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# THERAPEUTIC JURISPRUDENCE AND PROBLEM SOLVING COURTS

Bruce J. Winick\*

## I. PROBLEM SOLVING COURTS: A TRANSFORMATION IN THE JUDICIAL ROLE

In the past dozen or so years, a remarkable transformation has occurred in the role of the courts.<sup>1</sup> Courts traditionally have functioned as governmental mechanisms of dispute resolution, resolving disputes between private parties concerning property, contracts, and tort damages, or between the government and an individual concerning allegations of criminal wrongdoing or regulatory violations. In these cases, courts typically have functioned as neutral arbiters, resolving issues of historical facts or supervisingjuries engaged in the adjudicatory process.

Recently, a range of new kinds of problems, many of which are social and psychological in nature, have appeared before the courts. These cases require the courts to not only resolve disputed issues of fact, but also to attempt to solve a variety of human problems that are responsible for bringing the case to court. Traditional courts limit their attention to the narrow dispute in controversy. These newer courts, however, attempt to understand and address the underlying problem that is responsible for the immediate dispute, and to help the individuals before the court to effectively deal with the problem in ways that will prevent recurring court involvement.

The new courts, increasingly known as problem solving courts,<sup>2</sup> are specialized tribunals established to deal with specific problems, often involving individuals who need social, mental health, or substance abuse treatment services. These courts also include criminal cases involving individuals with drug or alcoholism problems,

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1. Leonore M. J. Simon, *Proactive Judges: Solving Problems and Transforming Communities*, in THE HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS (David Carson & Ray Bull eds., forthcoming) (manuscript at 4-7, on file with author).

2. CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADM'RS, CCJ RESOLUTION 22 & COSCA RESOLUTION 4: IN SUPPORT OF PROBLEM-SOLVING COURTS (2000) [hereinafter CCJ RESOLUTION 22 & COSCA RESOLUTION 4], at <http://cosca.ncsc.dni.us/Resolutions/resolutionproblemsolvingcts.html> (last visited Mar. 15, 2002).

mental health problems, or problems of family and domestic violence. The juvenile court is the forerunner of these specialized courts; it was started in Chicago in 1899 as an attempt to provide a rehabilitative approach to the problem of juvenile delinquency, rather than the punitive approach of the adult criminal court.<sup>3</sup> The modern antecedents of this movement are the drug treatment courts, founded in Miami in 1989.<sup>4</sup>

The drug treatment court was a response to the recognition that processing nonviolent drug possession charges in the criminal courts and then sentencing the offender to prison did not succeed in changing the offender's addictive behavior.<sup>5</sup> Criminal court dockets had become swollen with these drug cases, and the essentially retributivist intervention of the criminal court and prison seemed to do little to avoid repetition of the underlying problem.<sup>6</sup> The result was a "revolving door effect in which [drug offenders typically] resumed their drug-abusing behavior after [being] released from prison."<sup>7</sup> Instead of relying on the traditional criminal justice approach, the drug treatment court emphasized the offender's rehabilitation, and placed the judge as a member of the

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3. See *In re Gault*, 387 U.S. 1, 14-15 (1967) (recapitulating the development of the differences between adult and juvenile justice); Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1159 (2001) (supplying a brief historical background of the Illinois Juvenile Court Act of July 1, 1899, which established the first juvenile court); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909) (describing the establishment of the first juvenile court in Chicago in 1899).

4. John S. Goldkamp, *The Origin of the Treatment Court in Miami*, in THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INTERVENTION 19, 23 (W. Clinton Terry ed., 1999); Peggy F. Hora, *A Dozen Years of Drug Treatment Courts: Uncovering Our Theoretical Foundation and the Construction of a Mainstream Paradigm*, 37 SUBSTANCE USE & MISUSE 1469, 1483 (2002); Bruce J. Winick & David B. Wexler, *Therapeutic Jurisprudence and Drug Treatment Courts: A Symbiotic Relationship*, in PRINCIPLES OF ADDICTION MEDICINE (Allan W. Graham & Terry K. Schultz eds., 3d ed. forthcoming) (manuscript at 2, 6-7, on file with authors) (discussing the relationship between therapeutic jurisprudence and specialized problem solving courts, such as drug treatment courts); see Peggy F. 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, 453-54 (1999) (describing drug treatment courts as "judicially initiated treatment solutions for a certain class of drug offenders."); Pamela L. Simmons, *Solving the Nation's Drug Problem: Drug Courts Signal a Move Toward Therapeutic Jurisprudence*, 35 GONZ. L. REV. 237, 258 (1999/2000) (attributing nationwide success of drug courts to therapeutic jurisprudence).

5. See Winick & Wexler, *supra* note 4 (manuscript at 2).

6. See Goldkamp, *supra* note 4, at 20-24; see also Winick & Wexler, *supra* note 4 (manuscript at 2) (discussing the ineffectiveness of criminal courts in permanently changing drug offenders).

7. Winick & Wexler, *supra* note 4 (manuscript at 2).

treatment team.<sup>8</sup> Offenders accepting diversion to the drug treatment court, or pleading guilty and agreeing to participate in the drug treatment court as a condition of probation, agreed to several conditions; to remain drug-free, "to participate in a prescribed course of drug treatment, to submit to periodic drug testing in order to monitor their compliance [with the treatment plan], and to report [periodically] to court for judicial supervision of their progress."<sup>9</sup>

These court's success in helping many addicts to end their addiction and to avoid re-involvement with the criminal court led to a tremendous growth in the number of drug courts nationally and internationally, with the result that, as of December 2000, there were 697 such courts in America, and many more in the planning stage.<sup>10</sup> Indeed, there now are juvenile drug treatment courts, which specialize in juveniles with drug abuse problems, and dependency drug treatment courts, that deal with families with drug problems that are charged with child abuse or neglect.<sup>11</sup>

Other specialized treatment courts or problem solving courts, as they are now known, include domestic violence courts,<sup>12</sup> which attempt to protect the victims of domestic violence, to motivate perpetrators of domestic violence to attend batterer's intervention programs, and to monitor compliance with court orders and treat-

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8. *Id.* (manuscript at 3).

9. *Id.*

10. CAROLINE S. COOPER, U.S. DEPT OF JUSTICE, 2000 DRUG COURT SURVEY REPORT: PROGRAM OPERATIONS, SERVICES AND PARTICIPANT PERSPECTIVES EXECUTIVE SUMMARY [DRAFT] 3 (2001), available at <http://www.american.edu/academic.depts/spa/justice/publications/execsum.pdf> (last visited Mar. 15, 2003). As of November 2001 there were 502 Adult Drug Courts, 191 Juvenile Drug Courts, 37 Family Drug Courts, and 39 Tribal Drug Courts. *Id.*

11. Barbara A. Babb & Judith D. Moran, *Substance Abuse, Families, and Unified Family Courts: The Creation of a Caring Justice System*, 3 J. HEALTH CARE L. & POL'Y 1, 18 (1999) (describing the creation of the Family Division of the Circuit Court for Baltimore City, Maryland); Amy K. Brown, *Drug Courts Help Keep Families Together*, F.B. NEWS, Sept. 15, 2001, at 1, available at <http://www.flabar.org/> (last visited Mar. 15, 2003).

12. See, e.g., 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, 139 (2000); Amy Karan et al., *Domestic Violence Courts: What Are They and How Should We Manage Them?*, JUV. & FAM. CT. J., Spring 1999, at 75, 75-82; Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 36 (2000) [hereinafter Winick, *Domestic Violence*].

ment progress.<sup>13</sup> More than two hundred domestic violence courts now exist.<sup>14</sup>

Reentry courts are another form of problems solving courts. These courts were designed to assist offenders that are released from prison into a form of judicially-supervised parole, to effect a successful integration into the community.<sup>15</sup> A recently proposed application of the reentry court model deals with sex offenders and attempts to manage the risk of their reoffending through close supervision and monitoring through the use of polygraph examinations.<sup>16</sup>

Another example is the dependency court, a branch of family court that deals with issues of child abuse and neglect.<sup>17</sup> This is a civil court that adjudicates whether child abuse or neglect has occurred, and when it has, it attempts to provide services designed to avoid its repetition.<sup>18</sup> When such services appear fruitless, the dependency court works to terminate parental rights and arrange foster care for the child.<sup>19</sup>

Teen court, sometimes known as youth court, is another problem solving court.<sup>20</sup> This court deals with cases involving juveniles charged with minor offenses.<sup>21</sup> In addition, it allows other juveniles who have been through the teen court process, and who

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13. Winick, *Domestic Violence*, *supra* note 12, at 36-45.

14. See Karan et al., *supra* note 12, at 75 (finding that in "a 1998 survey over 200 courts reported having some specialized processing practice for domestic violence cases."); Winick, *Domestic Violence*, *supra* note 12, at 39.

15. John Q. LaFond & Bruce J. Winick, *Sex Offender Reentry Courts: A Cost Effective Proposal for Managing Sex Offender Risk in the Community*, in *SEXUAL AGGRESSION: UNDERSTANDING AND MANAGEMENT* (Robert Prentky et al. eds., forthcoming 2003) (manuscript at 26-28, on file with author); Joan Petersilia, U.S. Dep't of Justice, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY, Nov. 2000, at 1, 5, available at <http://www.ncjrs.org/pdffiles1/nij/184253.pdf> (last visited Mar. 15, 2003); Terry Saunders, *Staying Home: Effective Reintegration Strategies for Parolees*, 41 JUDGES' J., Winter 2002, at 34, 35; Jeremy Travis, U.S. Dep't of Justice, *But They All Come Back: Rethinking Prisoner Reentry*, SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY, May 2000, at 1, 8, available at <http://www.ncjrs.org/pdffiles1/nij/181413.pdf> (last visited Mar. 15, 2003).

16. LaFond & Winick, *supra* note 15 (manuscript at 27-28).

17. Brown, *supra* note 11, at 1.

18. *Id.*

19. *Id.*

20. See, e.g., Jeffrey A. Butts & Janeen Buck, *The Sudden Popularity of Teen Courts*, 41 JUDGES' J., Winter 2002, at 29, 29; Allison R. Shiff & David B. Wexler, *Teen Court: A Therapeutic Jurisprudence Perspective*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 287, 287-98 (David B. Wexler & Bruce J. Winick eds., 1996).

21. Shiff & Wexler, *supra* note 20, at 287.

have received special training, to play the role of prosecutor, defense attorney, or member of the jury.<sup>22</sup> This special process provides the juveniles charged with minor offenses with the ability to see their behavior from the victims' or society's perspective and to receive an inoculation of empathy training.<sup>23</sup>

One of the most recent types of problem solving courts to emerge is the mental health court,<sup>24</sup> started in 1997 in Broward County, Florida.<sup>25</sup> The mental health court is a misdemeanor criminal court designed to deal with people arrested for minor offenses whose major problem is mental illness rather than criminality.<sup>26</sup> This is a revolving door category of patients who are periodically committed to mental hospitals where they are treated with psychotropic medication.<sup>27</sup> Due to the use of medication, they experience sufficient improvement, which allows hospitals to discharge them, but, when they are back in the community, they fail to take their medication.<sup>28</sup> As a result, they frequently decompensate, sometimes committing minor offenses that result in their arrest.<sup>29</sup> Mental health courts seek to divert them from the criminal justice system and to persuade them to voluntarily accept treatment while in the community.<sup>30</sup> In addition, they link them with treatment re-

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22. *Id.* at 289-95.

23. *Id.* at 288.

24. JOHN S. GOLDKAMP & CHERYL IRONS-GUYN, U.S. DEP'T OF JUSTICE, EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FT. LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE 9 (2000), available at <http://www.ncjrs.org/pdffiles1/bja/182504.pdf> (last visited Mar. 15, 2003); Randal B. Fritzler, *How One Misdemeanor Mental Health Court Incorporates Therapeutic Jurisprudence, Preventive Law, and Restorative Justice*, in MANAGEMENT AND ADMINISTRATION OF CORRECTIONAL HEALTH CARE: POLICY, PRACTICE, ADMINISTRATION 14-1 to 14-22 (Jacqueline Moore ed., 2003); Arthur J. Lurigio et al., *Therapeutic Jurisprudence in Action: Specialized Courts for the Mentally Ill*, 84 JUDICATURE 184, 184 (2000); Bruce J. Winick, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 PSYCHOL. PUB. POL'Y & L. (forthcoming 2003) (manuscript at 39, on file with author) [hereinafter Winick, *Outpatient Commitment*].

25. John Petrila et al., *Preliminary Observations from an Evaluation of the Broward County Mental Health Court*, 37 CT. REV. 14, 15-16 (2001).

26. *Id.* at 16.

27. Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 4, 14); see GOLDKAMP & IRONS-GUYN, *supra* note 24, at vii (discussing jail overcrowding and the increased number of persons with mental illness and with co-occurring mental illness and substance abuse in the criminal justice system); Petrila et al., *supra* note 25, at 25 (discussing how mentally ill patients are frequently being arrested).

28. Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 4, 14).

29. *Id.* (manuscript at 14).

30. GOLDKAMP & IRONS-GUYN, *supra* note 24, at 31, 89; Petrila et al., *supra* note 25, at 14-15.

sources, and provide social service support and judicial monitoring to ensure treatment compliance.<sup>31</sup>

All of these courts grew out of the recognition that traditional judicial approaches have failed, at least in the areas of substance abuse, domestic violence, certain kinds of criminality, child abuse and neglect, and mental illness. These are all recycling problems, the reoccurrence of which traditional interventions did not succeed in bringing to a halt. The traditional judicial model addressed the symptoms, but not the underlying problem. The result was that the problem reemerged, constantly necessitating repeated judicial intervention. All these areas involved specialized problems that judges of courts of general jurisdiction lacked expertise in. Moreover, they involved treatment or social service needs that traditional courts lacked the tools to deal with.

