BENEVOLENT BEHAVIOR MODIFICATION: UNDERSTANDING THE NATURE AND LIMITATIONS OF PROBLEM-SOLVING COURTS

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This article critically assesses the recent proliferation of problem-solving courts and, in particular, drug and mental health courts. Specialty courts [FN1] have become attractive initiatives because of the perceived advantages of providing a therapeutic response to offenders who have identifiable problems underlying their criminal conduct. While characterized as treatment oriented initiatives, the therapeutic component is largely undefined, and the role of treatment in outcomes is, at best, unclear. For the most part, they rely on the application of rudimentary principles of operant conditioning to control behavior and, although somewhat more sophisticated, use the same coercive approach that has traditionally been the essence of probation supervision. Moreover, in the problem-solving court model, the role of the judge as a neutral adjudicator is virtually eliminated in favor of direct involvement in the supervision of offenders. Drawing upon a recent trial court initiative employing predictable sanctions for probation violators, it is suggested that the behavior control strategies embraced by problem-solving courts are adaptable to conventional probation supervision without the expense associated with the creation of a new bureaucracy and without distorting the traditional roles of judges, prosecutors, and defense attorneys.

I. THE PROBLEM-SOLVING COURT MOVEMENT

Over the past twenty years or so, variations on the traditional probation community supervision model have become a very prominent part of many local justice systems. [FN2] Most notable has been the proliferation of initiatives referred to as “specialty,” “treatment,” or “problem-solving” courts. According to the National Drug Court Institute (“NDCI”), there are no less than fourteen different types of problem-solving courts throughout the United States and a total of more than 2,500 separate problem-solving courts in operation. [FN3] Indeed, they have received such a favorable reception from state court systems that it could reasonably be argued that they have become an integral component of the American justice system. [FN4] Regardless of what they are called, these ventures generally embrace the idea that there can be something purposefully and effectively therapeutic about the court's response to certain kinds of offenders. [FN5] Indeed, their roots are directed to principles of therapeutic justice. [FN6] By utilizing an approach that both emphasizes and facilitates treatment or other practical change strategies, it is suggested that criminal offenders are more likely to successfully address underlying problems and therefore avoid further criminal involvement. [FN7] Like probation, these courts allow offenders the opportunity to remain in the community so long as the offenders adhere to specific requirements. They are thought of as specialty or problem-solving courts because they deal with offenders who have either engaged in a certain form of behavior or otherwise share a certain characteristic, such as drug or alcohol abuse or mental illness, and therefore are thought to have a common problem that if successfully resolved would lessen the chances of further criminal conduct. [FN8]

While it is evident that these problem-solving initiatives share many features, it is also apparent that there are considerable differences in the nuances of their operations. Because they function as an entity of a local court, subject to the limitations of local financial and human resources, and because there is little, if any, regulatory oversight, each problem-solving court has its own operational character. For example, differences are likely to be found with regard to whether one or more judges will be involved in the program or in a particular case, whether program participation will be limited to certain classes of offenders, the availability of incarceration as a sanction, and the quality of treatment services that are available. [FN9] Nonetheless, there are common characteristics of these initiatives that set them apart from the conventional way of responding to certain offenders; these include (1) the direct involvement of a judge in the monitoring and evaluation of offender performance, (2) a concerted effort to make available to offenders treatment strategies intended to “solve” their problem behavior, and (3) the systematic use of reward and punishment to motivate rule compliant behavior. [FN10]
Often working as a part of a “team,” prosecutors, defense attorneys, and judges shed their customary roles in favor of a collaborative approach to problem-solving. [FN12] Judges, it has been suggested, compromise their impartiality when they begin to see themselves as therapists. In order to qualify for participation in a problem-solving court program, a criminal defendant may very well have to forego the right to a trial by jury and attendant rights and agree to comply with special rules concerning treatment, court review procedures, and the use of sanctions. [FN13] This has raised questions “about [the] possible violation[ ] of ... constitutional rights.” [FN14] Moreover, the participation of defense attorneys has been criticized as a usurpation of the attorney's traditional role as a zealous advocate for the client's legal rights. [FN15] As part of the therapeutic justice movement, these court programs have been attacked as the work of do-gooders that do not work and that operate contrary to the traditional retributive model of western jurisprudence. [FN16]

One common feature of the problem-solving court concept that has received a degree of critical scrutiny is the reliance on legal procedures that are at variance with the due process model and traditional principles of adversariness. [FN11] Nonetheless, problem-solving courts have remained an attractive alternative to what has been described as the “McJustice” approach to adjudication. [FN17] Both frustration with the impersonal and assembly line approach and the perception that they are more effective in dealing with the complex problems underlying criminal behavior continue to drive the problem-solving court bandwagon. And importantly, these programs have largely, but not entirely, avoided the criticism that, like other rehabilitation programs, they are soft on crime. [FN18] Fundamentally, this is because problem-solving courts are unabashedly coercive in nature and are perceived as holding offenders accountable by forcing them to participate in treatment. In the end, however, it is critical to see these programs for what they really are: a phenomenally oversold, wasteful, and largely unsophisticated effort to apply elementary principles of behavior modification to criminal behavior in a manner that is both socially and politically acceptable. The two specialty courts that seem to have received the most attention, drug courts and mental health courts, provide a blueprint for examining the problem-solving court model.

A. Drug Courts

The first widely recognized drug court initiative was in Miami in 1989. [FN19] Since then, drug courts have largely charted the course for the specialty court movement, and there are now more than 1,500 drug and other specialty courts throughout the country. [FN20] Perhaps more significant has been the development of an expansive bureaucracy, intended to support the drug court mission, that includes a federal government-funding stream that has pumped hundreds of millions of dollars into local drug court programs, [FN21] with states adding well over $100 million to the kitty. [FN22] New Jersey alone appropriated $27 million for its drug courts. [FN23] Indeed, there are at least two national organizations supporting the drug court concept in one way or another. NDCI promotes education, research, and scholarship for drug courts and disseminates a number of publications in support of its mission. [FN24] NDCI is a result of a collaborative effort of a number of federal agencies and offices, including the United States Department of Justice (“DOJ”). [FN25] The National Association of Drug Court Professionals supports the drug court (and the driving while intoxicated (“DWI”) court) mission in a number of ways, including conferences and publications. [FN26] In addition, drug courts have received a great deal of evaluative scrutiny, and there has been a significant effort to determine their effectiveness, in large part, because of federal funding requirements. [FN27]

Fundamental to the drug court concept is the notion that the addicted offender must comply with treatment requirements or typically face increasingly onerous sanctions. [FN28] The failure to follow the conditions of the drug court program may well result in incarceration. [FN29] Therefore, like conventional probation, drug court is in every sense a program of conditional release to the community. There are, however, two attributes of drug courts that differentiate them from the more traditional probation model. First, drug courts rely on the systematic use of behavioral consequences to either punish or, to a lesser degree, reward behavior, and second, they require the direct and consistent involvement of judges to dispense those consequences. The use of sanctions in a planned fashion is an integral component of the drug court model. [FN30]

Drug courts adopt policies and procedures intended to facilitate their goal of getting clients into treatment. Participants must meet eligibility requirements that often limit involvement to those not charged with violent crimes and without violent criminal histories. They have to be subjected to an evaluation to determine the nature of their drug dependency and amenability to treatment. [FN31] If they meet the eligibility criteria, defendants usually must plead guilty and accept the terms of the program including status hearings and the imposition of sanctions. They may enter into a behavioral contract that sets forth their obligations and the consequences for not meeting them. [FN32]

