MAINSTREAMING THERAPEUTIC JURISPRUDENCE INTO THE TRADITIONAL COURTS: SUGGESTIONS FOR JUDGES AND PRACTITIONERS

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I. INTRODUCTION

Therapeutic jurisprudence ("TJ") has moved into the traditional courtroom, into the non-problem-solving courts. The next challenge for TJ is to mainstream those TJ practice techniques developed in problem-solving courts throughout the court system. Judges who have learned innovative and effective problem-solving court techniques have matured, and through judicial rotations, many have moved on to serve on calendars that do not traditionally require problem-solving court techniques.[1] They have carried their 'TJ toolkits'[2] with them, and they cannot forget those techniques and procedures that made their

* Retired Judge of the Arizona Superior Court, and Associate Professor of Law, Phoenix School of Law. I am deeply indebted to Professor David B. Wexler for his suggestion to write this article, his amazing scholarship in this area, his support, and his friendship. I also owe a great debt of gratitude to Judge Ian Dearden, Queensland District Court, Beenleigh, Australia, and Magistrate Maxine Baldwin, Magistrates Court, Gympie, Australia, for the idea that TJ could be *mainstreamed*, from their presentations on incorporating and implementing TJ into mainstream courts in Australia. Magistrate Maxine Baldwin, Address at the International Academy of Law and Mental Health 32nd Congress (July 18, 2011); Judge Ian Dearden, Address at the International Academy of Law and Mental Health 32nd Congress (July 18, 2011).

[1] William G. Schma, *Judging for the New Millennium*, *in* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 87 (Bruce J. Winick & David B. Wexler eds., 2003).

[2] *See* PAMELA M. CASEY ET AL., PROBLEM-SOLVING JUSTICE TOOLKIT 1-4 (2007), http://www.ncsconline.org/D_Research/Documents/ProbSolvJustTool.pdf.

problem-solving court experiences such a success.[3] This article contains practical tips, suggestions, and practice pointers for TJ and non-TJ judges and practitioners from the perspective of a TJ judge assigned to a traditional court calendar.

The rapid expansion of problem-solving courts throughout the United States and Canada is an endorsement and recognition of the effectiveness of TJ inspired techniques. Since the establishment of the first drug court in Miami in 1989,[4] the concept has spread to more than 2559 drug courts in the United States.[5] The varieties and forms that the modern drug court has taken reflect the complexities of the problems they address: adult drug court, DWI court, family drug court, federal re-entry drug court, juvenile drug court, state re-entry drug court, tribal Healing to Wellness court, Back on TRAC (Treatment, Responsibility, Accountability on Campus), and the newest—Veterans Treatment Court.[6] In addition to drug courts, there are problem-solving courts created to address the over-representation of people with mental illness in the criminal justice system and jails (mental health courts), the growing problem of domestic violence (DV courts), compulsive gambling (gambling court), and truancy (juvenile truancy court).[7] Canadian problem-solving courts include drug treatment, mental health, aboriginal, and domestic violence courts.[8] Problem-solving courts have made their appearance internationally with the creation of such courts in Australia, Brazil, England, Ireland, New Zealand, and Scotland.[9]

Professors Bruce Winick and David Wexler noted the evolution of problem-solving courts and judges moving from the problem-solving calendar back to a traditional court calendar:

> The new problem solving courts have served to raise the consciousness of many judges concerning their therapeutic role, and many former problem solving court judges, upon being transferred back to courts of general jurisdiction, have taken

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[3] *Id.*

[4] Michael S. King, *Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts, and Mainstream Courts*, 19 J. JUD. ADMIN. 133, 135 (2010), http://sites.thomsonreuters.com.au/journals/files/2010/09/Article-King-2010-19-JJA-133.pdf.

[5] Figure current as of February 2012. *See id.*; *Types of Drug Courts*, NADCP, http://www.nadcp.org/learn/what-are-drug-courts/types-drug-courts (last visited Apr. 18, 2012).

[6] *Types of Drug Courts*, *supra* note 5.

[7] *Problem-Solving Courts*, NADCP, http://www.nadcp.org/learn/what-are-drug-courts/types-drug-courts/problem-solving-courts (last visited Apr. 18, 2012).

[8] SUSAN GOLDBERG, NAT'L JUDICIAL INST., JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH 6 (2005).

[9] King, *supra* note 4.

> with them the tools and sensitivities they have acquired in those newer courts. Indeed, the proliferation of different problem solving courts, and the development of various "hybrid" models [e.g., juvenile drug courts, dependency drug courts, domestic violence courts, mental health courts], suggests to us that the problem solving court movement may actually be a transitional stage in the creation of an overall judicial system attuned to problem solving, to therapeutic jurisprudence, and to judging with an ethic of care.[10]

Judge Michael King devotes an entire chapter in his *Solution-Focused Judging Bench Book* to a solution-focused approach to judging in mainstream courts.[11] Judge King suggests that judges apply certain techniques of solution-focused judging outside the problem-solving court:

> Indeed, the underlying philosophy of solution-focused judging—therapeutic jurisprudence—can be applied in judging in any context. Arguably, some aspects of a therapeutic jurisprudence approach to judging should be applied in any court context. Thus, factors also emphasised as important by procedural justice—giving parties' voice, validation and respect—are important elements of day-to-day judging.[12]

Judges who serve in problem-solving courts have found these philosophical considerations important in formulating and developing their own courtroom skills. These problem-solving court skills, or TJ techniques, are equally useful and effective in a non-problem-solving court. In fact, many former problem-solving court judges find it difficult to transition from a problem-solving specialty court back onto a regular calendar. One does not forget the most valuable tools and techniques that worked so well in a problem-solving court, and it may be frustrating to allow those skills to fall into disuse.

