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Problem-Solving Courts?

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WHAT CAN MAINSTREAM COURTS LEARN FROM PROBLEM-SOLVING COURTS?

MICHAEL KING

Mainstream courts focus primarily on the resolution of legal problems by producing a legal outcome such as a sentence or judgment; any related problems are left to others to resolve. Problem-solving court programs are concerned with producing a legal outcome but also promote the resolution of underlying problems such as substance abuse or domestic violence. They seize upon a moment when people are open to changing dysfunctional behaviour — the crisis of coming to court — to give them the opportunity to change.

While the name 'problem-solving court' implies that the court resolves the problem, in reality the court is just one part — albeit an important part — of the process. Arguably, the source of change is within the participants; their attitude to change and to the process is the prime determinant of the success of any problem-solving court. Depending on the court, the judicial officer, community corrections officer, prosecutor, defence counsel, treatment and support agencies and court staff each play an important role.¹ The court is the facilitator, using therapeutic court processes to support the change process. However, problem-solving courts vary in the degree to which they apply therapeutic principles.

While more extensive research on these courts is needed, studies have found that drug courts promote participant well-being and decreased recidivism.² Early research supports the efficacy of domestic violence courts.³ There is a high degree of community support for some problem-solving courts.⁴ Given this evidence, the question arises whether problem-solving court principles can be used by mainstream courts to promote justice system goals such as offender rehabilitation and community respect.

This article analyses key principles underlying problem-solving court processes in the light of therapeutic jurisprudence and suggests how mainstream courts can use them. Therapeutic jurisprudence — the study of the effect of laws and legal processes on well-being — has become problem-solving courts' underlying ethos. It suggests that findings from the behavioural sciences can inform the development of legal processes.⁵ Therapeutic jurisprudence principles also underlie another court innovation: Indigenous sentencing courts.⁶

The importance of judicial interaction

In a conventional courtroom, communication is mainly between the judicial officer and counsel. The processes are formal and focus on a determination of the facts, the law and appropriate legal outcomes. Communication between judicial officer and a party and the party's involvement in the process is limited except where the party is unrepresented. The outcome is a court order — a mechanism of control — such as an order to pay money or a sentence of a community based order or imprisonment.

A distinctive feature of problem-solving courts is the interaction between participants and the judicial officer — not simply through additional appearances, but also in the length and nature of the interaction. Commonly at the start of each appearance, the judicial officer will greet the participant and inquire as to the participant's well-being. The judicial officer may ask how the participant's sick parent is progressing or congratulate the participant on the recent birth of a child. The judicial officer will listen carefully and give the participant their full attention. They may ask clarifying questions or repeat some of what the participant has said back to them to show they have listened and understood. Their approach will be less formal and more conversational. They will acknowledge any feelings the participant has expressed concerning their situation.

If the participant has made progress, the judicial officer will praise them. If there are problems, the judicial officer will ask the participant what has happened and express empathy for their situation. The judicial officer may then ask the participant what they have done to resolve the matter and, if the strategy is sound, praise them for their initiative and support their ability to implement the strategy. If the strategy is problematic, the judicial officer may raise concerns and ask the participant for suggestions and/or offer suggestions for their consideration. The prosecutor and defence counsel may also contribute suggestions. The judicial officer will solicit the participant's commitment to implement an agreed strategy and mention that at the next court appearance the judicial officer will ask the participant about their progress.

Here the judicial officer demonstrates an ethic of care towards the participant and takes a problem-solving approach. This is a cooperative and facilitative, rather than an adversarial and control-based, approach to court processes. The judicial officer takes an interest in

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1. Greg Berman and John Feinblatt, *Good Courts* (2005). As to court staff, see: Michael S King and Steve Ford, 'Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime' (2006) 1 *eLaw Journal (Special Series)* 9 <https://elaw.murdoch.edu.au/special_series.html> at 14 May 2007.
2. Berman and Feinblatt, above n 1.
3. *Ibid.*
4. *Ibid.*
5. Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key* (2003); Michael S King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129.

the participant and actively involves the participant in the court process.