B. Mental Health Courts
The mental health court movement is of more recent vintage with the first program beginning in 1997, also in Broward County, Florida, and it is estimated that there are now approximately 125 programs nationwide. [FN33] They have emerged in part as a result of the failure of the mental health system to provide adequate treatment to a large number of individuals who end up in the criminal justice system, and often in jail, and as a way of marshaling and focusing resources on mentally ill offenders. [FN34] Their objective is to stop the criminal justice system's “revolving door” approach to mentally ill offenders by providing effective case management and treatment. [FN35]

Although mental health courts do not yet seem to enjoy the broad administrative and funding support afforded drug courts, their emergence has been facilitated by national legislation and organizational and technical support provided by the DOJ's Bureau of Justice Assistance and the Council of State Governments. [FN36] The expansion of these programs has largely been the result of the availability of federal funding that flowed from the passage of “America's Law Enforcement and Mental Health Project,” a law that provided for state court grants for the establishment and further development of mental health courts. [FN37] Further federal legislation passed in 2004 provided additional funding for these court initiatives. [FN38]

There is considerable variation in the way mental health courts function, [FN39] and they have generated a fair degree of criticism. [FN40] Like drug and other specialty courts, they regard the need for treatment as paramount, embrace the notion that direct judicial supervision is of critical importance to their success, and use sanctions to enforce compliance with program requirements. [FN41] The use of “graduated sanctions” is explicitly acknowledged as a characteristic of the type of programs eligible for federal funding as mental health courts. [FN42] The use of sanctions, and in particular incarceration, is more controversial in the mental health court setting, although there is evidence that both are widely used. [FN43] There is some evidence that more recent mental health court programs have evolved into a model that more closely resembles drug courts, with an increasing use of incarceration as a sanction for noncompliance. [FN44] Unlike drug courts, there has been only a modest effort to empirically evaluate their effectiveness. [FN45] It has been noted that there are serious impediments to evaluating mental health courts. [FN46]

Like drug courts, mental health courts have developed their own rules concerning participation and procedure.

II. UNDERSTANDING WHAT PROBLEM-SOLVING COURTS DO

A. The Treatment Component

At the core of therapeutic jurisprudence and the problem-solving court model is the availability of “treatment” to address the “biopsychosocial” causes of the maladaptive behavior. [FN47] There is an assumption that conditions such as drug and alcohol addiction and mental illness cause criminal behavior. While the use of the term “treatment” implies the use of measures intended to address the underlying causes of various forms of abnormal behavior, there is scant attention in the therapeutic justice literature paid to a more precise definition. From the point of view of the criminal justice system, the nature of the exact strategies employed by treatment providers, as a part of both the drug court and mental health experience, seems to be of secondary concern. Evaluations pay virtually no attention to the type of treatment modalities utilized in these programs, and there is little empirical basis to conclude that one method is more likely to succeed than another. [FN48]

The overall concern is with assuring access to treatment, apparently with little consideration for the nature or the quality of the change strategy undertaken. [FN49] Problem-solving courts are not in the business of offering clients some novel and unusually effective form of treatment. The treatments for schizophrenia, crack addiction, or aggression, available through a court-based program, are not any different in terms of character or efficacy than those available to the general public. This is an important reality because it tells us that, as no more than vehicles for the delivery of treatment experiences, problem-solving courts, even under the best of conditions, can have no more success than what the treatment science allows. It is one thing to create a health care system that provides broad access to the latest therapeutic agent to fight viral infections, it is quite another to find agents that work.

It is apparent that there is no defined treatment strategy associated with drug and mental health courts or, for that matter, any other specialty court program. [FN50] In the mental health court arena, other than general references to taking medication, the justice system literature makes no mention of the efficacy of particular approaches to treatment. While drug court literature routinely refers to treatment, it hardly does so in any way that seeks to methodically differentiate one treatment modality from another. [FN51] In the comprehensive reviews of the performance of drug courts, there is no indication of the types of treatment modalities that worked best or for that matter work at all. [FN52] It appears common that reported drug court evaluations are most concerned with overall performance, particularly regarding rearrest rates, days spent incarcerated, and other objective findings, rather than the effectiveness of specific treatment methods. [FN53]
There are reports in drug court evaluations that offenders participated in either in-patient or out-patient programs, that they participated in a program with phases, or received a certain number of counseling sessions; [FN54] but there are no descriptions of the therapeutic interventions that are actually involved in any of these experiences and, more notably, which ones worked and which ones did not—this leaves important questions unanswered: Why, all other things being equal, are the recidivism rates (arrests for new charges) of offenders substantially lower in certain drug court programs than in others? Does it have something to do with the quality of treatment? Or, more fundamentally, what is it about a particular kind of therapeutic strategy that may make it more effective in changing addictive behavior? Or, for that matter, does the nature of the therapy matter at all? In mental health court similar issues arise, although the question may be more likely directed to the effectiveness of one drug protocol versus another, or perhaps the role played by hospitalization, it is more understandable that issues of efficacy would be left to the judgment of physicians. Nonetheless, given the pragmatic emphasis of problem-solving courts, attention to what works best, even in the practice of medicine, would seem to be of paramount concern. Along these same lines, it has been observed that the DOJ's criteria for awarding drug court funding focuses on whether an applicant has met various structural components, such as providing for a “continuum of treatment services” and “hands-on judicial supervision,” rather than the quality or even the nature of the treatment modalities that are to be used. [FN55]

This is not to suggest that there is a shortage of treatment approaches that may be available in various jurisdictions. Indeed, the DOJ reports that drug courts utilize more than twelve treatment modalities, including such things as acupuncture, mental health referral, and methadone maintenance, [FN56] and it appears that drug courts also tend to embrace “cognitive behavioral” approaches. [FN57] But the low priority given to the efficacy of treatment modalities as a sine qua non of the continuing problem-solving mission strongly implies that, while advocates of problem-solving courts believe there is something important about the role of the treatment they facilitate, they do not exactly know how it works and are not really concerned about it. This begs the question as to what it is about problem-solving courts that may make them perform successfully, or at least, makes them such an attractive alternative. I suggest that the answer lies in two closely related features: the emphasis on using principles of behavior modification and the direct involvement of judges.