The difficulties that a TJ judge will face include peer judges who are traditionalists, resistant to change, and who are invested with the procedures and techniques suited to the adversarial-only style popular in the last century. The attorneys who appear in courts other than the problem-solving courts will also resist attempts by a TJ judge to implement a team approach. Attorneys may view these attempts to be a waste of their time, or an encroachment upon their

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[10] Bruce J. Winick & David B. Wexler, *Introduction* to William G. Schma, *Judging for the New Millennium*, *in* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS, *supra* note 1.

[11] *See* MICHAEL S. KING, SOLUTION-FOCUSED JUDGING BENCH BOOK 183–97 (2009), http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf.

[12] *Id.* at 184.

traditional role as pure advocate. Peer judges and attorneys in the traditional courts have little tolerance for judges who take the time to engage in active listening or to engage with litigants and victims and their families.

Former problem-solving court judges—such as the author—can contribute to the study of TJ and its practical applications through an understanding and sharing of effective TJ techniques. Such techniques may be just as effective in non-specific traditional courts as in the problem-solving courts.[13] Perhaps the most important technique is that of improved communication skills.[14] For instance, it is important to abandon a paternalistic listening and speaking style in the courtroom and adopt a manner that communicates respect to the litigants and attorneys; this encourages people to feel comfortable speaking in court, giving voice to defendants, victims, and their families. In all criminal sentencing hearings, the judge can engage in active listening to aid the court in setting fines, restitution, and terms of probation. The unique concepts of the team-approach and review-type hearings can be modified and utilized successfully in traditional court proceedings.

After many years as a problem-solving judge, and then a special assignment appellate judge, nine years ago I found myself first on a traditional civil trial calendar and then a traditional felony criminal trial calendar. I sought every opportunity to use my problem-solving skills. On both calendars, the attorneys' first reactions to any judicial suggestion of a team approach, creative problem-solving, or the use of active listening were incredulity and opposition. Attorneys frequently objected when the judge—without a jury present—engaged in candid and direct communication with the parties—always with counsel present. However, at the end of five years, my civil calendar was a model of efficiency with counsel requesting early conferences with the court and parties present to address possible settlements—the attorneys wanted me to engage their clients. My experience on a felony criminal assignment—the last four years before my retirement—was similar in that I devoted a great deal of my time to successful settlement conferences for other judges. Defense counsel with 'difficult' clients and prosecutors with difficult[15] or fragile victims or victim's families requested transfer or settlement conferences in my court. I attribute this to my continued use of TJ problem-solving techniques—primarily the

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[13] *See* Peggy Fulton Hora, *Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits*, 2 CHAPMAN J. CRIM. JUST. 7, 7-8 (2011).

[14] *See* NICOLE L. WATERS ET AL., NAT'L CTR. FOR STATE COURTS, MENTAL HEALTH COURT CULTURE: LEAVING YOUR HAT AT THE DOOR 6-7 (2009), http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/spcts&CISOPTR=209.

[15] 'Difficult' *usually* meant persons with mental illnesses or personality issues. 'Difficult' *always* meant that it was difficult for the attorney to communicate with the person in the case.

communication skills discussed in this article. This article is not an exhaustive list of the possible and useful TJ or problem-solving techniques,[16] it consists of those techniques that worked particularly well for me during my last years on the bench. These are the techniques and tips that I recommend to other judges and attorneys: observance of the elements of procedural justice, generous use of active listening, gentle use of confrontation, creating and emphasizing of the team approach, and the use of review hearings.

Let us be clear that a judge or attorney uses TJ techniques not to provide therapy to attorneys, participants, or for the audience. A lawyer or judge uses TJ techniques with the understanding that his or her words and actions may be perceived as, or may produce, therapeutic or anti-therapeutic effects. It is in the interest of all that the therapeutic effects be maximized, or that at least that anti-therapeutic effects be minimized, whenever possible.

II. PROCEDURAL JUSTICE

Procedural justice was explained by Dean Arie Freiberg:[17]

> Procedural (or natural) justice refers to the ways in which decisions are made and their fairness. Procedural justice is regarded as important not only as a means of ensuring that decisions are accurate, but also by attempting to ensure that participants feel that the dispute process has been fair and open; engendering more confidence in the operation of the justice system. Therapeutic jurisprudence regards the principles of procedural fairness in the work of all agencies involved in the criminal justice system as important, not only the courts. Perceptions of unfair or unequal treatment are a major contributor to dissatisfaction with the operation of a legal system.[18]

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[16] *See, e.g.*, INT'L NETWORK ON THERAPEUTIC JURISPRUDENCE, http://www.therapeuticjurisprudence.org (last visited Apr. 18, 2012); PROCEDURAL FAIRNESS, http://www.proceduralfairness.org (last visited Apr. 18, 2012); *Therapeutic Jurisprudence*, FACEBOOK, http://www.facebook.com/TherapeuticJurisprudence (last visited Apr. 18, 2012). The author strongly recommends these websites and Prof. David Wexler, TJ bibliography, published annually by the PHOENIX LAW REVIEW, and found in this volume at 5 PHOENIX L. REV. (forthcoming May 2012).

[17] Arie Freiberg is the Dean of the Faculty of Law, Monash University, Australia. *Professor Arie Freiberg*, MONASH U. L., http://www.law.monash.edu.au/staff/afreiberg.html (last visited Apr. 18, 2012).

