

# SHOULD PROBLEM-SOLVING COURTS BE SOLUTION-FOCUSED COURTS?

## ARTICLE

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## INTRODUCTION

SINCE THEIR EMERGENCE IN THE UNITED STATES FROM 1989 ONWARDS, DRUG courts, family violence courts, community courts, mental health courts, re-entry courts, and similar courts have become an established feature of a growing number of legal systems around the world, including the United States, Australia, Brazil, Canada, Ireland, New Zealand, and the United Kingdom.

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They form part of a wider trend towards a more humane, psychologically aware, and holistic approach to resolving legal problems. In the United States (U.S.), this approach has been called the “comprehensive law movement.”<sup>1</sup> In Australia, it has been called “non-adversarial justice.”<sup>2</sup>

The term “problem-solving court” is commonly used in relation to these courts because they seek a more comprehensive resolution of the legal problem by resolving underlying issues such as substance abuse, intimate partner violence, mental health issues, and other offending-related issues.<sup>3</sup> While there are differences in principles and practices between these courts, they share a common goal in seeking to promote positive behavioral change in participants in their programs. U.S. domestic violence courts are said to differ from other problem-solving courts in that they have been largely focused on protecting victims rather than promoting perpetrator rehabilitation.<sup>4</sup> However, insofar as they seek to stop intimate partner violence, they are seeking to promote positive behavioral change on the part of perpetrators.

Problem-solving courts seek to have a therapeutic effect in that they endeavor to assist participants to address underlying issues associated with wellbeing that have contributed to their offending or to their other legal problems. Some problem-solving courts see themselves as a form of treatment.<sup>5</sup> There is a natural fit between therapeutic jurisprudence and problem-solving courts given that therapeutic jurisprudence uses findings from the behavioral sciences to suggest ways in which the Law, legal processes and legal actors can minimize negative effects on wellbeing and promote positive effects on wellbeing—particularly in the context where the law itself seeks to promote wellbeing.<sup>6</sup> Mental health law, the rehabilitation of injured workers, addressing the problems of Indigenous communities, and offender rehabilitation are examples of where the law seeks to promote wellbeing. Increasingly therapeutic jurisprudence is influencing judging and other legal processes associated with problem-solving courts.<sup>7</sup>

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<sup>1</sup> Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE 465 (Dennis P. Stolle, et al. eds., 2000).

<sup>2</sup> MICHAEL KING ET AL., NON-ADVERSARIAL JUSTICE (2009).

<sup>3</sup> GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE (2005).

<sup>4</sup> *Id.* at 102.

<sup>5</sup> Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 473 (1999).

<sup>6</sup> David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125 (2000).

<sup>7</sup> See Hora, *supra* note 5; RICHARD D. SCHNEIDER ET AL., MENTAL HEALTH COURTS: DECRIMINALISING THE MENTALLY ILL (2007); Randal B. Fritzier & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 CT. REV. 28 (2000);

Yet, problem-solving courts did not emerge from therapeutic jurisprudence. Therapeutic jurisprudence emerged from the academy at about the same time as the first drug court was established in Dade County, Florida in the late 1980's.<sup>8</sup> That court was developed from practice to meet justice system failures to address the needs of offenders with substance abuse problems rather than from a considered theory based on research findings as to how people engage in positive behavioral change.<sup>9</sup> The connection between therapeutic jurisprudence and drug courts was made a decade later.<sup>10</sup> In the meantime, other problem-solving courts—such as mental health courts, community courts and domestic or family violence courts—had been introduced.

Therapeutic jurisprudence emphasizes the importance of self-determination in promoting wellbeing—including positive behavioral change.<sup>11</sup> It sees paternalism and coercion as likely to promote resistance to change.<sup>12</sup> Ultimately it sees the individual participant in a problem-solving court as being responsible for making positive behavioral change. Therapeutic jurisprudence holds that many of the problems faced by participants in problem-solving courts “will respond effectively to available treatment, but only if the individual perceives that he or she has a problem and is motivated to deal with it.”<sup>13</sup> Indeed, treatment is regarded as a means of assisting an individual's innate change processes.<sup>14</sup>

Yet the concept of a *problem-solving court* does not recognize the centrality of participants in bringing about their rehabilitation. Rather, it implies that it is the court that solves the problem. This is not simply an issue with terminology. An examination of the underlying principles of different types of problem-solving courts—with the exception of some mental health courts—suggests they give inadequate weight to or ignore the central importance of participants being involved in decision-making concerning their rehabilitation in order to foster internal sources of motivation to change. Rather than emphasizing the use of strategies that promote internal sources of motivation to change, the prime focus of most of these courts is on the use of external motivators of behavioral change, such as the application of sanctions (including imprisonment) and rewards.

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<sup>8</sup> For a discussion of the emergence of Therapeutic Jurisprudence, see DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE* (1990).

<sup>9</sup> The introduction of drug courts is discussed in Hora, *supra* note 5, at 448, 449.

<sup>10</sup> Hora, *supra* note 5.

<sup>11</sup> Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L. J.* 1005 (2003); see also *JUDGING IN A THERAPEUTIC KEY* (Bruce J. Winick & David B. Wexler eds., 2003).

<sup>12</sup> *JUDGING IN A THERAPEUTIC KEY*, *supra* note 11, at 18, 19.

<sup>13</sup> *Id.* at 8.

<sup>14</sup> WILLIAM R. MILLER & STEPHEN ROLLNICK, *MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE FOR CHANGE* (2d ed. 2007).

For example, in many drug courts rather than engaging participants in decision-making concerning the essential aspects of their rehabilitation program and the goals they wish to achieve, the judge uses his or her authority to leverage them into engaging with treatment programs determined by treatment professionals to address their substance abuse and promotes compliance through the use of sanctions and rewards.<sup>15</sup> Yet there is no research finding that this, rather than alternative judicial approaches, represents best judicial practice in promoting drug court outcomes. In drug courts where participant involvement in decision-making is recognized it is generally as a subsidiary practice depending on the attitude of the individual judicial officer and other court personnel.

If drug courts (and other problem-solving courts) are to be regarded as a form of treatment, then they should better recognize the critical role the participant plays in treatment and in processes of behavioral change. An approach to judging that recognizes the centrality of the individual in his or her behavioral change processes requires a significant shift in focus in judging from a style informed by the principle of judge as problem-solver. Conventional judging requires the judge to be the decision-maker, to be the problem-solver—albeit the problem and solution are defined within the narrow boundaries of the law. Moreover, judicial decision-making is generally based on processes, dominated in the main by lawyers, which commonly involve conflict and that use argumentation as a principle means of identifying the issues in dispute and ways in which they may be resolved. The role of court as problem-solver remains in problem-solving courts but the problem is defined more broadly to include underlying issues and in most cases the problem-solving role is shared with a multidisciplinary court team using collaborative rather than adversarial processes and involves a more active, interventionist approach by the judge than would be proper in a conventional court.

This article suggests that an approach to judging that supports participants' internal change mechanisms requires processes that focus less on the role of the judicial officer as problem solver and more on the judicial officer as facilitator and as a supporter of participants' self-efficacy, their ability to initiate and sustain positive behavioral change. Such an approach relies less on judicial leverage and more on using processes that are inclusive and empowering for participants. In addition, the processes should not only be collaborative in the sense of involving the judicial officer and court team in decision making, but also collaborative in involving participants in decision-making concerning their entry into and progress through a problem-solving court program.

In addition, this article explores the process of behavioral change required to address underlying issues relating to legal problems, critiques the concept of a *problem-solving court*, considers the principles underlying the problem-solving

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<sup>15</sup> Hora, *supra* note 5; see also Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717 (2008).

judicial approach and the principles of a number of types of problem-solving courts, and suggests directions for reform. It also suggests strategies to enhance participants' internal change mechanisms that judges can use when presiding in problem-solving courts and, where possible, in mainstream lists. It argues that in most cases the use of court strategies that promote internal mechanisms of change are likely to be more effective in promoting participants' long term positive behavioral change than strategies that rely primarily on external sources of motivation—such as judicial leverage and sanctions—which are no longer applicable once a problem solving court program has been completed.

The lens through which this examination takes place is the therapeutic jurisprudence principle of the self-determination and findings relating to the process of positive behavioral change. The article draws on a broad range of sources in the areas of strengths-based and solution-focused approaches to psychological health and offender rehabilitation.<sup>16</sup>

While this article is critical of the term *problem-solving court*, for convenience it will use that term to describe drug courts, family violence courts, community courts, mental health courts and similar courts that are seen to take a problem-solving approach.

#### I. THERAPEUTIC JURISPRUDENCE, BEHAVIORAL CHANGE AND PROBLEM-SOLVING COURTS

Therapeutic jurisprudence asserts that laws, legal processes, and legal actors can affect the wellbeing of those involved in or affected by them.<sup>17</sup> It suggests that findings from the behavioral sciences can be used to reform the law and legal processes to minimize negative side effects on wellbeing and to promote justice system goals related to wellbeing. One such goal is offender rehabilitation. Given that problem-solving courts commonly seek to promote wellbeing in the form of offender rehabilitation and/or the promotion of the wellbeing of victims, it is natural that a significant application of therapeutic jurisprudence is the work and processes used by problem-solving courts.

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<sup>16</sup> See Michael King & Becky Batagol, *Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts*, 33 INT'L J.L. & PSYCHIATRY 406 (2010); STEVE DE SHAZER & YVONNE DOLAN, MORE THAN MIRACLES: THE STATE OF THE ART OF SOLUTION-FOCUSED BRIEF THERAPY (2007); Shadd Maruna & Thomas P. LeBel, *Welcome Home? Examining the "Reentry Court" Concept from a Strengths-Based Perspective*, 4 W. CRIMINOLOGY REV. 91 (2003), available at <http://wcr.sonoma.edu/v4n2/manuscripts/marunalebel.pdf>; Michael D. Clark, *Change-Focused Drug Courts: Examining the Critical Ingredients of Positive Behavioral Change*, 3 NAT'L DRUG CT. INST. REV. 35 (2001); Winick, *supra* note 11; JUDGING IN A THERAPEUTIC KEY, *supra* note 11.

