Problem-solving court judging, therapeutic jurisprudence and transformational leadership

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The use of court processes to promote participant accountability and rehabilitation is an important component of problem-solving courts such as drug courts, community courts and domestic violence courts. Therapeutic jurisprudence suggests findings from the behavioural sciences concerning matters such as health, motivation and behavioural change can be used to design suitable court processes to promote these goals. Transformational leadership theory also draws on such findings to design an approach that promotes follower motivation, satisfaction and performance. Empirical research provides strong support for its widely used approach. There are striking similarities between the theory and practice of therapeutic judging and transformational leadership. This article examines therapeutic judging in problem-solving court programs in the light of transformational leadership theory and suggests techniques judicial officers can use to enhance the rehabilitation process. Transformational leadership theory can enrich problem-solving court judging and contribute to the development of therapeutic jurisprudence.

Problem-solving courts such as drug courts, domestic violence courts and community courts have become a feature of the legal landscape in a growing number of nations including Australia, Canada, the United States, Ireland and the United Kingdom. In these courts and alternative sentencing regimes, such as the Geraldton Alternative Sentencing Regime, the judicial officer is expected to engage with participants and to use processes that promote participant readiness for, and participation in, rehabilitation. The judicial officer is expected to take a leadership role in relation to court processes and the court’s overall operation.

Therapeutic jurisprudence has become the underlying philosophy of problem-solving courts – although the degree to which its principles are applied will vary from court to court. Therapeutic jurisprudence asserts that findings from the behavioural sciences can be used to improve judicial and other legal processes so as to promote offender rehabilitation and other justice system outcomes. The application of therapeutic principles to judging – whether in problem-solving courts or generally – is

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in the process of development. There is a need for extensive research as to what behavioural sciences principles should be applied to judging and the manner in which they should be applied.5

Principles from psychology and other behavioural sciences increasingly inform developments in diverse areas such as education, business and the justice system. Psychological principles and findings have been applied in the development of leadership theory and practice. For example, transformational leadership is said to promote performance above normal expectations in organisations. It uses processes that inspire and motivate their members to high levels of achievement. The leader as role model, the communication of high ideals, facilitating a creative and supportive workplace, promoting individual creativity, intellectual stimulation and achievement, and concern for individuals and their needs and aspirations, are important aspects of this approach.

Problem-solving courts also seek to promote high levels of performance and achievement. Commonly, those who enter these courts have entrenched dysfunctional lifestyles of many years duration that they seek to transcend and replace with constructive, happy and law-abiding lives. Reaching important milestones along the way, and ultimately attaining their goals, represents significant life achievements for such people. Some of the processes used by problem-solving courts – particularly those relying on therapeutic principles – are similar to those used in transformational leadership.

This article seeks to highlight principles of problem-solving judging by means of a comparison with principles of transformational leadership.

TRANSFORMATIONAL LEADERSHIP

Burns’ transformational leadership theory

In his extensive study of leadership – particularly political leadership – and the psychological, social and historical factors that affect it, Burns saw leadership to be a process whereby a leader induces followers to engage in action to attain goals common to both leader and followers.6 These goals are related to basic human needs such as psychological, economic, safety, spiritual, sexual, aesthetic or physical needs.7

Burns distinguished between two kinds of leadership: transactional leadership and transformational leadership.8 Transactional leadership involves an exchange between leader and follower whereby the leader secures the follower’s agreement to achieve a certain goal (such as a sales target) in return for a particular reward (such as a bonus).

While Burns asserted that the bulk of leadership is transactional in nature, he asserted that transformational leadership, while more complex, is significantly more powerful. According to Burns:

The transforming leader recognises and exploits an existing need or demand of a potential follower. But, beyond that, the transforming leader looks for potential motives in followers, seeks to satisfy higher needs, and engages the full person of the follower. The result of transforming leadership is a relationship of mutual stimulation and elevation that converts followers into leaders and may convert leaders into moral agents.9

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6 Burns RM, Leadership (Harper and Row, 1978), p 19. “Followers” is a term commonly used in leadership literature to refer to those who are influenced by leaders to act towards certain goals. From a therapeutic jurisprudence perspective and being mindful of the effect of the use of labels such as “criminal” and “addict” on those coming before the courts it might be thought that such a term creates a stigma. It does not have such a connotation in the leadership literature or in this article.
7 Burns, n 6, p 36.
8 Burns, n 6, p 4.
9 Burns, n 6.
For Burns, leadership is moral where it promotes the attainment of goals that are truly common to both. At its highest, it aims at the promotion of higher values underlying such goals, such as human rights and respect for individuals.

Burns saw transformational leadership as a potential catalyst for promoting the self-actualisation of both leaders and followers. For this, leaders need to be aware of their own motivations and goals and their reasons for and goals in seeking to lead. Transformational leadership processes are not manipulation by leaders to promote their self-interest. Rather, in the process of leadership, leaders engage with followers, seeking to discern their various motivations and goals and seeking to promote a commonality between the goals of both. This process can bring about the refinement of common goals and ultimately the pursuit of the higher values underlying the goals. By this process followers can be inspired and motivated to pursue the common goals.

Burns’ theory emphasises high ideals of leadership but also its practice. It stresses the importance of the engagement by the leader with followers. It is also directed at results:

The ultimate test of practical leadership is the realisation of intended, real change that meets peoples’ enduring needs.

The approach of Bass

Bass and his co-authors have drawn on Burns’ work and also work by House in the area of charismatic leadership to formulate a theory of transformative leadership. According to House, through particular personal characteristics and behaviours, charismatic leaders can exert significant influence over the attitudes and behaviour of their followers. Acceptance of the leader’s ideology, affection towards the leader and obedience of the leader are examples. House emphasised the following as attributes of charismatic leaders: personal characteristics such as dominance, a strong desire to influence others, self-confidence and a strong sense of their moral values; and, in behaviour, being strong role models, an appearance of competence, articulation of ideological goals associated with strong moral principles and the communication of high expectations to followers. For Bass and Riggio, charismatic leadership is but one component – and an important component of transformative leadership.

Bass elaborated on the range of leadership behaviour. At one extreme, there is laissez-faire leadership where the leader is uninvolved and allows followers to proceed without particular direction. At the next level, there is management by exception, where the leader either monitors a follower’s behaviour to ensure that a mistake is not made, or waits until a mistake is made before intervening. Contingent reward is a transactional form of leadership: a reward is provided in exchange for satisfactory performance. If the reward is material, then it is transactional in nature; if it is psychological – such as praise – then it can be transformative.

While transactional leadership stresses the self-interest of the follower being served through engaging in the desired behaviour, transformational leadership emphasises identity with a social group of some nature. According to Bass and Riggio:

10 Burns, n 6, p 36.
11 Burns, n 6, p 42.
12 Burns, n 6, p 117.
13 Burns, n 6, p 460.
14 Burns, n 6.
15 Burns, n 6, p 461.
17 Northouse, n 16, pp 178-179.
19 Bass and Riggio, n 18, p 7; Northouse, n 16, pp 180-181.
Transformational leaders help followers grow and develop into leaders by responding to individual followers’ needs by empowering them and by aligning the objectives and goals of the individual followers, the leader, the group, and the larger organisation.  

There are four components of transformational leadership according to this theory: idealised influence, inspirational motivation, intellectual stimulation and individualised consideration.

Idealised influence refers to the charismatic effect of leaders in promoting identification of followers with the leader and their emulation of the leader. Here the factors identified by House are relevant. Leaders provide inspirational motivation “by providing meaning and challenge to their follower’s work” and “[l]eaders get followers involved in envisioning attractive future states; they create clearly communicated expectations that followers want to meet and also demonstrate commitment to goals and the shared vision”. Here the promotion of enthusiasm and team spirit is important.

Intellectual stimulation means the leader uses processes that expand followers’ capabilities. Creativity and innovation are encouraged in addressing problems and meeting new challenges and followers are included in the creative process.

Individualised consideration, like Burns’ theory, emphasises the need to treat the follower as a whole person. Individualised consideration means the leader communicates directly with the follower. The leader carefully listens to the follower and supports, coaches and mentors the follower as needed.