[18] ARIE FREIBERG, POST-ADVERSARIAL AND POST-INQUISITORIAL JUSTICE: TRANSCENDING TRADITIONAL PENOLOGICAL PARADIGMS 12-13 (Monash Univeristy Research Paper No. 2010/17, 2010) (citations omitted), http://ssrn.com/abstract=1609468 (follow One-Click Download button).

Professor Tom Tyler is a leading writer on the necessity and elements of "procedural fairness" in all court proceedings.[19] He explains that there are four basic public expectations of the courts and its judges: (1) having 'voice' (speaking in court and being heard by the decision-maker); (2) neutrality of the judge (an unbiased judge who makes decisions based upon the consistent application of legal principles); (3) respectful treatment (individuals are treated with respect and afforded dignity); and (4) trustworthy authorities (the authorities are caring individuals who are sincerely trying to help the litigants).[20]

It is important for the judge at the beginning of a court proceeding—such as a hearing or trial—to set a tone of mutual respect within the confines of the case. That is, the judge must demand respect for the court, counsel, litigants, and the litigants' families and friends in the audience. The judge should explain the proceeding and set guidelines or establish procedures for the order in which the hearing will proceed.[21] The judge should also establish an atmosphere in which counsel, litigants, and audience feel some comfort. That is to say, most people are nervous, fearful, and not accustomed to appearing in court. It is important for the judge to encourage those people by demonstrating his or her willingness to listen and consider what they have to say. Needless to say some courtroom proceedings are challenging, such as when the court conducts a sentencing hearing, and present in the courtroom are family members and friends representing the defendant and the victim, who may also be members of rival gangs. Other difficult situations include cases where a family member is accused of a crime, such as assault or molestation, by another family member. This results in a fractured or warring family, frequently requiring additional security by the court and close monitoring by the judge and the court staff to ensure the safety of all of those persons present—including the court staff and counsel. Clear ground rules and expectations of appropriate conduct—with threats of sanctions for inappropriate conduct—may be necessary.

These important ground rules can be achieved by simple introductory comments:

> *The Judge*: Good morning everyone, please be seated. This morning we're hearing the case of/sentencing of *State v. Danny Rosovich*. Did I pronounce your name correctly, Mr. Rosovich? Counsel, will you announce your appearances for the record, please?

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[19] Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 6 (2007), http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2BurkeLeben.pdf.

[20] *Id.* at 6.

[21] *Id.* at 18 ("At the start of the docket, [the judge should] explain the ground rules for what will happen.").

. . .

> *The Judge*: Thank you. I remember this case from the trial/guilty plea proceeding, and I have read the presentence investigation report prepared by our probation department and the sentencing memoranda submitted by counsel. Today I expect you to help me better understand this case and all of the people involved, including the defendant, the victim(s), and their families.
>
> I will not tolerate any person laughing, interrupting, or criticizing another while they are speaking in this courtroom. If anyone violates this rule they will be removed from the courtroom. I expect everyone to be quiet and respectful whenever another person or attorney is speaking, with the expectation that everyone else will be quiet and respectful when you or your friend or family member speaks.
>
> I'm anxious to hear constructive recommendations from all of you.
>
> First, could I hear from counsel, please?[22]

The judge should interrupt immediately if anyone criticizes, interrupts, or laughs at another person or participant. If the judge fails to interrupt, then counsel should request that the court admonish the person for his or her behavior. Letting rude or ill behavior continue, encourages it, legitimizes it, and devalues the person speaking.[23]

Some judges, because of personal preferences or lack of exposure to TJ and problem-solving courts, require—and will likely appreciate—prompting by counsel. Judges and court staff appreciate a 'heads-up' on cases involving difficult victims, defendants or their families. It is always appropriate for counsel to warn the court in advance of potentially dangerous courtroom situations, and suggestions to the court from counsel that the court address courtroom protocol are usually welcomed by judges. Counsel can also suggest to the court that a victim or defendant may require support personnel or additional time because of nervousness or fears.

Many times it is difficult to give voice to a victim or defendant who is afraid or nervous to speak in court. Of course, victims and defendants have a right to be silent, or to speak through others, such as their attorneys, but at times they feel most comfortable putting their thoughts and recommendations in writing to be read by others in the courtroom. To truly give voice to victims

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[22] These sample dialogues are loosely based upon hearings I conducted in my own courtroom and are not attributable to a particular case.

[23] Parents will certainly relate.

and defendants, the court should acknowledge that the judge has read and considered those comments:

> *The Judge*: Thank you Mr. Rosovich for your written comments. I've read your letter and was impressed with your success on probation several years ago.
>
> I also understand that over the years in your attempts to battle your substance-abuse addictions, you completed several outpatient programs successfully; you maintained a responsible and well-paying job for many years, supporting your wife and children throughout all the difficult times that you faced.

The judge should explain basic courtroom protocols and procedures to allow the victim—along with any family members—and the defendant—and his or her family members or friends—to address the court:

> *The Judge*: I'm anxious to hear from everyone today who wishes to address the court. First, I will hear from the attorneys. Secondly, I will hear from the victim and the victim's family. Thirdly, I will hear from the defendant and the defendant's family and friends. Finally, I will ask the attorneys if they have any concluding comments.
>
> When it is your turn to speak please come forward to the podium, right here with the microphone sticking up, and tell us your full name. I will ask you to speak clearly so that everyone can hear you and so that our court reporter, or court recording system, can properly record your statement. Let us know if you need any help or have questions.

Frequently, non-attorney speakers in court need and appreciate some prompting. People freeze in court; victims, defendants, and their families forget what they had intended to say when faced with a large crowded courtroom and the person who has harmed a loved one—or whom a loved one has harmed. Either the judge or counsel may gently prompt:

> Thank you for being here today. What do you want the court to know and understand; what do you want the Defendant or the victim to hear today in court?