<sup>17</sup> WEXLER, *supra* note 8; JUDGING IN A THERAPEUTIC KEY, *supra* note 11.

## II. THERAPEUTIC JURISPRUDENCE AND BEHAVIORAL CHANGE

The starting point for a therapeutic jurisprudence approach in relation to judging in a problem-solving court is encapsulated in the following passage from Winick:

[T]he problem solving judge cannot simply order the individual to recognize the existence of the [offending-related] problem and to obtain treatment. People must come to these realizations for themselves. Therefore problem solving court judges must understand that although they can assist people to solve their problems, they cannot solve them. The individual must confront and solve her own problem and assume the primary responsibility for doing so.<sup>18</sup>

From a therapeutic jurisprudence perspective, this understanding should also inform the work of lawyers and other professionals operating in problem-solving courts: they can assist clients in the process of understanding their problems and formulating and implementing solutions but ultimately it is the client who is responsible for the process.

This understanding is grounded in theory and research in the behavioral sciences concerning deliberate behavioral change. A key principle is that deliberate behavioral change is natural.<sup>19</sup> Indeed a significant number of people address problems such as substance abuse without the involvement of treatment agencies or the courts.<sup>20</sup> In the substance abuse literature this phenomenon has been referred to by various names such as “natural change” and “self-change”.<sup>21</sup>

There is also evidence that some perpetrators of domestic violence desist from offending without formal treatment.<sup>22</sup> Indeed, some criminologists suggest that much of the desistance from crime occurs outside of the context of a criminal justice system intervention.<sup>23</sup> As Farrall observes: “[I]f the desistance literature demonstrates anything, it is this: that people can, and regularly do, stop offending without the assistance of any of the branches of the criminal justice system.”<sup>24</sup>

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<sup>18</sup> Winick, *supra* note 11, at 1067.

<sup>19</sup> MILLER & ROLLNICK, *supra* note 14, at 4.

<sup>20</sup> Carlo C. DiClemente, *Natural Change and the Troublesome Use of Substances: A Life Course Perspective*, in *RETHINKING SUBSTANCE ABUSE: WHAT THE SCIENCE SHOWS AND WHAT WE SHOULD DO ABOUT IT* 81 (William R. Miller & Kathleen M. Carroll eds., 2006).

<sup>21</sup> PROMOTING SELF-CHANGE FROM ADDICTIVE BEHAVIORS: PRACTICAL IMPLICATIONS FOR POLICY, PREVENTION AND TREATMENT (Harald Kingemann & Linda Carter-Sobell eds., 2007).

<sup>22</sup> Jukka-Pekka Takala, *Spontaneous Desistance from Crime*, in *PROMOTING SELF-CHANGE FROM ADDICTIVE BEHAVIORS: PRACTICAL IMPLICATIONS FOR POLICY, PREVENTION AND TREATMENT*, *supra* note 21, at 127.

<sup>23</sup> TONY WARD & SHADD MARUNA, *REHABILITATION: BEYOND THE RISK PARADIGM* 12 (2007).

<sup>24</sup> STEPHEN FARRALL, *RETHINKING WHAT WORKS WITH OFFENDERS: PROBATION, SOCIAL CONTEXT AND DESISTANCE FROM CRIME* 25 (2004).

In practice, while natural change is thought to be self-directed it is likely also to be assisted by external factors such as family and social supports and motivations and particular life experiences—such as loss of a family member or friend. After all, life in society is rarely, if at all, free from external influence. Indeed, a combination of social and personal factors—such as past sexual abuse, dysfunctional family, loss of employment, relationship breakdown, a lack of social support—is likely to have contributed to the development of offending-related problems and some other law-related problems in the first place.

According to DiClemente, although recovery from substance abuse is a unique personal journey, it involves the accomplishment of specific tasks:

Substance users have to become *concerned* about the need to change, become *convinced* that the benefits of change outweigh the costs provoking a decision to change, *create* and *commit* to a viable and effective plan of action, *carry out* the plan by taking the actions needed to make the change, and *consolidate* the change into a lifestyle that can sustain the change.<sup>25</sup>

These are tasks recognized in the most prominent theory of deliberate behavioral change—particularly in the area of addressing substance abuse—the transtheoretical stages of change theory.<sup>26</sup> According to this theory individuals have the innate ability to change their behavior. It asserts that there are particular stages involving discrete cognitive, affective and motivational processes that form part of behavioral change for all individuals. These tasks, identified in the above quote, relate in order to the stages of change—precontemplation, contemplation, preparation, action and maintenance.

The transtheoretical stages of change theory suggests that these tasks and stages are involved in both self-change and in treatment assisted change. DiClemente suggests that self-change is present even when a person is involved in treatment.<sup>27</sup> He describes the relationship between self-change and treatment assisted change as follows: “Natural change and the process of self-change is the larger context of recovery. Treatment is a time-limited, circumscribed experience that interacts with and hopefully enhances the self-change process on the way to recovery.”<sup>28</sup>

Thus, the process of treatment-assisted behavioral change draws on the assistance gained in the specific treatment program as well as other self-initiated strategies that the individual may apply—including making use of social supports and relapse prevention strategies.<sup>29</sup> From this perspective it is not the therapist

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<sup>25</sup> DiClemente, *supra* note 20, at 82.

<sup>26</sup> James O. Prochaska et al., *In Search of How People Change: Applications to Addictive Behaviors*, 47 AM. PSYCHOL. 1102 (1992).

<sup>27</sup> DiClemente, *supra* note 20.

<sup>28</sup> *Id.* at 92.

<sup>29</sup> *Id.* at 91.

or other treatment provider that changes the client's behavior. Rather, it is the client who implements behavioral change with the assistance of the treatment provider and possibly with the assistance of other supports.

Brief interventions and motivational interviewing are commonly used to promote motivation to address substance abuse problems such as alcohol abuse.<sup>30</sup> Miller, writing in the context of addressing alcohol abuse, suggested that the elements of effective intervention are:

1. Feedback regarding personal status, relative to norms, of drinking and its consequences.
2. Responsibility for change is left with the client, honoring the person's autonomy.
3. Advice and encouragement to reduce or stop drinking.
4. Menu of options for how to change one's drinking.
5. Empathic counseling style that listens to the client.
6. Support for self-efficacy, and optimism about the possibility for change.<sup>31</sup>

### III. THERAPEUTIC JURISPRUDENCE AND STRATEGIES TO PROMOTE CHANGE

These elements are also seen by therapeutic jurisprudence to be an important aspect of how problem-solving court judicial officers should approach their work. Therapeutic jurisprudence says that coercion and paternalism should be avoided as they promote resistance to change whereas giving choice can promote the change process:

Self-determination is an essential aspect of psychological health. Moreover, if individuals who make their own choices perceive them as non-coerced, they will function more effectively and with greater satisfaction. People who feel coerced, by contrast, may respond with a negative psychological reaction, and may experience various other psychological difficulties.<sup>32</sup>

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People resent others treating them as incompetent subjects of paternalism, and suffer diminished sense of self-esteem and self-efficacy when not permitted to make decisions for themselves.<sup>33</sup>

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<sup>30</sup> *E.g.*, MILLER & ROLLNICK, *supra* note 14.

<sup>31</sup> William R. Miller, *Motivational Factors in Addictive Behaviors*, in *RETHINKING SUBSTANCE ABUSE: WHAT THE SCIENCE SHOWS AND WHAT WE SHOULD DO ABOUT IT*, *supra* note 20, at 134, 146.

<sup>32</sup> Winick, *supra* note 11, at 1072-73.

<sup>33</sup> *Id.* at 1077.



Therapeutic jurisprudence sees choice as important in promoting intrinsic motivation.<sup>34</sup> Intrinsic motivation involves acting because the activity itself is interesting and spontaneously satisfying.<sup>35</sup> If a defendant “participates in the program only because of extrinsic motivation, then it will be less likely that she will internalize the program goals and genuinely change her attitude and behavior.”<sup>36</sup> The use of sanctions and rewards are a clear example of extrinsic sources of motivation.<sup>37</sup> Moreover, research has found that intrinsic motivation is associated with greater performance, health, and wellbeing.<sup>38</sup>

For therapeutic jurisprudence, choice should extend to whether the person participates in a problem-solving court program and, where possible, the content of that program.<sup>39</sup> That is, a number of treatment options could be presented to and/or suggested by clients who would then draw from those options to formulate their rehabilitation plan.<sup>40</sup>

Therapeutic jurisprudence sees an individual with a legal problem—including participants in problem-solving court programs—as an important source of understanding as to how the legal problem and any underlying issues arose and what must be done to resolve them.<sup>41</sup> Accordingly it suggests that justice system professionals should use processes that promote participants’ active involvement in decision-making concerning their rehabilitation and that support their self-efficacy, their ability to implement change strategies.<sup>42</sup>

Engaging with participants, promoting their self-expression, giving them space in which to tell their story, actively listening to them, treating them with respect, expressing support for their rehabilitation plans, and expressing empathy when appropriate are important aspects of this approach.<sup>43</sup> Therapeutic jurisprudence draws on procedural justice research, motivational interviewing, and other behavioral science findings and practices to inform its approach.<sup>44</sup>

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<sup>34</sup> *Id.* at 1073.