In response to these failures, courts decided that they needed new judicial approaches. These new approaches involve a collaborative, interdisciplinary approach to problem solving where the judge plays a leading role. Not only is the judge a leading actor in the therapeutic drama, but also the courtroom itself becomes a stage for the acting out of many crucial scenes. On this stage, the judge also assumes the role of director, coordinating the roles of many of the actors, providing a needed motivation for how they will play their parts, and inspiring them to play them well.

The new problem solving courts are all characterized by active judicial involvement, and the explicit use of judicial authority to motivate individuals to accept needed services and to monitor their compliance and progress. They are concerned not merely with processing and resolving the court case, but in achieving a variety of tangible outcomes associated with avoiding reoccurrence of the problem. Problem solving courts generate the need for new kinds of information not typically collected by courts, and, in the process, have significantly improved the quality and quantity of information needed to understand the problem and deal more effectively with it.<sup>32</sup> They play an educative role in raising community conscious-

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31. GOLDKAMP & IRONS-GUYN, *supra* note 24, at 10, 31.

32. See, e.g., LaFond & Winick, *supra* note 15 (manuscript at 8-9) (discussing the use of risk assessment instruments and polygraph examinations to gather information about released sex offenders in order to increase the effectiveness of court supervision and monitoring); Winick, *Domestic Violence*, *supra* note 12, at 55 (discussing the use of risk assessment instruments by domestic violence courts to gather information concerning a batterer's risk of re-offending); Winick & Wexler, *supra* note 4 (manuscript at 2-5) (noting drug treatment court's ongoing and constant intervention into defendant's rehabilitation).

ness about the problem in question, its causes, and the resources that courts need to resolve it.<sup>33</sup> In addition, they become advocates for the populations they deal with and for the increased allocation of community resources needed to resolve their problems.<sup>34</sup> Finally, they work closely with community agencies and treatment providers, and, in the process, monitor and improve their effectiveness.<sup>35</sup>

Problem solving courts represent a significant new direction for the judiciary. These judges seek to actively and holistically resolve both the judicial case and the problem that produced it.<sup>36</sup> They extend help to people in need by connecting them to community resources, motivating them through creative uses of the court's authority to accept needed services and treatment, and monitoring their progress in ways that help to ensure their success.<sup>37</sup> By targeting recurring problems that seem to be the product of behavioral, psychological, or psychiatric difficulties or disorders, and intervening to prevent their reoccurrence, these courts can be seen as applying a public health approach to social and behavioral problems that cause serious individual suffering and deterioration in the quality of community life. Not only have these techniques emerged in the specialized problem solving courts described above, but also judges in general courts have begun to apply the problem solving approaches derived from these courts.<sup>38</sup>

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33. See, e.g., Hora et al., *supra* note 4, at 462-68; Karan et al., *supra* note 12, at 75; Winick, *Domestic Violence*, *supra* note 12, at 37; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 12-13).

34. See, e.g., Hora et al., *supra* note 4, at 453; Winick, *Domestic Violence*, *supra* note 12, at 39-40; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 12).

35. Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 833-34 (2000).

36. See *id.* at 832 (discussing how drug treatment courts were created in response to the excessive amount of cocaine and crack offenses, and how their intentions are to rehabilitate these offenders instead of sending them to jail).

37. *Id.* at 843-50.

38. See, e.g., Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 522-23 (1998); Brown, *supra* note 11, at 1; Pamela Casey & David B. Rottman, *Therapeutic Jurisprudence in the Courts*, 18 BEHAV. SCI. & L. 445, 454-55 (2000); Gilbert et al., *supra* note 3, at 1175-77; William Schma, *Judging for the New Millennium*, 37 CT. REV. 4, 4 (2000); David B. Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders Make Good*, 38 CT. REV. 18, 18-19 (2001).



## II. THERAPEUTIC JURISPRUDENCE AS A THEORETICAL FOUNDATION FOR PROBLEM SOLVING COURTS

The problem solving courts' revolution has been largely atheoretical. It grew out of experimental approaches used in drug treatment courts to facilitate the substance abuse treatment process, which, because of their success, were transplanted into other judicial arenas.<sup>39</sup> These programs appear to be successful, although the empirical research on their efficacy remains preliminary and often methodologically flawed.<sup>40</sup> Why these programs seem to work, however, has remained largely unexamined.

Therapeutic jurisprudence can be seen as a theoretical grounding for this developing judicial movement. We can understand the problem solving courts' revolution by situating it within the scholarly and law reform approach known as therapeutic jurisprudence.<sup>41</sup> Therapeutic jurisprudence began in the late 1980s as an interdisciplinary scholarly approach in the area of mental health law.<sup>42</sup> It criticized various aspects of mental health law for producing antitherapeutic consequences for the people that the law was designed to help.<sup>43</sup>

Legal rules and the way they are applied are social forces that produce inevitable, and sometimes negative, consequences for the

39. See *supra* notes 4-11 and accompanying text.

40. See STEVEN BELENKO, THE NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 26-33 (2001), available at [http://www.casacolumbia.org/usr\\_doc/researchon-drug.pdf](http://www.casacolumbia.org/usr_doc/researchon-drug.pdf) (last visited Mar. 15, 2003). Compare Hora et al., *supra* note 4, at 449-50, with Morris Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1489-90 (2000).

41. See generally DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE 17-18 (1991); BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 3-8 (1997); David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship* [hereinafter Wexler, *Changing Conceptions*], in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 20, at 597, 597-610; Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 184 (1997) [hereinafter Winick, *The Jurisprudence*].

42. DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 3-4 (1990); WEXLER & WINICK, *supra* note 41, at 6.

43. See, e.g., Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of Zinermon v. Burch*, 14 INT'L J.L. & PSYCHIATRY 169, 172 (1991) [hereinafter Winick, *Competency to Consent*] (criticizing the United States Supreme Court's broad dicta in *Zinermon v. Burch*, 494 U.S. 113 (1990), that voluntary admission to a mental hospital should always be preceded by an inquiry into the individual's competence to consent to voluntary hospitalization); Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 582-85 (1995) [hereinafter Winick, *Reforming Incompetency*] (criticizing incompetency to stand trial doctrine and practice).

psychological well-being of those affected. Therapeutic jurisprudence's basic insight was that scholars should study those consequences and reshape and redesign law in order to accomplish two goals<sup>44</sup>—too minimize antitherapeutic effects, and when it is consistent with other legal goals, to increase law's therapeutic potential.<sup>45</sup> Thus, therapeutic jurisprudence is an interdisciplinary approach to legal scholarship that has a law reform agenda. Although it started in the area of mental health law, therapeutic jurisprudence soon spread to other areas of legal analysis, and has emerged as a mental health approach to law generally.<sup>46</sup>

Therapeutic jurisprudence is not only concerned with measuring the therapeutic impact of legal rules and procedures, but also of the way they are applied by various legal actors—judges, lawyers, police officers, and expert witnesses testifying in court, among others.<sup>47</sup> Whether they know it or not, these legal actors are therapeutic agents, affecting the mental health and psychological well-being of the people they encounter in the legal setting. For example, how lawyers deal with their clients in the law office and the courtroom can have a significant impact on a client's emotional well-being, and therapeutic jurisprudence has spawned a growing literature concerning how attorneys should act in this regard.<sup>48</sup>

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44. See Bruce Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 20, at 645, 647-52.

45. *Id.*

46. See David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 20, at 713, 713-21; Winick, *The Jurisprudence*, *supra* note 41, at 184. For an up-to-date bibliography of therapeutic jurisprudence work, see the Therapeutic Jurisprudence website, at <http://www.therapeuticjurisprudence.org> (last visited Mar. 15, 2003).

47. See Winick, *Domestic Violence*, *supra* note 12, at 91 (proposing a more therapeutic application of the law in domestic violence cases); Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 31-48) (discussing how judges and lawyers can play their role more therapeutically in conducting civil commitment hearings, conditional release hearings, and in mental health court); Winick, *The Jurisprudence*, *supra* note 41, at 201 (describing the increasing body of therapeutic jurisprudence work ranging across a large spectrum of legal issues); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 52-60 (1999) [hereinafter Winick, *Civil Commitment Hearing*] (proposing how judges, lawyers, and expert witnesses can apply the law more therapeutically in civil commitment cases).

48. See, e.g., PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000) (anthology of essays applying therapeutic jurisprudence approach to lawyering); Symposium, *Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education*, 5 PSYCHOL. PUB. POL'Y & L. 793, 793-1210 (Bruce J. Winick et al. eds., 1999) (containing a symposium

In a similar way, therapeutic jurisprudence has much to offer judges concerning how they treat the people appearing before them and courts concerning how they should be structured and administered to maximize their therapeutic potential. Therapeutic jurisprudence uses insights from psychology and the behavioral sciences to critique legal and judicial practices, and to suggest how they can be reshaped to increase their therapeutic potential and avoid the risk of psychological harm.

Therapeutic jurisprudence is one of the major "vectors" of a growing movement in the law towards a common goal of a more comprehensive, humane, and psychologically optimal way of handling legal matters.<sup>49</sup> Problem solving courts are also one of these "vectors," and thus, share many common aims with therapeutic jurisprudence.<sup>50</sup> Thus, one may see problem solving courts as related to therapeutic jurisprudence, but they are not identical with the concept. Problem solving courts often use principles of therapeutic jurisprudence to enhance their functioning. Indeed, the Conference of Chief Justices and the Conference of State Court Administrators, following a joint task force analysis, recently adopted a resolution approving the growing movement in the direction of problem solving courts, and their use of principles of therapeutic jurisprudence in performing their functions.<sup>51</sup> These principles include "integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and governmental organizations."<sup>52</sup>

Although problem solving courts developed separately from therapeutic jurisprudence, their development occurred at the same time, and they share similar aims. Drug treatment courts, domestic violence courts, and mental health courts, for example, can be seen as taking a therapeutic jurisprudence approach to the processing of

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of articles applying the therapeutic jurisprudence/preventive law model to lawyering in various contexts).

49. See Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION, *supra* note 48, at 465.

50. See Casey & Rottman, *supra* note 38, at 454 (stating that "therapeutic jurisprudence principles are consistent with court performance goals."); David B. Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem Solving Courts*, NAT'L INST. JUST. J., Summer 1999, at 12-19; Simon, *supra* note 1 (manuscript at 2-7); Winick & Wexler, *supra* note 4 (manuscript at 1).

51. CCJ RESOLUTION 22 & COSCA RESOLUTION 4, *supra* note 2.

52. *Id.*

cases, inasmuch as their goal is the rehabilitation of the offender and their use of the legal process, in particular, the role of the judge, to accomplish this goal.<sup>53</sup> All of these courts seek to deal with the offender's underlying problem, and emphasize its resolution through the provision of treatment and rehabilitative services where the judge is an important member of the treatment team.<sup>54</sup> Judges in these specialized courts receive special training in the nature and treatment of drug addiction,<sup>55</sup> domestic violence,<sup>56</sup> and mental illness,<sup>57</sup> and themselves function as therapeutic agents through their supervision and monitoring of the offender's treatment progress. Unlike traditional judges functioning in traditional courts, judges in problem solving courts consciously view themselves as therapeutic agents, and, therefore, one can see them as playing a therapeutic jurisprudence function in their dealings with the individuals who appear before them.

Moreover, principles of therapeutic jurisprudence can help problem solving court judges play this function well. Therapeutic jurisprudence has already produced a large body of interdisciplinary scholarship analyzing principles of psychology and the behavioral sciences, and probing the ways in which they can be used in legal contexts to improve mental health and emotional well-being.<sup>58</sup> A growing body of therapeutic jurisprudence scholarship has also addressed how judges in specialized problem solving courts can apply principles of therapeutic jurisprudence in their work.<sup>59</sup> For instance, a recent symposium issue of *Court Review*, the official publication of the American Judges Association, was devoted entirely

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53. See Dorf & Sabel, *supra* note 35, at 841-44, 852; Winick, *Domestic Violence*, *supra* note 12, at 39-45; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 31-39).

54. See *supra* notes 7-31 and accompanying text.

55. Hora et al., *supra* note 4, at 476-77.

56. Winick, *Domestic Violence*, *supra* note 12, at 44.

57. Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 38).

58. See, e.g., LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 20 (anthology of therapeutic jurisprudence scholarship ranging across the legal spectrum).

59. See, e.g., Casey & Rottman, *supra* note 38, at 451-52, 455-56; Fritzler, *supra* note 24, at 14-1 to 14-22; Fritzler & Simon, *supra* note 12, at 59-62; Hora, *supra* note 4, at 1472-73, 1477, 1481-84; Hora et al., *supra* note 4, at 476-77; see also 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, 266-67, 288-94 (2002); Shiff & Wexler, *supra* note 20, at 291-95 (discussing the therapeutic jurisprudence of teen courts); Simon, *supra* note 1 (manuscript at 6); Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 36); Winick & Wexler, *supra* note 4 (manuscript at 1-7).

to therapeutic jurisprudence and its application to judging.<sup>60</sup> An understanding of therapeutic jurisprudence's approach and of the psychological and social work principles it uses can thus provide considerable help in the structuring of problem solving courts and in defining the role played by judges functioning within them.