The court should encourage and facilitate apologies; honor and acknowledge those who give apologies—and note the difficulty in admitting that one is wrong. The court may have the opportunity to thank those who accept an apology graciously:

Mr. B (Victim): Judge, before you came out this morning, Tim's (the Defendant) whole family came over and sat with us, and told my wife and me how sorry they were that he was involved in the robbery of our home. Tim's dad said that they were upset that they had failed to notice that he was using drugs again and hanging around with that bad crowd. If only they had paid more attention, he said. Tim's parents told me about his struggle with drugs, and the many times that they had taken him to rehab. My wife and I were so impressed; we sat and prayed with them, and cried with them.

We don't blame Tim's family. We understand why Tim robbed our house. We don't want Tim to go to prison. But we don't want you to release him and allow him to go back to drugs. I guess we want you to do 'tough love.' We want you to put him on probation, or parole or whatever, and require him to do some kind of drug treatment program that will actually work this time. And we want you to make it clear to him that if he doesn't stay clean, he will go to jail. Could you do that for us, please?

The Judge: Yes, Mr. B, I think I can. First, let me thank you and your wife for being here, and for your graciousness and kindness in accepting Tim's and Tim's family's apology. Let me also thank you for your constructive ideas and suggestions for a probation plan that could work for Tim. I can order a suspended sentence, or probation. That means so long as Tim complies with the conditions of his probation he will not need to go to jail; however, if he violates a term of probation, his probation could be revoked and he will face prison or jail.

More importantly, I can order that Tim complete a rigorous drug treatment program and submit to random drug testing while he's on probation.

Counsel, could I please hear from you regarding the suggestions of Mr. B for terms of probation in this case? Are there additional suggestions that you would like the court to consider?

III. Active Listening

The judge's role is that of facilitator and active participant in those hearings where the judge is the finder of fact or the ultimate sentencing authority.[24] Passivity does not work when the judge needs information that is not forthcoming from counsel, the litigants, or the witnesses. A very effective means of drawing out important information is to use active listening techniques. Active listening is not playing dumb or patronizing the speaker—such techniques will be doomed to fail.[25]

Active listening is listening to another person's statement—for instance, the details of an automobile accident—while indicating attentiveness and interest. Then, as soon as the speaker finishes, the listener recites back to the speaker the content of what was said. For example, "I understand you were in a car crash, and it happened without any warning or wrongdoing on your part. You were so severely injured that you were taken to the hospital by ambulance, and you suffered a terrible concussion."[26] Active listening is conversation to refine the meaning and details of the speaker's original communication, with the goal of improving the listener's understanding of what was said.[27]

Active listening demonstrates that the listener is hearing the content of what the speaker says. It demonstrates to the speaker that he or she is effectively communicating, and the listener cares enough to hear it. It allows for the speaker to correct any misstatements or misimpressions and to clarify matters not fully understood by the listener. Active listening demonstrates mutual respect, and its use facilitates effective communication between people. Frequently in court, people are surprised that an attorney or judge is actually listening; they appreciate it, and become more open, honest, and responsive to questions. People who use active listening regularly find that they are able to read and understand the overt—and sometimes the hidden—emotions of the speakers.[28]

Active listening is particularly useful to the court when the judge is required to make findings of fact without a jury. It can also be used, however, during *voir dire* in jury selection proceedings. In those situations where a prospective juror expresses a biased opinion, it is helpful for the judge to para-

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[24] *See* Dr. Andrew Cannon, *Finding the Facts: The Judge Should Lead the Search Party*, 37 Monash U. L. Rev. 120, 126-29 (2011), *available* at http://aija.org.au/NAJ%202010/Papers/Cannon.pdf.

[25] Goldberg, *supra* note 8, at 13.

[26] Susan Swaim Daicoff, Comprehensive Law Practice: Law as a Healing Profession 64 (2011).

[27] *Id.*

[28] *Id.*

phrase the juror's extreme language in a manner that illustrates the importance of fairness to all parties:

> *The Judge*: Ms. C's son was convicted of a crime, and she is concerned that she cannot be fair to the prosecution, but her complaint is that she feels another jury was not fair to her son—she understands the extreme importance of fairness to both sides. Is there anyone on our jury panel who believes that they cannot be fair to *both* sides in this trial?

In another case, at the pretrial stage, the defense attorney moves for a continuance of the trial date and the victim strongly objects:

> *The Victim*: Your Honor—I object. This case has been dragging on for more than four years! We've had a trial, an appeal, and now I have to go through another trial again. The defendant has had three different attorneys; I've had two different prosecutors, and you're the third judge who has heard this case. When is this going to end? I don't think it's ever going to end! I've lost a job, my family, and I don't think I can take this anymore.
> *The Judge*: I understand that this has been a long and painful process for you. I can hear the frustration in your voice and see it in your face. You have been incredibly patient with our justice system. You understand why the appellate court reversed the conviction and sent this case back for a new trial. I know the last thing that you want is for us to make a mistake that would warrant a third trial in this case.