**Bennis and Nanus**

For Bennis and Nanus, charisma is not a prerequisite for effective leadership; it is a product of it. Effective leaders are respected and esteemed by their followers. Their theory emphasises the ability of effective leadership not only to promote the attainment of the needs of their followers but also to promote growth for the leader, follower and organisation. Leadership is about becoming an integrated human being and helping others in that process. It is not a one-way street; leader and follower learn and grow together. Bennis and Nanus emphasise strategies that attract followers rather than coerce them; and that inspire, motivate and involve them in pursuing a common vision for the future. They interviewed 60 chief executive officers of businesses and 30 heads of public organisations, and from the resulting material distilled four strategies of transformational leadership: attention through vision, meaning through communication, trust through positioning and the deployment of self.

According to Bennis and Nanus, vision “animates, inspires, transforms purpose into action”. The leader creates an attractive, attainable vision for the organisation and is wholeheartedly committed to its implementation. For Bennis and Nanus, a good manager can so organise matters in the workplace as to ensure the work is productive, cost-effective and on time. But a leader gives meaning to the work that each employee does by linking that work to an important goal, the vision for the organisation:

- It is an emotional appeal to some of the most fundamental of human needs – the need to be important, to make a difference, to feel useful, to be part of a successful and worthwhile enterprise.

The strategy of trust through positioning is founded on the understanding that trust is a basic ingredient of organisations and is “a measure of the legitimacy of leadership”. It is the basis of any relationship between leader and follower. According to Bennis and Nanus, it depends on the setting of the credible and inspiring vision for the organisation, and the leader being clear and consistent as to his or her relation to the organisation and the position of the organisation in relation to the environment in which it operates.

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**References**

20 Bass and Riggio, n 18, p 7.
21 Bass and Riggio, n 18, p 5.
22 Bass and Riggio, n 18, p 6.
24 Bennis and Nanus, n 23, pp 18 – 25.
25 Bennis and Nanus, n 23, p 29.
26 Bennis and Nanus, n 23, pp 85 – 86.
27 Bennis and Nanus, n 23, p 142.
Bennis and Nanus also stress the deployment of self through positive self-regard. Here a leader’s self-knowledge and nurturing of self is important.\textsuperscript{28} Leaders need to be aware of their strengths and weaknesses and to be able to compensate for weaknesses, to foster their skill development with discipline and to find the connection between their skill set and the job requirements. Bennis and Nanus assert that leaders with positive self-regard rarely need to resort to criticism or punitive action. The leaders they studied saw the following as the basis of their communication with others: the ability to accept people as they are, not as what the leader would like them to be; to treat relationships in terms of the present rather than the past, while acknowledging that one can learn from mistakes; to treat people with the same courteous attention that is accorded to acquaintances and strangers; trusting others; and the ability to do without constant recognition and approval from others.\textsuperscript{29} The other aspect of positive self-regard Bennis and Nanus emphasise is to focus on positive goals and their achievement rather than on the avoidance of failure because a focus on the latter could bring about its attainment. Overall, the aim is to foster an atmosphere of possibilities of excellence.\textsuperscript{30}

**Kouzes and Posner**

Kouzes and Posner’s theory of transformational leadership is based on research conducted over a period of more than 20 years.\textsuperscript{31} Their theory is about getting “extraordinary things” done in an organisation by means of five practices: model the way, inspire a shared vision, challenge the process, enable others to act and encourage the heart. Common themes underlying these practices include: caring about people and about making a difference; the importance of communication skills, relationships, collaboration and building community; and a positive focus. For Kouzes and Posner, self-knowledge and self-development is the basis of leadership. Leaders need to understand their passions and talents and work to develop their talents. From self-development comes the confidence to lead.

Model the way refers to leaders’ clarity about the values they hold and the reflection of those values in their behaviour.\textsuperscript{32} Good leaders live what they preach; they are credible and competent. Moreover, their personal values and behaviour are in accord with the values of the organisation. Kouzes and Posner stress the importance of the development of shared values for an organisation in encouraging goals such as personal effectiveness, follower loyalty and ethical behaviour. But for shared values to be effective, they cannot be forced, they must be developed by engaging with and involving followers. Kouzes and Posner advocate the use of powerful imagery and storytelling as techniques leaders can use generally to communicate ideas to others.\textsuperscript{33}

To inspire a shared vision, Kouzes and Posner say that leaders need not be charismatic.\textsuperscript{34} Their theory of leadership is based on skills and practices that can be learned. But they stress that leaders need to be open to seeing exciting new opportunities and of making extraordinary things happen. Moreover, they need to know their followers, their hopes and dreams and, together with their followers, forge a broad vision that is inclusive.

Challenge the process involves leaders exploring opportunities to be creative and innovative and creating an environment where their constituents can be creative and, where appropriate, initiate innovation.\textsuperscript{35} It involves leaders being open to taking some risks and to learning from their mistakes.

Enable others to act reflects Kouzes and Posner’s view that leadership should be a collaborative process. They assert that constituents do not perform well if a leader makes them feel weak, dependent

\textsuperscript{28} Bennis and Nanus, n 23, pp 52 – 58.
\textsuperscript{29} Bennis and Nanus, n 23, pp 61 – 63.
\textsuperscript{30} Bennis and Nanus, n 23, p 63.
\textsuperscript{32} Kouzes and Posner, n 31, p 14.
\textsuperscript{33} Kouzes and Posner, n 31, pp 88 – 101.
\textsuperscript{34} Kouzes and Posner, n 31, p 144.
\textsuperscript{35} Kouzes and Posner, n 31, p 17.
or alienated. However, “when people are trusted and have more discretion, more authority, and more information, they’re much more likely to use their energies to produce extraordinary results”. Interpersonal skills in terms of listening, building trust, developing relationships, developing constituents’ competence and confidence, giving them greater choice and providing proper support, are essential aspects of enabling others to act.

Encourage the heart includes providing recognition to people for their achievements. Kouzes and Posner also emphasise that leaders should demonstrate a positive belief in their constituents’ ability to accomplish extraordinary things as a way of reinforcing the constituents’ self-confidence. Celebrations, they say, are important in fostering a sense of caring and community where shared values and successes can be appropriately recognised. Recognition builds self-esteem and demonstrates to all constituents that right action is valued and rewarded.

Transformational leadership in summary

Transformational leadership theories acknowledge the importance of the personal attributes of leaders but, unlike charismatic leadership theories, their emphasis lies elsewhere. They stress the building and development of relationships as the basis of effective leadership. They look to the whole person, to stimulating the mind and encouraging the heart. Such leadership, they argue, inspires, motivates and engages followers in the attainment of goals that advance the interests of leaders, followers and the organisation and ultimately tap into fundamental human values. The process promotes self-actualisation for leaders and followers and individual and collective performance that meets high expectations.

Transformational leadership theories say that leadership is exercised at all levels of society – from the family to the head of government. As Kouzes and Posner state of leadership: “It is a process ordinary people use when they are bringing forth the best from themselves and others”. They also suggest that leadership can be learnt. Indeed, they argue that effective leadership promotes the growth of followers into effective leaders.

Transformational leadership theory has attracted criticism in terms of its conceptualisation and practical application. As to the former, it has been suggested that there is significant overlap between the four components of the theory formulated by Bass, suggesting greater definition of each is needed. An instrument of measurement of transformational leadership theory – the Multifactor Leadership Questionnaire – has been criticised as not measuring factors unique only to transformational leadership, and some versions of the instrument suggest the four components are not distinct. There has also been a tendency by some to treat transformational leadership qualities as personal traits – even though, as has been pointed out, transformational leadership theories assert that transformational leadership can be taught. Further, it has been suggested that transformational leadership theory places too strong an emphasis on the role of the leader, ignoring the initiative and innovation of followers and their influence on leaders. Transformational leadership practices can also be abused, promoting goals that may not be in the best interests of followers or the organisation.