Both therapeutic jurisprudence and problem solving courts see the law as an instrument for helping people, particularly those with a variety of psychological and emotional problems. Our society has not done a particularly good job of dealing with many social problems, with the result that society often dumps them at the doorstep of the courthouse. When courts deal with such vexing problems as drug addiction, alcoholism, domestic violence, mental illness, child abuse and neglect, and juvenile delinquency, they can be seen to function as psychosocial agencies. In order for problem solving courts to succeed and function well, however, they need to be aware of some basic principles of psychology and social work. Thus, therapeutic jurisprudence can be understood as providing a theoretical foundation for much of the problem solving court movement, and a variety of principles that can help judges play this new and exciting role.

### III. THERAPEUTIC JURISPRUDENCE PRESCRIPTIONS FOR PROBLEM SOLVING COURT JUDGES

Problem solving courts are less involved with the adjudication of historic issues of fact than with functioning as psychosocial agencies that attempt to rehabilitate an offender or provide access to services designed to address the underlying problem that has brought the individual to court and monitor and supervise the treatment process. Therapeutic jurisprudence can provide instrumental prescriptions for how judges in problem solving courts can perform these new tasks.<sup>61</sup> Just as judges dealing with antitrust cases need to understand basic principles of economics and judges dealing with patent cases need to understand basic principles of engineering, judges in problem solving courts, dealing as they do with human problems, need to understand some principles of psychology, the science of human behavior. They must be aware that they are functioning as therapeutic agents, and that how they interact with the individuals appearing before them will have inevitable

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60. Symposium, *Therapeutic Jurisprudence*, 37 CT. REV. 1, 1-68 (2000).

61. See Robert F. Schopp, *Therapeutic Jurisprudence: Integrated Inquiry and Instrumental Prescriptions*, 17 BEHAV. SCI. & L. 589, 592-604 (1999) (describing therapeutic jurisprudence as providing "instrumental prescriptions" for law reform).

consequences for their ability to be rehabilitated or otherwise deal with their underlying problems.

Individuals usually appear before problem solving courts because of social or psychological problems they have not recognized, or because of their inability to deal with these problems effectively. They may have alcoholism or substance abuse problems, which may contribute to repetitive criminality, domestic violence, or child abuse and neglect.<sup>62</sup> They may be repetitive perpetrators of domestic violence or child abuse because of cognitive distortions concerning their relationships with their spouses or children, or because they lack the social skills necessary to manage their anger or resolve problems through means other than violence.<sup>63</sup> They may suffer from mental illness that impairs their judgment about the desirability of their continuing to take needed medication.<sup>64</sup> They may be in denial about the existence of these problems, refusing to take responsibility for their wrongdoing, rationalizing their conduct, or minimizing its negative impact on themselves and others. Many of these are problems that will respond effectively to available treatment, but only if the individual perceives that she has a problem and is motivated to deal with it.<sup>65</sup>

In these situations, the problem solving court judge cannot simply order the individual to recognize the existence of the 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. The judge can help the individual realize this, and, together with treatment staff, can help the individual to identify and build upon her own strengths and use them effectively in the

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62. See Babb & Moran, *supra* note 11, at 8-9; Brown, *supra* note 11, at 1.

63. See Brown, *supra* note 11, at 1; Winick, *Domestic Violence*, *supra* note 12, at 77.

64. See Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 4, 14) (discussing the conditions and consequences that mentally ill individuals undergo when they fail to take their medication).

65. See Michael D. Clark, *Change-Focused Drug Courts: Examining the Critical Ingredients of Positive Behavior Change*, NAT'L DRUG CT. INST. REV., Winter 2001, at 35, 44-46, 48-56 (suggesting that treatment programs in general are effective, but that factors related to the individual's own strengths are more important in treatment efficacy than the particular form of treatment used, and that court and program staff must build trust and find effective methods to encourage the individual to participate in treatment, affording increased choice and autonomy).

collaborative effort of solving the problem.<sup>66</sup> How can the judge facilitate this process?

### A. Improving Interpersonal Skills

At the outset, the judge should always treat the individual with dignity and respect.<sup>67</sup> Treatment is a collaborative process between the individual and the treatment team, including the judge, and the conditions necessary to forge a genuine treatment alliance include reciprocal understanding, mutual affirmation, emotional attachment, and respect.<sup>68</sup> Therefore, the judge and treatment personnel must act so as to give the individual the perception that they are empathic, accepting, warm, and willing to permit self-expression.<sup>69</sup>

Judges performing these functions need to improve their interviewing, counseling, and interpersonal skills. Even though they have engaged in wrongdoing, a special sensitivity to the individual's pain, shame, sadness, and anxiety in coming to terms with the existence of psychological or behavioral problems that have produced criminality and the victimization of others is called for in the judge-offender interaction.<sup>70</sup> Even though judges may strongly disapprove of the individual's conduct, they must strive in the judge-offender dialogue to be supportive, empathetic, warm, and good listeners.<sup>71</sup> These are highly sensitive conversations and offenders will be less likely to recognize their problems and resolve to deal with them effectively if they perceive the judge to be cold, insensitive, or judgmental. This is not to say that the judge should excuse or justify the individual's inappropriate behavior, but the judge should direct her disapproval at the individual's antisocial conduct, and not at the individual herself.<sup>72</sup> Once the individual has come to the recognition that her prior behavior has been inappropriate, the judge and treatment staff should shift to a future-focused orientation that concentrates on the steps needed to solve the prob-

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66. See *id.* at 57-58 (discussing strength based approaches and their importance in the drug treatment court treatment process).

67. Petrucci, *supra* note 59, at 285-86.

68. See Clark, *supra* note 65, at 44-46.

69. See *id.*

70. See JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 85 (1989); John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244, 257-61 (2002) [hereinafter Braithwaite, *Restorative Justice*].

71. See Braithwaite, *Restorative Justice*, *supra* note 70, at 257-61.

72. *Id.* The literature on restorative justice criticizes the shaming of the individual, recommending instead "reintegrative shaming," a condemnation of the act and not the person. *Id.*

lem.<sup>73</sup> Focusing upon past failures, by contrast, can result in demoralization and resignation.<sup>74</sup> To be an effective agent of change, the judge should convey empathy to the individual, even if not to her act.

Empathy involves the ability to experience another person's feelings and to see the world through that person's eyes.<sup>75</sup> Empathy has both cognitive and affective components.<sup>76</sup> The judge should convey both an intellectual response to the individual, communicating that she understands the individual's predicament, and an emotional response, communicating that she shares the individual's feelings. The individual, after all, is a fellow human being with a human problem that the judge is attempting to help her deal with. Therefore, in discussing the individual's problem with her, and the need for rehabilitation or treatment, the judge should communicate a sense of caring, sympathy, genuineness, and understanding.<sup>77</sup> Just as physicians need to develop their "bed-side manner," judges need to develop what can be termed their "bench-side manner."<sup>78</sup> This can help create a comfortable space in which offenders can feel free to express their emotions about their problems and deal effectively with them.

Judges playing this role need to be sensitive to the psychological mechanisms of transference and counter-transference, and how they can affect communication in the judge-offender interaction. Transference is an individual's tendency to project onto a current relationship, feelings that originated in prior relationships with others, frequently parents and siblings.<sup>79</sup> Counter-transference oc-

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73. See Michael D. Clark, *Change-Focused Youth Work: The Critical Ingredients of Positive Behavior Change*, 3 J. CENTER FAM. CHILD. & CTS. 59, 63-64 (2001) [hereinafter Clark, *Change-Focused Youth*]; Clark, *Drug Courts*, *supra* note 65, at 53-55.

74. See Clark, *Drug Courts*, *supra* note 65, at 53-54.

75. Bruce J. Winick, *Legal Counseling About Advance Directive Instruments: Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal With a Psycholegal Soft Spot*, 4 PSYCHOL. PUB. POL'Y & L. 901, 909 (1998) [hereinafter Winick, *Legal Counseling*].

76. Gerald A. Gladstein, *Understanding Empathy: Integrating Counseling, Developmental, and Social Psychology Perspectives*, 30 J. COUNSELING PSYCHOL. 467, 468 (1983); Daniel W. Shuman, *The Use of Empathy in Forensic Examinations*, 3 ETHICS & BEHAV. 289, 296 (1993).

77. See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 145-46 (1995); DANIEL GOLEMAN, *WORKING WITH EMOTIONAL INTELLIGENCE* 137-46 (1998); Marjorie A. Silver, *Therapeutic Jurisprudence/ Preventive Law and Law Teaching: Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y & L. 1173, 1196-1203 (1999).

78. Cf. Francis Peabody, *The Care of the Patient*, 88 JAMA 877, 877-82 (1927) (discussing the importance of physician's bedside manner).

79. Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 263-65 (1999) [hereinafter Silver,



curs when the judge transfers feelings onto the individual that stem from the judge's own prior relationships.<sup>80</sup> The judge should be sensitive to the possibility of transference on the part of the individual, and should seek to induce positive transference and avoid negative transference when possible. For example, individuals who have experienced repeated exposures to the criminal justice system because of their repetitive wrongdoing are likely to have had parents, family members, teachers, friends, and others unsuccessfully lecture them about their need to shape up and achieve rehabilitation. To the extent that these individuals infected the lectures with a paternalistic tone, they might have stimulated feelings of resentment and humiliation or produced a degree of resistance or psychological reactance.<sup>81</sup> Hence, problem solving court judges should seek to avoid tainting their interactions with offenders with these prior negative feelings and relational images that these former unsuccessful lectures might have produced.

Similarly, problem solving court judges should be sensitive to the possibility of counter-transference on their own part, which can interfere with their ability to develop rapport with the individual. Judges will inevitably have had prior experiences with criminal offenders that have produced anger and other negative reactions directed at such offenders. The reemergence of these negative feelings engendered in prior relationships with offenders may produce a negative counter-transference toward the individual appearing in the problem solving court that might compromise the problem solving court judge's ability to play the therapeutic role contemplated. Judges, therefore, must be on their guard to avoid such counter-transference, in other words, to avoid associating the individual appearing before them in the problem solving court with prior offenders who may have invoked strong negative emotional reactions.

In helping offenders come to grips with their criminality and underlying psychological and behavioral problems, problem solving court judges need to be good listeners.<sup>82</sup> Rather than giving the

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*Love & Hate*]; Stephanie Stier, Essay Review, *Reframing Legal Skills: Relational Lawyering*, 42 J. LEGAL EDUC. 303, 310-12 (1992); Winick, *Legal Counseling*, *supra* note 75, at 911.

80. Silver, *Love & Hate*, *supra* note 79, at 262-65; Stier, *supra* note 79, at 312; Winick, *Legal Counseling*, *supra* note 75, at 911-19.

81. See Sharon S. Brehm & Jack W. Brehm, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* 13 (1981).

82. See Clark, *Drug Courts*, *supra* note 65, at 50-51 (discussing the need for improved communication skills in drug treatment court contexts, including the use of

offender a speech, the judge should seek to promote dialogue. At appropriate intervals, the offender should be encouraged to speak, since this will require the judge to stop speaking, signaling to the individual that what she has to say is important. Problem solving court judges need to convey to individuals appearing before them that they genuinely wish to hear them, are interested in their problems, and are interested in attempting to help them find a solution. They need to listen to the individual in ways that are attentive, non-judgmental, and sympathetic. Finally, active listening and passive listening techniques may be helpful in this connection.<sup>83</sup>

Problem solving court judges also need to learn to read the individual's non-verbal forms of communication and to interpret her underlying feelings.<sup>84</sup> Non-verbal forms of communication, such as facial expression, body language, and tone of voice, can be important clues for understanding both the individual's emotions in the context of the sensitive judge-offender conversation, and how judges should respond to them.<sup>85</sup> Attempting to facilitate the individual's acceptance of responsibility for her wrongdoing, and to motivate the individual to accept help for an underlying problem that may contribute to it, requires a high degree of psychological sensitivity on the part of the problem solving court judge.

### **B. Avoiding Paternalism and Respecting Autonomy**

It is important for problem solving court judges to avoid paternalism in these judge-offender interactions. The judge may be fully aware that the individual suffers from an emotional or psychological problem that produces repetitive criminality and that she could respond effectively to available rehabilitative programs. A paternalistic attitude, however, is not likely to help in facilitating the individual's recognition of these realities.

Its recipients often experience paternalism as offensive. Paternalism may create resentment and possibly backfire by producing a

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reflective listening, in which the judge or treatment staff member frequently checks the accuracy of what she believes the individual has said); *see also* Steven Keeva, *Beyond the Words: Understanding What Your Client Is Really Saying Makes for Successful Lawyering*, A.B.A. J., Jan. 1999, at 60 (providing pointers on good listening techniques for attorneys to use in lawyer-client conversations); Silver, *supra* note 77, at 1174 (discussing listening skills on the part of lawyers).

83. *See* David A. Binder et al., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 16-24 (1991); *see also* Winick, *Legal Counseling*, *supra* note 75, at 912.

84. *See* Winick, *Legal Counseling*, *supra* note 75, at 912 (extolling the virtues of "nonverbal responses that express interest, caring, warmth, and sympathy"); *see also* Stier, *supra* note 79, at 309.

85. *See* Winick, *Legal Counseling*, *supra* note 75, at 910-11.

psychological reactance to the advice offered that might be counter-productive.<sup>86</sup> Many offenders will be in denial about their underlying problems, and paternalism is unlikely to succeed in allowing them to deal with such denial.<sup>87</sup> Instead, it may produce anxiety and other psychological distress that will make it harder for them to do so.

