center for State Courts, *Trial Court Performance Standards with Commentary* (Washington, DC: Bureau of Justice Assistance, 1997); Tom R. Tyler, "Procedural Justice and the Courts," *Court Review* 44 (2009): 26-31.
4. Note that I chose the original formulation of this Purpose over Mr. Batty's revision of "final" resolution of disputes because not all cases are finally resolved in court, even after several appeals. Mr. Batty's discussion of his new purpose of "at risk" children provides an example of how some foster children are never placed in a permanent home, but merely "age out" of the system.
5. Theodore L. Becker, *Comparative Judicial Politics* (Chicago: Rand McNally, 1970), p. 26.
6. Jethro K. Lieberman, *The Litigious Society* (New York: Basic Books, 1981), p. 169.
7. National Center for State Courts, *supra* n. 3, p. 13.
8. National Association for Court Management, "Purposes and Responsibilities," CORE website.
9. See discussion as well as descriptions of specialized courts in Victor E. Flango and Thomas M. Clarke, *Reimagining Courts: A Design for the Twenty-First Century* (Philadelphia: Temple University Press, 2015), chap. 7. See also Lawrence Baum, *Specializing the Courts* (Chicago: University of Chicago Press, 2011).
10. See Douglas B. Marlowe, Carolyn D. Hardin, and Carson L. Fox, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem-Solving Court Programs in the United States* (Alexandria, VA: National Drug Court Institute, 2016).
11. Phil Knox and Peter C. Kiefer, "Future of the Courts: The Next Ten Years," Facebook page, November 23, 2015.
12. See Victor E. Flango, "Never the Twain Shall Meet: Why Problem-Solving Principles Should Not Be Grafted onto Mainstream Courts," *Judicature* 100 (2016): 30-36.
13. Alexander Hamilton, Federalist Papers No. 78, "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

14. Kevin Burke and Steve Leben, “Procedural Fairness: A Key Ingredient in Public Satisfaction,” *Court Review* 44 (2007-08): 4.
15. *Id* at 6. See also Tom R. Tyler, *supra* n. 3, pp. 26, 31-32; and Victor E. Flango, “Is Procedural Fairness Applicable to All Courts?,” *Court Review* 47 (2011-12): 92-95.
16. See National Center for State Courts, *supra* n. 3.

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