In criminal or civil settlement conferences, active listening is useful in communicating to all parties that the judge and the other parties understand each other's positions. It is particularly beneficial when it is used to enumerate the pros and cons of a settlement:

> *The Plaintiff*: I need enough money to help me rebuild my house. Anything less is worthless. I lose. But . . .
> *The Defendant*: You're just as responsible for the fire as my people are. And . . .
> *The Judge*: Please don't interrupt. I want to understand exactly what you need to settle this case. I want to hear from each of you in turn without interruptions, and I want to understand clearly, so I may need to ask a few questions.
>
> Mr. Plaintiff, I know you wish to rebuild your house. I understand that you feel that Mr. Defendant's employees are

> chiefly responsible for the fire that destroyed your home. Please explain to us, in detail, why you need the amount that you're requesting.
>
> . . .
>
> *The Judge*: Thank you, Mr. Plaintiff. The major cost in rebuilding for you will be the costs of labor, and you do not wish to use the services of the Defendant's construction company, though that will increase the costs to you.
>
> Have you considered the costs of not settling this case, including the attorneys' fees, witness fees, the cost of your time, and all the possible costs of an appeal?
>
> *The Plaintiff*: The principle of making him pay for my losses is important to me.
>
> *The Judge*: I understand why you brought this case and why you have prosecuted it this far. You're interested in justice, but there are costs associated with securing justice in our court system that I know that you understand because you have a good attorney advising you in this case.

During many court proceedings, one or more parties may express their frustration with the length of time that it takes to complete a court case or to have a trial. Judges can use these statements to not only sympathize with the speakers, but to educate them about the legal process and to encourage a settlement of the case that will bring some finality to all parties:

> *The Defendant*: I object to postponing the trial any further. I've been sitting here rotting in jail while the attorneys work on other cases. When will this end?
>
> *The Judge*: I know that you would like to get this over with as quickly as possible. And, it's frustrating to you even more because you're in jail waiting for your trial. But, I also understand that you want your attorney to be as prepared as possible, and to be ready for your trial.
>
> The waiting, and the stress while waiting, is a difficult thing for many of the people that I see in my courtroom. I would encourage you and the attorneys to consider a plea agreement in this case that would bring some finality to everyone—that is an end to this case today. When there is a plea agreement there is no need for a postponement or continuance, no need for a trial, no need for an appeal. The case ends. Why don't we take a break before I consider postponing the

trial and give everyone an opportunity to think about a possible plea agreement?

A. Active Listening With Victims of Crimes

There are many opportunities to use active listening with victims of crimes. The use of active listening may serve to release pent-up emotion and tension in constructive ways. Active listening can be used to educate the victims about criminal laws and processes including the intricacies of probation, parole, and prison versus jail sentences.

> *Victim's Family*: Judge, we have a video that we would like to play for you that contains pictures of our son Tommy's life. Tommy wrote the music that is playing in the background. These pictures show what an important part of our family Tommy was, and they show just a few of his accomplishments in college and in the Navy. May we show that to you?
>
> *The Judge*: Of course. Tommy's life, his accomplishments, and his role in your family are important.
>
> . . .
>
> *The Judge*: Thank you for the video that has helped me to know Tommy better as a person and a member of your family. It's very comforting to know that before his death, Tommy was much loved, and that he lived such a rich life. What a tragedy that someone with such promise lost his life too soon.

The court can also use active listening to involve the victim, or the victim's family, in crafting a sentence that will better serve the defendant and the community.

> *Victim*: I want him to serve the maximum sentence, your Honor. He needs to pay for what he did to me and my family. It's only fair.
>
> *The Judge*: I'm glad that you're here today and that you care about the sentence that the court will impose. Are you requesting a maximum sentence out of a concern that this defendant will commit a similar crime against another innocent person, such as yourself?
>
> *Victim*: That's right. I want him in jail for as long as possible, so that he doesn't hurt someone else.
>
> *The Judge*: I understand. You want to protect society from this defendant. Very commendable.

> Does it matter to you whether the defendant is in jail or in prison? Or whether he's supervised on probation or house arrest? Should we discuss which of these will better protect you and society?
> *Victim*: I'm not sure.
> *The Judge*: Do you understand that I can order a *longer* supervised probationary term than a jail or prison sentence? And, that as a condition of probation I could require house arrest, enrollment in a drug treatment program, regular employment, and regular restitution payments to you?
> *Victim*: I didn't know about that. So, he would have to work, go to treatment, and stay at home the rest of the time? Who watches him? How do we know that he will obey?
> *The Judge*: It's too bad this was not explained to you before, but we have time to make sure we understand it now. Yes, probation may include terms and conditions that a Defendant agrees to follow, otherwise probation may be revoked and the Defendant sent to prison. Those terms could include employment, treatment, and house arrest. I will order probation officers to monitor the Defendant's compliance.
>
> Can you think of other terms of the sentence that you think I should order?
> *Victim*: When will he pay my medical bills?
> *The Judge*: Good point. I can order payment for restitution as part of the conditions of probation. We can discuss how much the Defendant can pay towards your bills each month.
>
> Now, before I enter orders in this case, are there other terms or conditions of probation that may be appropriate? I will also hear from counsel their recommendations, and finally from the Defendant as to whether he agrees.

B. Active Listening With Defendants and Their Families

Active listening is useful to address the fears of defendants and their families. Primarily, defendants and their families are afraid that the court will not take time to understand and know the defendant as a person. Many are fearful that they and their loved ones will be judged as a bad person. Many are desperate in their hope that a judge will hear them.

> *Mother*: I know my son did wrong. He knows better. We taught him better. He's not a bad person; please don't think that he's bad just because he has done stupid things.

> *The Judge*: I understand that good people can make mistakes. I don't think that your son is a bad person.
>
> I see good people in this courtroom every day who are here because they have used poor judgment; they have made mistakes.

Active listening can be very helpful to the court in evaluating and determining the sentence or possible conditions of probation. The court can engage the defendant and his family and friends in constructive conversation about the length and nature of the defendant's drug, alcohol, or mental health problem. The Court can inquire about the nature of treatments and programs that the defendant has previously completed and solicit opinions why those treatments did not work. The judge can also solicit opinions and recommendations[29] for future programs that might work.