B. Embracing Behaviorism: Sanctions and the Role of the Judge

Behavior modification, the applied science of behaviorism, is based on the notion that behavior is, in significant part, a function of the environment and that the consequences of behavior determine the likelihood and frequency of occurrence. [FN58] Behavior is shaped through contingency management—the planned pairing of behavior with a consequence—utilizing principles of operant conditioning. [FN59] The general notion is that if a behavior is followed by something rewarding it will tend to be strengthened and increase in frequency (reinforcement). Conversely, if it is followed by something unpleasant its appearance will become less likely (punishment). [FN60] Effective contingency management requires adherence to important principles with regard to the character of behavioral consequences and the manner and timing of their dispensation. [FN61] When problem-solving courts dispense behavioral consequences in a concerted and planned fashion, they are embracing the principles of behavior modification, albeit at the most rudimentary level. This can be seen in the use of “behavioral contracting,” a technique advocated by proponents of therapeutic jurisprudence that specifies performance standards and establishes rewards and punishments for compliance with treatment requirements. [FN62]

The use of behavior modification is a critical component of the problem-solving court model and has been embraced by judges who favor treatment as the solution to the drug addiction problem. [FN63] Punishment, or as it is most often described in drug court literature, sanctions, comes in various forms, ranging from the threat of further criminal prosecution and incarceration to the loss of program privileges and added program requirements, all intended to encourage rule compliant behavior and, in particular, adherence to treatment requirements. The use of consequences that are generally considered rewarding is also a part of the problem-solving court's repertoire of behavior shaping tools. [FN64] As noted by Judges Peggy Hora and William Schma, and John Rosenthal, a court that practices therapeutic jurisprudence applies “smart punishment” to encourage “offender[s] to succeed in completing the treatment program.” [FN65] While the prospect of an offender receiving a more lenient disposition or avoiding the stigma of a criminal conviction is seen, by some, as leniency, the use of “smart punishment” connotes a more pragmatic agenda. The coercive power of the court and the use of sanctions, including incarceration, are essential features of the problem-solving courts, not because they are seen as just, but because when used in accordance with principles of behavior modification they lead to positive, practical results. [FN66]

Indeed, the delivery of consequences is of such critical significance that problem-solving court initiatives emphasize the importance of judicial participation in the ongoing monitoring and evaluation of an offender's progress. [FN67] The
judge becomes a part of a treatment team, using his or her authority to dispense sanctions and other consequences as each offender's performance warrants. [FN68] Because the judge is in a position to directly dispense consequences and determine the conditions under which they will be meted out, the judge has become the central player in the problem-solving court model's efforts to modify offender behavior. In these circumstances, the judge is seen not as the impartial arbiter of conflict or the disinterested dispenser of justice, but rather as the government's skilled agent of change. While the judge's role may be characterized as therapeutic, and his or her mission described as holding offenders accountable, there is no mistake that in the problem-solving court model the judge is the chief behavior modifier. [FN69]

The judge's active participation as a therapeutic agent has not been without controversy. While rehabilitation has long been recognized as an important goal of sentencing, a judge's active and direct involvement in the change process raises serious questions about the continuing ability of a judge to act as the neutral and detached magistrate as the law may require and the public expect. [FN70] When a judge becomes a member of a treatment team, he or she is no longer interested in what is just, but rather what works. As Richard Boldt and Jana Singer point out, proponents of drug courts have justified their existence on the basis of what they accomplish. [FN71] They suggest that this "frank pragmatism" is their most important characteristic. [FN72] In his or her role as therapist, the judge quite naturally wants the treatment plan to work and in no way can the judge be considered an impartial observer. And yet, if things do not work out, if the treatment team fails to accomplish its mission, then the patient—the offender—stands to be punished by his or her very own therapist. [FN73] While this is perhaps seen as necessary or at least expedient, in the context of the behavior modification strategy employed by the court, it is obviously inconsistent with the traditional justice imperative. This contradiction was recognized by an Oklahoma appellate court when it determined that a judge, who was a member of the defendant's drug court treatment team, was required to recuse himself from proceedings regarding the defendant's continued participation in drug court. [FN74] The court noted that "[r]equiring the District Court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant's program." [FN75]

What is not known, however, is whether the overall behavior modification strategy adopted by problem-solving courts plays an independent role in addressing both an offender's underlying problem such as drug use, mental illness, or lack of self-control and reducing recidivism. Compliance with treatment requirements remains a central concern because supplying treatment is the very reason such courts are said to exist. Moreover, even though little is known about the precise relationship between certain treatment strategies and positive performance in problem-solving court programs, there is evidence that those who complete a drug court program are less likely to recidivate. [FN76] So it seems likely that as long as the use of behavior modification techniques is justified as the best vehicle to deliver treatment they will remain attractive to judges who embrace their role as therapists regardless of more fundamental issues. [FN77]

But it is entirely plausible that the designated treatment modality is nothing more than an adjunct to the use of the contingency management approach used to generally shape law-abiding behavior. Participants in problem-solving courts are sanctioned for a myriad of unacceptable behaviors, and sanctions are certainly not limited to attending treatment sessions. For example, the continued use of drugs or alcohol would surely lead to sanctioning, while abstinence would in all likelihood be rewarded. Program evaluations do not tell us whether it is the way in which this is accomplished that is of critical importance to the effectiveness of the program.

C. Effectiveness

It has been widely maintained that problem-solving courts, and more particularly drug courts, have been a great success. In fact, this conclusion is frequently repeated both in the legal literature and through publications issued by specialty court advocates. For example, NDCI, in reporting on research results, states:

> Perhaps the most important finding is that offenders who become part of a drug court program are succeeding upon completion. Comparisons with other groups reveal much higher retention rates and lower recidivism and drug-use rates for drug court participants both during the life of a program and after the program ends. [FN78]

NDCI goes on to maintain that drug court graduates have impressive recidivism rates. [FN79] Thereafter, and apparently on the basis of the apparent success of the drug court phenomenon, NDCI maintains that the recent emergence of DWI courts is also a good idea. [FN80]

While there is no body of research that purports to evaluate the usefulness of problem-solving courts generally, there is a plethora of research, although of varying quality, describing and evaluating the performance of drug courts. [FN81] What this research has shown overall is not easy to summarize in a way that leads to a definitive conclusion about their value. [FN82] But it does demonstrate the substantial challenges in conducting scientifically valid studies concerning the
consider the suggestion that recidivism rates are lower for those who participate in drug courts. [FN86] This is a critical issue since the only reason problem-solving courts exist is to respond to persons who have committed crimes, and if they do not significantly reduce recidivism, there is no reason for them to continue. Steven Belenko has reported post-program recidivism rates of six drug court programs ranging from a low of 12% to a high of 45%, while pointing out that there are many factors that have to do with program operation that can have an impact on a drug court's effectiveness. [FN87] Consider, for example, the suggestion that recidivism rates are lower for those who participate in drug courts.

While drug court participants and graduates seem to have significantly lower rearrest rates than both other drug abusing offenders and state prisoners, NDCI's statement that “offenders who become part of a drug court program are succeeding upon completion” [FN94] does not tell the entire story. First of all, to the degree that these results are truly favorable, they should not be surprising. Drug courts, and probably mental health courts, are by definition dealing with a special population of offenders. They are selective. [FN95] Certain offenders, because of bad criminal histories or because they have committed certain crimes, cannot participate. [FN96] Moreover, of those who are eligible, only those amenable to treatment are chosen and they are not necessarily individuals who are addicted to drugs. [FN97] According to NDCI, the targets of adult drug courts are “substance abusing offenders.” [FN98] Combined with the fact that on average 43% of initial participants fail to graduate, it is fair to say that drug court graduates are, in relative terms, the offenders most likely to succeed. [FN99] Finally, if these studies are intended to demonstrate that requiring offenders to enter a treatment program-- and then actually making sure they do what they are supposed to--works better than essentially doing nothing, are favorable results at all surprising?