The literature provides good reasons for this approach. Research has found that the legal system processes can significantly affect a person's self-respect, and their perception of and respect for the system.⁷ Although research suggests that people perceive legal institutions as generally fair, that perception may change due to their experience of the system. Tyler observes that

[p]eople value the affirmation of their status by legal authorities as competent, equal, citizens and human beings, and they regard procedures as unfair if they are not consistent with that affirmation.⁸

Litigants value participation, dignity and trust more than the neutrality of the court in assessing its fairness.⁹ Litigants value telling their story to a person in authority who listens and cares about the litigant's situation, being a part of the decision-making process and being treated with respect. Similarly, medicine increasingly recognises that a patient telling his or her story to a doctor who listens is important in developing a therapeutic relationship and in promoting healing.¹⁰ The promotion of these values is effected through the interpersonal skills and emotional intelligence of the professionals involved.¹¹

Other aspects of this judicial officer-participant interaction promote participant well-being and rehabilitation. According to Makkai and Braithwaite, praise can have 'cognitive effects on individuals through nurturing law-abiding identities, building cognitive commitments to try harder, encouraging individuals who face adversity not to give up...and nurturing belief in oneself'.¹² A judicial officer's support for participants' ability to implement their plan is supporting their self-efficacy – their confidence in their ability to implement the plan. Self-efficacy impacts upon cognitive function, motivation and emotional states.¹³ Thus, perceived ability to control drug use can predict who will relapse in drug treatment.

This process can have powerful effects. For example, a recent graduate of Perth Drug Court commented:

The Magistrate Courts don't seem to care as much, your [sic] just another number. Where Drug Court is focused on helping you and that's [sic] all some people need, a bit of positive encouragement.¹⁴

Involving people in court processes helps to demystify them. It also promotes commitment to the processes and the values they endeavour to promote.

Self-determination and the individual

Problem-solving court judicial officers applying therapeutic jurisprudence also involve these processes in decision-making. Some of the strategies courts use include: voluntary admission to the court program; participants setting goals and strategies; and behavioural contracts between participants and the courts.

Self-determination has been found to be important in promoting health, educational, employment and rehabilitation outcomes. Its value in promoting well-being is also emphasised in economic theories and in the political theories of philosophers such as Locke,

Mill and Jefferson. According to Eastern traditions, such as the Vedic tradition, the self is the basis for action and the source of personal growth.¹⁵ Self-determination is a fundamental concept of constitutional, contract, marriage, tort, criminal and other areas of law.

Mill thought choice to be indispensable to self-development.¹⁶ According to Mill, a decision to act engages all of an individual's faculties in its implementation whereas acting contrary to choice injures feeling and intellect. It is a theme repeated in the literature.

Some economists see self-determination as the basis of economic well-being. Friedman attributed the significant economic growth and improvement in the United States' living standards during the decades preceding the 1950s to the 'initiative and drive of individuals co-operating through the free market'.¹⁷ He constructed an economic philosophy on the basis of the ability of individuals to pursue their own interests and values freely within society in the form of voluntary cooperation and private enterprise provided they do not violate the freedoms of others. According to Sen, individuals are dynamic agents of change, able to shape their own destiny and to promote social change and well-being.¹⁸ Economic and social development involves expanding individuals' capabilities and opportunity to choose while involving them as active agents in the development process.

Self-determination theory explores motivation and its implications for behaviour and achievement. It asserts that 'motivation, performance, and development will be maximised within social contexts that provide people the opportunity to satisfy their basic psychological needs for competence, relatedness and autonomy'.¹⁹ Competence involves understanding how to achieve outcomes and self-efficacy in doing so, relatedness means stable and satisfying relationships, and autonomy is the ability to begin and govern one's actions. Deci et al refer to research finding that self-determined motivation is linked to improved educational outcomes including educational performance, retention at school, conceptual learning and memory.²⁰ They stress its importance in promoting cognitive flexibility, creativity and self-esteem. Managers supporting the autonomy of their employees have been found to promote greater job satisfaction, higher performance evaluations and greater psychological adjustment.²¹

Winick's review of findings from psychology suggests self-determination is intimately connected with personal well-being, happiness, and the ability to recognise any need for behavioural change and to implement behavioural change strategies.²² Winick observes that choice promotes motivation, confidence, satisfaction and 'increased opportunities to build skills necessary for successful living'.²³

In health, patient choice in determining whether to engage in treatment promotes compliance with treatment programs.²⁴

Maruna's study found self-determination to be a significant factor in why some ex-offenders desist from

6. Kate Auty, 'We Teach All Hearts to Break — But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' (2006) 1 *eLaw Journal (Special Series)* 101 <https://elaw.murdoch.edu.au/special_series.html> at 14 May 2007.