Binney, Wilke and Williams argue that transformational leadership is impractical, placing unrealistic expectations on leaders to be visionary heroes who transform organisations, and that it underestimates and belittles the followers’ role. It may be argued that this criticism results from a misunderstanding or misapplication of key aspects of transformational leadership theories including: creating a shared and suitable vision and collaboration, relationship and team building, and

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37 Kouzes and Posner, n 31.
40 Kouzes and Posner, n 31, p xxiii.
41 Key criticisms are summarised in Northouse, n 16, pp 192-194.
empowerment. Moreover, Bass and Riggio suggest that transformational leadership may not be needed in some organisations that are not subject to change and that traditional processes are more appropriate in such circumstances.43 In any event, most leadership involves a combination of leadership practices such as transactional and transformative, depending on the situation.

Nevertheless, there is significant evidence that transformational leadership promotes leadership effectiveness as indicated by measures including follower satisfaction, motivation and performance.44 Meta-analyses have found transformational leadership to be more effective in promoting follower satisfaction and performance than transactional leadership.45 Contingent reward has also been found to promote follower satisfaction and performance – more so than management by exception.46 Transformational leadership has also been found to positively affect follower optimism and to assist followers to deal with negative affect associated with incidents causing frustration.47 It has also been found to promote follower creativity.48

Transformational leadership theory has become influential, attracting significant research interest and being widely applied across public and private organisations and across different professions, including health, education, military, correctional management, community organisations and in the business sector.49

**PROBLEM-SOLVING JUDGING**

**Role of the judicial officer**

In a problem-solving court program, the judicial officer presides in court and has overall responsibility for the conduct of, and decision-making in, the court. Further, both in court and out, the judicial officer is commonly seen as the public face and leader of the court.

Most problem-solving court programs are team based. A multi-disciplinary case management team is involved in managing offenders through the court program. The judicial officer may or may not be a member of that team. Where the judicial officer is not a member, the court may only see a participant upon entry to and graduation from the program, or where there is a problem. In that regard, the judicial officer’s involvement is analogous to management by exception as described in leadership theory.

Where the judicial officer is a member of a case management team, he or she usually attends case management meetings and contributes to the discussion and decision-making concerning individual cases. An important element of these programs is a significant number of court appearances for participants. The purpose of these appearances is not only to promote participants’ accountability to the court and community for their actions but also to address any problems that have arisen and to promote participant performance. Thus it is recognised that the judicial officer has a therapeutic role in promoting and supporting the participant’s rehabilitation. In such programs – as in every court case – the way in which the judicial officer conducts court hearings and interacts with a participant can significantly influence the participant’s respect for the justice system and the outcome of their case.

43 Bass and Riggio, n 18, p 137.
46 Bass and Riggio, n 18.
47 Bass and Riggio, n 18, p 45.
48 Bass and Riggio, n 18.
49 Northouse, n 16.
The model of leadership derived from transformational leadership theory can be used to examine the court’s approach during such hearings. For example, an integral part of most drug courts is a system of incentives and sanctions. The largest incentive is the imposition by the court of a lesser sentence – often an avoidance of a term of imprisonment – on the participant’s successful completion of the program. Clean urine tests and other indicators of progress through the program may be met with less frequent court appearances and urine tests, permission to attend a special event outside the State, or being awarded gift vouchers or completion certificates. Where a participant fails to follow program requirements, there may be more frequent court appearances, time in custody or termination from the program and sentencing. On the face of it, these appear to be contingent reward-based strategies: you do X and I will do Y for you.

However, for most drug courts, there is some activity accompanying the giving of rewards that transformational leadership theory would recognise as a part of leadership practices that transform: eg praise from the judicial officer, applause from the court, a graduation ceremony. From a therapeutic jurisprudence perspective, these practices promote psychological wellbeing. This approach of drug courts combines transactional and transformative processes.

As noted above, there are four components of the transformational leadership theory described by Bass and Riggio: idealised influence, inspirational motivation, intellectual stimulation and individualised consideration. There are also significant similarities between aspects of these components and problem-solving courts.

**Idealised influence**

Charisma is not commonly regarded as an essential quality for judicial office. Traditionally, the judge’s role is to dispassionately determine the facts of the case and the law applicable, apply the law to the facts and determine a legal outcome. The court relies on respect for the authority of the court, and its powers to coerce, to promote compliance with its orders, rather than relying on the particular personal qualities of the judicial officer.

Even in a problem-solving court, the focus tends to be more on the interaction between judicial officer and participant and its therapeutic potential than on the personal qualities of the judicial officer. Nevertheless, some of the personal characteristics articulated by House as being associated with charisma, such as a strong desire to influence others, self-confidence, a strong sense of moral values and an appearance of competence, would appear to be useful for a problem-solving judicial officer. An attitude of dominance potentially could interfere with therapeutic interactions required in such courts.

A judicial officer sitting in court would not appear to have the same scope to act as a role model for participants as other positions in society such as teachers, university professors, coaches or employers who engage with participants within the community on a more prolonged basis. The participant is in the program for a relatively brief period and may only spend a comparatively short period of time interacting with the judicial officer during the entire program. However, the participant also has the opportunity of observing how the judicial officer deals with the participant and other participants in court.

Arguably, a judicial officer who appears genuinely interested in participants – one who: listens; demonstrates an ethic of care; shows empathy, compassion and understanding; and who is fair, consistent and reliable in the conduct of cases and decision-making – can act as a role model in relation to these basic human values. That is, a judicial officer who does his or her job well, who affirms participants as competent human beings worthy of respect, can create a positive impression on participants and generate respect and admiration for the judicial officer and respect for the court system. Petrucci’s study of a domestic violence court found that the interaction between the judge and participants promoted their respect for the judge.50 Tyler comments that:

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People 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.\(^{51}\)

Having high expectations of followers is a significant aspect of idealised influence. It is thought that leaders’ expectations concerning followers influence their performance – positively or negatively. This factor is based on research in education and business settings finding that positive leader expectation promotes follower performance.\(^{52}\) For example, one study found that where a teacher was told that members of a particular group – randomly assigned by researchers – were “intellectual bloomers” that group improved significantly on a measure of intelligence as compared to a control group.\(^{53}\) No other factor could account for the result.

Participants of problem-solving court programs are commonly those for whom society – particularly the authority figures they have encountered – has had low expectations for some time. They may have been in and out of the court system for many years. They may have chronic substance abuse problems and dysfunction in diverse areas of their lives, including unemployment, relationship issues and housing problems. They are likely to have a low self-concept. The judicial process and the actions of justice system professionals may have helped to perpetuate their low self-concept and a perception that they are hopeless offenders. Labelling theory has drawn attention to the possible effect which society and its institutions can have in reinforcing criminal conduct by using negative labels in relation to people who have committed criminal acts.\(^{54}\)

The problem-solving court has the opportunity of fostering a different self-concept by having positive expectations concerning participants. Hence, when a judicial officer accepts a person into the court program he or she could confidently express an expectation of the person completing the program. So that it does not appear to be shallow, the court should refer to supporting evidence, such as the person’s attitudinal change, past history of desistance, family or social supports, engagement in treatment and any other positive factors. When a participant has relapsed but has formulated a good relapse prevention plan, the court could refer to and praise the positive attributes of the plan, cite evidence of the participant’s ability to implement plans and express a positive expectation that by implementing the plan the person will avoid future relapse.

Effectively, the judicial officer expresses positive expectations in relation to the participants and reinforces their self-efficacy in meeting those expectations. This reinforcement of self-efficacy promotes motivation and psychological mechanisms needed to implement rehabilitation processes.\(^{55}\)

Maruna, LeBel, Mitchell and Naples suggest that offender rehabilitation may require a de-labelling process whereby the “desisting person’s change in behaviour is recognised by others and reflected back to him”.\(^{56}\) The entire problem-solving court process may be seen as de-labelling: the progressive reinforcement of self-efficacy through the judicial officer and court team showing support for and a positive expectation in relation to the participant’s rehabilitation plan and its implementation – with the addition, at times, of any required remedial action – and acknowledging and praising the progress made by the participant in implementing the plan. For the successful participant, the process culminates in the graduation ceremony where the court celebrates the reintegration of the participant into the community. The judicial officer and court team members need to be sensitive to the way in which they address participants and the possibility of perpetuating negative self-concepts – eg through

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53 Kieran and Gold, n 52 at 915.