What is also apparent is that there is nothing in the research that suggests that the accomplishments of problem-solving courts, whatever they may be, could not be replicated within the context of the traditional probation (and perhaps, parole) system without the need to create a new bureaucracy; without the expenditure of hundreds of millions of dollars; and perhaps most notably, without the need for judges to shed their traditional roles as the guardians of due process and the purveyors of impartiality. [FN100] I suggest that when all is said and done, we will recognize the challenge has always been to make the probation system work the way it is supposed to and to understand that the problem-solving court concept is not the least bit unique and really nothing more than an unnecessary, but emotionally attractive, variation on a time-tested but perhaps neglected theme.

III. PROBATION: THE ROOTS OF SUPERVISION IN THE COMMUNITY

Problem-solving courts supervise offenders while they remain in the community. They make arrangements for offenders to obtain treatment and other community services and try to motivate them to be responsible citizens. These courts require offenders to follow specified rules, and the offenders are punished if they fail to do so. All of these things have long been, and remain, an inherent part of the probation system.

From the days of John Augustus, the Elmira Reformatory, and the indeterminate sentence, this country has embraced the notion that supervision in the community, either following incarceration or as a substitute for it, can be an effective strategy for responding to criminal offenders. [FN101] The concept underlying probation is quite simple: allow offenders who are amenable to positive change and not dangerous to remain in the community so long as they follow specified rules intended to reduce the likelihood of continued criminal behavior. Whether one characterizes it as giving an offender a chance to prove that he or she is deserving of freedom or an opportunity to further the rehabilitative ideal, probation, like its cousin parole, represents a period of continued behavioral control intended to minimize the prospect of recidivism while avoiding the costs, both financial and otherwise, of incarceration. [FN102] While the conditions for continued
As a sentencing alternative, probation has been broadly recognized as an opportunity to maximize the chances of offender rehabilitation and continues to be extensively relied on as an alternative to incarceration. [FN106] The DOJ reports that more than four million individuals were on probation at the end of 2003. [FN107] By comparison, there were approximately two million prisoners in state and federal correctional institutions. [FN108] While the administrative and operational features of probation systems are understandably diverse, the essential character of probation as a system of managing offenders in the community remains as it was first conceptualized by John Augustus more than 100 years ago. [FN109] Then, as now, an offender released to the community was provided assistance to overcome personal challenges, such as alcoholism, and in order to remain in the community was required to follow certain conditions. [FN110] Those who failed to follow the rules were subject to further punishment, generally in the form of incarceration. While the effectiveness of probation has been the subject of some disagreement, the research seems to support the conclusion that probation remains an effective and relatively inexpensive alternative to incarceration. [FN111]

What then do problem-solving courts do that probation supervision does not? The answer is nothing, although they may be in a position to do it better. The difference lies in the fact that an entirely new bureaucracy has been created in order to improve upon the probation model when the real challenge has always been to improve probation. When viewing the defining features of problem-solving courts--providing access to treatment and holding offenders accountable through the systematic use of reward and punishment--one sees nothing more than how courts have failed to properly support the probation mission. Other than the lack of interest and dispassionate thinking, there is absolutely no impediment to doing these things in the context of the model of probation first developed more than 200 years ago. Importantly, and not without irony, drug courts often work within the conceptual and even the actual structure of probation. It is not uncommon that participation in a drug court program is predicated on a probationary sentence and that following the drug court's rules is made a condition of probation. [FN112]

It is hard to conceive of any private sector business entity completely ignoring the obvious efficiencies of utilizing currently available resources in favor of creating an entirely new organization, where there was no practical or theoretical need to do so. Only to the government is such a strategy attractive. It has been suggested that the present probation system is not capable of carrying out the problem-solving court mandate because resource limitations and high caseloads prevent the kind of close supervision that offenders with complex problems require. [FN113] In the traditional probation model, judges are not therapists but rather adjudicators of allegations of probation violations. Nor are they normally directly involved in monitoring probationer rule compliance. These functions are left to the probation officer who, it has been noted, is chronically overworked with average caseloads perhaps reaching 200 or more probationers. [FN114] Implicitly, this would suggest that it is unrealistic to expect probation officers to effectively provide their clients with the necessary treatment experience and to hold them accountable for the failure to adequately perform. [FN115] However, these are not problems inherent in the probation concept but limitations resulting from poor management and inadequate funding.

If the concern is that probation officers do an insufficient job in providing offenders with treatment services, then the logical answer is to motivate them to do a better job, not to create an entirely new organization. It is important to recognize that problem-solving courts do not provide a specific brand of treatment that is neither endemic nor unusually effective and that would not be otherwise available to any probationer. Problem-solving courts do not treat anyone. A part of their advantage seems to lie in their ability to better assure that offenders are linked with whatever treatment services are available in the community. This requires nothing more than a concerted effort and is well within the reach of any probation organization capably managed and held accountable for its performance by the judiciary.

Perhaps most perplexing is the suggestion that offenders with special problems cannot be effectively supervised without the direct and intensive involvement of a judge. The reason that judges have played such a prominent role in the drug and mental health courts is their reliance on coercion to get offenders to take advantage of treatment opportunities and their commitment to using it effectively as a part of a program of behavior modification. As noted above, judges are used as rule enforcers to punish offenders for rule infractions and not to pat them on the back for doing a good job. When seen in the context of behavioral principles, judges are the dispensers of reinforcement and punishment, the managers of the behavioral contingencies seen as important to changing the behavior of offenders. Judges have nothing more to offer.
They have no training as therapists and, as a group, there is no reason to believe that they possess unusual motivational skills. Their selection as judges, in all likelihood, had nothing to do with any special knowledge of drug and alcohol addiction, mental illness, or any other esoteric problem of the species. And yet the intense involvement of judges is the characteristic, more than any other, which sets the problem-solving court apart from traditional community supervision.

Recognition of both the historical tradition of the probation function and the role of the probation officer, along with the demystification of the role of the judge in the problem-solving court model, leads to the inescapable conclusion that whatever success these court initiatives have had it could easily have been accomplished within the context of the probation system. The need for active judicial participation in the direct supervision of offenders is greatly exaggerated. While a system that relies on principles of behavior modification requires the ability to dispense behavioral consequences in a manner consistent with the tenets of learning theory, it does not require a judge to do it. The Erie County Court of Common Pleas Sanction Certainty (“SC”) program demonstrates the feasibility of a consequences-based approach that does not require judges to abdicate their traditional adjudicatory role, does not require the creation of an entirely new bureaucracy, and does not require the kind of massive financial outlays that drug courts have engendered. [FN116]

IV. THE ERIE COUNTY SC EXPERIENCE

Since 1991, the Erie County Adult Probation and Parole Department pursued a policy of using graduated and selective but seemingly ineffectual sanctions in response to probation violators. [FN117] It was the department's intention to limit arrests in order to minimize the need for jail space at a time when it was at a premium and to give offenders every opportunity to redeem themselves prior to taking more severe action. [FN118] Depending on the severity of the violation, offenders were warned, counseled, further restricted, and then ultimately incarcerated, largely at the discretion of the probation officer. [FN119] By the time cases came before a judge for revocation, the typical offender had been given several chances to follow the rules. These now serious cases typically resulted in extensive prerevocation incarceration as well as the likelihood of resentencing involving a similar outcome. Although the number of these violators as a percentage of the total caseload was low, their impact on the jail population was believed to be quite significant. [FN120]