<sup>35</sup> Edward L. Deci & Richard M. Ryan, *Facilitating Optimal Motivation and Psychological Well-Being Across Life's Domain*, 49 CAN. J. PSYCHOL. 14, 15 (2008).

<sup>36</sup> Winick, *supra* note 11, at 1073.

<sup>37</sup> Deci & Ryan, *supra* note 35, at 15.

<sup>38</sup> *Id.*

<sup>39</sup> Winick, *supra* note 11; MICHAEL S. KING, SOLUTION-FOCUSED JUDGING BENCH BOOK (2009), available at <http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>.

<sup>40</sup> David B. Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders “Make Good”*, 38 CT. REV. 18 (2001); Winick, *supra* note 11.

<sup>41</sup> JUDGING IN A THERAPEUTIC KEY, *supra* note 11; KING, *supra* note 39.

<sup>42</sup> *Id.*

<sup>43</sup> Winick, *supra* note 11, at 1068.

<sup>44</sup> See Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU. L. REV. 433 (1992-1993) in relation to procedural justice research; MILLER & ROLLNICK, *supra* note 14, regarding motivational interviewing; and Winick, *supra* note 11;

Therapeutic jurisprudence suggests that confrontational, argumentative, and coercive or paternalistic judicial approaches are likely to be counter-productive in most situations.<sup>45</sup> It therefore suggests the use non-confrontational and non-argumentative approaches to dealing with participants' resistance to change and to promote their progress through the different stages of change.<sup>46</sup> The final section of the article considers the application of these techniques to judging.

A therapeutic jurisprudence approach does not elevate participant self-determination above all other values promoted by a problem-solving court.<sup>47</sup> It recognizes that the justice system and the community have a legitimate say in how legal problems—particularly offending-related problems—are resolved. Thus, participants' self-determination is exercised in the context of a collaborative approach to addressing participants' problems, where the judicial officer and members of the court team engage with participants in the development of rehabilitation plans and in addressing problems as they arise.

Further, therapeutic values relating to individual participants must be considered in the light of other values such as maintaining the integrity of the court program, promoting participant accountability for their actions, and following the provisions of statute and the common law.<sup>48</sup> At times these other values take precedence. Thus, sometimes a court does take a coercive or paternalistic approach to a participant where other approaches have failed or there is no alternative.<sup>49</sup> Participants who seriously and/or consistently breach program conditions are removed from the program.

Taking a therapeutic jurisprudence approach to judging in a problem-solving court has been compared to transformational leadership.<sup>50</sup> Transformational leadership promotes a broad vision whereby the individual goals of followers may be achieved.<sup>51</sup> It uses strategies that inspire creativity, intellectual stimulation, and motivation.<sup>52</sup> Therapeutic jurisprudence techniques of participant goal setting and formulation of rehabilitation plans in problem-solving court fall neatly within this concept. The mentoring approach of transformational leadership can be seen in the keen interest judicial officers show in the partic-

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JUDGING IN A THERAPEUTIC KEY, *supra* note 11, and KING, *supra* note 39, regarding the application of therapeutic principles to judging.

45 Winick, *supra* note 11; JUDGING IN A THERAPEUTIC KEY, *supra* note 11; KING, *supra* note 39.

46 Winick, *supra* note 11, at 1080; Astrid Birgden, *Dealing with the Resistance Criminal Client: A Psychologically-Minded Strategy for more Effective Legal Counseling*, 38 CRIM. L. BULL. 225 (2002).

47 Wexler, *supra* note 6.

48 KING, *supra* note 39, at 197-99.

49 Michael S. King, *Problem-Solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership*, 17 J. JUD.ADMIN. 155 (2008); KING, *supra* note 39.

50 King, *supra* note 49.

51 *E.g.*, BERNARD M. BASS & RONALD E. RIGGIO, TRANSFORMATIONAL LEADERSHIP 6 (2d ed. 2006).

52 *Id.*; King, *supra* note 49.

ipants of problem-solving courts, the demonstration of their trust in the participants, and in the support and encouragement judicial officers provide them.

As these problem-solving courts are operating as therapeutic agents—in seeking to promote wellbeing—it is important that they appreciate the nature and extent of their function. Problem-solving courts do not change participants' behavior. When applying therapeutic jurisprudence, they provide a supportive environment and assistance to enhance participants' self-change processes. Like the different forms of treatment, they should be considered to be time-limited interventions designed to promote and support the natural process of change.

#### IV. THE PROBLEMATIC NATURE OF “PROBLEM-SOLVING COURTS”

The concept of court as problem solver pervades the legal literature concerning the approach of drug courts, family violence courts and community courts. It is also manifest in the core components of each of these kinds of courts. Yet the discussion in the previous section concerning the nature of positive behavioral change suggests that this concept of court as problem solver is flawed. This section of the paper firstly explores the difficulties in the concept, gives examples concerning how those difficulties arise in the legal literature, and in court practice and then considers implications from research on problem-solving courts.

#### V. THE IMPLICATIONS OF PROBLEM SOLVING

A possible implication of the name “problem-solving court” is that it is the court that solves participants' problems rather than the participants themselves.<sup>53</sup> In that regard, problem-solving courts could be considered to be little different from a conventional court in that in both courts, litigants/participants hand over their problem to the court for decision-making and resolution. Both types of court are dealing with legal problem solving.

However, the problem-solving court defines the problem more broadly than the mainstream court. The mainstream court ascertains whether the established facts fit into a particular category of legal problem—a criminal offence, tort, breach of contract or family law issue—and determines the appropriate remedy (if any). The problem-solving court seeks to address the legal issues but also seeks to address the underlying issues—such as substance abuse problems, mental health issues or family violence—that have caused the legal problem.

In taking an approach that sees the court as problem-solver, there is a risk of paternalism, a risk that a message—implicit or explicit—will be conveyed to participants that they lack the ability to address their problems and that they need an external authority to solve their problems for them. There is a kernel of truth in this assertion in that many offenders coming into problem-solving court pro-

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53 KING, *supra* note 39.

grams are caught up in a cycle of offending that regularly brings them into contact with the justice system. However, the fact that they are caught in such a cycle does not mean that they lack insight into their problems or any problem-solving skills at all, simply that the unique combination of internal and/or external conditions that promote positive behavioral change in their situation are lacking in some respects.

It is not in participants' or the community's interests to promote participants' self-concept of dependency, to entrench in them the understanding that they must necessarily look to an external authority to resolve their problems for them. A risk in such approach is that when the external source of support is withdrawn—such as when a problem-solving court program has been completed—a participant may lack the self-efficacy to address further problems as they arise. The justice system should be empowering people to resolve their present and future problems, to promote their self-efficacy, to draw on social supports and treatment services where needed and only resort to the justice system where other remedies have failed or where only a justice system remedy is appropriate.<sup>54</sup>

The term *problem-solving court* also does not take into account the variety of personal circumstances of the participants coming before the court. They may well be at different stages of change. Some participants may be simply thinking about whether to change or not and the opportunity to engage in a problem-solving court program may tip the decisional balance in favor of change. Some may have resolved their ambivalence about change and decided to take steps to address their offending-related problems but not progressed further. The court program could then provide support for the formulation and implementation of a rehabilitation plan.

However, other participants may have already decided to change and formulated a plan for behavioral change. Some participants may not have implemented the plan prior to coming before the court. Others may have already begun to implement it—such as by moving into supportive accommodation, commencing treatment programs, and initiating more positive contact with family and friends and other sources of support. Indeed, if a therapeutic jurisprudence-oriented lawyer is representing them, it is probable that participants will have implemented change already and have submitted a rehabilitation plan to the court.<sup>55</sup> A problem-solving court program provides a supportive environment for them to build on the work they have already done to address their underlying issues.

It is also important to consider the end point of a participant's involvement in a problem-solving court program in considering the change process. The behavioral change process may not be completed by the time a participant gradu-

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<sup>54</sup> See Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54 (2000) (concerning the role of a court in empowering litigants to solve their problems).

<sup>55</sup> Wexler, *supra* note 40; REHABILITATING LAWYERS (David B. Wexler ed., 2008).

ates from the problem-solving court program. For example, some participants may still be in the maintenance stage of change, requiring their continued use of relapse prevention strategies and other supports long after their time in the court program has ended. Some may not have progressed beyond the action stage of change. There may also be participants who are terminated from the program and imprisoned due to non-compliance with the court program but when released from prison apply what they learned in the program and put their lives back on track.

The concept of the court as problem solver does not do justice to these different nuances of participant experience, their decision-making and problem-solving abilities and the importance of the work they have done or will do in undertaking behavioral change. A participant may have begun the change process well before coming into a problem-solving court and may need to continue to engage in the process of change, the process of solving the problem well after participating in the court program.

It is conceded that the courts falling within the category of *problem-solving court* do not bear that name. Instead they are called *drug courts*, *family violence courts*, *domestic violence courts*, *mental health courts*, *community courts*, *neighborhood justice centers*, and so on. Yet the notion that they are problem-solving courts guides the approach that the courts and their personnel take in their work and the approach they take can potentially exert a significant influence on participant outcomes.<sup>56</sup>

## VI. THE LITERATURE ON PROBLEM-SOLVING COURTS

The issue concerning whether participants in problem-solving court programs are actively involved in decision-making or whether decisions are made for them is not confined to the implications that may be drawn from the term *problem-solving court*. The literature concerning the approach these courts should take also gives rise to this issue.

For example, chief judge Judith Kaye described why New York introduced a problem-solving approach in its courts:

Conventional case processing may dispose of the legal issues in these cases but it does little to address the underlying problems that return these people to court again and again. It does little to promote victim or community safety. In too many cases, our courts miss an opportunity to aid victims and *change the behavior of offenders*. So we started to ask ourselves whether the courts' interventions in these cases could be more constructive- whether it was possible to use our time and resources to help break the cycle, to stop the downward spiral.<sup>57</sup>

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<sup>56</sup> KING, *supra* note 39.