55 Winick, n 1 at 1078-1081.

56 Maruna et al, n 54 at 274.
the use of terms such as “offender” or “addict” – that could adversely impact on the healing, the de-labelling process. This is not to deny the participant’s history of offending or substance abuse but to direct the focus upon the participant addressing and overcoming these problems with the support of the court team.

To exercise these skills, to exert a positive influence on participants in a problem-solving court program, the judicial officer must possess self-confidence and competence. Being learned in the law and being able to assess the credibility of witnesses, determine the facts of a case and reach a proper decision by determining the law and applying the law to the facts, are all parts of the skills set of judicial officers. These are factors that principally engage the intellect of the judicial officer.

Transformational leadership theories emphasise the need for leaders to address the whole person. Intellectual competencies alone are not enough. They emphasise competencies that have been collectively called “emotional intelligence”. Emotional intelligence competencies relate to self-management and management of relationships. They include: awareness and management of one’s own emotions; knowledge of how emotions are communicated to and affect others; sensitivity to the feelings of others; the ability to express empathy; and communication skills such as listening and persuasion. These are competencies that are particularly important for judicial officers presiding in a problem-solving court, and arguably judicial officers generally.

Problem-solving court judicial officers need to be aware of causative factors bearing upon the dysfunctional behaviour addressed by the court program – such as substance abuse or domestic violence – and related social and psychological issues. They need to be aware of the healing process, of how people change their behaviour. For example, the Trans-theoretical Stages of Change Model, which is a widely used framework for understanding the process of deliberate behavioural change, is a useful model for judicial officers presiding in a problem-solving court. Knowledge of the principles of motivational interviewing can assist judicial officers in interacting with participants, particularly in situations of relapse and/or where a participant is ambivalent to change. Winick suggests knowledge of persuasion theory is also important.

Bennis emphasises that leadership is about expression: expression of the particular goals, values, character and capabilities of the leader. Problem-solving judging also reflects the judicial officer’s goals, values, character and capabilities. Although general therapeutic principles should guide a problem-solving court judge, the way in which they are expressed depends on the individuality of the judicial officer. A judicial officer new to problem-solving judging may well learn from and use approaches of more experienced judicial officers they have observed. However, their own unique style will develop as they become more experienced in the job. For example, the words they use, their manner in court, their use of humour (where appropriate) and the way they engage with participants, family members, community corrections officers, defence and prosecution in court will depend on their own individuality.

It is important that the way judicial officers act in court is consistent with the values they expound and the goals they seek to promote. Transformational leadership theory similarly emphasises the need for leaders to be credible, to be authentic. A judicial officer who asks a personal question of a participant – such as what caused the participant’s relapse during the past week – but reads a report


58 King, n 4.

59 King, n 4; King MS and Piggott L, “Mirroring the Stages of Change in the Establishment of Problem Solving Courts” in Reinhardt G and Cannon A Transforming Legal Processes in Court and Beyond (AIJA, 2007), p 161.

60 Winick, n 1 at 1080-1082; King, n 4 and King, n 6.

61 Winick, n 1 at 1078-1082.


while the participant answers, does not convey a genuine interest in what the participant has to say. It dilutes the message that the judicial officer has an ethic of care. A lack of authenticity limits the judicial officer’s ability to positively influence and motivate participants.

For transformational leadership theory, self-knowledge is important for self-expression. Self-knowledge and the possession of skills needed to do the job promote self-confidence. As to the nature of self-knowledge, these theories refer to the importance of leaders’ knowledge of their goals, motivations, strengths and weaknesses, and of ways of addressing weaknesses. All of these factors bear upon the work of a judicial officer presiding in a problem-solving court program. A judicial officer whose career goals include presiding in the problem-solving court program and who is passionate about the work and the role of the court is likely to do a better job than one who is not so committed and passionate.

The awareness of problem-solving judicial officers of how their past experiences may impinge upon their work is also important. Winick refers to the need for problem-solving judicial officers to be aware of the possibility of counter-transference – where a feeling generated from a past experience is transferred onto a present relationship – and to ensure that it does not adversely impact upon present relationships. Thus, where a close member of a judicial officer’s family has been a victim of crime, strong feelings about the offender and the offence may have arisen in the judicial officer. There is the possibility that the same feelings will be engendered when a similar offender appears before the judicial officer.

There are significant similarities between key attributes of leaders emphasised in transformational leadership theory and those identified by Gould and Murrell as attributes needed by therapeutic jurisprudence oriented judges, including: self-knowledge, acceptance of responsibility, complexity of thinking processes, authenticity and commitment to higher values. Drawing on the cognitive theory of William Perry and their elaboration of it, Gould and Murrell assert the following are attributes of “highly developed people”:

- thinking in complex ways;
- possessing a high degree of competence;
- accepting responsibility for themselves, including the consequences of their own actions;
- accepting their own experience as the best guide for their actions;
- being consistently and tenaciously authentic; and
- commitment to goals that transcend their own immediate needs and situations. 64

Such people are also able to exercise empathy.

**Inspirational motivation**

All transformational leadership theories value vision as a means of giving direction, meaning and motivation for leaders, followers and organisations. They stress the value of including followers in developing a shared vision and of the vision being broad enough to encompass the achievement of followers’ goals. Transformational leadership theories eschew coercion as a means of obtaining followers’ commitment to organisational goals, emphasising that such an approach can generate only the temporary commitment of followers and negative reactions such as hostility. 65

Courts are creatures of statute. Some problem-solving courts have their own Acts that define their purpose and processes. Other problem-solving courts operate as divisions of an existing court or as a general court sitting in a special list relying on general statutory provisions as to bail and sentencing to justify their operation. Such courts may have practice directions setting out their purposes and processes. These practice directions may have originated from collaboration between the court and other justice and treatment agencies. Although in some cases a judicial officer may have initiated the problem-solving court program, the articulation of goals and process will almost always have been a collaborative process. 66 The ability of a problem-solving court judicial officer to then articulate a different vision for the court is somewhat limited.

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65 Bass and Riggio, n 18, pp 40-41.

66 King and Wilson, n 2; King MS, “Applying Therapeutic Jurisprudence in Regional Areas: The Western Australian
However, a judicial officer is able to help enrich a problem-solving court’s vision by adding therapeutic strategies to the court processes and connecting them to broader dimensions of the court’s mission. For example, it could be that the court, the court management team or a particular officer determines a participant’s rehabilitation program. However, Wexler and Winick suggest that participants should be actively involved in decision-making concerning the formulation of their rehabilitation plans. This is because those who voluntarily participate in a program are likely to be more committed to the process and outcome than those who are coerced to participate. Psychological mechanisms supportive of participation are activated through voluntary engagement.

Self-determination is a value cherished across disciplines and societies as important for human development and wellbeing. A study of why some offenders later desist from offending, while others do not, found that the former, unlike the latter, had a sense of control over their lives. According to Winick, choice promotes motivation, confidence, satisfaction and “increased opportunities to build skills necessary for successful living”. On the other hand, coercion and paternalism promote resentment and resistance to change. Both practices effectively suggest to a person that the relevant authority has little confidence in the person’s ability to make and implement sound decisions concerning his or her wellbeing. As we have seen, promoting the self-determination of followers and avoidance of coercive tactics is an important part of transformational leadership theory, and for similar reasons.

The Perth Drug Court has used this approach. The court asks participants accepted into a program to formulate goals and strategies for their time in the program – and beyond, if they so wish. The magistrate points out that the goals can be in any area of their life concerning their ability to lead a happy, constructive, law-abiding life; and the strategies are what participants need to do to accomplish each goal. The magistrate explains that drug court is a partnership between the participant and the court team for the implementation of their strategies to achieve their goals. Participants are given two weeks to work on their goals and strategies. Their Court Assessment and Treatment Service Officer gives them a template and any support they need in formulating the goals and strategies. Some choose not to use the template and use a drawing to represent their plan.