Accordingly, problem solving court judges should respect the autonomy of the individuals they are seeking to help, thus, allowing them to make decisions for themselves about whether to accept treatment, rather than mandating treatment participation. For example, a problem solving court judge should remind an individual charged with a drug offense that she is free to deal with the charges in criminal court and accept a sentence to prison if found guilty. Drug treatment court is not required, but is only an alternative option. Hence, the judge should remind the offender that the choice is hers, and that she should not elect the drug treatment court unless she is prepared to admit the existence of a problem and express a willingness to deal with it. This is important because the approach can be empowering to such individuals who often feel powerless and helpless.

Individuals should see the role of the problem solving court judge in discussing rehabilitation with the offender as one of persuasion rather than of coercion. Judges should be aware of the psychological value of choice.<sup>88</sup> 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,<sup>89</sup> and may experience various other psychological

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86. See BREHM & BREHM, *supra* note 81, at 13; Winick, *Legal Counseling*, *supra* note 75, at 913 (suggesting that if attorneys are not "attentive, nonjudgmental and sympathetic," clients may respond negatively).

87. See Winick, *Legal Counseling*, *supra* note 75, at 903 (warning that lawyers should expect that clients may frequently be in denial); see also Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL'Y & L. 1034, 1064 (1999) [hereinafter Winick, *Redefining*].

88. See BRUCE J. WINICK, THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT 334 (1997) [hereinafter WINICK, RIGHT TO REFUSE]; Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. L. REV. 1145, 1147 (1997) [hereinafter Winick, *Mental Health*]; Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1707 (1992) [hereinafter Winick, *Autonomy*].

89. See BREHM & BREHM, *supra* note 81, at 49-51 (explaining the results of a test showing that a removal of "freedom" in choice of essay topic caused a significantly higher reactance arousal).

difficulties.<sup>90</sup> In appropriate circumstances, the judge should communicate to the individual her own views concerning the individual's best interests, but should ultimately cede the choice to the individual. To succeed, treatment or rehabilitation will require a degree of intrinsic motivation on the part of the individual.<sup>91</sup> If she 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.

The individual should be afforded a choice not only in deciding whether to elect to participate in a problem solving court, but also in the design of the rehabilitative plan, when feasible. Typically, there may be many options available in fashioning such a plan, including variations in rehabilitative techniques and service providers.<sup>92</sup> The problem solving court judge can lay the options out for the individual, who can then exercise choice. The individual's choice concerning the various issues that arise in the design of the treatment plan can be empowering, and can influence the likelihood of success.

Some problem solving court judges describe what they do as "benevolent coercion," and extol the virtues of judicial coercion as an essential ingredient in the rehabilitative enterprise.<sup>93</sup> While many of the individuals in drug treatment or other problem solving courts who agree to participate in a course of treatment or rehabilitation will benefit from the structure, supervision, and compliance monitoring that they provide, it is neither appropriate nor desirable to regard this as coercion.<sup>94</sup> An individual who decides to accept diversion to a drug treatment or other problem solving court, or to plead guilty and accept treatment in a problem solving court program as a condition of probation, is making a legally voluntary

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90. See Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 13-22 (1995) [hereinafter Winick, *Side Effects*].

91. See ALBERT BANDURA, *SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY* 471-72, 477-78 (1986); Bruce J. Winick, *Harnessing the Power of the Bet: Wagering With the Government as a Mechanism for Social and Individual Change*, 45 U. MIAMI L. REV. 737, 762-63 (1991) [hereinafter Winick, *Harnessing*]; see also EDWARD DECI, *INTRINSIC MOTIVATION* 53 (Elliot Aronson ed., 1975).

92. See Babb & Moran, *supra* note 11, at 25-34 (detailing the various options available to families who are affected by substance abuse).

93. See, e.g., Jeffrey Tauber, Address at the Eleventh Annual Symposium on Contemporary Urban Challenges at the Fordham University School of Law (Feb. 28, 2002), in *Problem Solving Courts: Adversarial Litigation to Innovative Jurisprudence* 29 FORDHAM URB. L.J. 1755, 1901-05 (2002) ("We have an opportunity through problem-solving courts to use coercion, but to do it in a benevolent way.").

94. See Winick, *Harnessing*, *supra* note 91, at 768-72.

choice as long as she is not subjected to duress, force, fraud, or a form of improper inducement.<sup>95</sup> Individuals making such choices may be functioning within a coercive context. Although they may face hard choices, none of which may be agreeable, they are in these difficult situations because of their own actions. For example, they were not arrested as a vehicle for forcing them into treatment, but because they possessed drugs or committed some other crime. Moreover, they are free to either plead not guilty and face trial, or plead guilty and receive an appropriate sentence. Therefore, extending to them the additional option of accepting a rehabilitative alternative does not make the choice they will then face a coercive one.

An analogy to plea-bargaining is appropriate. Although offenders who have been offered plea deals may feel that the choice they are required to make is coercive, as long as the prosecutor's offer was not illegal, unauthorized, unethical, or otherwise inappropriate, the courts have held that it does not constitute legal coercion.<sup>96</sup> Accordingly, if an individual's decision about whether to accept a guilty plea is not coerced, then her decision as to whether to accept diversion to a problem solving court, or to plead guilty and accept treatment through the auspices of such a court as a condition for probation also would not constitute coercion in a legal sense. Plea-bargaining is an example in which individuals face hard choices, but where, absent an offer that is improper, illegal, or unethical, the courts will not consider the choice to be coercive.

Parole from prison presents another example. The criminal justice system may release an individual on parole before the expiration of her prison term, if she accepts certain conditions of parole.<sup>97</sup> These conditions may include, for example, an undertaking that the individual not use alcoholic beverages or associate with other individuals who have a criminal record.<sup>98</sup> Unless the conditions of parole are improper or illegal, we would consider the individual's choice to accept these conditions as voluntary, rather than co-

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95. ALAN WERTHEIMER, COERCION 172, 267-68, 287, 301, 308 (1987).

96. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363-65 (1978); *Brady v. United States*, 397 U.S. 755, 758 (1970); WERTHEIMER, *supra* note 95, at 172, 267-68, 287, 301, 308; Winick, *Harnessing*, *supra* note 91, at 771 n.107; Winick, *Mental Health*, *supra* note 88, at 1153-55.

97. 18 U.S.C. §§ 3561-3566 (2000).

98. *Id.* § 3563(a)(5), (b)(6).

erced.<sup>99</sup> Even though the individual's desire to be released from prison might be so powerful that she may feel that she has no real choice other than to accept the conditions of parole, it would be absurd for the law to invalidate her choice on grounds of coercion. As long as the conditions of parole are not unlawful, improper, or unreasonable, parole accords the individual an opportunity that she may find more desirable than serving the remainder of her sentence in prison.

Opportunities for diversion from the criminal process are essentially similar. An individual charged with a crime that must decide between facing her charges or accepting diversion into a rehabilitative program may be facing a hard choice. It is a fair and reasonable choice, however, and is not one that the law will invalidate on grounds of coercion.<sup>100</sup>

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99. See WERTHEIMER, *supra* note 95, at 172, 267-68, 287, 301, 308 (discussing how choices given to defendants are not considered coercive unless illegally imposed upon them).

100. See *McKune v. Lile*, 122 S. Ct. 2017, 2042-43 (2002) (O'Connor, J., concurring) (distinguishing pressure from compulsion for Fifth Amendment purposes, and noting that compulsion is limited to choices involving grave consequences). At least this is true where diversion is reasonably related to the offense charged, and does not impose conditions that would themselves be unconstitutional. Requiring mental health treatment as part of a diversion program for an individual whose offense does not involve mental illness, for example, would seem to be an arbitrary governmental imposition, arguably offending due process. Moreover, although an individual may have the constitutional right to refuse such treatment, such a right may generally be waived, as long as the waiver is competent, voluntary, and knowing. WINICK, *RIGHT TO REFUSE*, *supra* note 88, at 303, 345-70. While some constitutional rights may be unwaivable, for example the right to be free of cruel and unusual punishment, most will be subject to waiver, at least where the right in question is reasonably related to the governmental purpose sought to be served. See, e.g., *Wyman v. James*, 400 U.S. 309, 317-18 (1971) (requiring waiver of Fourth Amendment right to be free of warrantless searches as condition for receipt of certain welfare benefits when such search was related to assessing continued eligibility for benefits).

It is important that an offender understand the risks of entering into a problem solving court treatment program as part of diversion from the criminal court or as a condition of probation, and it is an important role of defense counsel to ensure that the client possesses this understanding. See Martin Reisig, *The Difficult Role of the Defense Lawyer in a Post-Adjudication Drug Treatment Court: Accommodating Therapeutic Jurisprudence and Due Process*, 38 CRIM. L. BULL. 216, 218-19, 221-23 (2002) (discussing the relationship between a defense lawyer and a defendant and the role the defense lawyer should play). Defense counsel who fail to fully advise their clients in this regard may be depriving them of the effective assistance of counsel guaranteed by the Sixth Amendment, particularly since those offenders who repeatedly fail to comply with program requirements may, as a consequence, be re-diverted back to criminal court for a revocation of probation or a criminal sentence. See Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 54-56 (2000-2001). Moreover, failing to fully advise the client concerning the potential consequences of

The line between coercion and choice can be a narrow one. Moreover, the concept of legal coercion does not necessarily coincide with the psychological perception of coercion. When judges, attorneys, and other court personnel help individuals consider whether to opt for a problem solving court rehabilitative alternative instead of criminal court, they should rely on persuasion or inducement, and avoid coercion and negative forms of pressure. Of course, once the individual chooses the treatment option, her future actions are constrained by the choice she has voluntarily entered into. Thus, the individual, as a condition for accepting the drug treatment court, may agree to attend a drug treatment program, to remain drug-free, and to submit to periodic drug testing.<sup>101</sup> The individual knows that if she fails to comply, the court can apply sanctions (typically graduated sanctions) agreed to in advance by the individual.<sup>102</sup> Moreover, the individual knows that repeated non-compliance can result in expulsion from the program and return to criminal court, or a violation of probation if the individual had pled guilty.<sup>103</sup> While, in a manner of speaking, these potential sanctions may pressure the individual to comply and even induce her compliance, there is no need to regard this as coercion. It is not legal coercion, and, if properly applied, the individual may not even experienced it as psychologically coercive.

In this connection, problem solving court judges must understand what makes people feel coerced and feel that they have acted voluntarily. They should be aware of the implications of recent research conducted on coercion by the MacArthur Research Network on mental health and the law.<sup>104</sup> This research examined the

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entering into a problem solving court program not only can compromise the defendant's rights, but also can undermine the potential for treatment success. *See* Reisig, *supra*, at 218-19, 221-23 (discussing the importance of a defendant's informed consent and waiver); Winick & Wexler, *supra* note 4 (manuscript at 4-5).

101. Winick & Wexler, *supra* note 4 (manuscript at 3).

102. Hora et al., *supra* note 4, at 528.

103. *Id.* at 478, 510.

104. Nancy S. Bennet et al., *Inclusion, Motivation, and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295, 296-305 (1993); William Gardener et al., *Two Scales for Measuring Patient Perceptions of Coercion During Mental Hospital Admission*, 11 BEHAV. SCI. & L. 307, 308-20 (1993); Steven K. Hoge et al., *Perceptions of Coercion in the Admission of Voluntary and Involuntary Psychiatric Patients*, 20 INT'L J.L. & PSYCHIATRY 167, 170-81 (1997); Charles W. Lidz et al., *Perceived Coercion in Mental Hospital Admission: Pressures and Process*, 52 ARCHIVE GEN. PSYCHIATRY 1034, 1034 (1995); John Monahan et al., *Coercion and Commitment: Understanding Involuntary Mental Hospital Admission*, 18 INT'L J.L. & PSYCHIATRY 249, 252-55 (1995) [hereinafter Monahan et al., *Coercion and Commitment*]; John Monahan et al., *Coercion in the Provision of Mental Health Services: The*

causes and correlates of what makes people feel coerced. Conducted in the context of mental patients facing involuntary hospitalization, this research concluded that even though patients were subjected to legal compulsion through involuntary civil commitment, they did not feel coerced when treated with dignity and respect by people who they perceived as acting with genuine benevolence, and as providing them with a sense of "voice" (the ability to have their say), and with "validation" (the impression that what they said was taken seriously).<sup>105</sup> This research also showed that there is a correlation between the degrees of perceived coercion, and the kinds of pressures that doctors, families, and friends placed upon the patient.<sup>106</sup> Negative pressures, such as threats and force, tend to make individuals feel coerced, whereas positive pressures, such as persuasion and inducement, do not.<sup>107</sup> Even though courts subject these individuals to the legal compulsion of civil commitment, if treated in these ways, they tend to not feel coerced.

Problem solving court judges should apply the lessons of the MacArthur research on coercion, treating all individuals appearing before them with dignity and respect, and according them voice and validation in the interactions they have with them.<sup>108</sup> They should avoid negative pressures and threats, relying instead on positive pressures like persuasion and inducement. If they do so, it is more likely that they will experience the treatment they have consented to as voluntary, rather than coerced, and as a result, they will experience the psychological benefits of choice,<sup>109</sup> and avoid the negative psychological effects of coercion.<sup>110</sup> People resent others treating them as incompetent subjects of paternalism, and suffer a diminished sense of self-esteem and self-efficacy when not permitted to make decisions for themselves.<sup>111</sup> To the extent that

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*MacArthur Studies, in COERCION IN MENTAL HEALTH SERVICES* (J. Morrissey & John Monahan eds., forthcoming) (manuscript at 5-17, on file with authors) [hereinafter Monahan et al., *Coercion in the Provision*].