<sup>57</sup> Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 129 (2004) (emphasis added).

Similarly, Simon observed that in the proactive judging that takes place in problem-solving courts “judicial authority is actively used to solve problems and change litigant’s behavior.”<sup>58</sup>

Berman and Feinblatt describe the difference between mainstream judging and lawyering and the judicial and lawyering approach in problem-solving courts as follows:

For problem-solving courts and attorneys, a case is a problem to be solved, not just a matter to be adjudicated. Moreover, instead of seeing each case as an isolated incident, judges and attorneys in problem-solving courts analyze the cases in front of them for patterns and then fashion responses that seek to change the behavior of offenders, enhance the safety of victims and improve the quality of life in our communities.<sup>59</sup>

The implication from these passages is that the concept of court as problem-solver involves courts changing the behavior of offenders. The offenders’ own internal cognitive, motivational, and affective processes and outward efforts are not recognized as central to the process of their behavioral change.

Chief Judge Kaye describes the elements of problem-solving courts in these terms:

While problem-solving courts can, and do, vary greatly from place to place, the good ones all share some key elements. First is careful planning involving the usual courtroom participants, like prosecutors and defenders, as well as a broad spectrum of social service agencies and community groups we refer to as “stakeholders.” Second, and equally important, is having an assigned judge to ensure both continuity in the courtroom and expertise in the issue at hand, be it addiction, domestic violence or neighborhood crime. Third, in one way or another, problem-solving courts all employ close judicial monitoring—a luxury that most of our teeming urban courts simply do not have. Requiring regular court appearances by the parties involved in a case reinforces a message of accountability to defendants and to “the system.” Just as important, regular appearances provide comprehensive, up-to-date information so the judge can make better decisions in individual cases.<sup>60</sup>

Here participation is not concerned so much with participants as with lawyers and treatment, and other community agencies; the expertise in relation to participants’ problems is the province of the judicial officer; and judicial monitoring is about holding participants accountable and allowing judicial officers to do their job better. In her article, Chief Judge Kaye does refer to involvement of participants in problem-solving courts but in the context of preserving due process rights and giving participants in drug court the choice whether to enter a

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<sup>58</sup> Leonore M.J. Simon, *Proactive Judges: Solving Problems and Transforming Communities*, in *HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS* 449, 452 (David Carson & Ray Bull eds., 2d ed. 2007).

<sup>59</sup> BERMAN & FEINBLATT, *supra* note 3, at 5.

<sup>60</sup> Kaye, *supra* note 57, at 129-30.

drug program<sup>61</sup>—where treatment is mandated and promoted through the use of external sources of motivation such as sanctions and rewards—rather than being actively involved in presenting insights into the causes of their offense and being actively involved in formulating solutions.

## VII. EFFECTIVE JUDGING FOR BUSY JUDGES

The publication *Effective Judging for Busy Judges* provides a useful guide to judicial officers concerning principles of problem-solving judging.<sup>62</sup> Again, its focus is on the court as problem-solver rather than participants as sources of solutions who actively engage in decision-making processes—whether court or otherwise—concerning their rehabilitation. It notes that problem-solving judging combines a focus on process and outcome. According to *Effective Judging for Busy Judges*:

Combining a process focus with an outcome focus may require a cultural change in the court. This cultural change needs to include all the primary parties involved in the case (e.g., the attorneys on both sides; the staff in the courtroom, including the clerk, bailiff and court reporters; probation officers; family court counselors; or others who may be involved in the hearings). It will be helpful to meet with all principal participants, go over with them what you intend your approach to be, and seek their input and suggestions before moving forward.<sup>63</sup>

It would appear that defendants do not come within the definition of *primary parties*.

*Effective Judging for Busy Judges* acknowledges the importance of judicial interaction with participants but in a limited way. For example, it suggests that judicial officers wishing to take a problem-solving approach ascertain whether a person has a problem susceptible of such an approach by asking the following questions:

Question 1:

Do you have special problems such as substance abuse, homelessness or mental illness that I should know about with regard to this case?

Question 2:

Do you have a case manager, counselor, therapist, or psychiatrist in the community? If so, when will you see this person next?

Question 3:

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<sup>61</sup> *Id.*

<sup>62</sup> NATIONAL JUDICIAL COLLEGE, *EFFECTIVE JUDGING FOR BUSY JUDGES* (2006), available at [http://www.judges.org/pdf/effectivejudging\\_book.pdf](http://www.judges.org/pdf/effectivejudging_book.pdf).

<sup>63</sup> *Id.* at 7.

Does anyone in your family or with whom you live have issues with alcohol or other drugs, or mental health?

Question 4:

Do you have a guardian, conservator, or payee?

Question 5:

Was there another person harmed physically or property damage in this case and, if so, what was the damage?<sup>64</sup>

Most of these questions can be answered *yes* or *no*. They are closed rather than open questions. Judicial officers can use open questions to promote dialogue with participants whereas if they use closed questions it will generally limit dialogue with participants.<sup>65</sup> The questions suggested by *Effective Judging for Busy Judges* do not invite participants to present their views as to why a problem has arisen and what must be done to put things right or to describe the efforts they have already made to address the problem.

Similarly the elements of a problem-solving judging approach outlined in *Effective Judging for Busy Judges* do not include the empowerment of participants. However, *Effective Judging for Busy Judges* does encourage judges to use “dialogue (i.e., active listening, good questions, feedback, and affirmation) to motivate behavioral changes.”<sup>66</sup> It refers to judicial use of behavioral modification techniques.<sup>67</sup> However, it does not specifically acknowledge that individuals are the prime source for their behavioral change.

### VIII. DRUG COURTS

The exclusion of the active role of participants in managing their positive behavioral change process as an important element of problem-solving courts is not only a feature of much of the general literature on these courts, it can also be readily seen in the formulation of the elements of most problem-solving courts. For example, the oft quoted list of ten components that are said to be essential for drug courts:

1. Drug courts integrate alcohol and other drug treatment services with justice system case processing.
2. Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights.

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<sup>64</sup> *Id.* at 8.

<sup>65</sup> KING, *supra* note 39, at 125-26.

<sup>66</sup> NATIONAL JUDICIAL COLLEGE, *supra* note 62, at 9.

<sup>67</sup> *Id.* at 12.



3. Eligible participants are identified early and promptly placed in the drug court program.
4. Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs drug court responses to participants' compliance.
7. Ongoing judicial interaction with each drug court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
9. Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.
10. Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.<sup>68</sup>

On the face of it, the wording of these components suggests processes that happen to or around participants or processes in which they have no direct connection rather than processes in which they have a role in decision-making. It is the court, prosecution and defense counsel, and agencies that are the decision-makers according to these components, with participants being the reactive elements. It is the court or court team that identifies eligible participants and places them in the court program. It is the court that integrates the processing of participants' cases with treatment services. Even the expression of judicial interaction with participants does not reflect the richness of interaction that can flow from participants being actively involved in initiating dialogue, problem solving, and decision-making.

Indeed, a critical part of this interaction is seen to be the court *leveraging* participants to comply with the court program through the use of a carrot and stick approach, an approach in which, arguably, there is a degree of implicit coercion—even though a person may have consented to take part in the program.<sup>69</sup> The imposition of sanctions and rewards is considered to be an important part of the judicial role in drug courts. Imprisonment is one of the key sanctions used by drug courts in the United States. Although imprisonment is regarded as ineffective in addressing substance abuse problems when imposed by a mainstream court, proponents view imprisonment imposed by a drug court as a sanction that can have therapeutic effects.<sup>70</sup>

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68 BUREAU OF JUSTICE ASSISTANCE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (2004), available at <http://www.ncjrs.gov/pdffiles1/bja/205621.pdf>.

69 This approach is discussed by Hora, *supra* note 5 and HORA & STALCUP, *supra* note 15.

70 *Id.*

Apart from the use of sanctions and rewards, there is significant variability between drug courts concerning the judicial approach. Nolan gives examples of some drug court judges taking a confrontational approach, lecturing participants and demeaning participants in order to promote compliance.<sup>71</sup> Each of these tactics demonstrates a resort to external sources of motivation to change participant behavior and does not respect the autonomy of the individual.

It is noteworthy that the list of drug court components refers to due process rights of participants. Due process rights—or as they are called in some common law jurisdictions outside the United States, “principles of natural justice” —were developed in the context of the adversarial system where the court makes the decision in a case after hearing from the parties. As can be seen from procedural justice research, these rights have therapeutic implications, which are acknowledged by therapeutic jurisprudence.<sup>72</sup> Where court gives parties the space to tell their story, listens to what they say, demonstrates concern for their situation, and treats them with respect, then the parties are more likely to be satisfied with the court experience and comply with court orders.<sup>73</sup> However, due process rights do not encompass to the fullest degree the participants’ active involvement in decision-making suggested by therapeutic jurisprudence. They are more concerned with a participant’s right to be heard and to be dealt with by an impartial court than being actively involved in decision-making.

This is not to say that all drug courts exclude participants from decision-making. Indeed, some drug courts specifically apply therapeutic jurisprudence based strategies such as giving participants the choice whether to enter the court program, asking participants to set goals and strategies for their time in the program, including these goals and strategies into behavioral contracts between participants and the court and actively involving participants in problem solving, and the formulation of relapse prevention plans.<sup>74</sup> However these are not standard practices across drug courts.

Moreover, in the above list there is not an essential component of drug courts in these or similar terms: to assist participants in gaining an awareness of their strengths and weaknesses and the underlying causes of their offense and to empower them to formulate and implement rehabilitation plans with the assistance of the court team. It is argued that such an element is at the core of a therapeutic jurisprudence based approach to drug court practice. By not including an element to this effect is at best to downplay the importance of involving the people whose problems they seek to address in gaining understanding of and formulating solutions for these problems. This point is particularly significant in

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71 JAMES L. NOLAN JR, REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 7-11 (2001).