Participants present their goals and strategies to the magistrate in open court. Most of the time the goals and strategies are accepted without question, and the magistrate praises participants for their depth of thought and attention to the task, assures them that the plan is sound and that, with the implementation of the plan, the goals are achievable. The magistrate advises participants that the court team is happy to be able to work with them in the implementation of their strategies. Sometimes the magistrate makes suggestions concerning the plan – eg where a participant forgets to include overcoming illicit drug use – and asks them for a response in relation to the suggestion. The plan is amended only by consent. Commonly, goals include overcoming substance abuse, further training or education directed to a particular career, improved relationships, better housing, resolving financial problems, obtaining work, seeing their children or buying a car.

This approach has a number of advantages in addition to promoting participants’ self-determination.

68 Winick, n 1 at 1078.
71 Winick, n 69 at 1765.
First, the goal of resolving substance abuse or domestic violence or any other offending-related problem is given a wider context and a particular personal meaning for participants: their ability to live a happy, constructive and law-abiding life in the community.\(^{73}\) This not only requires healing in relation to the problem itself but also the resolution of any related dysfunction – such as a chronic amphetamine user’s financial problems, health problems, child contact issues, poor accommodation etc – which may have resulted from, but now contributes to, the substance abuse problem. It also requires the restoration of the participants’ strengths or the development of new skills relating to diverse areas such as career, relationships and stress coping. It ties into the concept of transformational leadership that leadership is about promoting self-actualisation, and to holistic concepts of rehabilitation that rehabilitation is more than the absence of offending but also the ability to live a full life in the community.\(^{74}\)

Second, the exercise offers participants the opportunity to tap into their goals and dreams, to explore what motivates and challenges them and makes them happy.

Third, it gives the judicial officer and the court team insight into such matters, providing the basis for them to communicate and connect with the participant at a more profound level and to offer more appropriate recommendations concerning implementing their goals and strategies for them to consider.

Fourth, the exercise involves participants formulating a positive, achievable vision for themselves for the future.

Fifth, it allows the judicial officer, exercising authority on behalf of the community, to indicate to participants that promoting their vision is in harmony with the mission of the court and the wider community and that there is support at hand for the implementation of that vision. It becomes a shared vision. The problem-solving court’s vision then becomes facilitating participants’ formulation of their vision for healing and leading a constructive and law-abiding life and supporting the implementation of a plan to achieve it.

Sixth, it promotes participants’ self-efficacy – their confidence in their ability to implement the plan. Self-efficacy influences affect, cognitive function and motivation.\(^{75}\)

Seventh, it promotes participants’ trust in the court, repaying the court’s trust in them.

In encouraging participants’ determination of their goals and strategies, a problem-solving court must be mindful of their unique situation. The experience of the Perth Drug Court is that a few participants are so dysfunctional due to their substance abuse and mental health issues that it is unrealistic to ask that they plan ahead more than one week at a time. In such cases, at weekly court appearances, the magistrate will ask participants about their plans for the coming week, offer suggestions and negotiate an agreed strategy with the participant where needed, and provide support and encouragement. Where there has been significant improvement, more long-term planning can be considered.

At times a problem-solving court will encounter a situation where a person is resistant to change, where there is doubt as to their readiness for rehabilitation.\(^{76}\) A common response of a conventional court has been to take an overtly coercive approach – such as ordering a person to engage in rehabilitation programs or remanding them in custody – or to apply significant pressure on the person in court. Winick suggests that techniques of persuasion and motivational interviewing can promote self-determination in this context and hence the possibility of a more consensual and successful outcome.\(^{77}\) These techniques promote cognitive processes that support behavioural change. Winick says that persuasion theory, particularly “central route persuasion”, can assist in this context.\(^{78}\) Based

\(^{73}\) King and Ford, n 1.


\(^{76}\) Winick, n 1; Wexler, n 1.

\(^{77}\) Winick, n 1 at 1078.

\(^{78}\) Winick, n 1 at 1079-1080.
on an understanding that persuasion is more effective where a person is actively engaged in processing
the information presented, he suggests that, given offenders generally wish to avoid prison, a strategy
which presents them with information about rehabilitation alternatives and the incentives involved in
completing the program – such as avoiding imprisonment – and which allows them time to think
about them and discuss them with counsel and to reach their own decision, will be more effective than
correction.

A motivational interviewing approach would be to listen to the participant and, in a
non-judgmental, non-critical way, and without blaming, to demonstrate an understanding of the
participant’s situation and feelings about it (express empathy).79 The court would ascertain the
participant’s position in terms of the stages of change model. If the participant does not admit the
existence of a problem (pre-contemplation stage), the court would ask the participant about his or her
goals and how they are advanced by the participant’s behaviour – eg how their use of amphetamines
would affect the participant’s chances of having their child returned to their care (create dissonance).
This is a process that encourages participants to see the benefits of change for themselves. To avoid
resistance the judicial officer would not be argumentative at any stage. If resistance is encountered,
motivational interviewing theory says it is better to “roll with resistance”, allowing the person to
remain in control, listening with empathy and introducing new information where needed. Providing
encouragement regarding the participant’s ability to implement change – supporting self-efficacy – is
important to support the change process.

**Intellectual stimulation**

This factor of transformational leadership theory involves using processes that promote peoples’
capabilities and stimulate creativity and innovation. Therapeutic jurisprudence based processes
promoting self-determination that are used in problem-solving courts offer intellectual stimulation to
participants, fostering psychological mechanisms promoting performance. For example, the goal and
strategy exercise gives participants the challenge of thinking about what they want to achieve and the
strategies they need to implement to achieve their goals. Many of the participants will not have
engaged in such an exercise before. It may require them to think creatively and to undertake inquiries
to develop an appropriate strategy, particularly where a goal involves pursuing something new – such
as pursuing a new career path.

Another strategy encouraged by therapeutic jurisprudence is involving participants in problem-
solving. For example, where participants have relapsed into old ways – whether it is the use of illicit
drugs or abusive behaviour towards their spouse – instead of dictating to the participant what is to
happen, the problem-solving court may adopt the strategy described in greater detail below and ask the
participant to formulate a relapse prevention plan.80 This approach could be taken in relation to any
less serious problem that arises in relation to the participant’s performance in the program. Naturally,
very serious breaches of program conditions may require a punitive response from the court.

Participation in the individual programs which comprise the participant’s rehabilitation strategies
is also a source of intellectual stimulation. For example, counselling programs can give participants
insights into their behaviour that they find exciting and practical.

**Individualised consideration**

This aspect of transformational leadership involves the leader taking an interest in and cultivating a
relationship with followers. Listening to followers; communication skills; building trust; supporting,
coaching and mentoring followers; and addressing the whole person, are emphasised. These concepts
are important to problem-solving judging.

Procedural justice research stresses the importance of proper communication from the bench in
promoting litigant respect for and compliance with the court and justice system generally. As Tyler

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79 Miller WR and Rollnick S, *Motivational Interviewing* (Guilford Press, 2002); Winick, n 1 at 1080-1081; King, “The
Therapeutic Dimension of Judging: The Example of Sentencing”, n 5.

80 Wexler, n 67.

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observed, litigants seek affirmation from the court of their status as competent human beings worthy of respect.\textsuperscript{81} They value participation, dignity and trust. They value judicial officers who have a genuine interest in their situation, who listen carefully to the litigant, acknowledge their concerns and take their story into account in determining the case, and who treat them with respect. Judicial officers who act contrary to this ethic of care can frustrate litigants and generate disillusionment and a lack of faith in, and respect for, the justice system.\textsuperscript{82} As Wexler points out, a failure to follow these procedures may seriously jeopardise a defendant’s prospects of rehabilitation, particularly if the defendant feels he or she has been unfairly treated.\textsuperscript{83} On the other hand, judicial officers who exercise an ethic of care can promote respect for the court and its decisions.

All judicial officers should exercise an ethic of care in relation to their work. But the concept of an ethic of care takes on a special significance for a problem-solving judicial officer, for that officer is expected to promote participants’ successful completion of the court program. The interaction between judicial officer and litigant and the relationship that builds between them is the means by which this function is carried out.

The contact that a participant has with a judicial officer in a problem-solving court is unique in frequency, quantum and content. In a conventional court list, a person may only appear before the court on a few isolated occasions, or even on only one occasion. That may be the case with some problem-solving court programs. However, with drug courts and programs such as the Geraldton Alternative Sentencing Regime, the participant will appear before the court weekly for some months until they have made significant progress and then less frequently until completion of the program.