> *Defendant*: I know that all I need is a good drug program where I can learn to be clean.
>
> *The Judge*: Well, excellent. The first step in recovery is acknowledging your problem. So, tell me about your previous treatments and programs. What worked best for you?
>
> *Defendant*: The support, and knowing that I wasn't alone; that other people had beat this thing. That they were living with their drug addiction and it wasn't ruining their lives, like it was mine.
>
> *The Judge*: Support is important. Why did you stop going to treatment, then?
>
> *Defendant*: It was a hassle. I lost my car, and the bus line ran at weird times. Lots of reasons.
>
> *The Judge*: If your probation officer orders it, are you willing to complete a more rigorous drug program, such as a residential program where you will get twenty-four-hour-a-day support?

Frequently, admitting the underlying problem, illness, or addiction is difficult for defendants.

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[29] Judge Michael King has expressed serious concern about the judge over-stepping his or her role in recommending a specific therapy. In many U.S. jurisdictions, however, individuals will not receive the level of service that they may require unless higher levels of service are required and directed or ordered by the court. The judge should base these orders on recommendations from the appropriate professional, but it is useful to begin such dialogues with the defendant.

> *The Judge*: I can't help noticing that each of the times that you were arrested for assaulting your wife, you were using drugs.
> *Defendant*: I used the drugs because I feel so bad, so depressed, all the time. But I worked, I earned a living, and I supported my kids.
> *The Judge*: So, you functioned well as long as you had the drugs to numb the depression? Are you willing to speak with your probation officer about your depression?
> *Defendant*: Okay. I actually think counseling might help.
> *The Judge*: I will request that your probation officer investigate that option and do whatever screening may be appropriate.

Focus the Defendant (or his family) on the future:

> *Defendant*: I just want to get this over with. I hate her (ex-wife who reported Defendant to police for a probation violation).
> *The Judge*: I know that you want to get this over with, so let's discuss your plans to succeed on probation after your release from jail later today.

Active listening and some gentle confrontation[30] facilitate a constructive conversation between the important parties, which include a young defendant's parents or other significant family members. Those family members may effectively monitor a defendant's terms of release conditions[31] or terms of probation:

> *Mother*: Please just give my daughter another chance. Alcoholism is a disease.
> *The Judge*: I understand you want things to be as they were before this crime occurred, and you want your daughter not to go to jail. More importantly, I understand that alcoholism is a serious addiction. What can you and the rest of your family do to help your daughter stay sober?

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[30] *See infra* Part IV.

[31] *See* David B. Wexler, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship between Procedural Justice and Therapeutic Jurisprudence*, 44 CT. REV. 78, 78-79 (2008), http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2Wexler.pdf (recommending inclusion of family members of the defendant in discussions about the terms of a pretrial release). Such a measure will likely enhance the parents' or family's involvement in compliance with those terms of release. *See id.*

> *Mother*: We'll be there for her—every moment. We'll make sure she doesn't drive a car, or drink.
> *The Judge*: Will you take her car keys away from her? Will you call her probation officer if she takes a drink?
> *Mother*: I will do whatever it takes.
> *The Judge*: What kind of alcohol treatment program will work for your daughter?
> *Mother*: She's been in several, and she goes to AA.
> *The Judge*: I understand that she has tried many times to stay sober. But, has she completed an in-patient program? Would you support her in a residential treatment program?

IV. GENTLE USE OF CONFRONTATION

A general observation about confrontation is that it frequently does not work well unless it is gently done, and the person confronted is able and willing to understand the sometimes subtle point being made. Gentle confrontation works when the person confronted trusts the person who is speaking. Confrontation works best when the 'trusted speaker' does not place the person to be confronted in a position where he or she perceives an unfair attack. The judicial role is well-suited to fit the position of the trust role.

Confrontation can be motivational: "You haven't been successful at drug rehab so far, why is this time different?"[32] "How can I be sure that you will take your medications?" "What type of counseling do you think will work, since you haven't been successful in other programs?" Or, "*If* I release you from jail, what's your plan to find a job when you're released from jail?"[33]

Confrontation is most effective in settlement conferences to address factual conflicts, fallacies, and false hopes or expectations by the parties (or the attorneys). As the neutral party, the judge can easily make the point that a party's claim, defense, or monetary expectation is not reasonable or credible.

In a recent criminal settlement conference,[34] the judge effectively used confrontation to convince a defendant that his defense was not entirely credible. Jim Smith[35] appeared with his attorney and the prosecutor for a scheduled settlement conference. Smith was a nice looking, well-dressed young man—pos-

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[32] *See id.* at 79.

[33] *Id.* Professor Wexler recommends including the defendant in "relapse prevention planning" to review the chain of events and circumstances that previously led to criminal behavior and to solicit suggestions on how such situations may be avoided in the future. *Id.*

[34] In Arizona, judges regularly conduct criminal settlement conferences. ARIZ. R. CRIM. P. 17.4(a). The judge who conducts such settlement conferences is not the judge who will conduct the trial, unless the parties consent. *Id.*

[35] This is not the Defendant's true name.

sibly a con man, but in a charming, inoffensive way—who was charged with Indecent Exposure with minors present;[36] he had mooned the crowd while dancing to street musicians on Mill Avenue in Tempe, Arizona. Smith's attorney interrupted the judge's preliminary remarks about the recording of settlement conferences to explain that his client was not interested in any form of plea bargain because he believed he had a complete defense to the crime: Smith had *accidentally* exposed himself to minors, and so there was no intent to commit the crime. Smith's attorney further explained that he wanted the prosecutor and judge to explain the crime charged, and he would appreciate opinions on the sufficiency of the prosecutor's case and the defense.