72 See Tyler, *supra* note 44 (discussing procedural justice); JUDGING IN A THERAPEUTIC KEY, *supra* note 11, at 129-36 (on the application of procedural justice to therapeutic jurisprudence based judging).

73 Tyler, *supra* note 44.

74 See e.g., Michael S. King, *Perth Drug Court Practice*, 33 BRIEF 27 (2006).

relation to drug courts in that since the seminal article by Hora, Schma and Rosenthal there has been wide acceptance of the proposition that therapeutic jurisprudence is the underlying philosophy of drug courts.<sup>75</sup>

## IX. MENTAL HEALTH COURTS

In contrast with the literature concerning other problem solving courts, the mental health court literature places significant emphasis on the need to actively involve defendants in decision-making in court and program processes. Perhaps this is because of the origins of therapeutic jurisprudence in mental health law and the recognition by legal and mental health professionals in this area of the therapeutic effects of active involvement in decision-making of those directly affected by the decision.<sup>76</sup> Thus, components of mental health courts include voluntary participation, the use of practices for reducing the stigma associated with mental health problems and promotion of participants' involvement in the court proceedings.<sup>77</sup>

The promotion of self-determination has been recognized as an important aspect of mental health courts: "The services and supports provided should build on the individual's strengths and needs while addressing the stigma of mental illness and emphasizing choice, service flexibility and self-determination."<sup>78</sup>

There is evidence of less reliance on sanctions in some mental health courts and more reliance on judicial engagement with participants in order to promote compliance.<sup>79</sup> Although there appears to be increasing emphasis on the use of rewards and sanctions in these courts, for many there is also a reluctance to use imprisonment as a sanction.<sup>80</sup>

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<sup>75</sup> Hora, *supra* note 5.

<sup>76</sup> Wexler, *supra* note 6; JUDGING IN A THERAPEUTIC KEY, *supra* note 11.

<sup>77</sup> PAMELA M. CASEY & DAVID B. ROTTMAN, PROBLEM-SOLVING COURTS: MODELS AND TRENDS (2003), available at [http://www.ncsconline.org/WC/Publications/COMM\\_ProSolProbSolvCtsPub.pdf](http://www.ncsconline.org/WC/Publications/COMM_ProSolProbSolvCtsPub.pdf).

<sup>78</sup> SCHNEIDER ET AL., *supra* note 7, at 78.

<sup>79</sup> See Michael Thompson, Fred Osher & Denise Tomasini-Joshi, *Improving Responses to People with Mental Illness: The Essential Element of a Mental Health Court* (2007), available at [http://www.ojp.usdoj.gov/BJA/pdf/MHC\\_Essential\\_Elements.pdf](http://www.ojp.usdoj.gov/BJA/pdf/MHC_Essential_Elements.pdf) (concerning the use of sanctions in mental health courts); Patricia A. Griffin, Henry J. Steadman & John Petrila, *The Use of Criminal Charges and Sanctions in Mental Health Courts*, 53 PSYCHIATRIC SERVICES 1285 (2002); See also GINGER LERNER-WREN, THE NATIONAL CENTER FOR STATE COURTS, BROWARD'S MENTAL HEALTH COURT: AN INNOVATIVE APPROACH TO THE MENTALLY DISABLED IN THE CRIMINAL JUSTICE SYSTEM (2000), available at [http://www.ncsconline.org/WC/Publications/KIS\\_ProSol\\_Trends99-00\\_FlaMentalPub.pdf](http://www.ncsconline.org/WC/Publications/KIS_ProSol_Trends99-00_FlaMentalPub.pdf) (regarding judicial engagement in mental health courts).

<sup>80</sup> Griffin et al., *supra* note 79.

## X. OTHER PROBLEM SOLVING COURTS

Although some U.S. domestic violence courts acknowledge the need to promote offender rehabilitation, their main focus is on the protection of the victim rather than on the rehabilitation of the perpetrator.<sup>81</sup> It is natural that the components of these courts should reflect that focus. They include important practices to protect victims, lessen the stress involved in court appearances and negotiating the justice system, and to involve them (if they wish) in the court process.<sup>82</sup>

These court programs usually involve court-mandated treatment for perpetrators.<sup>83</sup> Regular court appearances are to ensure compliance with the mandated court conditions and to impose sanctions where the perpetrator has breached program conditions.<sup>84</sup> The aim is to promote perpetrator accountability to the court and to stop perpetrator violence rather than using the court process to engage with perpetrators and include them in decision-making processes designed to address their underlying issues. The ability of perpetrators to creatively contribute to the resolution of their problems is largely discounted.<sup>85</sup> The kind of judicial interaction with participants may be limited to keeping an eye on them to ensure they have not been violent and to see whether they have been complying with other program conditions.<sup>86</sup> However, some domestic violence courts that include offender rehabilitation as a goal use drug court processes such as awarding of rewards and sanctions to promote that goal.<sup>87</sup>

The formulation of the elements of community courts raises similar concerns to those relating to drug courts. As with the ten components of drug courts, the components of community courts convey the sense of activities that happen to or around participants more than processes empowering them and actively involving them in decision-making concerning their rehabilitation and the disposition of the case. Indeed, one of the commitments of community courts is “changing the lives of individual offenders” rather than “assisting indi-

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<sup>81</sup> BERMAN & FEINBLATT, *supra* note 3; King & Batagol, *supra* note 16. See Randal B. Fritzler & Leonore M.J. Simon, *The Development of a Specialized Domestic Violence court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139 (2000) (describing a family violence court directed to perpetrator rehabilitation).

<sup>82</sup> EMILY SACK, FAMILY VIOLENCE PREVENTION FUND, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES (2002), available at [http://www.futureswithoutviolence.org/userfiles/file/Judicial/FinalCourt\\_Guidelines.pdf](http://www.futureswithoutviolence.org/userfiles/file/Judicial/FinalCourt_Guidelines.pdf).

<sup>83</sup> King & Batagol, *supra* note 16.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*; Michael Rempel, Melissa Labriola & Robert C. Davis, *Does Judicial Monitoring Deter Domestic Violence Recidivism? Results of a Quasi-Experimental Comparison in the Bronx*, 14 VIOLENCE AGAINST WOMEN 185 (2008).

<sup>87</sup> Fritzler & Simon, *supra* note 81, at 171.

vidual offenders to make positive behavioral change.”<sup>88</sup> The kind of collaboration emphasized in the components of community courts is that between the court and court team and the community rather than between the court and participants.

## XI. IMPLICATIONS FROM THE RESEARCH

Proponents of drug courts are enthusiastic about their benefits, including their ability to reduce the recidivism of participating offenders. There is support for the benefits of drug courts in government reports and in research findings. There have been a number of meta-analyses concerning the effect of drug courts on recidivism finding reductions of up to 14%.<sup>89</sup> There are also findings suggesting reductions in recidivism may be long term. A study of a drug court in Portland, Oregon, found reductions in participants’ recidivism up to fourteen years after they entered drug court compared to non-participating but eligible offenders.<sup>90</sup>

The drug court recidivism meta-analyses are largely confined to North American studies.<sup>91</sup> However, there is more recent research on non-U.S. drug courts finding decreased recidivism. For example, the New South Wales Bureau of Crime Statistics and Research studied reconviction rates of New South Wales Drug Court completers compared with a matched comparison group of offenders who had been eligible for drug court but excluded because they did not reside in the catchment area of the court or had a prior conviction of a violent offence.<sup>92</sup> The study controlled for a number of criminal justice related and demographic variables. It found that over the follow up period, compared with the comparison group, drug court completers were 17% less likely to be convicted for any offence, 30% less likely to be convicted of a violent offence and 38% less likely to be convicted of a drug offence.

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<sup>88</sup> See CASEY & ROTTMAN, *supra* note 77 (discussing nature and purpose of community courts).

<sup>89</sup> David B. Wilson, Ojmarrh Mitchell & Doris L. MacKenzie, *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. OF EXPERIMENTAL CRIMINOLOGY 459 (2006); JEFF LATIMER, KELLY MORTON-BOURGON & JO-ANN CHRÉTIEN, DEP’T OF JUSTICE CANADA, *A META-ANALYTIC EXAMINATION OF DRUG TREATMENT COURTS: DO THEY REDUCE RECIDIVISM?* (2006), available at [http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/tr06\\_7/tr06\\_7.pdf](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/tr06_7/tr06_7.pdf); Christopher T. Lowencamp, Alexander Holsinger & Edward Latesse, *Are Drug Courts Effective: A Meta-Analytic Review*, 15 J. OF COMMUNITY CORRECTIONS 5 (2005).

<sup>90</sup> MICHAEL W. FINIGAN, SHANNON M. CAREY & ANTON COX, U.S. DEP’T OF JUSTICE, *THE IMPACT OF A MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS* (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf>.

<sup>91</sup> *But see* LATIMER ET AL., *supra* note 89 (including a geographically broader range of studies).

<sup>92</sup> DON WEATHERBURN, CRAIG JONES, LUCY SNOWBALL & JIUZHAO HUA, NSW BUREAU OF CRIME STATISTICS AND RESEARCH, *THE NSW DRUG COURT: A RE-EVALUATION OF ITS EFFECTIVENESS* (2008), available at [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/CJB121.pdf/\\$file/CJB121.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB121.pdf/$file/CJB121.pdf).