105. Monahan et al., *Coercion in the Provision*, *supra* note 104 (manuscript at 12-14, 17).

106. *Id.* (manuscript at 10-12, 17).

107. *Id.* (manuscript at 10-11, 17).

108. See Winick, *Mental Health*, *supra* note 88, at 1166-67.

109. See WINICK, RIGHT TO REFUSE, *supra* note 88, at 303, 327-44; Winick, *Civil Commitment Hearing*, *supra* note 47, at 48-52; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 38-39).

110. See Winick, *Mental Health*, *supra* note 88, at 1159.

111. ALBERT BANDURA, SELF-EFFICACY: THE EXERCISE OF CONTROL 12-13 (1997); Winick, *Side Effects*, *supra* note 90, at 6.



the individual experiences her decision to participate in a problem solving court treatment or rehabilitative program as voluntary, it can have significant positive effects on treatment outcome.<sup>112</sup>

Therefore, problem solving court judges should avoid paternalism and respect the individual's autonomy. They should encourage and urge the individual to accept needed treatment or rehabilitation. They should use techniques of persuasion or inducement, but avoid a heavy-handed approach, strong negative pressure, and coercion.

If handled properly by the problem solving court judge, conversations about the need for treatment or rehabilitation can be an opportunity for empowering the individual in ways that can have positive psychological value. Such conversations can build self-esteem and self-efficacy, without which these individuals may not feel they can succeed in what might be a long and difficult path to rehabilitation. These conversations can facilitate the individual's sense that she has made a voluntary choice in favor of treatment, which can increase her commitment to achieving the treatment goal, and set in motion a variety of psychological mechanisms that can help to bring it about.

### C. Using Persuasion and Sparking Motivation

Persuasion, not coercion, should be the hallmark of judge-offender interactions in problem solving court contexts. Involvement in the judicial process itself can provide an important motivating force that may prompt the individual to reexamine past patterns and seek to undergo change. The process of attempting to persuade the individual in this direction often will occur in conversations with the individual's own defense attorney.<sup>113</sup> At times, however, the judge will participate in the persuasion process through conversations with the individual occurring in open court. When such occasions present themselves, judges functioning in the problem solving court context should remember that judicial conversations that are perceived by the individual as coercive may be counterproductive, and that there is an important difference between coercion and persuasion.<sup>114</sup>

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112. See Michele Cascardi et al., *Procedural Justice in the Context of Civil Commitment: An Analogy Study*, 18 BEHAV. SCI. & L. 731, 736-38 (2000); Winick, *Civil Commitment Hearing*, *supra* note 47, at 40-41, 48.

113. See Astrid Birgden, *Dealing with the Resistant Criminal Client: A Psychologically-Minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225, 226-29, 232-39 (2002); Winick, *Redefining*, *supra* note 87, at 1049-51.

114. See *supra* notes 88-95 and accompanying text.

When the context calls for the judge to attempt to persuade the individual to accept treatment or rehabilitation, the judge's understanding of the social psychology of persuasion will augment her ability to be an effective persuader.<sup>115</sup> This body of psychological research identifies three elements of the persuasion process as critical-source, message, and receiver.<sup>116</sup> The content of the message, and the way it is delivered, significantly influence the likelihood of persuasion.

Persuasion theory has postulated an elaboration likelihood model, which asserts that certain persuasive elements are influenced by the extent to which the receiver of information is actively involved in the processing of the information presented.<sup>117</sup> Under this theory, when the individual receiving the information has a high likelihood of elaboration, this will maximize the potential for successful persuasion, for example, when they engage in issue-relevant thinking about the content of the message itself. It is more likely that a judge will be successful in persuading individuals if the message has personal relevance to them and they have prior knowledge about the issue.<sup>118</sup>

Individuals facing criminal charges wish to minimize the risk of imprisonment, so they will value strategies that can achieve this result. Problem solving courts should present them with information concerning the rehabilitative alternatives to criminal court that they present, as well as the positive consequences for successfully completing the program, including, in many cases, the dismissal of charges. Then, judges should leave them free to engage in instrumental thinking concerning the value of electing these rehabilitative alternatives. Judges should also give these individuals the opportunity to ask questions about their options, the freedom to engage in their own processing of the information, and the freedom to reach their own decision. Additionally, they should fully encourage individuals facing criminal charges to discuss their options

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115. See DANIEL J. O'KEEFE, *PERSUASION: THEORY AND RESEARCH* 134 (1990); see also RICHARD E. PETTY & JOHN T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* (1986) (discussing the use of central and peripheral persuasion in communication as a method of changing people); Winick, *Legal Counseling*, *supra* note 75, at 915-17.

116. See O'KEEFE, *supra* note 115, at 130-88.

117. PETTY & CACIOPPO, *supra* note 115, at 1-60.

118. See Wendy Wood, *Retrieval of Attitude-Relevant Information From Memory: Effects on Susceptibility to Persuasion and on Intrinsic Motivation*, 42 J. PERSONALITY & SOC. PSYCHOL. 798, 799-800 (1982); Wendy Wood & Carl A. Kallgren, *Communicator Attributes and Persuasion: Recipients' Access to Attitude-Relevant Information in Memory*, 14 PERSONALITY & SOC. PSYCHOL. BULL. 172, 172-73 (1988).

with counsel, and provide them with a reasonable opportunity to see counsel and think about their choices. This form of persuasion, known as "central route" persuasion,<sup>119</sup> can be more effective than pressuring the individual to make a decision, and can allow her to internalize the rehabilitative goal and increase the intrinsic motivation needed to accomplish it.

The elaboration likelihood model of persuasion is similar to the motivational interviewing technique developed for use by clinicians to help motivate individuals to deal with problems of addiction and alcoholism.<sup>120</sup> Thus, problem solving court judges should also master the techniques of motivational interviewing. Although treatment staff<sup>121</sup> and the individual's own attorney<sup>122</sup> will be primarily involved in conducting such motivational interviews, occasionally problem solving court judges will personally engage in such interviews. Likewise, judges will have the opportunity to reinforce the motivational effects of interviews conducted by the treatment staff or defense attorney.

Five basic principles underlie this technique.<sup>123</sup> First, the interviewer needs to express empathy.<sup>124</sup> This involves understanding the individual's feelings and perspectives without judging, criticizing, or blaming.<sup>125</sup> Second, the interviewer, in a non-confrontational way, should seek to develop discrepancies between the individual's present behavior and important personal goals.<sup>126</sup> Applying this approach, the judge should attempt to elicit the individual's underlying goals and objectives.<sup>127</sup> In addition, the judge should attempt to get the individual to recognize the existence of a problem through the use of interviewing techniques, such as open-ended questioning, reflective listening, providing frequent statements of affirmation and support, and eliciting self-motivational statements.<sup>128</sup> For example, if the individual wishes to obtain or keep a particular job, the judge can ask questions designed to probe the relationship between her drinking or substance abuse and her poor performance in previous employment that may have

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119. PETTY & CACIOPPO, *supra* note 115, at 3-11.

120. WILLIAM R. MILLER & STEPHEN ROLLNICK, MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE TO CHANGE ADDICTIVE BEHAVIOR 51-63 (1991).

121. See Clark, *Drug Courts*, *supra* note 65 (manuscript at 23-27).

122. See Birgden, *supra* note 113, at 237.

123. MILLER & ROLLNICK, *supra* note 120, at 55-62.

124. *Id.* at 55-56.

125. *Id.*

126. *Id.* at 56-58.

127. *Id.*

128. See *id.* (describing the general goal of eliciting discrepancies).

resulted in dismissal. An interviewer will create motivation for change only when individuals perceive the discrepancy between how they are behaving and the achievement of their personal goals.

Third, the interviewer should avoid arguing with the individual, which can be counter productive and create defensiveness.<sup>129</sup>

Fourth, when resistance is encountered, the interviewer should attempt to roll with the resistance, rather than becoming confrontational.<sup>130</sup> This requires listening with empathy and providing feedback to what the individual is saying by introducing new information, which also allows the individual to remain in control, to make her own decisions, and to create solutions to her problems.

Fifth, it is important for the interviewer to foster self-efficacy in the individual. The individual will not attempt change unless she feels that she can reach the goal, overcome barriers and obstacles to its achievement, and succeed in effectuating change.<sup>131</sup>

Problem solving court judges, court officials, treatment professionals working with them, and lawyers counseling clients about their options to enter into problem solving court rehabilitative programs should learn the techniques of motivational interviewing and apply them in their conversations with offenders. These motivational interviewing techniques have recently been adapted for application by criminal defense lawyers dealing with clients who have recurring problems, are in denial about their problems, and are resistant to change.<sup>132</sup> Additionally, in mental health courts, the techniques have been adapted to apply to lawyers representing clients, mental health professionals, and mental health court judges.<sup>133</sup> These techniques can be particularly effective when the individual finds herself in a situation where change is being contemplated.<sup>134</sup> The individual's arrest and need to face criminal charges can present the pressures needed to create such a teachable moment or therapeutic opportunity in which the individual is ready to contemplate change, accept responsibility for wrongdoing, and consider making a genuine commitment to rehabilitation. The

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129. *Id.* at 58-59.

130. *Id.* at 59-60.

131. *Id.* at 60-62.

132. See Birgden, *supra* note 113, at 232-42.

133. See Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 38-42).

134. See JAMES O. PROCHASKA & JOHN C. NORCROSS, SYSTEMS OF PSYCHOTHERAPY: A TRANSTHEORETICAL ANALYSIS 109-39 (1994); Birgden, *supra* note 113, at 240-41; James O. Prochaska et al., *In Search of How People Change: Applications to Addictive Behaviors*, 47 A. PSYCHOL. 1102, 1108-12 (1992); James O. Prochaska & J. M. Prochaska, *Why Don't Continents Move? Why Don't People Change?*, 9 J. PSYCHOTHERAPY INTEG. 83, 83-102 (1999).

use of motivational interviewing and related psychological strategies as a means to sparking and maintaining the individual's motivation to accept needed treatment can substantially increase the potential of problem-solving courts to help the individual solve her problem.

#### D. Increasing Compliance

Once the individual has made the decision to enter into a treatment program under the auspices of the problem solving court, the judge's focus should shift to the question of how to assure the individual's compliance with the requirements of the treatment program. A body of therapeutic jurisprudence scholarship has examined how to increase compliance in a variety of legal contexts.<sup>135</sup> This work has analyzed the adaptation of health care compliance principles and methods of behavioral or contingency contracting to legal contexts and has explored the implications of the psychology of procedural justice for improving compliance with judicial orders. These approaches can easily be adapted for application in the context of problem solving courts.

##### 1. *Health Care Compliance Principles*

A parallel problem arises in the context of medical practice—how can physicians and other healers convince their patients to comply with their medical advice? Patient non-compliance is a significant problem that has been addressed extensively in the medical literature.<sup>136</sup> Behavioral medicine, a field of medical practice that builds on principles of behavioral psychology, offers much help for the resolution of this problem.<sup>137</sup> For example, the work of psychologists Donald Meichenbaum and Donald Turk sets forth a number of health care compliance principles, and shows how they can be applied by health care professionals to increase the likeli-

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135. See, e.g., David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process* [hereinafter Wexler, *Health Care*], in WEXLER & WINICK, *supra* note 41, at 199, 208-17; Winick, *Harnessing*, *supra* note 91, at 740-88; Winick, *Redefining*, *supra* note 87, at 1062; David B. Wexler, *How the Law Can Use What Works: A Therapeutic Jurisprudence Look at Recent Research on Rehabilitation*, 15 BEHAV. SCI. & L. 365, 367-70 (1997) (book review).

136. See, e.g., DONALD MEICHENBAUM & DENNIS C. TURK, *FACILITATING TREATMENT ADHERENCE: A PRACTITIONER'S GUIDEBOOK* 149-84 (1987).

137. See *id.* (discussing the theory and practice of behavioral medicine).

hood that their patients will follow their treatment recommendations.<sup>138</sup>

Patients frequently fail to comply with treatment recommendations when the physician or other health care professional fails to instruct them adequately concerning the treatment they are asked to follow.<sup>139</sup> The way the health care professional interacts with the patient during the period when treatment is explained can be most significant.<sup>140</sup> If the physician appears to be distant, distracted, reads case notes, uses professional jargon, asks questions calling for brief "yes" or "no" answers, fails to allow the patient the opportunity to tell her story in her own words, describes the treatment plan imprecisely or in technical terms, acts paternalistically, or is abrupt with the patient, compliance with the health care professional's treatment recommendations will be less likely.<sup>141</sup>

To increase treatment adherence, Meichenbaum & Turk recommend that the health care provider introduce herself to the patient, avoid jargon, and elicit the patient's views, preferences, and active involvement in designing the treatment plan.<sup>142</sup> Providing patient choice even concerning minor details of treatment can be significant in increasing compliance.<sup>143</sup> Moreover, adherence is furthered when the physician is perceived as prestigious, competent, caring, and motivated by the patient's best interests.<sup>144</sup> Involving family members and others significant to the patient can also increase compliance.<sup>145</sup> These individuals can provide encouragement and reminders to the patient and can help the physician access information about compliance.<sup>146</sup> Furthermore, when the patient makes a public commitment concerning the treatment plan to significant others, compliance is more likely to occur than when the patient's commitment is privately made.<sup>147</sup> The anticipated disapproval of a respected physician and of the patient's family members, as well as

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138. *Id.*; see Wexler, *Health Care*, *supra* note 135, at 199 (discussing health care compliance principles and their application by criminal judges making insanity acquittee conditional release decisions).