7. Tom Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key* (1996) 3.

8. *Ibid.* 10.

9. *Ibid.*

10. Warren Brookbanks, 'Narrative Medical Competence and Therapeutic Jurisprudence: Moving Towards a Synthesis' (2003) 20 *Law in Context* 74.

11. Michael S King, 'The Therapeutic Dimension of Judging: The Example of Sentencing' (2006) 16 *Journal of Judicial Administration* 92.

12. Shadd Maruna and Thomas P LeBel, 'Welcome Home! Examining the "Reentry Court" Concept from a Strengths-based Perspective' (2003) 4 *Western Criminology Review* 91, 101.

13. Albert Bandura, 'Self-efficacy' (1997) 13(9) *Harvard Mental Health Letter* 4.

14. Drug Court exit survey response held by the Perth Magistrates Court.

15. Michael S King, 'Natural Law and the Bhagavad-Gita: The Vedic Concept of Natural Law' (2003) 16 *Ratio Juris* 399.

16. Bruce J Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705.

17. Milton Friedman, *Capitalism and Freedom* (2002) 200.

18. Amartya Sen, *Development as Freedom* (1999).

19. Edward L Deci et al, 'Motivation and Education: The Self-Determination Perspective' (1991) *Educational Psychologist* 325, 327–328.

20. *Ibid.*

21. Marylène Gagné and Edward L Deci, 'Self-determination Theory and Work Motivation' (2005) 26 *Journal of Organizational Behavior* 331.

Problem-solving court programs ... seize upon a moment when people are open to changing dysfunctional behaviour — the crisis of coming to court — to give them the opportunity to change.

offending while others continue offending.²⁵ Those who continued to offend did not have a vision for the future and felt powerless to alter their circumstances; those who had desisted had a vision for the future and felt confident they could achieve it. They felt in control of their lives.

Coercion and paternalism remove the locus of control from the individual to some external source, whether a court, another government body or otherwise. Implicit in such practices is the belief that a person cannot and/or should not make a particular decision impacting upon his or her own well-being. As Winick points out, these practices are likely to cause resentment and resistance to change and undermine self-efficacy.²⁶ While there is some evidence that those coerced to take part in drug treatment programs do as well as those who do so voluntarily, there is no evidence that coercion promotes pro-social activities.²⁷

Strategies for mainstream courts

All courts should apply the principles of participation, dignity and trust identified in procedural justice research.

Goal setting is a powerful tool used by some problem-solving courts to promote self-determination, commitment and motivation for rehabilitation. According to Winick, setting goals 'provides direction for the individual and focuses his or her interest, attention and personal involvement on the effort'.²⁸ For example, Perth Drug Court participants, at the start of their order, are asked to determine their goals while in the program and their strategies for attaining the goals.²⁹ A dedicated team of community corrections officers and a program officer support the participants' implementation process and refer them to appropriate treatment and support agencies.

Commonly, participants set goals such as becoming drug-free, further education or training, obtaining employment, improving personal relationships and improving finances. In implementing their strategies they remove the dysfunction that has impeded them from making healthy choices while promoting strengths that broaden their opportunities for a healthy life in the future.

The problem-solving court praises participants for formulating their rehabilitation plan and supports their ability to implement it. The court uses review hearings to receive updates on progress, to encourage and support progress and to engage in a creative problem-solving exercise with participants where needed.

This strategy can be used by mainstream courts.³⁰ For example, when a court adjourns sentencing to allow offenders to participate in rehabilitation programs — such as a diversion program — or sentences offenders to a community-based order, it could ask offenders to state their goals and strategies for the adjournment period or order. They could be included in the terms of the order or conditions of bail on adjournment. In effect, that would be formulating a behavioural contract.³¹ Review hearings can also be used in certain contexts.

Therapeutic court strategies could minimise the anti-therapeutic effects of laws providing for continuing supervision or detention of certain sex offenders.³² In child welfare proceedings parents could formulate goals and strategies to promote family healing and address underlying issues, and implement the strategies while awaiting the final determination of the application.