However, some critics question whether it is possible to make firm conclusions concerning the outcome of drug courts given the poor methodology used in many of the studies.<sup>93</sup> On the other hand, Gutierrez & Bourgon, though critical of the methodology of many of the drug court evaluations, suggest that if only methodologically sound studies were taken into account, then the drug court reduction in recidivism is 8%.<sup>94</sup> There is a great variation in the strength of research designs used in the various recidivism studies. While it is rarely possible to use a randomized longitudinal study in a court setting given that courts make decisions based on statute and common law applied to the circumstances of individual cases, there is the need for more rigorous designs to be used in drug court evaluation studies.

There are also concerns whether drug courts produce sustained benefits over time. While the Portland study suggests there are long term effects on recidivism from participation in drug court, other research suggests that benefits may be reduced in the absence of “after care” programs supporting participants after they have completed drug court.<sup>95</sup>

The evidence suggests that some drug courts do reduce recidivism and that they are cost-effective compared to conventional justice system processing.<sup>96</sup> However the mechanics by which these results are achieved remains unclear. Drug courts have a number of elements with potentially therapeutic effects including the provision of treatment and support, the interaction with members of the court team, judicial supervision, regular drug testing and, in the case of some courts, the therapeutic judicial processes discussed in the final section of this article. Whether one or more factors are important or whether there may be a synergistic effect among a number of factors is not apparent. There is clearly the need for further research on the mechanics of drug courts.

There is research finding that mental health courts promote increased engagement with mental health services.<sup>97</sup> There is also a growing body of research

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<sup>93</sup> See e.g., Randall T. Brown, *Systematic Review of the Impact of Adult Drug Treatment Courts*, 155(6) TRANSLATIONAL RESEARCH 263 (2010).

<sup>94</sup> LETICIA GUTIERREZ & GUY BOURGON, PUBLIC SAFETY CANADA, DRUG TREATMENT COURTS: A QUANTITATIVE REVIEW OF STUDY AND TREATMENT QUALITY (2009), available at [http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/2009-04-dtc-eng.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/2009-04-dtc-eng.pdf).

<sup>95</sup> See FINIGAN ET AL., *supra* note 90 (Portland study); Douglas B. Marlowe et al., *Adapting Judicial Supervision to the Risk Level of Drug Offenders: Discharge and 6-Month Outcomes from a Prospective Matching Study*, 88 DRUG & ALCOHOL DEPENDENCE S4 (2007) (regarding the significance of after care programs).

<sup>96</sup> Elizabeth K. Drake, Steve Aos & Marna G. Miller, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, 4 VICTIMS & OFFENDERS 170 (2009).

<sup>97</sup> Roger A. Boothroyd et al., *The Broward Mental Health Court: Process, Outcomes and Service Utilization*, 26 INT'L J. L. & PSYCHIATRY 55 (2003).

finding that mental health court graduates experience decreased recidivism.<sup>98</sup> Some of these studies have significant research design limitations. More extensive research is needed to assess the long-term effect of mental health court programs on recidivism.

The effect of domestic violence courts on offender recidivism is mixed, with some studies measuring modest reductions in recidivism and others finding no effect on recidivism.<sup>99</sup> Whether one model of domestic violence court is more effective in promoting a reduction in recidivism than others is not known. Research on community courts is less advanced. Many courts have not set up protocols for tracking recidivism rates of offenders and comparison groups.<sup>100</sup> Still, there are some indications that some community courts promote decreased offender recidivism.<sup>101</sup>

The evidence concerning what works in judging in problem-solving courts is limited. There is evidence that the amount and quality of judicial supervision in problem-solving courts is important. In drug courts it has been found that in the case of high-risk offenders, increased judicial supervision can enhance program outcomes such as decreased substance abuse.<sup>102</sup> Having the same judicial officer supervise participants over time has been found to be important in promoting program outcomes such as treatment compliance, decreased substance abuse, and decreased likelihood of further convictions.<sup>103</sup> A study of judicial monitoring

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<sup>98</sup> See e.g., Virginia Hiday & Bradley Ray, *Arrests Two Years After Exiting a Well-Established Mental Health Court*, 61 PSYCHIATRIC SERVICES 463 (2010); Dale E. McNeil & Renée E. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395 (2007); Marlee E. Moore & Virginia A. Hiday, *Mental Health Court Outcomes: A Comparison of Re-arrest and Re-arrest Severity Between Mental Health Court and Traditional Court Participants*, 30 LAW & HUM. BEHAV. 659 (2006); Heidi A. Herinckx et al., *Rearrest and Linkage to Mental Health Services among Clients of the Clark County Mental Health Court Program*, 56 PSYCHIATRIC SERVICES 853 (2005); GRACE SKRZYPIEC, JOY WUNDERSITZ & HELEN MCROSTIE, OFFICE OF CRIME STATISTICS AND RESEARCH, GOVERNMENT OF SOUTH AUSTRALIA, MAGISTRATES COURTS DIVERSION PROGRAM: AN ANALYSIS OF POST-PROGRAM OFFENDING (2004), available at [http://www.ocsar.sa.gov.au/docs/evaluation\\_reports/MCDP2.pdf](http://www.ocsar.sa.gov.au/docs/evaluation_reports/MCDP2.pdf).

<sup>99</sup> SAMANTHA MOORE, CENTER FOR COURT INNOVATION, TWO DECADES OF SPECIALIZED DOMESTIC VIOLENCE COURTS: A REVIEW OF THE LITERATURE, available at [http://www.courtinnovation.org/\\_uploads/documents/DV\\_Court\\_Lit\\_Review.pdf](http://www.courtinnovation.org/_uploads/documents/DV_Court_Lit_Review.pdf).

<sup>100</sup> DIANA L. KARAFIN, OPEN SOCIETY FOR SOUTH AFRICA, COMMUNITY COURTS ACROSS THE GLOBE: A SURVEY OF GOALS, PERFORMANCE MEASURES AND OPERATIONS (2008), available at [http://www.osf.org.za/File\\_Uploads/docs/community\\_court\\_world\\_text\\_web.pdf](http://www.osf.org.za/File_Uploads/docs/community_court_world_text_web.pdf).

<sup>101</sup> *Id.*; VICTORIAN GOVERNMENT DEPARTMENT OF JUSTICE, EVALUATING THE NEIGHBOURHOOD JUSTICE CENTRE IN YARRA 2007-2009 (2010), available at [http://www.neighbourhoodjustice.vic.gov.au/webdata/resources/files/NJC\\_evaluation\\_main\\_document.pdf](http://www.neighbourhoodjustice.vic.gov.au/webdata/resources/files/NJC_evaluation_main_document.pdf).

<sup>102</sup> Marlowe et al., *supra* note 95.

<sup>103</sup> UNITED KINGDOM MINISTRY OF JUSTICE, DEDICATED DRUG COURT PILOTS: A PROCESS REPORT (2002), available at <http://www.justice.gov.uk/publications/research010408.htm>; JOHN S. GOLDKAMP, MICHAEL D. WHITE & JENNIFER B. ROBINSON, CRIME AND JUSTICE RESEARCH INSTITUTE FROM WHETHER TO HOW DRUG COURTS WORK: RETROSPECTIVE EVALUATION OF DRUG COURTS IN CLARK COUNTY (LAS

in a domestic violence court in the Bronx found that it had no effect on perpetrator recidivism.<sup>104</sup> Given that at most the judge simply adjourned a case where there was compliance with the court program and referred the case for disposition by another judge where there was non-compliance and did little more suggests that a lack of quality in the judicial supervision may have been a significant factor in the result.<sup>105</sup>

A focus-group study found that drug court participants thought the role of the judge to be important in promoting compliance and that they valued positive encouragement from the judge and dreaded the consequences of poor performance—angering or disappointing the judge.<sup>106</sup> They also feared the sanction of imprisonment and said that it motivated them to try to succeed. But if they thought the imprisonment imposed was arbitrary, too frequent or disproportionate, it produced anger, resistance, and a feeling of injustice.

There is evidence that positive interaction between the judge and participants may be more important for participant outcomes than the judge's imposition of sanctions when warranted. A comparative study of eighteen adult drug courts found that there was no difference in outcome costs when it was someone other than the judge that imposed sanctions but that there was a significant improvement in outcome costs when the judge imposed rewards.<sup>107</sup>

According to its judge, Broward's Mental Health Court "makes every effort to take a pre-trial and non-punitive/therapeutic approach to cases in an endeavor to promote the assumption of personal responsibility and personal empowerment of the Court participant."<sup>108</sup> Participants in that court reported that they did not perceive their participation in the court to be coerced and also reported high levels of procedural justice values such as voice, genuine interest from the judge, and being treated respectfully and fairly by the judge.<sup>109</sup> Procedural justice was correlated with high levels of satisfaction with court outcomes while perceived coercion was not.

Similarly, the evaluation of the Brooklyn Mental Health Court found that its participants also reported low levels of perceived coercion and high levels of

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VEGAS) AND MULTNOMAH COUNTY (PORTLAND) (2002), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/194124.pdf>.

<sup>104</sup> Rempel et al., *supra* note 86.

<sup>105</sup> *Id.*

<sup>106</sup> GOLDKAMP ET AL., *supra* note 103.

<sup>107</sup> SHANNON M. CAREY, MICHAEL W. FINIGAN & KIMBERLY PUKSTAS, U.S. DEP'T OF JUSTICE, EXPLORING THE KEY COMPONENTS OF DRUG COURTS: A COMPARATIVE STUDY OF 18 ADULT DRUG COURTS ON PRACTICES, OUTCOMES AND COSTS (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/223853.pdf>.

<sup>108</sup> LERNER-WREN, *supra* note 79.