139. See Meichenbaum & Turk, *supra* note 136, at 55-60.

140. See *id.* at 78.

141. See *id.*

142. *Id.* at 81.

143. *Id.* at 171.

144. *Id.* at 172.

145. *Id.* at 124.

146. *Id.* at 162.

147. *Id.* at 173-75 (discussing the making of formal commitments through a written instrument).

her own anticipated self-disapproval, can significantly increase the patient's motivation to comply.<sup>148</sup>

These health care compliance principles can be adapted for use by judges in problem solving courts. Judges, court personnel, treatment providers, and defense attorneys, should take care to instruct the individual carefully and understandably concerning her obligations relating to participation in the treatment program and reporting to court. The judge should act concerned rather than distant, provide the individual with her undivided attention during conversations, avoid jargon, allow the individual an opportunity for voice, avoid paternalism, and generally treat the individual with respect. At the outset, the judge should encourage the individual's active involvement in both the negotiation and design of the rehabilitative plan, providing as great a degree of choice concerning the details as is possible in the circumstances. The judge should treat the individual with dignity and respect, conveying to the individual that her actions are motivated by the individual's best interests. Whenever possible, the judge should seek to involve family members and significant others in the process during which the individual makes a commitment to participate in treatment, and that commitment should be made in a formal and relatively public way.

## 2. *Behavioral Contracting*

A behavioral psychology technique known as "behavioral contracting" or "contingency management" captures many of these compliance principles and may be helpful in insuring the individual's compliance with the treatment or rehabilitative program.<sup>149</sup> Under this technique, an explicit, formal contract is entered into between the parties in which specific goals are set forth.<sup>150</sup> Motivation to achieve the goal is facilitated through contract terms providing for a combination of agreed-upon rewards or positive reinforcers for success or aversive conditioners for failure.<sup>151</sup> This technique is frequently used in clinical practice, and the combination of positive reinforcement to encourage compliance and aversive conditioning to decrease or extinguish non-compliant behavior

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148. *Id.*

149. See Winick, *Harnessing*, *supra* note 91, at 772-89, 793-97 (advocating the adoption of a wager system to cure social ills such as drug addiction, unproductivity in government employment, and repeat criminal offenses, which borrows heavily from behavioral conditioning theory and uses both positive and negative reinforcement).

150. *Id.* at 780-89.

151. *Id.* at 779-81.

can be quite effective.<sup>152</sup> The behavioral contract provides rewards and penalties for the achievement and failure to reach intermediate and long-term goals.<sup>153</sup> Partial rewards or sanctions can be provided periodically as intermediate goals that are measured at frequent intervals are either achieved or missed, thereby facilitating the progressive shaping of the individual's behavior.<sup>154</sup> Tailoring the rewards and punishments to the individual's incentive preferences, and involving the individual in the process of selecting the goals and reinforcers, when practicable, can significantly increase motivation to comply.<sup>155</sup> Such sub-goals will best maintain self-motivation, provide inducements to action, provide guideposts for performance, and, if attained, will produce self-satisfaction needed to sustain effort.<sup>156</sup>

The behavioral contract makes explicit the expectations of everyone involved. Target behaviors are objectified, measurable, and well understood by all parties. The setting of explicit goals is itself a significant factor in their achievement.<sup>157</sup> The behavioral contract is a successful method of ensuring compliance, in part, because of the goal-setting effect,<sup>158</sup> which posits that the mere setting of a goal produces positive expectancies for its achievement that themselves help to bring about success.<sup>159</sup> Goals serve to structure and guide the individual's performance, providing direction and focusing interest, attention, and personal involvement. The behavioral contract also engages other mechanisms of psychology that help to achieve effective performance, including intrinsic motivation, cognitive dissonance, and the psychological value of choice.<sup>160</sup>

Such behavioral contracts are explicitly used in many drug court treatment programs.<sup>161</sup> Whether or not formally negotiated and executed, individuals agreeing to participate in treatment or reha-

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152. *Id.* at 780-81.

153. *Id.* at 758-59.

154. *Id.* at 748 n.31, 758 n.66 (defining shaping as the breaking down of a desired behavior into smaller easier to understand steps).

155. *Id.* at 780-88.

156. *Id.* at 758.

157. *Id.* at 761.

158. *Id.*

159. *Id.*

160. *Id.* at 761-70.

161. See William M. Burdon et al., *Drug Courts and Contingency Management*, 31 J. DRUG ISSUES 73, 74, 78-81 (2001); David Carson, *Civil Proceedings: Legal Frameworks for Psychology's Contribution*, in THE HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS 395, 406 (David Carson & Ray Bull eds., 2d ed. 1995); Simon, *supra* note 1, at 452; Winick & Wexler, *supra* note 4 (manuscript at 4).



bilitation in a variety of problem solving court contexts are, in effect, engaging in behavioral contracting.<sup>162</sup> Offenders that agree to participate in reentry courts and to submit to supervision by the reentry court judge are also engaging in behavioral contracting.<sup>163</sup> Domestic violence perpetrators who agree to enter a batterer's intervention program as a condition of bail, diversion, or probation are, in effect, engaging in behavioral contracting with the domestic violence court.<sup>164</sup> Individuals with mental illnesses in mental health court who agree to accept treatment in the community as a condition for diversion from the criminal court similarly are engaging in behavioral contracting with the mental health court.<sup>165</sup> These contracts should be explicitly negotiated, written, and agreed to by both the court and the individual in a formal and public way.

Judges in these problem solving courts should understand the psychology of behavioral contracting, and how it can be used to increase motivation, commitment, compliance, and effective performance. Behavioral contracting also increases the satisfaction of people involved in problem solving court programs.<sup>166</sup> Moreover, the process through which the behavioral contract is negotiated and entered into can itself provide an important opportunity for minimizing feelings of coercion that might undermine compliance and successful performance.<sup>167</sup>

Rather than rushing through the process in which the individual is asked to make an election in favor of drug treatment court or another problem solving court rehabilitative program,<sup>168</sup> the problem solving court process should regard the individual's decision and the behavioral contract as a significant opportunity for reducing feelings of coercion and inspiring the perception of voluntary choice. As the MacArthur Research Network on Mental Health and the Law research shows, according individuals a sense of voice and validation, treating them with dignity and respect, and conveying to them that the court is acting in good faith and in their best interest will diminish the perception of coercion and increase the

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162. See Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 36).

163. See LaFond & Winick, *supra* note 15 (manuscript at 16-17).

164. See Winick, *Domestic Violence*, *supra* note 12, at 41-42.

165. See Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 5).

166. See Adele V. Harrell, Address at the Eleventh Annual Symposium on Contemporary Urban Challenges at the Fordham University School of Law (Mar. 1, 2002), in *Problem Solving Courts: Adversarial Litigation to Innovative Jurisprudence*, *supra* note 93, at 1933-36.

167. See Winick, *Mental Health*, *supra* note 88, at 1147.

168. See Quinn, *supra* note 100, at 47; Reisig, *supra* note 100, at 220.

perception of voluntary choice.<sup>169</sup> Individuals opting for a problem solving court rehabilitative program should be reminded that the choice is entirely up to them. In addition, they should be given the opportunity, when practicable, to participate in the negotiation of the behavioral contract and the selection of the reinforcers, sanctions, and conditions that will be used and applied. This participation and involvement should occur in ways that respect their need for voice and validation. If handled properly, the negotiation and entry into the behavioral contract can constitute an important opportunity to engage intrinsic motivation and commitment and to establish a mechanism that will help to assure compliance in ways that the individual will regard as fair.

By requiring an individual accepting drug treatment court to agree to periodic drug testing and reporting to court, the drug treatment court is monitoring compliance with the behavioral contract. When the drug test shows the individual to be drug-free, the drug treatment court judge praises the individual, often in the presence of a room full of attorneys, court personnel, and other drug treatment court participants. Such praise is an important form of positive reinforcement that rewards the individual for compliant behavior, helps to shape future behavior, and builds much needed self-esteem and self-efficacy. At the successful completion of the drug treatment court program, the individual is given a graduation ceremony in court where the arresting officer usually presents a "diploma," the judge offers praise, and there is general applause.<sup>170</sup> When other program participants observe this "graduation" ritual, they themselves receive a form of vicarious reinforcement.<sup>171</sup>

When the individual's drug test is positive, the judge applies an agreed-upon sanction or aversive conditioner, which is designed to deter future non-compliant behavior.<sup>172</sup> Future incidents of non-compliance are then subjected to graduated sanctions that were agreed to in advance by the individual, as well as verbal disapproval, occurring in the presence of others.<sup>173</sup> The court maintains

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169. Monahan et al., *Coercion in the Provision*, *supra* note 104 (manuscript at 12-14, 17); Winick, *Mental Health*, *supra* note 88, at 1166-67.

170. Steven Belenko, *Diverting Drug Offenders to Treatment Courts: The Portland Experience*, in *THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INTERVENTION*, *supra* note 4, at 108, 127-28.

171. See Albert Bandura, *Social Learning Through Imitation*, in *NEBRASKA SYMPOSIUM ON MOTIVATION* 211, 211-13 (M. Jones ed., 1962); Winick, *Harnessing*, *supra* note 91, at 749.

172. Hora et al., *supra* note 4, at 528.

173. *Id.*

close monitoring and supervision of the treatment process by having the individual report to the court every ten to fourteen days, so that the judge may receive frequent feedback from the treatment team and information concerning whether the individual has remained drug-free.<sup>174</sup>

The periodic delivery of positive reinforcement or sanctions contingent upon whether the individual has met intermediate goals helps to maintain the individual's commitment and motivation during the one and one-half to two years that drug treatment court typically requires. In this way, what the drug treatment court does can be seen as an application of behavioral contracting or contingency management, a technique which, if properly applied, can substantially increase the likelihood of treatment success.<sup>175</sup> Other problem solving courts should adapt this approach and all judges in these courts should receive training in its application.

### 3. *The Psychology of Procedural Justice*

In all of their interactions with the individual, problem solving court judges should be careful to apply procedures that fully respect the individual's participatory and dignitary interests.<sup>176</sup> Therapeutic jurisprudence scholarship has frequently pointed to the literature on the psychology of procedural justice,<sup>177</sup> suggesting that its application in a variety of contexts can achieve therapeutic benefits for the individuals involved.<sup>178</sup> This literature, based on

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174. *Id.* at 475.

175. See Burdon et al., *supra* note 161, at 73-90; Winick, *Harnessing*, *supra* note 91, at 799-808.

176. See Winick, *Civil Commitment Hearing*, *supra* note 47, at 53, 57-58.

177. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

178. See, e.g., Amy D. Ronner, *Songs of Validation, Voice and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CINN. L. REV. (forthcoming) (manuscript at 23-35, on file with author) (discussing the application of therapeutic jurisprudence to juvenile offenders); Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499, 504 (2000); Winick, *Civil Commitment Hearing*, *supra* note 47, at 53, 57-58; Winick, *Domestic Violence*, *supra* note 12, at 33; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 8); Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 537, 565-66 (1998); Bruce J. Winick & Ginger Lerner-Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel?: A Therapeutic Jurisprudence Brief*, 71 U. CINN. L. REV. (forthcoming) (manuscript at 3-5, on file with author) (discussing the application of the psychology of procedural justice in the context of juveniles in foster care under state custody when the state seeks to transfer them to residential treatment centers); Winick & Wexler, *supra* note 4 (manuscript at 2-7) (discussing drug treatment court proceedings); see also Amend. R. of Juv. Proc., Fla. R. Juv. P. 8.350,

empirical work in a variety of litigation and arbitration contexts, shows that if people are treated with dignity and respect at hearings, given a sense of "voice," (the ability to tell their story) and "validation" (the feeling that what they have said has been taken seriously by the judge or hearing officer), and generally treated in ways that they consider to be fair, they will experience greater satisfaction and comply more willingly with the ultimate outcome of the proceedings, even if adverse to them.

Thus, according individuals in problem solving court contexts a full measure of procedural justice can help to increase compliance with and successful participation in a treatment or rehabilitative program. For reasons developed earlier, according individuals procedural justice will also diminish their perception of coercion in the judicial process and increase the chances that they will experience the decision to enter into a treatment or rehabilitative program as having been voluntarily made.<sup>179</sup> The resulting perception can itself help to increase the likelihood of genuine participation on the part of the individual, intrinsic motivation, program compliance, and treatment success.<sup>180</sup> These utilitarian reasons for respecting the procedural rights of individuals in problem solving court contexts coalesce with the historic commitment to fairness embodied in the concept of due process of law.<sup>181</sup> Even when functioning as psychosocial agencies, problem solving courts should accord the individual a full measure of due process.

### CONCLUSION

Therapeutic jurisprudence can contribute much to the functioning of problem solving courts, which can provide rich and fascinating laboratories to generate and refine therapeutic jurisprudence approaches. Considerably more research is needed on the functioning of problem solving courts and their effectiveness in rehabilitating offenders and avoiding recidivism. To the extent that these

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804 So. 2d 1206, 1210-11 (2001) (recognizing psychology of procedural justice as providing a therapeutic jurisprudence basis for adopting rule allowing children facing civil commitment to be represented by counsel).