The judge suggested that perhaps the best way to proceed to evaluate the case would be for everyone to imagine that they were an average juror sitting in the jury box hearing the case for the first time: first, the prosecutor would call the parents of the children who observed the Defendant dancing with his pants and underwear around his ankles, and buttocks and genitals exposed. Then, the Defendant would have the opportunity to testify and explain 'the accident.' The judge asked for clarification about how the pants accidentally fell down, and the Defendant explained that he was surprised that they just fell.

At that point, the judge reminded everyone that it was likely that half of the jurors would be male. They would be asking themselves, "How many times, in my life, have my pants fallen down around my ankles—with no warning?" The judge asked everyone if they agreed that this would be a likely question and a serious concern of the jurors. Even the Defendant agreed it would be. The judge then suggested to the attorneys and the Defendant that the jurors—at least the male jurors—would ask themselves not only, "How many times, in my life, have my pants fallen down around my ankles—with no warning?" but also, "And my *underwear* fell down, too!!" The judge suggested that jurors would likely conclude from their personal experiences that one usually has some warning of a 'wardrobe malfunction'[37] or clothing failure.

The judge asked the defendant and his counsel if they had considered facts or arguments that would address these likely jury concerns. The defendant responded that, "I didn't plan to do it, I just got so wrapped up in the music—it just happened." At that point, the judge gently suggested that a spur-of-the-moment act that is not planned is still different from an accident. The judge asked the defense attorney to explain the legal difference between accidents and volitional acts. Counsel also explained that the jury would make the ultimate determination about whether an accident had occurred; however, it was

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[36] A class 6 felony under Arizona law. ARIZ. REV. STAT. ANN. §13-1402(c) (Westlaw through 2012 Legis. Sess.).

[37] *Jackson Apologizes for Super Bowl Exposure*, CNN (Feb. 2, 2004), http://articles.cnn.com/2004-02-02/us/superbowl.jackson_1_halftime-show-mtv-damita-jo?_s=PM:US.

likely—given the factual issue—that the prosecutor would ask the Defendant on cross-examination if he had previously exposed himself in public, and been previously convicted of Indecent Exposure (which he had).[38] The Defendant understood and readily agreed. The case was resolved with a probation stipulation in a plea agreement approved the same day.

V. Creating and Emphasizing a Team Where None Previously Existed

The TJ judge can teach attorneys, even in adversarial proceedings in a traditional court, the benefits of working as a team, rather than at cross purposes. There is much to be accomplished: the court can delegate tasks to the attorneys, such as agreeing upon the language in an order—for discovery, a protective order, etc.—the limits on depositions, and time limits on testimony, arguments, and *voir dire* questions. Attorneys will appreciate the freedoms, the control, and the trust implicit in the court's delegation of authority.

Dr. Andrew Cannon[39] argues persuasively that judicial officers "should lead the search party" in identifying and resolving pretrial discovery abuses in civil cases, which he explains "are common enough to have a name: 'deep pocketing' your opponent, that is making the pretrial path so tortuous and expensive that the opponent cannot afford to make the journey."[40] The judicial officer can require counsel to agree to reasonable presumptive limits on the numbers of interrogatories, depositions, or examinations.

The TJ judge coordinates activity and possesses a "disentrenching capacity" that Professor Michael C. Dorf describes as, "[t]he ability to declare some course of conduct unlawful, even where a court does not have a solution ready at hand, enables courts to force other actors to address their problems immediately."[41] Such a court "can impose a 'penalty default,' a state of affairs so unpalatable to all parties that they have no choice but to hammer out some solution."[42] The judge is in a unique position because

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[38] Although a misdemeanor under Ariz. Rev. Stat. Ann. §13-1402(c) (Westlaw through 2012 Legis. Sess.), the conviction might be relevant to prove absence of mistake or an aberrant sexual propensity under Ariz. R. Evid. 404(b) or (c).

[39] Dr. Andrew Cannon is the Deputy Chief Magistrate and Senior Mining Warden for South Australia and Adjunct Professor of Law at Muenster University, Germany, and Flinders University, South Australia. *Andrew Cannon*, Flinders U., http://www.flinders.edu.au/ehl/law/staff/andrew-cannon.cfm (last visited Apr. 18, 2012).

[40] Cannon, *supra* note 24, at 126.

[41] Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 875, 946 (2003).

[42] *Id.*

> unlike other actors in the legal system, courts are perceived as neutral parties that lack a direct stake in the outcome of litigation or substitutes for litigation. Neutrality, or at least the perception of it, permits courts to function as honest brokers when problem solving becomes a matter of negotiation. In addition, the courts' perceived neutrality, when combined with such quasi-mystical symbols of judicial power as the robe and gavel, lends prestige to the courts, thereby enabling courts to command respect where other actors might not.[43]

The judge is in a perfect position of authority to serve as a "dynamic risk manager."[44] He or she can challenge the attorneys to work together to design individual solutions to underlying mental health, domestic violence, or substance abuse issues, to name but a few. The judge can also lead the attorneys to collaborate with specialist professionals who may interview, test, or design treatment plans that minimize risk factors or the likelihood of recidivism for parties in the case. Upon attorneys' failure to agree on a complete settlement, the judge can suggest evaluations or tests that might affect a future settlement or the presentation of evidence. Examples include criminal cases where the competency or insanity of the defendant is not an issue, but the judge can still refer the parties to neurological and/or psychiatric specialists to develop a plan to treat the defendant's underlying mental health issues. The judge can then incorporate the mental health plan into the terms of probation. The judge can also schedule review hearings to facilitate progress reports toward the goals established, and dispense rewards and sanctions.