The nature of the interaction and relationship that builds between the judicial officer and participant may be considered in terms of three stages: introduction, development and conclusion. A participant who has never experienced a problem-solving court may have a mindset built on distrust of courts and other legal authorities due to past negative experiences. The participant may be nervous and uncertain what to expect – even if it has been explained to the participant before court. The participant is also likely to have emotionally sensitive issues based on past negative experiences. It is unrealistic to expect that participants will open up from the start in a public forum, such as a court, to a judicial officer who is a complete stranger – although some might do so. It is also unrealistic to expect that participants will trust the process and the court team right from the start. Trust must be earned – as acknowledged in transformational leadership theory.

A judicial officer acting therapeutically does not force communications with participants. Patience and understanding are needed. When a person first appears before the court, the court can open a dialogue with the participant, asking general questions concerning the problems the participant has had, why they have arisen, what the participant thinks he or she needs to do to address them and what the participant would like to do in the program. Showing a participant that the judicial officer is listening and understands the participant’s story, and the participant’s feelings concerning it, is important in demonstrating an ethic of care and building the participant’s trust in the judicial officer. It may be that the participant’s answers may be short or devoid of substantial content at first – but that will change as the participant’s trust in the judicial officer grows. The judicial officer could ask follow-up questions where needed to seek further information, but needs to be sensitive as to whether the participant is ready to speak further. In some cases, it may be better to leave further questioning on the point to another day.

Having positive expectations of the participant and promoting self-determination also promote a participant’s trust in the judicial officer. The goal-setting exercise is an example of how a judicial


\textsuperscript{82} Examples of judicial behaviour in this category appear in the following cases: Allen v Gittos (1995) 13 WAR 560; Were v Police [2003] SASC 116 and Barmettler v Greer & Timms [2007] QCA 170 at [40]-[42].

\textsuperscript{83} Wexler, n 1 at 114.
officer can demonstrate trust in participants by assigning them the significant responsibility of setting a direction for their court program. Praising them for the work they have done in performing that task reinforces that trust.

Through what a participant tells a judicial officer in court, the participant’s goals and strategies, and any presentence psychological or psychiatric reports or references, the judicial officer gains understanding of the participant’s background, offending-related problems, present circumstances and issues, and their interests and passions. This becomes the foundation for a judicial officer to develop the interaction and a relationship with the participant. On regular court appearances, the judicial officer can demonstrate an interest in the participant by asking about current personal issues of concern – eg how the participant’s sick child is, how a particular family celebration went or the participant’s experience at a new job. Open questions help to facilitate the participant presenting information to the court. The judicial officer can make notes on the court file of what is said as a reminder so that the dialogue can continue on further occasions.

Where a problem has arisen, such as a relapse, the first response of the judicial officer acting therapeutically is not to lecture the participant. Although articulation of ideological goals associated with high moral principles is seen by House to be a characteristic of charismatic leadership, it is likely to have a negative effect on participants in a problem-solving court. As Winick points out, often participants will already have had a lecture as to the deficient nature of their conduct and character from family or friends and may already have had feelings of humiliation and resentment as a result. A lecture from a judge may be perceived to be paternalistic by the participant and simply aggravate the problem and promote resistance to change.

A therapeutic approach to a problem such as relapse would be for the judicial officer to ask the participant what has happened, to listen attentively to what the participant says, to acknowledge the factual content and any feelings the participant expresses, to demonstrate empathy for the participant’s situation and to ask the participant what he or she intends to do to prevent the situation from recurring. If there is resistance to change, then the judicial officer can use persuasion and motivational interviewing techniques. If the judicial officer has concerns about a proposed prevention plan, the judicial officer could raise the concerns with the participant and ask for the participant’s input. The judicial officer could negotiate an agreed plan. The judicial officer could reinforce the participant’s ability to implement the plan, referring to the participant’s past achievements as evidence in support. This whole process may help the participant to deal with negative feelings associated with the relapse and to implement the plan.

The development of a working relationship where the participant opens up to a judicial officer about personal matters, and the judicial officer demonstrates trust in a participant, presents particular challenges for both the judicial officer and the participant. Where the participant trusts and respects the judicial officer then, if there is a relapse, the participant may not only feel frustration and a sense of failure, the sense of failure may be compounded in that the participant may also feel that he or she has let the judicial officer down. In some cases in the Perth Drug Court participants have failed to attend court as required due to this very reason.

This situation is a reminder that the court should not hold unrealistic expectations concerning participants. It is also important that the court tells them at the start that sometimes relapse happens; that provided it is not compounded by serious offending or persistent non-compliance, it is not fatal to their program continuing; and that it is better to be open and honest with the court so that any problems can be addressed collaboratively.

Kouzes and Posner refer to the desirability of leaders being prepared to take risks as a part of challenging the process and generating alternative paths that produce success (innovation). In taking a therapeutic, problem-solving approach, at times the judicial officer must take risks in the same sense.

84 Winick, n 1 at 1070.
85 See the references cited in notes 77-79 and the related text of this article.
86 Kouzes and Posner, n 31, p 207.
For example, a sentencing judge may say to an offender: “This is a marginal case. But I am going to take a chance on you and place you on a community based order [probation] rather than sending you to prison”.

A recent case in the Perth Drug Court illustrates this point. A young woman under a presentence order supervised by the court had relapsed and resumed using amphetamines. Her living circumstances and lifestyle were chaotic. She was approaching her breach point limit – in the Perth Drug Court, breach points are imposed for breaching program conditions and attaining the breach point limit leads to a remand in custody and an application for termination from the program.87 She assured the court that she could stop using and presented a relapse prevention plan to the court that appeared sound and that involved her remaining in the community receiving treatment and support. The magistrate asked the participant whether, given the severe problems she was experiencing in the community, it would be preferable that she attend residential treatment after a short remand in custody until a bed was available. The participant assured the magistrate that she could implement her rehabilitation plan. The magistrate had to balance whether to remand her in custody to consider residential treatment or to promote her self-determination and trust in the court by allowing her to implement the plan. The magistrate chose the latter and reinforced the participant’s self-efficacy.

A short time later the participant reached her breach point limit. She pleaded with the court for a chance to continue to engage in rehabilitation in the community but the court remanded her in custody – despite her vocal protests when being led away by court security staff. On her next appearance she thanked the magistrate for remanding her in custody, having come to the realisation that she needed residential treatment before being returned to the community. Rather than terminating her from the program and imprisoning her, the magistrate decided to give her a final chance – which involved completing a residential treatment program. Subsequently, she completed community residential treatment, stopped using drugs, began to re-establish her life in the community and graduated from the Perth Drug Court.

It can be a fine balancing act between taking an approach that is more coercive and paternalistic – but one that may be needed given the participant’s circumstances – or taking an approach that allows a participant to implement his or her own rehabilitation strategy. The above example indicates that sometimes a paternalistic approach is needed in a problem-solving court; but, from a therapeutic perspective, it should not be the first response in most cases. In the example, the paternalistic response was a last resort, used after giving the participant a reasonable time to implement her strategy.

It should also be noted that participation in the Perth Drug Court is voluntary.88 Participants are advised of the program conditions – including the consequences of reaching their breach point limit – prior to entering the program. The breach point system serves as a mechanism to promote participants’ accountability for their actions; something that the community expects the court to uphold along with the use of processes that promote rehabilitation.

For the judicial officer (and the court team generally) it can be particularly challenging emotionally where, for example, months into a program, after the court team has developed a close working relationship with the participant and has seen the participant progress despite significant personal issues and challenges, the participant commits a breach that must result in the participant’s termination from the program and imprisonment. The relationship between the participant and the judicial officer and court team comes to a swift end.

In other cases, the judicial officer, court team and participant can prepare for the end of the working relationship prior to the graduation date. Hopefully by then the participant, with the aid of the court team and treatment agencies, will have developed the inner resources and social support networks that will allow them to maintain desistance from offending and underlying problems that existed previously. The preparation process is also facilitated by listing less frequent court appearances and relaxing program requirements as appropriate in the time leading up to graduation.