179. See *supra* notes 86-112 and accompanying text (discussing the MacArthur Research Network on Mental Health and the Law research on the causes and correlates of perceived coercion).

180. See Winick, *Civil Commitment Hearing*, *supra* note 47, at 48-49, 60; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 30-31); Winick & Wexler, *supra* note 4 (manuscript at 4-5).

181. See Reisig, *supra* note 100, at 216-19; Winick, *Civil Commitment Hearing*, *supra* note 47, at 38, 44-47.

courts are successful, as the preliminary research and many anecdotal reports suggest, there is considerable need to understand why they work and more research is needed on this question. The interaction between the problem solving court judge and the individual seems to be an important ingredient in program success, and more empirical work should probe how this occurs.<sup>182</sup>

This Essay has offered a number of suggestions concerning how judges should act in problem solving court contexts to spark the motivation of the individual to achieve rehabilitation and to increase compliance with treatment. These proposals are derived from psychological literature in other contexts, therefore, further analytical analysis and empirical research are needed concerning the application of these principles in the problem solving court arena.

Problem solving courts are a noble undertaking. They represent a newly broadened conception of the role of the courts, one that is fully consistent with the basic concept of therapeutic jurisprudence. To perform this role effectively, judges need to develop and improve their interpersonal, psychological, and social work skills. Therapeutic jurisprudence can help judges in this effort. Problem solving courts can become natural laboratories for the development and application of therapeutic jurisprudence principles and for research on what works best in the court-involved treatment and rehabilitative process. Therapeutic jurisprudence and problem solving courts share a common mission—how legal rules, judicial practices, and court structures and administration can be redesigned to facilitate the rehabilitative process. Problem solving courts, applying principles of therapeutic jurisprudence, can become an important force for dealing with a number of the most vexing social and psychological problems that affect our communities. Although problem solving courts are not identical with therapeutic jurisprudence, these two approaches can be seen as having a symbiotic relationship.<sup>183</sup> Together they can do much to transform law into an instrument of healing for both the individual and the community.

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182. See Petrucci, *supra* note 59, at 294-95 (acknowledging importance of judge-defendant interaction and recommending future research).

183. See Winick & Wexler, *supra* note 4 (manuscript at 2).

# SPECIALIZED COURTS: NOT A CURE-ALL

*Phylis Skloot Bamberger\**

## INTRODUCTION

Discussion of judicial problem solving in criminal cases through specialized courts is, in reality, a discussion about alternatives to incarceration and the administration of those alternatives.<sup>1</sup> Judicial efforts to avoid inappropriate incarceration by the use of suitable alternative programs is old stuff. It has been going on at least since the advent of the probation system. The story of how New York added pre-trial and pre-sentence programs to post-conviction imprisonment alternatives, and went from probation to specialized courts is well documented.<sup>2</sup> In the last few years, the focus in many state judicial systems has been on specialized courts to provide the response to societal problems that arise in courts with criminal dockets, including administration of alternatives to incarceration.<sup>3</sup> The most well-known of these problem solving courts having criminal case jurisdiction are drug courts and domestic violence courts. Other courts of specialized jurisdiction have also been suggested or funded. These courts are given unique resources and staffing to

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1. There are other specialized courts. For example, community courts are concerned with matters in addition to docketed cases, and compliance courts deal only with cases in which the defendant is already in a program. See Michael Schunk & Judith Phelan, *Problem Solving Courts*, 41 JUDGES J., Winter 2002, at 17. There are also specialized courts for trying felony cases like those in which juveniles are tried. This Essay deals only with specialized courts that are specially staffed, and have access to special services to allow non-incarceratory dispositions.

2. See N.Y. STATE BAR ASS'N, REPORT OF ACTION UNIT NO. 7, at 31-57 (1998) [hereinafter STATE BAR]; N.Y. STATE COMM'N ON DRUGS & THE COURTS, CONFRONTING THE CYCLE OF ADDICTION AND RECIDIVISM 10 (2000) [hereinafter FISKE REPORT]; N.Y. STATE OFFICE OF COURT DRUG TREATMENT, THE FIRST YEAR: REPORT TO CHIEF JUDGE KAYE AND CHIEF ADMINISTRATIVE JUDGE JONATHAN L. LIPPMAN (2002) [hereinafter FIRST YEAR]; N.Y. STATE UNIFIED COURT SYS., REPORT OF THE UNITED COURT SYSTEMS COMMITTEE ON ALTERNATIVE CRIMINAL SANCTIONS 16 (1995) [hereinafter UNIFIED COURT] (detailing, *inter alia*, the need to reduce the burdens on probation courts which has given rise to more specialized courts); Ass'n of the Bar of the City of N.Y., *Report on Alternatives to Incarceration and Probation*, 49 REC. 376 (1994) [hereinafter City Bar] (in 1985, the New York State Division of Probation was reorganized as the Division of Probation and Correctional Alternatives to meet the increasing demand for specialized amounts of probationary contact).

3. See FISKE REPORT, *supra* note 2, at 35 n.81 (discussing alternatives to incarceration in Drug Courts).

administer post-plea sentences that are alternatives to incarceration. They are given access to the professional delivery of diagnosis, screening, and assessment services not generally available to courts of general jurisdiction, as well as to the programs that provide the services.<sup>4</sup> Specialized courts are part of the continuing effort to avoid putting people in jail or prison when something less drastic will work to the advantage of the defendant and the public, satisfying concerns of humane treatment and reducing the costs of punishment.

Traditionally, the courts of general criminal jurisdiction, however, have assumed the role of administering pre-trial and pre-sentence programs, funded both publicly and privately, that provide education, vocational training, counseling, and substance abuse rehabilitation. And historically, when a non-incarceratory sentence is imposed, probation departments have played the administrative role, selecting the appropriate program, supervising compliance, and acting as liaison with the court when problems arise needing judicial intervention.<sup>5</sup>

The focus on specialized courts requires reexamination of funding and staffing of courts of general jurisdiction to administer alternatives to incarceration. General jurisdiction courts have the authority, at any point in the proceeding, to involve probation eligible defendants who do not come within the scope of the work of specialized courts in alternate programs. Thus, despite the shift to specialized courts, the general jurisdiction judges are left with the administrative responsibility for initiating, effectuating, and monitoring alternates to incarceration, and the responsibility of supervising defendants who are in pre-trial programs as alternatives to jail detention and post-conviction/ pre-sentencing alternatives to prison.

Further, in recent years there has been insufficient funding and staffing of probation services, which, in New York State, is mostly the responsibility of the counties.<sup>6</sup> According to a recent report by the New York State Commission on Drugs and the Courts,

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4. *See id.* at 34.

5. *See id.* at 75 (discussing the role of probation in drug courts).

6. New York State's probation system is organized on a countywide basis; there is one system, however, for New York City. The New York State Division of Probation and Alternatives to Incarceration exercises general supervision over local probation systems and contributes matching funds to local offices. *See id.* at 76; City Bar, *supra* note 2, at 398. Furthermore, state funding to local departments has declined and the caseloads have skyrocketed. *See UNIFIED COURT, supra* note 2, at 17-18; *see also* FISKE REPORT, *supra* note 2, at 76-77.

“[p]robation departments are often underfunded and beset with enormous caseloads which make effective supervision a virtual impossibility. Indeed, in many respects some of the treatment innovations that are described in this Report have arisen to fill the gaps left by the failure of traditional probation supervision.”<sup>7</sup> While creation, funding, and support of some specialized courts are appropriate, my view from the bench is that all courts should be provided with the panoply of services, including a properly funded probation department, so that alternatives to jail or prison are equally available to all defendants found eligible for them, regardless of the court before which their cases are pending. While specialized courts, such as drug courts, dealing with defendants charged with crimes are of critical importance, I believe that sole or even primary reliance on specialized courts is not sufficient. Rather, for the reasons that follow, what should be done is to make centralized resources available as necessary to all courts in a county or city in which alternatives to incarceration are possible, although not automatic.

### **I. THE POPULATION DEPENDENT ON COURTS OF GENERAL CRIMINAL JURISDICTION**

There are defendants who, for various reasons, are not serviced by specialized courts. Such defendants must seek probation and jail or prison alternatives from the general jurisdiction judges before whom their cases are pending. The defendants include those seeking pre-plea and pre-sentence alternatives to jail, all those seeking a sentence alternative to prison, but who are not in the target population of a specialized court, and all those who choose not to seek early diversion from the traditional court processes into the specialized court.

Offenders who are addicted or substance abusers are the most well-known target population of the specialized court system. Taking specialized drug courts as an example, in New York, the target population is defendants, nineteen years old or older, charged with possession or sale of drugs in an amount below the drug weight needed for the most serious felony drug charge, provided the offense did not occur on certain days and times within a thousand feet of a school, and provided the defendants have no prior felony conviction.<sup>8</sup> Defendants in the target group who pass a screening

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7. FISKE REPORT, *supra* note 2, at 75.

8. *See id.* at 34.



review are placed in substance rehabilitation programs, given intense supervision, and appear regularly before a judge.<sup>9</sup>

There are, however, many cases in which defendants who are addicts are excluded from specialized courts because they have prior convictions, are charged with crimes other than drug law offenses, have sold drugs within a thousand feet of a school at the requisite time, or who have other disqualifying factors. Many would benefit from participation in a program under strict supervision without posing a danger to the community. Their cases remain pending before judges of general jurisdiction.<sup>10</sup> In addition, there are defendants who are substance abusers or addicts who would be excluded from some, although not all, drug courts because they have problems other than addiction. People addicted to drugs may also have heart conditions, asthma, AIDS, positive results for HIV, learning disabilities, emotional disturbances, mental illness, retardation, syndromes from physical or sexual abuse, illiteracy, infirmities from old age, an absence of any marketable skills, and homelessness. These cases remain in general jurisdiction courts where the judge must determine whether to order an alternative to jail or prison in these difficult cases.

Further, specialized drug courts do not reach those defendants who are not addicts, but who do have one or more of the other problems listed above. People charged with crimes who appear before courts of general jurisdiction have such a vast array of problems and needs that, for the most part, there is not a specialized court for each of these separable groups. It is apparent that if specialized courts were established to respond to the needs of each of these groups, an expensive infrastructure and costly staffing would be required in a single court for a comparatively small, although important, population needing help. Defendants with these problems are before the many general jurisdiction judges, who will be the administrators for any pre-sentence program alternative to jail.

Finally, defendants who are eligible for help in a specialized court may choose not to take that option because it comes very early in the processing of the case. The premise of many of the specialized courts is early diversion, and, as noted, a guilty plea by the defendant is required within a short time after the case is commenced in order that the defendant may take advantage of the pro-

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9. *See id.* at 33.

10. *See id.* at 34-35.

gram offer.<sup>11</sup> If no plea is entered early in the proceedings, the defendant goes through the usual court processes.

While the goal of prompt intervention is often an appropriate consideration for treatment therapy, the defendant has a right to make a thoughtful, voluntary, and knowing decision about whether to plead guilty and take the treatment route. And the defendant has a right to make such a decision after consultation with a lawyer who has information about the pending case. At the early stage in the proceedings, when the specialized court begins intervention, counsel often does not have very much information about the accusations and the case, has had virtually no discovery or police paperwork, and does not know what issues may be present in the case, as, for example, if there is any basis to challenge the admissibility of the evidence against the defendant, or if there is a defense to the charges. Counsel's advice is particularly significant if the plea is to a felony. There is the risk that the felony guilty plea will remain on the defendant's record if the defendant does not complete the program. Further, because only the prosecutor can authorize a reduction in a charge, the plea arrangement may require the defendant to plead to a felony, albeit one not requiring a prison term, even if the defendant successfully completes the program.<sup>12</sup> Even entry of a misdemeanor plea has collateral consequences for the defendant, and she should be advised by counsel of the consequences. When the defendant chooses to exercise constitutional or statutory rights and remain in the court of general jurisdiction, that judge will determine if the alternate sentence is appropriate.

The First Year Report to New York's Chief Administrative Judge concludes that most participants in drug court programs "face severe socioeconomic disadvantages, posing a substantial challenge to rehabilitation efforts and highlighting the importance of supplemental vocational educational or employment services . . . ."<sup>13</sup> The needs of many non-addicted people with criminal cases before the general jurisdiction courts are comparable to those who are addicted. All courts that people come before should be aided in their efforts to provide appropriate supportive alternative programs.

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11. *See id.* at 37.

12. N.Y. CRIM. PROC. LAW § 220.10(3)-(4) (McKinney 2002). In addition, under recent federal law, a guilty plea can result in deportation for a non-citizen. *See* 8 U.S.C. § 1227(2) (1999).

13. FIRST YEAR, *supra* note 2, at 9.

## II. CASES WHERE PROBLEM SOLVING DISPOSITIONS ARE AVAILABLE TO CRIMINAL COURTS OF GENERAL JURISDICTION

Problem solving when dealing with felony cases is directly affected by the sentencing structure. Many states, including New York, require mandatory prison sentences for many felonies. In New York, the mandatory sentence can be either a determinate or indeterminate sentence, depending on whether the crime is defined as a violent felony.<sup>14</sup> Mandatory sentences are enhanced if the convicted person is a predicate felony offender,<sup>15</sup> or a persistent, violent felony offender.<sup>16</sup>

Even within this legal framework of required incarceration, defendants are eligible for non-incarceratory sentences. Judges of general felony and misdemeanor courts can provide alternatives to incarceration for these probation-eligible defendants who are not eligible for processing and sentencing by specialized courts.