Moreover, there was considerable dissatisfaction among both probation officers and judges with a system that did not carry through on its implicit, if not overt, promise to hold offenders accountable for rule violations. The question arose as to whether there was a more effective means of managing this problematic group of offenders and whether this could be accomplished within the practical limitations imposed by typically large and diverse caseloads. With this in mind, a pilot study was initiated in 1997 to determine the feasibility and effectiveness of a new approach to responding to probation violators. [FN121] Referred to as “Zero Tolerance,” this approach required probation officers to respond to any significant violation of probation conditions by making an immediate arrest. [FN122] This was in effect the use of a contingency management strategy that used punishment as a predictable and immediate response to rule-breaking behavior. [FN123] It was also hypothesized that there would be a deterrent effect such that violation rates among all offenders in SC caseloads would be diminished whether they were sanctioned or not. [FN124] The role of the judge as the adjudicator of requests for revocation of probation remained unchanged. Of course, probation officers were obligated to comply with all legal requirements for making arrests of probationers. [FN125]

The pilot study yielded favorable results. [FN126] Offenders in SC caseloads had on average less than one-half the number of violations per violator (1.7 violations per violator vs. 3.6 violations per violator), although the percentage of offenders was about the same, with those in the traditional caseloads having a slight edge (34.7% vs. 32.3%). [FN127] The average number of days detained per technical violator was significantly lower for those in the SC caseload (8.5 days vs. 30.5 days). [FN128] Only 9% of the SC detainees proceeded to revocation compared to 53% of the control-group detainees. [FN129] Importantly, anecdotal information indicated a high degree of satisfaction among the three supervising officers and one field supervisor assigned to SC caseloads. [FN130]

A replication study was implemented in January 2001 that included 216 probationers randomly assigned to six caseloads, three of which followed a SC approach and three of which followed the traditional “matrix” approach. [FN131] The performance of this group was followed over the course of one year. [FN132] The sanctioning approach to violators remained the same as had been developed in the pilot study. [FN133] Like the pilot study, there were no changes in the way in which offenders were referred to drug and alcohol or mental health treatment. [FN134] Those who were identified as in need of such treatment were supervised in the customary way. [FN135] If participation in treatment was a condition of probation, then the failure to comply would have been responded to in the same way as any other violation. [FN136]
The results of the replication study generally supported the earlier findings. [FN137] However, far fewer individuals in the SC group committed violations during the one-year period (63.3% in the traditional caseloads vs. 37.5% in SC caseloads). [FN138] Although the difference was not as pronounced as in the pilot study, the average number of violations per offender also remained lower for the SC caseloads. [FN139] With regard to the detention experience, the results were also similar, with the average detention period for SC technical violators being far less than the detention period for those in the traditional caseloads (fourteen days vs. fifty-seven days). [FN140]

Beginning in December 2002, the SC protocol was adopted as the standard approach to caseload supervision within the department. The character of the SC approach remained the same, although certain groups of offenders were excluded including those who were seriously mentally ill, those assigned to the mentally challenged unit, and offenders in the pretrial diversion program. [FN141] This included offenders who had a history of drug and alcohol abuse and a host of other personal challenges associated with their criminal involvement. [FN142] A written policy was adopted that set forth the requirements of the SC protocol. [FN143] It detailed the circumstances under which a violator was to be detained and in essence provided for arrest and detention for all serious violations, including failure to comply with treatment requirements, failure to submit to drug screens, and being charged with most minor and all serious crimes. [FN144]

Probation officers were required to strictly comply with the legal requirements of arrest, and all detentions were reviewed by supervising officers, who in turn met to assure consistency among the caseloads. [FN145] Although the period of each detention was to be limited and monitored by supervisors, it was recognized that practical concerns, largely involving arrangements for drug and alcohol or mental health evaluations and treatment, delayed release. [FN146] In addition, new-charge detentions customarily resulted in longer detention periods because of bail circumstances. Bimonthly detention reports listing the probationers detained, the nature of the violation, and the probation officer making the arrest were provided to the administrative judge for review. [FN147]

The Mercyhurst College Civic Institute provided an analysis of the results of SC policy in reports issued in May 2005 and February 2006. The core findings of the first year's evaluation may be summarized as follows:
1. The overall rate of violation (24%) for those under the SC policy remained much lower than the rate for the comparisons in the prior studies. [FN148]
2. The recidivism rate, as measured by arrests for any new charge, during the first year of operation was 7%. [FN149]
3. Approximately two-thirds of the technical violators committed a violation related to drug or alcohol use or treatment requirements. [FN150]
4. SC offenders who only had technical violations were detained at a much higher rate than those in the traditional caseloads in the earlier studies. [FN151]
5. The rate of detention was higher than in all prior results. [FN152]
6. The average number of days detained per violator for technical violations was at least 58% lower than past comparison caseloads. [FN153]
7. There was no additional direct cost attributable to the SC initiative. [FN154]
8. Probation officers continued to be overwhelmingly supportive of the SC approach to supervision. [FN155]

The SC approach provides support for the feasibility of effectively supervising most offenders, including those who have “special” problems such as drug and alcohol abuse, by utilizing the behavioral management approach so favored in the problem-solving court model without the direct involvement of a judge and without the added cost associated with drug courts. Although the generally favorable results of the SC initiative on the propensity to violate conditions of supervision cannot be attributable to any increased effort to link offenders with specialized treatment experiences, they are not presented here as a definitive indication of the necessity of incarceration as a sanction for probation violation. As has been observed concerning drug courts, there are considerable theoretical limitations of any change strategy that relies almost entirely on the use of punishment. [FN156] Moreover, due to both methodological and analytical shortcomings, all of the SC studies have significant empirical limitations and therefore their usefulness lies more in what they tell us about what needs to be done, as opposed to what has been accomplished. Significant practical and policy issues need to be considered and resolved.

V. MOVING BEYOND PROBLEM-SOLVING COURTS: PRACTICAL AND POLICY CONSIDERATIONS

A. Controlling Discretion

In the problem-solving court model, the judge is responsible for responding to offenders who do not follow the rules. Typically this requires that an offender appear before the court for a status hearing so the judge can assess performance and determine an appropriate response. It is likely that a range of options are available. In the Erie County SC initiative,
the nature of the response was predetermined and only the length of the detention was at issue. Unless there was a move to revoke probation, there was no appearance before a judge prior to arrest and detention, nor was there a judicial determination of the length of incarceration.

Although traditionally probation officers have enjoyed broad discretion in supervising offenders and commonly have the authority to arrest without a warrant upon probable cause, [FN157] the manner in which that discretion is exercised in the absence of direct judicial oversight is a matter of concern. In states where officers may detain and release at will without the obligation to bring an offender before the court for review or bail consideration, careful administrative review is particularly necessary to prevent arbitrariness and assure equal treatment. Without oversight, the length of a detention may become more a function of an individual officer's subjective view of the retributive sufficiency of punishment than of its therapeutic necessity.