<sup>109</sup> Norman G. Poythress et al., *Perceived Coercion and Procedural Justice in the Broward Mental Health Court*, 25 INT'L J. LAW & PSYCHIATRY 517 (2002).



procedural justice values.<sup>110</sup> Further, Petrucci's study of the interaction between judge and participants in a domestic violence court that applied therapeutic jurisprudence characterized it as one of mutual respect, suggesting that treating participants with respect will mean that participants will be more likely to comply with the judge's directions.<sup>111</sup>

In summary, the general literature on problem-solving courts and the elements of the main types of problem solving court—with the possible exception of some mental health courts—are based on the idea that it is the court and the court team that are the principal sources and determinants of the change process. They fail to give due weight to the literature on the behavioral change process that sees individuals as the prime source of their own change process—albeit at times external supports may be required to help sustain it. While there is research supporting the efficacy of these courts, there is little research concerning what are the effective therapeutic elements of these courts and what judging practices are the most appropriate. However, the research suggests that it may be the positive, encouraging, and supportive aspects of judicial interaction rather than a judicial resort to coercion that is most important in promoting behavioral change.

## XII. WHERE TO FROM HERE?

The criticisms of the term *problem-solving court* and of the concept of the court as problem-solver raise questions concerning both the appropriate terminology for these courts and as to what role these courts should play in the behavioral change process of the participants. This section of the article considers possible alternatives, including one that arises from an alternative judicial approach based on therapeutic jurisprudence that seeks to involve and empower participants in these programs in decision-making and implementation processes concerning their rehabilitation. This section concludes by considering judicial techniques for empowering participants to address their underlying issues.

## XIII. TERMINOLOGY ISSUES

If the term *problem-solving courts* is problematic, what is the best alternative term? It is probably not possible to produce a single term that satisfactorily covers the diverse approaches of drug courts, family violence courts, community courts, mental health courts, etc., and the variations between courts within each

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<sup>110</sup> Kelly O'Keefe, THE BROOKLYN MENTAL HEALTH COURT EVALUATION: PLANNING IMPLEMENTATION, COURTROOM DYNAMICS AND PARTICIPANT OUTCOMES, NEW YORK STATE OFFICE OF MENTAL HEALTH (2006), available at [http://www.courtinnovation.org/\\_uploads/documents/BMHCevaluation.pdf](http://www.courtinnovation.org/_uploads/documents/BMHCevaluation.pdf).

<sup>111</sup> Carrie J. Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 263 (2002).

category. Moreover, as noted earlier, a number of different components of these courts may assist in addressing the problems of those coming before the courts—including treatment and community support agencies

Another alternative is to call this approach *outcome-focused*. These courts certainly seek to produce more comprehensive outcomes for parties and the community than mainstream courts. However, they also see the unique processes they use—which they distinguish from mainstream judging and adversarial court processes—as important in promoting outcomes.

Some have also referred to these courts as “problem-oriented courts.”<sup>112</sup> While certainly these courts seek to address the underlying issues concerning legal problems, they should be forward looking, oriented to the development of solutions. *Problem-oriented courts* suggests an almost negative focus.

In a recent consultation paper the Law Reform Commission of Western Australia referred to problem-solving courts and special court lists that seek to promote therapeutic outcomes for participants as “court intervention programs.”<sup>113</sup> This term uses the concept of intervention which is a term also used in health to refer to treatment. In that sense it implies the therapeutic role of these programs. Unlike the term *problem-solving court*, it does not imply that the court assumes the responsibility for solving the problems of those who are involved. However, a problem with the term *court intervention program* is that it may be too broad—including in its ambit programs that have few common features.

Australian and New Zealand judicial officers interested or involved in a therapeutic approach to judging have recently begun to use the term “solutions” in relation to their work, particularly in the context of drug courts, family violence courts and the like.<sup>114</sup> They have commenced an email list of interested judicial officers for the exchange of information and news concerning recent developments in the area. The list is called *courts as solutions*.

#### XIV. SOLUTION-FOCUSED JUDGING

The Australasian Institute of Judicial Administration has published a bench book entitled *Solution-Focused Judging Bench Book*.<sup>115</sup> Although the name implies that this kind of judging is directed towards solutions, it does not imply that the court solves participants’ problems. The term is flexible enough to embrace the fact that the resolution of participants’ problems may have begun prior to their entering the program and continue after the program has concluded. While it

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<sup>112</sup> See e.g., KING ET AL., *supra* note 2, at 138; HARRY BLAGG, LAW REFORM COMMISSION OF WESTERN AUSTRALIA, PROBLEM-ORIENTED COURTS (2008), available at <http://www.lrc.justice.wa.gov.au/2publications/reports/P96-BlaggRP.pdf>.

<sup>113</sup> LAW REFORM COMMISSION OF WESTERN AUSTRALIA, COURT INTERVENTION PROGRAMS CONSULTATION PAPER (2008), available at <http://www.lrc.justice.wa.gov.au/096-CP.html>.

<sup>114</sup> KING, *supra* note 39.

<sup>115</sup> *Id.*

may be argued that mainstream courts are also interested in solutions to legal problems, *solution* in the context of the bench book refers to a far broader concept, one that sees rehabilitation to be more than the absence of offending but the ability of participants to lead a happy, constructive and law-abiding life in their community.<sup>116</sup> In this broad definition of offender rehabilitation—as the living of a full life in the community—it is similar to Good Lives Theory.<sup>117</sup> Good lives theory asserts that rehabilitation should be about promoting the attainment of the physiological (e.g. health), psychological (e.g. autonomy) and social conditions needed for the particular individual to lead a good life in the community.

*Solution-focused* in the context of the bench book is not only concerned with outcomes, it is also concerned with the method of developing solutions.<sup>118</sup> It sees the participants as central to their rehabilitation process. It follows the therapeutic jurisprudence principle that it is participants who must undergo the internal and external processes necessary to make positive behavioral change. Like other therapeutic interventions, this approach to judging acknowledges that a therapeutic court can support participants, use strategies that promote motivation to change, and put them in touch with treatment and relevant community agencies. But it is a facilitator, not the problem-solver.<sup>119</sup>

This approach of assisting participants through the change process is consistent with the development of a “what helps” approach in criminal justice.<sup>120</sup> This approach stands in contrast to the *what works* approach that is influential in criminal justice systems today. The *what works* approach emphasizes the need for professional intervention in order to reduce offending.<sup>121</sup> Suitably qualified professionals assess offenders in order to ascertain their needs and to determine what treatment programs would work in promoting their rehabilitation. Offenders are then mandated to participate in these programs.<sup>122</sup>

On the other hand, the “what helps” literature suggests the need to look beyond the question as to what criminal justice interventions work in reducing offending.<sup>123</sup> Rather than simply identifying and assigning appropriate treatment

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<sup>116</sup> Michael S. King, *Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush*, 26 CRIM. L. J. 260 (2002); KING, *supra* note 39, at 5.

<sup>117</sup> WARD & MARUNA, *supra* note 23; Tony Ward & Claire Stewart, *Criminogenic Needs and Human Needs: A Theoretical Model*, 9 PSYCHOL. CRIME & LAW, 125 (2003).

<sup>118</sup> KING, *supra* note 39, at 5.

<sup>119</sup> Michael S. King, *What Can Mainstream Courts Learn from Problem-Solving Courts?*, 32 ALT. L. J. 91 (2007).

<sup>120</sup> See WARD & MARUNA, *supra* note 23; FARRALL, *supra* note 24; Fergus McNeil, *A Desistance Paradigm for Offender Management*, 6 CRIMINOLOGY & CRIM. JUST. 39 (2006); Hans Toch, *Everything Works*, 46 INT'L J. OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 119 (2002).

<sup>121</sup> McNeil, *supra* note 120, at 45.

<sup>122</sup> *Id.*

<sup>123</sup> WARD & MARUNA, *supra* note 23; FARRALL, *supra* note 24; McNeil, *supra* note 120; Toch, *supra* note 120.

programs *for* offenders according to particular criteria, the criminal justice system should *engage with* offenders to see what offenders consider will help in their case. This should be an important component of any rehabilitation strategy. Indeed, Maruna and Ward describe offenders as “an extraordinary untapped resource in the formulation of rehabilitation theory and policy.”<sup>124</sup>

Farrall’s study of probation found that in most cases factors such as motivation and social circumstances were more important in promoting desistance from offending than the intervention of a probation officer.<sup>125</sup> He suggested that a vital part of probation should be probation officers promoting motivation and social circumstances supportive of desistance. Such an approach would arguably support participants’ own natural change process.

## XV. COURTS AND THE PROMOTION OF BEHAVIORAL CHANGE

This article also asserts that all courts that seek to promote participants’ positive behavioral change need to acknowledge the centrality of participants’ experience, their understanding of their problems, their ability to develop and implement solutions for their problems, and the need for them to be actively involved in decision-making concerning their rehabilitation as part of the court program. This principle should form part of the guiding principles of each of these court programs and inform the operation of the other principles of these programs. Further the other guiding principles of these programs should be re-drafted where needed so as to remove any suggestion of exclusion of participants from active participation in decision-making. In a drug court, family violence court, mental health court, and the like, the judicial approach should similarly promote participants’ ability to resolve their problems and to be able to engage in problem-solving after the court process has finished.

For defendants caught up in a cycle of offending that has repeatedly brought them back to court over the years, the court process may have reinforced a conception that they do not have the ability to address their problems themselves and even that their situation is hopeless. A paternalistic approach to judging and other legal processes may have been a critical part of this process. Taking a paternalistic judging approach in a problem-solving court has the risk of inhibiting participant self-efficacy.

A therapeutic judging and lawyering approach in a drug court, community court, mental health court, or re-entry court may progressively de-label participants, reinforcing the conception that they do have the ability to effectively deal with their life problems, including drawing on treatment and/or other support

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<sup>124</sup> WARD & MARUNA, *supra* note 23, at 15.