87 King, n 72.
88 On the issue of voluntariness, coercion and problem-solving courts, see Winick, n 1 at 1071-1078.
Celebration and community

Kouzes and Posner’s theory of transformational leadership encourages leaders to create a sense of community and caring in an organisation. They advocate the use of celebrations and the recognition of individual achievement to show that achievement is valued and rewarded and to acknowledge shared values.

This is also the approach used in drug courts and in other problem-solving court programs such as the Geraldton Alternative Sentencing Regime. Commonly, where a participant has made progress, the judicial officer will praise the participant in open court. If a breach point system is in operation, there may be an appropriate adjustment of breach points. There may also be applause for the participant from those in the court. The court’s celebration of these “small wins” helps to motivate participants to keep going.

On successful completion, the court uses a graduation ceremony. The form of the ceremony varies from court to court. In the Perth Drug Court, the graduation is in open court, commonly at the commencement of the court list with other participants on the list for that day encouraged to be in court for the ceremony. The participant’s Court Assessment and Treatment Service Officer delivers a verbal report to the court summarising the participant’s achievements. Defence counsel and the prosecutor address the court in turn. In addressing the court and the participant, all parties acknowledge the significant life achievement of the participant in addressing the problems that brought the participant into the court system. The judicial officer also comments on the participant’s achievements and then invites the participant to address the court if he or she so wishes. The court acknowledges what the participant has said. The judicial officer then presents the graduation certificate to the participant and shakes the participant’s hand. Those in the court give a round of applause. The court then completes the sentencing process, imposing a significantly less serious sentence than otherwise would have been imposed if the participant had not completed the program.

The recognition of achievements through the use of praise, applause and graduations, and the use of processes that connect with participants, treat them with respect, and promote self-determination and self-efficacy, fosters the image of the court and its team as a caring community. Praise promotes “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”.

The use of ceremonies and praise also demonstrates to other participants that success is a real possibility, and that the court program is a means by which participants can resolve problems and restructure their lives if they are sufficiently motivated. In a sense, graduating participants assume the role of leaders, leading by example – demonstrating to others that rehabilitation is possible and something to be enjoyed and celebrated. Certainly participants will see situations where people have not completed the program, and have been sentenced to imprisonment, but they will also see that such cases are less frequent than graduations, that program termination was for good cause and that an ethic of care was taken by the court team in endeavouring to prevent termination.

Leadership theorists such as Kouzes and Posner refer to storytelling as a powerful technique that leaders can use to motivate and inspire followers. A problem-solving court working well becomes the source of many stories about participants from diverse backgrounds overcoming adversity. In appropriate situations a judicial officer can draw on these stories as a means of uplifting other participants when they have encountered a difficult situation to show them that “it can be done”. But the inspiration must be given a direction. It is preferable that the storytelling be done in conjunction with the participant developing a strategy to deal with the situation and the court’s reinforcement of the participant’s self-efficacy.


90 For a discussion of drug courts in terms of narrative, see Nolan, n 2, pp 111-132.
Transformational leadership theories assert that leader/follower processes are learning and development experiences for those involved. Indeed, these theories see the possibility of growth to self-actualisation as the result of this leadership.91

The problem-solving court process also promotes the learning of participants, judicial officers and team members involved. Arguably, participants learn from being involved in planning and problem-solving that are a part of therapeutic jurisprudence based court processes and their skills and self-confidence in these areas are enhanced. Their self-esteem and self-efficacy are promoted by the coaching approach used by the judicial officer. Watching other cases before the court can also provide a learning experience, as suggested above. Of course, court appearances are but one part of a participant’s engagement in a problem-solving court program: treatment and support programs and the engagement with community corrections officers, court officers and counsel also support and enrich the learning process.

The judicial officer also learns through the process. For example, the judicial officer gains knowledge of general social and psychological issues concerning problems dealt with in the court, such as addiction and domestic violence. Through interacting with participants over time, in the many different situations presenting themselves before the court, the judicial officer develops a better understanding and feeling as to what is required in individual situations and can act accordingly. The judicial officer’s interpersonal skills are refined through the court process. Such interpersonal skills are also an aid to the problem-solving judicial officer who sits in other lists. Further, such skills are useful in other areas of the judicial officer’s life – listening, empathy, respect for others and the like are useful in any relationship.

Inevitably, the judicial officer encounters difficult situations in court that have arisen without notice. Reserving a decision or adjourning for further information to be provided will not always be an option. The judicial officer must think and act quickly as the situation may demand it – eg in cases involving how best to deal with a participant in crisis. Reflecting on the decision, or talking it over with colleagues at a later stage, can help the judicial officer work through any doubts or outstanding issues and more easily deal with similar situations in the future.

The problem-solving court process can also inspire the judicial officer and the court team. They see the power of the human spirit to conquer adversity. They see participants grow despite the most tragic backgrounds. They see them go beyond the difficulties of the past and start to build a better life. A participant’s milestones during a program and their graduation are times of inspiration and celebration not only for the graduate but also for other participants and the court team. Given these outcomes and the contribution judicial officers make to the process, it is little wonder that research has found that problem-solving court judicial officers experience higher levels of job satisfaction than other judicial officers.92

Certainly, problem-solving court judicial officers learn on the job, but it is also important that they receive proper training before undertaking the work. Judicial education should address the theoretical understanding and competencies necessary for presiding in a problem-solving court, and provide continuing education regarding developments in the field and to refine judicial techniques.93 Gould and Murrell suggest judicial education include courses that promote the cognitive development necessary for therapeutic judging.94 They advocate learning processes that promote concrete experiences, reflection, abstract conceptualisation and active experimentation in a supportive environment.95 Like transformational leadership, therapeutic judging can be learnt and taught.

91 Burns, n 6, p 117; Bennis and Nanus, n 23, p 203.
94 Gould and Murrell, n 64 at 2130-2131.
95 Gould and Murrell, n 64 at 2131.
However, as this discussion illustrates, just as a therapeutic, transformational approach to judging requires the judicial officer to be open to new ideas and approaches, judicial education also needs to be open to new ideas and approaches. Justice Kirby has pointed out that some members of the judiciary have used meditation to deal with the stress of judging. The Transcendental Meditation technique has been found to promote self-actualisation and the elements of transformational leadership identified by Kouzes and Posner. It has the potential to help develop the cognitive skills that promote good judging.

**CONCLUSION**

Comparing transformational leadership with problem-solving judging is a useful means of highlighting distinctive features of problem-solving judging. It would be worthwhile to explore how far the principles discussed in this article apply to mainstream judging.

Therapeutic jurisprudence based problem-solving judging, like transformational leadership, is concerned with promoting behavioural change and goals associated with individual and social wellbeing and development. Both draw on findings from the behavioural sciences regarding what works in motivating people to change behaviour and in formulating strategies to be used to attain their goals. Often they cite similar concepts and references – such as self-efficacy and self-determination. While transformational leadership is often associated with promoting organisational change, problem-solving judging is concerned with promoting positive, enduring behavioural change in individuals through an organisational structure designed for that purpose and, within the wider context of the justice system, its governing laws and sometimes conflicting values.

Moreover, in light of the principle of transformational leadership theory that leadership can exist at many levels in an organisation, team members of therapeutic jurisprudence oriented problem-solving courts may also be taking a therapeutic, transformational leadership approach in their own interactions with participants. Participants may well be the beneficiaries of a synergy involving the therapeutic approach of the court team and their treatment and support programs. It would be useful to analyse the role of each court team member – including defence lawyers, prosecutors and community corrections officers – from the perspective of idealised influence, intellectual stimulation, inspired motivation and individualised consideration and to see if the techniques of transformational leadership can augment therapeutic processes they use already.