On the other hand, judicial discretion in a problem-solving court may be without any meaningful scrutiny, at least without the scrutiny normally attendant to sentencing decisions. Participants in drug courts, for example, are usually required to consent to status hearings and the imposition of sanctions as conditions of acceptance into the program. Their right to appeal, particularly where the drug court participation was part of a plea agreement, may be limited. [FN158] Complaining about a supervising judge's abuse of discretion as it relates to the judge's decision to impose a sanction, including a jail term, is likely to be an option only if one no longer wishes to participate. In the problem-solving court model, the offender's main "therapist" is the one who decides the offender's fate. [FN159] Ultimately, the failure to follow the rules precludes further program participation and in a pre-adjudication program results in reversion to the normal adversarial proceedings. [FN160] In a post-adjudication program, it results in going forward with a sentencing proceeding. [FN161]

It was also apparent from both the surveys of the probation officers as well as a comparison of violations and detentions that there was significant noncompliance with the arrest and detention protocol. Following the full implementation of the SC policy, only 44% of the officers reported complying all the time, although an additional 19% indicated that they follow the department's requirement most of the time. [FN162] This of course begs the question of how different the results--both in terms of performance and cost--would have been in the event of anything near complete compliance and calls into question whether the likelihood of a sanction was as predictable as intended. It also points to the need for vigilant officer supervision to assure that the decision to sanction an offender by arrest is not made arbitrarily.

B. Cost

The direct costs associated with the SC initiative are insignificant. While policy changed and caseload management was altered, overall departmental workload was not increased in any material way. SC requires reallocation or redistribution of resources rather than the acquisition of new ones. [FN163]

From the onset, concerns were voiced about the potential costs associated with an increased rate of incarceration. As noted above, the rate of detention following department-wide implementation was higher than previously experienced, although the average number of days detained per violator was significantly less than for the comparison groups, resulting in a much lower per violator average cost of incarceration. [FN164] Comparison with previous years was not possible because accurate data was not available with regard to the total number of detention days attributable to the department-wide caseload. [FN165] This remains an important question because it is well documented that jail space is limited and the cost of incarceration substantial.

Additionally, SC did not provide more or different treatment experiences and, to the extent that it is believed an enhanced treatment component will lead to improved performance, additional funding may be seen as necessary.

C. Measuring Recidivism

Although the rate of recidivism was very low, 9%, there was no reliable historical department recidivism data available, and it was not possible to compare this result with past performance. [FN166] So, while it appears that in-program recidivism may be lower in the SC model, further study is required to determine if these results are any better than what would be expected under a traditional approach. Moreover, there is no indication as to the effect of SC on post-program recidivism. This is an issue that remains of substantial interest in evaluating the efficacy of drug courts. [FN167] Based on general studies of recidivism, one would expect higher failure rates the longer one has been discharged. [FN168]

From a national perspective, comparison is difficult. DOJ surveys indicate that only about 60% of offenders successfully completed probation, and in 2003, 16% were returned to incarceration with 5% of those receiving a sentence for a new
crime. [FN169] Parole performance is less favorable, with only about 47% of offenders successfully completing parole supervision, 38% returning to incarceration, and of the 38% returning for incarceration, about 11% were returning for a new sentence. [FN170] Joan Petersilia has noted that the rates for misdemeanants and felons differ significantly with most misdemeanor probationers, perhaps as high as 80%, completing their sentence, while as many as 65% of felony probationers are rearrested. [FN171] Although by these standards Erie County's SC initiative performed quite well, it must be emphasized that these results relate only to in-program performance for a limited period of one year. On the other hand, SC data includes incidents of rearrests rather than convictions and includes minor offenses.

D. Maximizing the Effectiveness of Sanction-Based Contingency Management

Although much has been written about the use of the principles of learning theory in problem-solving courts, in reality, the behavioral methodology found in practice is most rudimentary. While it is true that the use of reward and punishment as behavioral consequences are fundamental concepts of applied learning theory characterized as operant conditioning, their application in the context of problem-solving courts is far removed from the kind of planned and disciplined application that successful behavioral change typically requires. For example, Marlowe has succinctly described the important considerations attendant to the use of punishment in shaping behavior, most of which are of seemingly little concern in the operation of drug court programs. [FN172] He points out the well-known principle that, to be effective, a sanction must be applied in close proximity to the behavior it is intended to punish. Yet we know almost nothing about the precise manner in which behavioral consequences have actually been applied in given circumstances. [FN173] In a similar vein, others have noted that the use of sanctions is most effective when used consistently and not intermittently. [FN174] There is nothing to indicate that this principle is adhered to in the problem-solving court model.

As an exercise in behavior modification, SC was also an unsophisticated application of learning theory. There was no differentiation with regard to the general character of the response to rule violators and so it is likely that the “one-size-fits-all” approach to sanctioning requires modification. [FN175] Although the SC experience suggests that the use of immediate and more predictable sanctions is effective in reducing the number of probation violations, it is unlikely that all or even most offenders require incarceration to deter them from further rule violation, nor is it likely that all offenders need to be incarcerated for the same period of time in order to maximize effectiveness. It is not at all apparent whether there is an incarceration norm that should serve as a benchmark in an SC protocol. This, however, is no different than the concerted use of jail as a sanction in a problem-solving court context where a judge is deciding how long a recalcitrant participant needs to spend in jail in order to obtain rule compliance. The question of the proportionality of a response to undesirable behavior in a therapeutic justice context is much more a question of efficacy than fairness.

What SC does demonstrate is the advantage of using probation officers to allocate behavioral consequences within the context of learning theory. Because they are actually supervising the offenders, they are in a far better position than judges to immediately and consistently dispense consequences. They do not have to wait for a status hearing to review the offender's noncompliance and are not dependent on the whims of judicial discretion to determine the character and timing of a response.

In the end it is not at all clear whether either SC or the problem-solving court's accountability model is anything more than a successful example of general deterrence--perhaps with a sophisticated twist. From the perspective of general deterrence, perceptions about likely behavioral consequences are just as important as the reality. It has been strongly suggested that the severity of a threatened criminal penalty is not necessarily determinative of its deterrent effect. [FN176]

E. Impact on Probation Officers

A survey of officers was conducted to learn about both their performance and view of SC, and it revealed a general consensus that the SC initiative was worth retaining. [FN177] Seventy-five percent of the officers responding to the survey said that they did not want to return to the traditional approach to supervision. [FN178] All officers said that SC was either the same as or a better form of supervision policy than the old system. [FN179] More than 80% of officers believed that SC increased violator accountability, and more than two-thirds believed that it increased offender compliance with probation conditions. [FN180] Interestingly, more than two-thirds also believed that SC policy had actually reduced the total number of days violators spent in jail. [FN181] Given that officers play a critical role in the distribution of behavioral consequences and, therefore, the policy's success, a favorable view of the initiative would seem to be of great practical significance.

However, as noted above, officers did not come close to maximum compliance with the detention requirement. [FN182] While the reasons for this are not clear, written comments provided by some officers point to areas of concern. [FN183]
For example, officers observed that SC was too restrictive and prevented creative casework and detracted from the exercise of professional judgment. [FN184] There was also concern expressed that SC violators were treated more harshly than some offenders at the time of sentencing and that following revocation SC offenders were treated more leniently than they were under the SC detention policy. [FN185] These observations indicate that there is reason to believe that lack of compliance with SC arrest standards may be related, at least in part, to officers' fairness concerns. In addition, while noting overall satisfaction with SC policy, the majority of officers believed that it did not offer them enough tools to respond to offender misconduct. [FN186] There were also concerns expressed about increased workload and a diminution in professional discretion. [FN187]

F. Probation Administration

The administrative relationship of probation services and the court may influence the ability to effectively manage the work of probation officers. In Erie County, this was not a major concern because the probation department is a branch of the court and under its direct administrative control. Nationwide, this is not likely to be the norm. [FN188] Where a department is not under the direct management of the court, it may be much more difficult to implement a dramatic change in policy, particularly where probation services are administered as a part of a statewide system. A decentralized system with local control is more likely to be in a position to respond to the need for the kind of close supervision that a predictable system of sanctioning requires.