VI. Review Hearings

Review hearings in court cases are not a new or revolutionary concept. Review hearings are, by their nature, opportunities for the court to review the efficacy of prior orders, such as discovery, injunctions, temporary support, or terms and conditions of probation. A TJ judge may use a review hearing as a means of relapse prevention, and to "encourage and praise participants where appropriate; to note the achievement of any of the participants' goals or significant progress towards the attainment of those goals; [and] to reinforce the participants' self-efficacy."[45] Most probation revocation proceedings are fundamentally a *review* of the defendant's progress. Review hearings are held in the problem-solving courts to administer rewards or sanctions when a defen-

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[43] *Id.* at 945.

[44] Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DePaul L. Rev. 93, 119-20 (2007).

[45] King, *supra* note 11, at 190.

dant has achieved or failed to achieve goals set as part of the court's 'contract' with the defendant. What is new and exciting is Judge King's notion that review hearings can be held in a criminal court *before* formal probation/parole revocation proceedings are initiated—or, that review hearings may be useful to review compliance with pre-trial and post-trial orders in both criminal and civil cases.[46]

Review hearings are quite an effective tool in collecting funds owed to the court or to individuals, such as support arrearages, fines or restitution. In cases where child and/or spousal support is owed, a party can request a hearing in most courts by submitting a petition for order to show cause as to why the person in arrears should not be held in contempt of court. Or, where a person has a history of willfully failing to pay support,[47] the court can schedule regular, periodic review hearings, with the threat of a contempt order and incarceration to compel compliance with the court orders.

The Maricopa County Superior Court established a 'Restitution Court' to increase compliance with the court's restitution orders in criminal cases; the process functions in a way similar to support arrearage contempt hearings.[48] On a party or victim's request, or on its own motion, the court schedules a hearing to review the payment history of a person owing restitution. At the hearing the judge will hear reasons why the person owing restitution has not paid or is delinquent in his or her payments, and impose or threaten sanctions or modify the payments to reasonable amounts.

Review hearings are effective when probationary terms are about to expire and the probationer has not completed all the terms and conditions of probation. Formal revocation of probation is time consuming, expensive, and unnecessary when the court could schedule a review hearing before the period of probation expires to address non-compliance with probation terms. For example, in drug cases, the probationer is frequently ordered to complete a drug education or counseling program, or a substance abuse screening and/or urinalysis testing. Alternatively, defendants are ordered to complete community service hours, or to pay fines or restitution. Many times, short probation periods merely need to be extended, or probationers need additional time to fully comply with the court's orders:

> *The Judge*: Good morning counsel and Mr. Arras. It appears that Mr. Arras only has 60 days remaining on his term of probation, but that there appears to be a substance abuse screen-

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[46] I include 'Family Court' cases within the term civil.

[47] Frequently referred to as a 'scofflaw.'

[48] Judge Roland Steinle, of the Maricopa County Superior Court, initiated this new type of problem-solving court in Arizona.

> ing and some community service hours that remain to be completed?
> *Counsel*: My client had a stroke in February of this year, and it left him debilitated. We do have a certificate of completion of a drug screening (hands certificate to probation officer); however, there has been no treatment required. I think treatment was obviated by the fact that he had this stroke that was related to his drug usage. But, he has not completed any hours of community service.
> *Mr. Arras*: I'm willing to do the community service. My rehab center has offered to let me volunteer a couple of hours each week, you know, doing things like cleaning up the tables, and things like that.
> *The Judge*: That seems very appropriate; giving back to the rehab center that has helped you.
> *Mr. Arras*: I'm happy to do that.
> *Counsel*: Your Honor, I'm not sure that my client will be able to complete 100 hours of community service within the 60 days remaining on his probation, is there a way we can extend that?
>
> . . . .
>
> *The Judge*: I will accept the parties' stipulation to extend probation in this case for an additional 120 days from this date. So ordered.

In traditional courts, there is no court *hearing* to end probation terms when they are completed. Traditionally, there is a handoff from the judge to the probation office and the defendant, with no further court involvement, except when probation must be revoked. A regularly scheduled court hearing could assist the probation officer in impressing the seriousness of probation and the need to fulfill the terms of probation. Such review hearings could be set halfway through and near the end of a term of probation. A review midway through the probationary term could serve as a wake-up call to those people who fail to take their responsibilities seriously.

Some probationers need additional motivation from a judge. For example, if they fail to comply with all terms and conditions of probation, then formal revocation proceedings, including the possibility of jail or prison, will follow. A brief review hearing can address these issues:

> *The Judge*: This is the time for a review hearing, and it appears that the restitution order in your case, Ms. Rodriguez, was $2,208.00. Is that right?

> *Probation Officer*: Ms. Rodriguez has a job with the state, but has made exactly zero payments toward her restitution since she was placed on probation. She hasn't even asked for an extension or provided any explanations for her non-payments.
> *Ms. Rodriguez*: I can make a payment today.
> *The Judge*: Good. And, when can you make another payment?
>
> . . .
>
> *The Judge*: I will set a review hearing in six months' time, and if you make regular payments for the next six months, I will delete all of the clerk's late charges on your account. If you don't make regular payments, I could find you in contempt of court and put you in jail until you make a payment, do you understand?

VII. Conclusions

The next challenge for the TJ judge is to mainstream TJ practice techniques developed in problem-solving courts throughout the court system. Judges who have learned innovative and effective TJ practices and problem-solving court techniques, such as emphasis on the elements of procedural justice, active listening, confrontation, team building and the effective use of review hearings, may readily use those techniques in the mainstream courts. TJ judges cannot and should not forget those techniques and procedures that made their problem-solving court experiences such a success.