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99 For example, Winick (n 69), Bass and Riggio (n 18) and Kouzes and Posner (n 31) refer to Bandura’s work on self-efficacy. Winick (n 69) and Kouzes and Posner (n 31) refer to Deci’s work on self-determination.
100 King MS, “Innovation in Court Practice: Using Therapeutic Jurisprudence In a Multi-Jurisdictional Regional Magistrates Court” (2004) 7 *Contemporary Issues in Law* 86.
Extensive research has found that transformational leadership promotes effective leadership in private and public organisations – including corrections. Transformational leadership has been found to positively impact upon offenders. Canada’s Correctional Service found correctional supervisors using transformational leadership promoted greater work motivation and involvement, willingness to put in extra effort and punctuality of offenders as compared to non-transformational leadership supervisors. Credibility also positively impacted work practices: Correctional Work Supervisor Leadership and Credibility: Their Influence on Offender Work Motivation, http://www.csc-scc.gc.ca/text/public/forum/e073073e_e.pdf, viewed 16 June 2007. See also Gillis C and Muirhead M, Corcan Instructor Leadership and Offender Work Attitude (Correctional Service of Canada, 2004), http://www.csc-scc.gc.ca/text/search/reports/1160116_e.shtml, viewed 16 June 2007.


Problem-solving judgment is but one element of problem-solving courts – arguably an important element – among a number with potentially significant therapeutic effects, including treatment programs, support from community corrections officers, positive interaction with counsel and support from new social networks. Further research is needed to determine what is effective in problem-solving courts and why. Still, there is Petrucci’s study finding participant respect results from therapeutic problem-solving judging and the evaluation of the Geraldton Alternative Sentencing Regime suggests that the role of the magistrate was vital to the program. It has also been suggested that a lack of judicial intervention can adversely affect problem-solving court outcomes.

This article has focused on one approach to leadership – transformational leadership – and compared it to one aspect of the work of problem-solving court judicial officers: the court process. There are other aspects of the work of problem-solving court judicial officers – eg working with court team members as well as treatment and other community groups, and interacting with court staff and government agencies. It would be useful to consider this work in the light of leadership theory. For example, the work of case management teams and the role of the judicial officer in the teams could be considered in the light of approaches to team leadership. Leadership theory is a broad field covering not only transformational leadership approaches but also approaches such as those focusing on style, trait, skills or situations. It would be worthwhile exploring whether other leadership approaches can cast light on the role of the problem-solving judicial officer or judicial officers generally.

The in-court role of problem-solving judicial officers is commonly called judicial case management. Yet many of the therapeutic jurisprudence based strategies they use – particularly those associated with promoting motivation – would be seen by theorists to be leadership rather than management practices. Indeed, theorists commonly distinguish between leadership and management. But they differ as to the precise nature of the distinction. In any event most acknowledge that a manager can and often should engage in actions that may be described as leadership. In terms of the distinction between management and leadership, for example, Bennis and Nanus assert that management is about getting things done, about organising physical resources to achieve organisational targets, whereas leadership is about working on the emotional and spiritual dimensions


102 Maruna, n 70.


of human nature, it is about providing a vision that connects with followers and their goals, giving a higher meaning to their work and inspiring them to greater achievement.\footnote{Bennis and Nanus, n 23, p 85.}

From this perspective, problem-solving court judging may well be a combination of both management and leadership. In terms of management, it would include the scheduling of cases, the hearing of applications for admission and termination, following due process, receiving reports regarding the progress of participants, and the allocation and deduction of breach points. In terms of leadership, it would include therapeutic jurisprudence based strategies discussed in this article, such as the promotion of self-determination and self-efficacy, the proper use of communication skills and empathy, and praise and graduation ceremonies.

A similar management/leadership division is evident in corrections. Birgden observes that corrections, around the world, is moving away from simply managing offenders to minimise the risk of offending, to a more rehabilitative approach.\footnote{Birgden A, “Therapeutic Jurisprudence and ‘Good Lives’: A Rehabilitation Framework for Corrections” (2002) 37 Australian Psychologist 180; Ward T, “Good Lives and the Rehabilitation of Offenders Promises and Problems” (2002) 7 Aggression and Violent Behavior 513; Ward T, “The Management of Risk and the Design of Good Lives” (2002) 37 Australian Psychologist 17. Some problem-solving court programs have also seen rehabilitation to be the ability to lead a happy, constructive and fulfilling life in the community. The practice direction of the Geraldton Alternative Sentencing Regime (2001) takes this approach and the program uses the goals and strategies exercise and other therapeutic jurisprudence techniques to promote rehabilitation: King and Wilson, n 2; King, n 66 and King, n 75.}

She asserts that, in addition to risk management, corrections officers can use therapeutic jurisprudence techniques to promote motivation and to involve offenders in decision-making concerning their rehabilitation and their ability to lead what Ward has called “a good life”.\footnote{Ward, n 107.} Ward sees a good life as the attainment of physiological, psychological and social goods. They are attained as a result of internal conditions (psychological skills) and external conditions (eg skills derived from suitable education and training). Rehabilitation is a matter of identifying the “good life” of the individual and promoting the internal and external conditions needed for its attainment. It is suggested that transformational leadership theory would see this approach as being potentially transforming: it gives the offender a vision for the future that he or she has had a part in structuring and that is motivational, it is intellectually stimulating, develops competencies and gives individual consideration. Properly done, in this approach the corrections officer can also demonstrate idealised influence.

Birgden has asserted that to promote rehabilitation in a correctional context requires not only the promotion of motivation and the enhancement of the decision-making processes of offenders, but also a cultural shift towards staff helping to motivate and support offenders in this process.\footnote{Birgden A, “Therapeutic Jurisprudence and Responsivity: Finding the Will and the Way in Offender Rehabilitation” (2004) 10 Psychology, Crime and Law 283. Transformational leadership is widely used to promote organisational change. Perhaps it could be used to help promote the cultural shift in corrections that has been sought by Birgden.}

Problem-solving courts represent isolated areas within the court system where there has been a substantial shift in this direction: all of the personnel involved are committed to promoting therapeutic jurisprudence based principles in supporting participant rehabilitation. Problem-solving courts provide an atmosphere of care and community spoken of by Kouzes and Posner and, in the words of Bennis and Nanus, one of excellence – but without unrealistic expectations.

It is often a matter of personal preference whether a problem-solving court judicial officer takes a purely managerial approach or a more therapeutic, leadership approach. The latter offers the possibility of enhancing the process for participants, judicial officers and court teams. For the participant it offers the possibility of a more supportive and less stressful court process and a better court outcome. For the judicial officer it offers the challenge of engagement in a unique process – where the judicial officer must address the whole person, and creatively use strategies that support the rehabilitation process, when other justice system values permit – and the satisfaction of seeing a positive outcome. The court team shares in the satisfaction of contributing to the successful outcome.
With engagement comes the additional challenge of dealing with the emotions involved where a participant encounters difficulties or an application for termination is made. Judicial officers in a normal court setting, or those operating in a pure non-engaged, managerial style, though not immune to the emotions that can arise in a case, are, to a more significant degree, cloaked by judicial detachment. Given the research that has found higher levels of satisfaction for judicial officers presiding in problem-solving courts than those presiding in conventional courts, it would appear that problem-solving court judicial officers consider the additional challenge to be most worthwhile.\textsuperscript{110}

Australian legal literature has considered judicial leadership in terms of the judiciary: making judgments more accessible to the community, commenting on topical issues in speeches and newspaper articles, and contributing to legal scholarship.\textsuperscript{111} The emergence of problem-solving courts and therapeutic jurisprudence has brought into focus other dimensions of judicial leadership such as the influence of the judiciary on the behaviour and lives of those coming before them in court and its influence through engagement with community agencies in connection with the work of the problem-solving courts.\textsuperscript{112} These dimensions of judicial leadership are worthy of further examination.

Transformational leadership theory can add to the understanding of which problem-solving court techniques work and why, enhance problem-solving court processes, add to the skills set of problem-solving court judicial officers and court teams and promote a richer and more rewarding experience for participants. Judicial education should include courses on transformational leadership in the judicial context. It is suggested that transformational leadership theory also has the potential to contribute to the development of therapeutic jurisprudence, particularly in the areas of judging, legal practice, corrections and court-community collaboration. It offers a fertile ground for further study.

\textsuperscript{110} Hora and Chase, n 92.
\textsuperscript{112} Nolan, n 2; King and Wilson, n 2; King, n 69; Roach Anleu S and Mack K, “Magistrates, Magistrates Courts and Social Change” (2007) 29 Law & Policy 183.