VI. CONCLUSIONS

No matter whether one describes or characterizes the specialty court approach to supervising criminals as the delivery of "treatment" or the supplying of "accountability," it is evident that these programs rely on coercion to obtain offender compliance with important rules of conduct. Regardless of the nature of the criminal conduct, offenders in problem-solving courts are required to follow rules intended to prevent further crime. If they do not, there are said to be bad consequences. In this respect, the rules are no different from traditional probation sentences. Where they claim to depart is in two respects: First, they maintain that they offer something special to address the "problem" causing the criminal behavior, usually but not always referred to as treatment. Second, they claim to get offenders to be more rule compliant because judges are directly involved in monitoring offender behavior. In other words, they tell offenders what they need to do to solve their problem and then make them do it. This is a remarkably simple, and some might suggest commonsense, notion that may have cost taxpayers more than one billion dollars. [FN189] In the end, we have paid a very large sum of money to get the justice system to do what it has always been required to do.

It is telling that as problem-solving courts have proliferated, the significance of the role of the judge has become more pronounced and the treatment component less defined. Consider for example, NDCI's description of "gun court" as a place where a defendant is placed under direct supervision of a judge, case manager, and probation officer for an immediate response to violations of court orders, or the "domestic violence court" where a permanent judge works with others, including the prosecutor, to "ensure physical separation between the victim" and the defendant. [FN190] Aside from, perhaps, the consequences of drug and alcohol abuse, what would be the disease responsible for assault or using a gun in the commission of a crime that requires treatment? I suggest that the need that is truly being addressed by these efforts is for a control mechanism to make offenders, and perhaps others who influence their behavior, do what we expect of them when they are released into the community. Short of incarceration, supervision in the community is the only currently available sentencing alternative that fits the bill. In this regard, the judge's power to punish is seen as an attractive and convenient tool to maximize control in the community.

Marlowe, Festinger, and Lee have commented that "a major policy movement is afoot ... to dispense with judicial monitoring of drug offenders," pointing to statutory initiatives in California and Arizona. [FN191] Noting that judicial status hearings are expensive and time-consuming, they maintain that close judicial monitoring should be restricted to a relatively small group of high-risk offenders who seem to require it. [FN192] The balance, they suggest, will perform as well, if not better, in the context of a more conventional drug treatment regimen. [FN193] If the lesson of drug courts is that it is beneficial to force drug abusers to participate in treatment, it is a lesson easily learned and a strategy easily replicated. Judges have no corner on the coercion market. Probation officers, given the proper administrative support, are entirely capable of providing whatever incentives the law authorizes to motivate offenders to pursue appropriate therapeutic strategies. Indeed, as Judge Morris B. Hoffman has forcefully noted, the drug court judge is in reality acting in the role of probation officer, while blurring the line between branches of government. [FN194]

However, it is essential to recognize that for many judges this is a very attractive role that will not be given up easily. Judges who are relegated to assignments where they are constantly confronted with cases involving offenders who present with the same dysfunctional histories are understandably inclined to want to do something to fix them—to put an
end to "revolving door" justice. Moreover, the judges have been told over and over that "if only so and so could get some treatment" or "if only so and so could learn to ..." everything would be better. In such an environment, it is entirely reasonable to expect many judges to embrace the prospect of a new role as "change agent" and therapist. While in this new capacity the judge's arsenal of behavioral responses remains largely composed of punitive alternatives, the mission seems so much more altruistic. The prospect of having some success with what appears to be an incorrigible group of offenders motivates judges to embrace principles of behavior modification. It is what works that counts. This is a powerful force propelling the problem-solving court frenzy that cannot be ignored in understanding its attraction.

On the other hand, it is evident that judges have taken on the responsibility of problem-solving courts not only because they have the authority to dispense sanctions, but also because they and others who administer probation services have failed to require those that they either supervise or direct to rigorously enforce the conditions of supervision. As noted above, probation systems largely come under the authority of statewide organizations, although courts in a substantial number of states are directly responsible for administering the probation function. [FN195] Regardless of how probation services are administered, judges can have immense influence on the character of supervision by directing probation officers to supervise offenders in a particular way. By specifying behavioral contingencies for offenders and directing probation officers to supervise accordingly, judges will be doing exactly what is expected of the judge in the problem-solving court context. Moreover, by definition, offenders who are in problem-solving court programs are, in fact, on probation in one form or another, and there is no conceptual legal barrier to probation officers controlling the behavior of their clients in the same way that it would occur at the hands of the problem-solving court judge. [FN196]

Although the number of problem-solving courts has grown dramatically, their reach encompasses only a very small number of offenders, and it is unrealistic to think that they can have any significant impact on recidivism. According to NDCI, the number of individuals in drug court programs totals around 70,000, while the number of persons probation supervision at any one time is more than four million. [FN197] That constitutes about 1.75% of the probation population. The number of problem-solving courts would have to increase by more than 400% to reach even 10% of those serving a probation sentence. When compared to the entire correctional population of about seven million, the number of persons in these specialty court programs is insignificant. [FN198] The only conceivable practical way of extending the problem-solving courts' approach to a broader population of offenders is to standardize a protocol that can be replicated in the traditional probation setting. The SC initiative provides some evidence of the workability of such a strategy.

Finally, the endless money stream that has propelled these court programs will inevitably dry up as governmental priorities shift and as the realization that drug courts and their cousins have serious limitations occurs. Indeed, federal support to drug courts has already been significantly curtailed. [FN199] There can be little doubt that this will result in a search for inexpensive ways of accomplishing the drug court agenda, and incorporating the drug court model into the probation mainstream may seem very attractive.

While the jury is still out on Judge Hoffman's assertion that "[s]tate-coerced treatment does not work," it may only be because the definition of treatment is too narrow. [FN200] Indeed, the drug court model has taught us that the "therapy" in therapeutic jurisprudence is largely concerned with the calculated use of punishment. That we can justify it as a vehicle for delivering some form of conventional treatment makes it palatable to the proponents of therapeutic jurisprudence. However, in the end, the calculated manipulation of behavioral consequences, punitive or otherwise, to effect behavioral change is every bit a form of treatment as talk therapy. If nothing else, the specialty court movement has legitimized the use of behavior modification techniques in meeting the requirements of the treatment imperative, a development that may have significant implications for future sentencing practices and criminal jurisprudence. [FN201]

From a practical perspective, however, the problem-solving court concept should be recognized as nothing more than a well-intentioned but unnecessary and expensive means of carrying out the traditional probation function that has the added and very unfortunate disadvantage of distorting the traditional and vital role of the judge as a neutral adjudicator. In that regard, it is time for courts to use their limited material and human resources more wisely.

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[FN1]. The terms problem-solving court and specialty court are used interchangeably in this article.