<sup>125</sup> FARRALL, *supra* note 24.

where needed.<sup>126</sup> Involving them in the decision-making process and supporting self-efficacy is an important part of this de-labeling.

#### XVI. COURT STRATEGIES TO SUPPORT POSITIVE BEHAVIORAL CHANGE

Courts seeking to take a therapeutic jurisprudence approach to judging—including problem-solving courts and mainstream courts—should not only provide external supports such as by facilitating access to treatment and support services and monitor compliance, they should use strategies that uphold participants' internal change mechanisms. The preceding sections of the article have described key principles underlying such an approach. The following are examples of strategies embodying these principles that courts should consider applying:

1. Giving participants a choice whether they enter a court program. By offering choice, the court promotes self-determination.<sup>127</sup> While it may be thought that where the alternative is an immediate term of imprisonment there is little choice to be offered, not all participants are willing to address their problems or face the rigorous requirements of a problem-solving court program. In any event, Winick argues that there remains choice in this situation given that participants are before the court by virtue of their own actions.<sup>128</sup>
2. Encouraging participants to formulate a rehabilitation plan for their time in the court program and, if appropriate, beyond.<sup>129</sup> The plan could set out goals concerning their rehabilitation and could relate to diverse life domains—such as health (including substance abuse and mental health issues), relationships, education, employment, and housing. The plan could also set out the strategies participants aim to use in achieving their goals. Given the court and community's interest in the matter, the plan would need to be negotiated with the court team. This strategy seeks to uphold participants' self-determination, draws on internal sources of motivation by tapping into what they wish to achieve, and gives the court the opportunity to promote their self-efficacy by praising them for formulating the plan and for achieving their goals as they progress through the program. Goal setting may also focus participants' attention on activities directed to achieving their goals and away from ir-

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<sup>126</sup> Maruna & LeBel, *supra* note 16; King, *supra* note 49.

<sup>127</sup> Winick, *supra* note 11.

<sup>128</sup> *Id.*

<sup>129</sup> Wexler, *supra* note 40.

- relevant activities, be energizing, promote persistence and the development of appropriate knowledge and strategies.<sup>130</sup>
3. Use the plan as a basis for the judicial officer and court team members in communicating with participants. The plan gives the judicial officer and other members of the court team greater insight into participants, their goals and dreams, and provides an opportunity for them to communicate and connect with them on a more profound level than is possible in a judging approach based on the use of external sources of motivation.
  4. Include rehabilitation plans in behavioral contracts between participants and the court.<sup>131</sup> Behavioral contracts are used widely in health, education, business and family settings to promote positive behavior. A court entering into a behavioral contract with a participant demonstrates respect for the participant and the court's faith in the ability of the participant to achieve the goals and seeks to promote participant self-determination and self-efficacy.
  5. Use the rehabilitation plan as a tool in addressing problems of non-compliance by appealing to internal sources of motivation to change.<sup>132</sup> Instead of referring to an external instrument, an external and arguably coercive means of motivation—an order that has been imposed on them or the threat or imposition of sanctions—the court can refer participants to their own goals and their agreement to implement them in the behavioral contract as a reference point for engaging participants in problem-solving by asking how their non-compliant behavior fit in with the goals they had set. The court could engage with participants, asking them what caused the non-compliance, how they felt about it, and what they think they need to do to rectify the situation. If appropriate given the nature of the non-compliance the court could then allow participants time to implement their plan to address the non-compliance and support their self-efficacy in implementing the plan.
  6. As far as possible, problem-solving court judges and judges using therapeutic jurisprudence in mainstream lists should use collaborative and non-coercive rather than argumentative and coercive means as the first approach to resolving differences they may have with participants. For example, differences may arise where there is a problem with the participant's performance and the issue is what the participant should do to rectify the situation. Here the judicial officer could use techniques of persuasion or the principles of motivational interviewing. Motivational interviewing is a non-confrontational process of dialogue that encour-

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<sup>130</sup> Edwin A. Locke & Gary P. Latham, *Building a Practically Useful Theory of Goal Setting and Task Motivation: A 35-Year Odyssey*, 57 AM. PSYCHOL. 705 (2002).

<sup>131</sup> Wexler, *supra* note 40.

<sup>132</sup> KING, *supra* note 39.

ages and supports the process of self-change.<sup>133</sup> It involves practices that promote self-talk directed at change, allow participants to work through their resistance to change in a supportive and non-confrontational manner, and support their ability to implement their decision to change. Active listening, expression of empathy, rolling with resistance, and supporting participant's self-efficacy are important techniques used in motivational interviewing.<sup>134</sup> However, where these approaches are not successful, a court may have little choice but to order a participant to undertake the necessary course of action to resolve the problem.

7. Use therapeutic jurisprudence principles even in the most serious cases of non-compliance. Clearly at times the degree of non-compliance will be so persistent and/or serious that a court will have no alternative but to take a coercive approach, remand a participant in custody for a time, permit the program to continue or remove the participant from the court program and, where appropriate, sentence the participant according to law.<sup>135</sup> Even in that case a court should refer to the progress the participant has made as a basis for the participant to take further action in the future to address underlying issues relating to offending.
8. As far as possible, promote participants' self-efficacy. It was noted above that promoting self-efficacy is an important part of a motivational interviewing based approach to dealing with participants' problems and that it could also be used in connection with participants' setting and achievement of goals and strategies. However, there are other instances where a judicial officer can promote self-efficacy. For example, at the start of participants' time in the court program a judicial officer can refer to past instances where they have demonstrated the ability to abstain from substance abuse and/or offending behavior as evidence in support of their ability to engage in the rehabilitation process. Counsel for the participant can assist by drawing the court's attention to these past instances. At graduation from the court program, a judicial officer can also reinforce self-efficacy by referring to the participants' achievements and the skills they applied to attain them.

## CONCLUSION

To borrow from McNeil, the concept of problem-solving courts and the approach of most species of problem-solving courts "begin in the wrong place; that is, they begin by thinking about how *practice* . . . should be constructed without

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<sup>133</sup> MILLER & ROLLNICK, *supra* note 14.

<sup>134</sup> *Id.*

<sup>135</sup> KING, *supra* note 39.

first thinking about how *change* should be understood.<sup>136</sup> When viewed in the light of the literature on the nature of behavioral change it is apparent that the problem-solving court paradigm is inadequate.

Drug courts, family violence courts, community courts, re-entry courts, and the like should not be problem-solving courts. They should not be about trying to solve other people's problems for them. Such an approach ignores the contribution self-change makes to the process of behavioral change. It does not recognize the change in the individuals that takes place where they engage in treatment and other therapeutic processes is a product of self-change along with the intervention. From this perspective, change should be the product of collaboration between the individual, and treatment and support agencies (and court, where applicable) rather than these professionals assuming the prime responsibility for the design and implementation of change. Problem-solving courts supplement and support the change process; they are not the sole instigators of it.

These courts should be solution-focused courts working collaboratively with participants and team members to develop solutions. In this model, rather than simply being leveraged into treatment by the court, participants are respected sources of creative solutions to problems that can be implemented by them with the support of the judicial officer and the court team. This model recognizes that individuals may have already embarked on the change process and implemented strategies to change before they enter the court program and that for many the change process may need to be maintained by their own efforts and community support long after their time in the court program has come to an end.

This model has practical implications for how a judge operates in court. Here the judging style should be less that of an authoritarian decision-maker and more a facilitator of decisions being made. Judicial strategies—such as promoting participant's use of rehabilitation plans and entering into behavioral contracts with them, including participants in problem-solving and adapting motivational interviewing techniques to judging—should be used to promote self-determination, motivation, and self-efficacy which support the change process. The use of sanctions should be at best a secondary mechanism for promoting compliance.

This approach requires judges to have a good understanding of the nature and mechanics of behavioral change and to possess the necessary intrapersonal and interpersonal skills to apply it. It is an important part of a wider development that values interpersonal skills as a significant aspect of judging in any context.<sup>137</sup>

This approach also recognizes that therapeutic values are not absolute and that at times, even when taking a solution-focused approach, other considerations such as sentencing principles and the integrity of the court program may

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<sup>136</sup> McNeil, *supra* note 120, at 45.

<sup>137</sup> Michael S. King, *Realizing the Potential of Judging*, MONASH U. L. REV. (forthcoming 2011).



require the court to acknowledge the wishes of a participant but to overrule them in the interests of justice—particularly in the case of serious or persistent breaches of program conditions.<sup>138</sup>

Research on the appropriate approach to judging in problem-solving courts is scant. Practice has developed ahead of empirical research and theory. Though there are good reasons for suggesting that a judicial approach that enhances internal change mechanisms is likely to be more effective in promoting problem-solving court outcomes than one that primarily relies on external sources of motivation, such as a carrot and stick approach, there is a pressing need for research comparing judicial methods and their effect on participant outcomes.

While the focus of this article has been on the philosophy behind problem-solving courts and its effect on judging, it is important that a solution-focused approach to judging is supported by court services and advocacy that are also based on the principles of therapeutic jurisprudence. An emerging body of literature is informing legal practice in criminal cases based on therapeutic jurisprudence.<sup>139</sup>

It is suggested that by adopting a solution-focused approach, drug courts, family violence courts, community courts, and the like will gain an additional and significant resource for addressing underlying issues of those coming before the courts with substantial problems—the insight that participants may have into how their problems arose and what must be done to address them and their internal motivation to implement and maintain positive behavioral change. In addition, much more than a judging and lawyering approach based on the use of external motivators for change, this approach has the potential to promote not only participants' satisfaction with and respect for the court but also their problem-solving abilities and self-efficacy, enhancing their ability to sustain positive change long after the court program has ended.

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138 KING, *supra* note 39.

139 See e.g., REHABILITATING LAWYERS, *supra* note 55.