Self-determination, community and the courts

Self-determination is also important for community groups and peoples. For example, coercive and paternalistic policies have been a feature of the treatment of Indigenous peoples by government and community agencies in diverse nations including Australia, Canada, South Africa and the United States. These peoples see self-determination — the right to make decisions concerning basic aspects of their lives in areas such as health, education, economic development and justice — as fundamental to resolving endemic problems that could not be resolved through coercion or paternalism but may well have been aggravated by them.³³

Pearson asserts that self-determination is not passive but dynamic. It is about taking responsibility: '[s]ocial change ultimately requires citizens to be engaged in the solution of their own problems, that of their families and of their communities'.³⁴ He advocates that his people in Cape York Peninsula be active in promoting their traditional values and relationships and in changing the social and economic structures that have created problems.

The responsibility of communities to be involved in the resolution of their problems is a factor in the development of court-community collaboration. Lindsay argues that '[c]ommunities should not expect the courts to deal with [community problems] alone if the community has resources that could be put to collaborative use in partnership with the courts'.³⁵

22. Winick, above n 16.

23. *Ibid* 1766.

24. *Ibid* 1757.

25. Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild their Lives* (2001).

26. Winick, above n 16.

27. Maruna and LeBel, above n 12, 96.

28. Winick, above n 16, 1760.

29. Michael S King, 'Perth Drug Court Practice' (2006) 33(11) *Brief* 27.

30. Winick and Wexler, above n 5; King, above n 11.

31. *Ibid*.

32. Michael S King, 'Problem-solving under the Dangerous Sexual Offenders Act 2006 (Western Australia)' (2007) *eLaw Journal* 32 <https://elaw.murdoch.edu.au/issues/2007/1/eLaw_problem_solving.pdf>.

33. Noel Pearson, *Our Right to Take Responsibility* (2000).

34. *Ibid* 43.

35. Margot Lindsay, 'Public Involvement as the Key to Public Trust and Confidence: A View from the Outside' (1999) 36(3) *Court Review* 20, 21.

Involvement of the community is a vital part of problem-solving and Indigenous sentencing court programs. Magistrates and justice system personnel have met with Indigenous communities to listen to their concerns and wishes and have also involved them in the design and running of Indigenous sentencing courts.³⁶

Drug courts commonly refer participants to local treatment and support agencies who may then be involved in collaborative case management of participants. Community courts are pro-active, working with government and non-government agencies in the community to determine problems, find solutions and implement required strategies. The aim of this community justice approach is 'to restore order, strengthen community cohesion, repair the damage from crime, and build partnerships that nurture a more beneficial community life'.³⁷

The principles underlying community-court collaboration are similar to those used in therapeutic court processes: participation, dignity and trust. Ideally, there is a sharing of information and concerns, an acknowledgment of the concerns of all those involved, the involvement of court and community agencies in decision-making in particular contexts, and a mutual respect and acceptance of participants' good faith.

Court-community collaboration produces therapeutic outcomes. To paraphrase the words of Lord Falconer of Thoroton LC, it promotes the connection of courts to the communities they serve.³⁸ It also promotes community confidence in — and respect and support for — the court and the law, and facilitates the achievement of such community and court objectives as crime prevention and the rehabilitation and reintegration of offenders into the community.³⁹ Community-court collaboration can help dispel any perception that the courts are remote from the community and its problems.⁴⁰ It can bring the challenges facing courts into community focus and generate support for increased court resources.⁴¹ Indigenous sentencing courts promote empowerment of the Indigenous community and a greater understanding of and respect for that community amongst judicial officers, justice system personnel and the wider community.⁴²

Strategies for mainstream courts

Court-community collaboration marks a departure from previous thinking about courts' functions. Previously it was thought that the courts' ability to address community problems was limited as the causes were beyond the courts' province.⁴³ The courts were institutions apart from the community, simply there to resolve conflict by determining legal disputes and enforcing sentences and remedies. But separation from the community carries the risk of a perception that courts are ignorant of community concerns. Problem-solving courts have opened up new possibilities for the court system.

Mainstream courts are already developing better community connections through processes such as community education programs and volunteer welfare

officers. Some mainstream courts involve justice system stakeholders — such as the legal profession, police and community justice services — in meetings to discuss any issues concerning the court's functioning. The next step would be to form consultative committees like those used by community courts, involving representatives of community service organisations, local government, treatment agencies, other government agencies and victim support organisations. The committees' purpose would be to provide input as to court processes and their impact on the community and to offer suggestions for reform. The overall purpose would be to engage the community in the processes it has established to resolve conflict with the law — the justice system — and to address underlying problems.