Referring to New York as an example, a judge handling felony cases is able to provide an alternative to incarceration in three situations: when the defendant is eligible for youth offender adjudication; when the defendant is charged with a felony requiring incarceration, but the prosecutor agrees that the defendant will be allowed to plead to a lesser charge carrying a non-incarceratory sentence;<sup>17</sup> and when the defendant is charged with a crime, and probation is a permissible sentence.

### A. Youth Offender Adjudication

Under New York law, a defendant who is at least sixteen , and not more than nineteen years old at the time the crime is committed, and who has not been previously convicted of a felony, or previously adjudicated a youth offender, is eligible for youth offender adjudication.<sup>18</sup> An eligible youth charged with a felony *may* be adjudicated a youth offender in the court's discretion, "[i]f in the opinion of the court the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and by

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14. N.Y. PENAL LAW §§ 70.00(6), 70.02 (McKinney 2002).

15. *Id.* §§ 70.04, 70.06.

16. *Id.* § 70.08.

17. *Id.* § 220.10(3)-(4).

18. N.Y. CRIM. PROC. LAW § 720.10(1)-(2) (McKinney 1995). There are exceptions for certain crimes, but even as to these crimes, the defendant is eligible if the defendant was not the only participant in the crime, and her actions were minor, or there are mitigating circumstances in the commission of the crime. *Id.* § 720.10(2)(a)-(3).

not imposing an indeterminate term of imprisonment of more than four years . . . .”<sup>19</sup> The eligible youth charged with a misdemeanor *must* be adjudicated a youth offender if she has not been previously convicted of a crime or adjudicated a youth offender.<sup>20</sup> The adjudication allows the court to impose a probation sentence, and to condition probation upon the participation in a program as an alternative to incarceration. If the defendant violates the conditions of probation, an indeterminate prison sentence with a maximum of four years can be imposed.

In a court of general jurisdiction dealing with eligible youths who are charged with felonies normally requiring imprisonment, there are two stages at which the eligible youth can make a positive track record to enable the judge to determine the appropriateness of youthful offender adjudication and the imposition of probation with a program as an alternative to incarceration. The first is prior to conviction by plea or verdict. The second is after conviction. At either of these times, the defendant can be ordered to attend educational, vocational training or substance abuse programs, psychiatric treatments, or other appropriate programs.<sup>21</sup>

To the extent that the judge is uncertain as to whether the defendant should be entitled to youth offender adjudication, the defendant’s participation in any assigned program and her general behavior can provide the basis for the adjudication. Once one is adjudicated a youth offender, if the judge makes the separate decision to impose a sentence of probation, participation in a program can be made a condition.

### **B. The Prosecutor’s Agreement**

In some circumstances where incarceration is mandatory, the defendant enters a plea of guilty to the felony requiring a prison sentence because the prosecutor consents to allow the defendant to remain out of custody, to participate in a program, and, on condition that the defendant completes the program, consents to allow the defendant to withdraw the plea of guilty to the charge requiring imprisonment, and to plead guilty to a crime that permits a non-incarceratory sentence. In Bronx County courts of general jurisdiction, arrangements for this disposition, except in drug cases, are made by the judge acting with the defense counsel.

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19. *Id.* § 720.20(1)(a).

20. *See id.* § 720.

21. *See* N.Y. PENAL LAW § 65.10.

There are other cases where the prosecutor makes no initial promise to consent to a plea to a reduced charge, but the defendant, under court supervision, agrees to participate in a structured out-patient or residential program of schooling, vocational training, psychiatric counseling, or other suitable activity. In these cases, the defendant agrees to delay the trial until she can make a track record and entry of a plea is delayed. Here, too, substantial efforts are assumed by the judge to administer the arrangement. The whole undertaking is pursued with the knowledge that the prosecutor makes no promise to consent to the reduced plea or to a probation sentence and, in the end, may reject any such proposal. Yet, there are cases in which the defendant makes a sustained and successful effort in the program, supported by the interest of counsel and under the supervision of the judge. In such circumstances, the prosecutor may determine that it is appropriate to allow the defendant to plead to a crime that will allow the imposition of a probation sentence. Once the sentence is imposed, monitoring and supervision of the defendant rests with the probation department.

### **C. Crimes for which Probation is a Permissible Sentence**

In New York, convictions for misdemeanors and some felonies treated as non-violent by the penal law can result in probation, determinate sentences of up to one year, or indeterminate sentences. Where a choice is permissible, the option of imposing probation is based in part on the judge's evaluation of the history and character of the defendant. Where that history and character raise questions as to the suitability of probation, or where the record is unclear, the judge can order the defendant to participate in a program, and monitor the progress as part of the evaluation. If the record, considering the probation department's pre-sentence report, leaves no question, the judge can immediately impose probation. In the former circumstance, the judge undertakes the administration of the defendant's participation in the program. In the latter circumstance, the probation department undertakes supervision, in accord with the statute.

The possibility of probation for the felony of gun possession<sup>22</sup> is an extremely important statutory provision given the number of people charged with that offense, and the large number who can be supervised on probation without any harm to the community.

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22. *Id.* §§ 70.02(c)(ii), 265.02(4)-(8).

### III. METHODS OF PROBLEM SOLVING IN GENERAL CRIMINAL JURISDICTION COURTS: A VIEW FROM THE BENCH

The importance of the constituency of the courts of general jurisdiction emphasizes the importance of making sure that the commitment to those courts matches the commitment to specialized courts. Both deserve the resources available to administer alternatives to incarceration. In the pre-plea stages of a proceeding, a judge of the general criminal jurisdiction court is responsible for putting in place and supervising any alternative to incarceration. After a plea of guilty or conviction after trial, the judge can ask for the assistance of the probation department in supervising the defendant, or can individually undertake the responsibility. After the imposition of the sentence, the probation department is the administrative and supervising agency until the department re-engages the judge in the event of a problem. This structure depends on two factors: first, the ability of the busy judge to participate in the details of setting up a program for a defendant and supervising that participation; and second, the ability of local probation officers to perform their statutory obligations and traditional functions.

As a judge of general criminal jurisdiction, I have sought to find ways to identify those defendants who should be given an opportunity to avoid jail or prison by participating in programs that are alternatives to incarceration, and I have tried to encourage the efforts of these defendants.

The first task is to find a suitable program to do a screening interview of the defendant. The search for a suitable program is complicated if the defendant has multiple problems, such as drug addiction, AIDS, or mental retardation.<sup>23</sup> Programs assisting defendants with multiple problems are limited. Although in 1994 the Unified Court report recommended use of a data base of all programs and their target populations, there is no updated list of available programs. Nonetheless, over time I have learned about available programs that are funded by local, state, and federal government levels, and by private agencies and foundations. Through repeated efforts, I have learned the names and telephone numbers of directors and intake officers.

The second task is to arrange for admission of the defendant to the program. I have arranged for intake interviews. I have assisted in efforts to obtain necessary documentation required for admission. These documents included school records, as well as mental

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23. *See supra* text accompanying note 10.

health records from private doctors and hospitals, prison health services, and public hospitals. I have assisted in attaining medicaid, housing, and other benefits which have been delayed or improperly denied to defendants. In one case, I assisted when the defendant was disqualified for benefits because an outstanding warrant, that had long been resolved, came up on the computer.

The third task is to monitor and supervise the defendant's participation in the program once the defendant is accepted into either an inpatient or outpatient program. Written, detailed, and periodic progress reports are necessary to monitor the defendant. If the reports are not supplied or sufficiently specific, I contact the program personnel for the necessary information.

I also communicate with the program staff to make clear that if the defendant violates program rules, uses drugs, absconds, or is expelled from the program, such incidents must be reported to the court immediately.

In one case, the immediate reporting resulted in a miraculous recovery. The defendant had been placed in a drug rehabilitation program. During the course of attending required counseling, the defendant became highly distressed. The program counselor reported to me that the defendant would be dismissed from the program because the facility could not handle the problem. The program delayed any action until I was able to reach a doctor who agreed to walk the defendant through emergency intake at the psychiatric unit of a hospital. The program representative took the defendant to the hospital. There the defendant was admitted, received several months of treatment, returned to the program and completed it successfully.

The help that I have received from both the prosecutor and defense counsel has demonstrated that judges will greatly benefit in their efforts from a systematized and courtwide administration offering help comparable to that given to specialized courts.

The District Attorney of Bronx County, working with a program called Treatment Alternatives to Street Crime ("TASC"),<sup>24</sup> has established a highly organized program of screening, program selection, and supervision for those charged with drug offenses. Once the prosecutor determines that a defendant is eligible, TASC representatives interview the defendant to determine eligibility for one of the programs in the community. TASC collects the necessary paperwork, finds the program, makes sure that the defendant is

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24. See Education and Assistance Corporation, Programs & Services, at <http://www.eacinc.org/criminal.htm#Bronx%20tasc> (last visited Jan. 15, 2003).

transported to the program, makes sure that the program supplies the necessary reports, arranges for court dates, and reports missteps, expulsions, and successes. At the completion of the eighteen to twenty-four month program, TASC advises the court whether the imposition of the non-incarceratory promised sentence is appropriate. TASC is a courtwide program, assisting all judges, but is limited to defendants charged with drug offenses deemed eligible by the prosecutor.

In many cases defense counsel has also provided much needed assistance. The time consuming nature of program associated work, and the need to tend to it immediately, however, is sometimes incompatible with the demands of criminal litigation that face every defense lawyer. In the last few years, an agency called Defense Advocacy Services has been providing assistance to locate programs, arrange screening, conduct interviews, collect required paperwork, and escort defendants to program facilities. The program has done an excellent job, often acting beyond the call of duty. This program, like TASC, is available to all judges. Its resources, however, are limited by budget constraints.

There are several programs that have their own administrators who, when contacted by the judge, arrange for screening interviews and do all the administrative work needed for the admission of an defendant accepted into the program. One of the most significant is the St. Elizabeth Ann's program affiliated with St. Vincent's Hospital.<sup>25</sup> The program is a dual diagnosis program. For one defendant, it provided a safe and comfortable haven until he died; for another, it restored him to a modicum of health that now enables him to live in circumstances approaching reasonable normalcy.

There are some defendants who are already receiving medical or psychiatric treatment. For these defendants, it makes sense to make those existing arrangements into a program that satisfies the meaning of an alternative to incarceration. In several cases, the prosecutor has agreed to accept a plea to a crime allowing a non-incarceratory sentence after the defendant continued treatment for approximately two years with periodic reporting to me along with the submission of reports from the treatment providers. One of the defendants was treated weekly at a Veterans Administration Hospital where he was trained to take his medication; another was treated by a psychologist and attended a vocational training school;

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25. See Saint Vincent Catholic Medical Centers: St. Elizabeth Ann's Health Care & Rehabilitation Center, at <http://www.svcmc.org/stelizabethann> (last visited Jan. 15, 2003).



and another went to a combination of medical and psychiatric clinics.

The remaining need of courts of general jurisdiction, as well as of the community, is a properly funded and staffed probation department. In all the reports, cited above, it has been stated that probation departments, locally funded and organized, must be given resources to fulfill their post-plea supervision responsibilities, also known as interim supervision, and their traditional role as supervisors of those on probation imposed as a sentence.

It appears that the specialized court approach has resulted in neglect of local probation departments, the traditional agencies for providing information to the court about defendants and for providing services and conducting supervision of defendants. They have been inadequately funded, understaffed, and left in the backwater of technological development,<sup>26</sup> pre-empted by a new layer of service providers and administrators. This deprivation of resources has caused serious limitations on the traditional functions of local probation offices. Specialized courts did not cause the failure of support for probation departments<sup>27</sup> because funding for the two comes from different sources. Nevertheless, it is hoped that the current emphasis on funding and staffing specialized courts will stimulate efforts to reinvigorate regular probation services and staffing. The problems created by the underfunding and consequent underutilization of probation departments affects the work of courts of general criminal jurisdiction. It is, however, the probation department that provides a ready made infrastructure for administering problem solving programs in courts of general criminal jurisdiction.

In 1995, the Unified Court System report concluded that "most judges are unable to assume responsibility for monitoring a sentenced offender's progress in an alternate program. As a result, this responsibility should be borne by the local probation department, which should be appropriately funded for this responsibility."<sup>28</sup> The report notes that the statutes require the probation department to monitor the sentenced offender and that the legal obligations make "the probation department ideally suited to fulfill this monitoring function."<sup>29</sup> At least since the State Bar's 1988 re-

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26. FISKE REPORT, *supra* note 2, at 76-80; UNIFIED COURT, *supra* note 2, at 17-18; City Bar, *supra* note 2, at 398-404.

27. See State Bar, *supra* note 2, at 36-43.

28. UNIFIED COURT, *supra* note 2, at 38.

29. *Id.* at 39.

port, proper and sufficient funding and staffing of probation departments has been recognized as an important need. The significance of that need is enhanced by the present effort not only to supervise people who return to the community, but also people who are in programs as alternatives to prison.

### CONCLUSION

Every defendant eligible for a sentence that is an alternate to incarceration should be given the opportunity to have such a sentence. Countywide support services for all courts is the key to making such programs available to every such defendant. To accomplish this important goal, the recognized achievements of specialized courts should be used to generate support services for courts of general jurisdiction and the local probation departments.