The ultimate step in this process would be for a court to operate like a community court or neighbourhood justice centre where the court is not simply reactive but is actively engaging with the community in identifying and resolving local justice-related problems. Judicial officers would be a part of the engagement process.

Although all courts should consider a community engagement function, this model could be particularly considered for magistrates' courts.⁴⁴ After all, magistrates' courts are considered 'the people's court', dealing with the vast bulk of criminal cases and using less formal processes than other courts. Under this proposal, magistrates' courts would continue to deal with summary trials and sentencing. But they would also have a problem-solving component. Rather than focusing only on specific problems, such as illicit drugs or domestic violence, they could follow the example of the Geraldton Alternative Sentencing Regime and address a broad range of offending-related problems in partnership with offenders and local treatment and support agencies.⁴⁵ If a particular magistrates' court did not have an Indigenous sentencing court, then depending on community wishes, need and resources, it could move to establish such a court.⁴⁶

The court would have a community engagement and development function. While community courts in the United States typically target less serious quality of life offences such as prostitution and vandalism, the magistrates' courts community development function could be designed to fit the needs of the local community.

Courts — particularly magistrates' courts — often have large workloads and limited time to spend on cases. Thus, a court's ability to use problem-solving, therapeutic jurisprudence-based techniques may be limited — despite their potential beneficial outcomes for the parties and community. But if people coming to court are to have a perception other than that the court thinks of them as 'a number' then time needs to be available according to the needs of each case. This requires appropriate court staffing levels. Further, the court's community development function envisioned in this article requires adequate staff. These resource issues are a matter for the Executive to consider. However, given that the British government is in the

36. Michael S King, 'Applying Therapeutic Jurisprudence in Regional Areas: The Western Australian Experience' (2003) 10 (2) *eLaw Journal* <<http://www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html>> at 14 May 2007; *Auty*, above n 6.

37. Todd Clear and Eric Cadora, *Community Justice* (2003) 4.

38. Lord Falconer of Thoroton, Speech to the Community Justice Conference, London, 27 November 2006 <<http://www.dca.gov.uk/speeches/2006/sp061127.htm>> at 14 May 2007.

39. David Rottman, Hillery S Efkenan and Pamela Casey, *A Guide to Court and Community Collaboration* (1998) <http://www.ncsconline.org/WC/Publications/Res_CtComm_CFCGuidePub.pdf> at 14 May 2007.

40. Falconer, above n 38.

41. Lindsay, above n 35.

42. *Auty*, above n 6.

43. *R v Peterson* [1984] WAR 329, 332.

44. Michael S King and Stephen Wilson, 'Country Magistrates' Resolution on Therapeutic Jurisprudence' (2005) 32(2) *Brief* 23.

45. King and Ford, above n 1; King, above n 36.

46. *Auty*, above n 6.

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process of introducing community courts throughout England and Wales the proposal is not unrealistic.⁴⁷

Traditionally, judicial officers have limited their engagement with the community in order to safeguard judicial independence and impartiality. However, as country magistrates and problem-solving judicial officers have shown, judicial officers can engage with community agencies and listen to their concerns about general issues without compromising their ability to hear individual cases.⁴⁸ Their engagement has included agency visits and attending agency meetings.

The extension of therapeutic jurisprudence and problem-solving court principles to mainstream courts requires specific education programs for the judiciary, lawyers and justice personnel.⁴⁹ For example, the stages of change model and motivational interviewing techniques used in problem-solving courts are not normally included in legal education.⁵⁰ Development of communication and other emotional intelligence related skills should be an important component of these programs.

Conclusion

Like Indigenous sentencing courts, problem-solving court programs acknowledge and apply the principle, articulated by Sen, that people are dynamic agents of change. Their approach emphasises collaboration and connection rather than adversarialism and separation. They seek to promote individual and community responsibility, connection and involvement in resolving problems. They produce therapeutic outcomes for participants and the community. The principles they generally apply can be stated as follows: take a comprehensive approach; process is powerful; telling the story to a judicial officer who listens is important; involving people in decision-making is vital; promoting dignity, trust and connection is essential; and courts can make a difference. These principles can be applied in mainstream courts to further justice system goals, including offender rehabilitation and community respect for courts and the justice system.

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47. Falconer, above n 38.

48. Berman and Feinblatt, above, n 1; King, above n 36.

49. King, above n 5.

50. King, above n 11.



MENTIONS

CONFERENCES

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