[FN6]. Early on in their development, these court programs were often lumped together under the title of “therapeutic jurisprudence” because they were viewed as emphasizing treatment rather than punitive measures and, in particular, incarceration to address the underlying causes of criminal behavior. See, e.g., Peggy Fulton Hora et al., Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America, 74 Notre Dame L. Rev. 439, 467-69 (1999); see also LeRoy L. Kondo, Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders, 28 Am. J. Crim. L. 255, 261-62 (2001) (“Therapeutic justice is the study of the role of the law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or anti-therapeutic consequences. Such consequences may flow from substantive rules, legal procedures, or from the behavior of legal actors (lawyers or judges).” (quoting David B. Wexler, “Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence” in Essays in Therapeutic Jurisprudence 3, 8 (Davis B. Wexler & Bruce J. Winick eds., 1991)).


[FN9]. Robert Bernstein & Tammy Seltzer, Criminalization of People With Mental Illnesses: The Role of Mental Health Courts in System Reform, 7 D.C. L. Rev. 143, 147 (2003) (“There is no single ‘model’ of a mental health court; each court operates under its own, mostly unwritten, rules and procedures and has its own way of addressing service issues.”).

[FN10]. For a thorough review of the characteristics of problem-solving courts as well as their relationship to principles of therapeutic justice, see Winick, supra note 8.


[FN14]. Nolan, supra note 13, at 1559.

[FN15]. See Tamar M. Meekins, “Specialized Justice”: The Over-Emergence of Specialty Courts and the Threat of a


[FN21]. See also Press Release, Dep't of Justice, Dep't of Justice Awards More Than $25 Million To Communities Nationwide For Drug Courts (Sept. 22, 2005), available at http://www.ojp.usdoj.gov/pressreleases/BJA05050.html (awarding twenty-five million dollars in fiscal year 2005 for federal support to develop and implement drug courts).

[FN22]. Huddleston et al., supra note 3, at 15.

[FN24]. NDCI has characterized the drug court movement as a “quiet revolution” and has sought to apply its principles to the justice system's response to alcohol or drug impaired drivers. Our Mission, Nat'l Drug Court Inst., available at http://www.ndci.org/dwi_drug_court.htm (last visited Aug. 26, 2007).


[FN29]. Casey, supra note 12.

[FN30]. Greg Berman & Anne Gulick, Just the (Unwieldy, Hard to Gather but Nonetheless Essential) Facts, Ma'am: What We Know and Don't Know About Problem-Solving Courts, 30 Fordham Urb. L.J. 1027, 1032 (2003).

[FN31]. Casey, supra note 12, at 1481-82.
Winick, supra note 8, at 1084-88.


Seltzer, supra note 11, at 577-78. See also Gregory L. Acquaviva, Comment, Mental Health Courts: No Longer Experimental, 36 Seton Hall L. Rev. 971, 985-86 (2006).

Kondo, supra note 8, at 374.

Id. at 424-28.

42 U.S.C. § 3796ii (2000); Acquaviva, supra note 34, at 1003; Bernstein & Seltzer, supra note 9, at 144.


Bernstein & Seltzer, supra note 9, at 147 (“There is no single ‘model’ of a mental health court; each court operates under its own, mostly unwritten, rules and procedures and has its own way of addressing service issues.”).

Susan Stefan & Bruce J. Winick, Foreword: A Dialogue on Mental Health Courts, 11 Psychol. Pub. Pol'y Y & L. 507, 507-08 (2005). There has been considerable debate about whether the specialty court model is the appropriate way to respond to individuals suffering from mental illness, and some have raised serious legal questions about the competency of mentally ill defendants to voluntarily choose to participate. Seltzer, supra note 11, at 570.

Redlich et al., supra note 33, at 532.


Bernstein & Seltzer, supra note 9, at 158 (“Sixty-four percent of mental health courts report[ed] ... us[ing] jail time as a sanction.”).

See id. Seltzer, supra note 11, at 579. This development may be controversial, “If the goal is to lessen the incarceration of people with mental illnesses, then using incarceration as punishment is a perversion of the whole idea of mental health courts.” Bernstein & Seltzer, supra note 9, at 158.


Wolff & Pogorzelski, supra note 45, at 542.

Hora et al., supra note 6, at 464.

See, e.g., Marlowe et al., supra note 18, at 156 (“[W]e know next to nothing about what may be the most effective type, dose, or modality of treatment for various types of drug court clients.”).

Bernstein & Seltzer, supra note 9, at 148. The impetus for these courts was the lack of adequate treatment available from within the mental health system and the availability of treatment generally may be a problem. Id. “However, the services available to the individual may be only those offered by a system that has already failed to help. Too many public mental health systems offer little more than medication and very occasional therapy.” Id. at 151.

Kondo, supra note 8, at 453-54.
See, e.g., Douglas B. Marlowe, Effective Strategies for Intervening with Drug Abusing Offenders, 47 Vill. L. Rev. 989 (2002) (observing that drug courts and therapeutic communities do a better job of rehabilitating drug abusing offenders than such things as prison, intermediate community sanctions, referral to treatment, and monitoring compliance with treatment; thus, leaving open the question of the character of the treatment in each experience).


Id. at 69.


Id. at 217, 293-94. See also Patricia A. Brennan & Sarnoff A. Mednick, Learning Theory Approach to the Deterrence of Criminal Recidivism, 103 J. Abnormal Psychol. 430, 430-31 (1994).

See generally Bandura, supra note 59, at 229-42 (reviewing the recent theoretical and experimental advances in the field of social learning and the basic psychological principals governing human behavior. It is not the character of a consequence that determines whether it is rewarding or punishing, but rather its effect on the behavior it follows and whether it strengthens or weakens it. Therefore, what is rewarding or punishing to one person may not be rewarding or punishing to another.). See Martin & Pear, supra note 58, at 25. Because behavior is influenced by expectations, much consideration needs to be given to the timing and predictability of consequences. Moreover, there are significant issues concerning the limitations of relying on punishment strategies as the primary means of shaping behavior. Id. at 17. In the context of this article, it is sufficient to note that effective behavior modification requires a far more comprehensive understanding of the principles of contingency management than a general recognition of the role played by reinforcement and punishment in influencing behavior.


[FN64]. Cooper, supra note 63, at 23-24 (describing the importance of using behavior modification techniques and emphasizing the need to emphasize the use of rewards rather than punishments). According to the National Association of Drug Court Professionals, drug courts use a variety of incentives to reward individuals for program achievements. Nat'1 Ass'n of Drug Court Prof'ls, The Facts: Facts on Drug Courts 1-2, http://www.nadcp.org/docs/FACTS_final.pdf.

[FN65]. Hora et al., supra note 6, at 475-76. See also National Drug Court Institute, supra note 63, at 1-2 (noting the long history of using sanctions as a tool to obtain drug treatment compliance).

[FN66]. Cooper, supra note 63, at 23. This can be problematic in programs involving DUI offenders where there are mandatory penalties and a public perception that there is a need to “get tough.” Tauber & Snavley, supra note 19, at 1. In a similar vein, it has been argued that a diminution in sanctions in domestic violence cases may be counter-productive because it may have the effect of “reinforcing” rather than discouraging the conduct in question. Fritzler & Simon, supra note 8, at 31. In Oklahoma, a statute actually requires a judge to use progressively increasing sanctions. Okla. Stat. tit. 22 § 471.7(E) (2007).

[FN67]. Hora et al., supra note 6, at 475-76. See, e.g., Okla Stat. tit. 22 § 471.7(a) (2007) (describing the judge's duty to require progress reports and conduct periodic reviews).


[FN69]. Marlowe et al., The Judge is a Key Component of Drug Court, Drug Ct. Rev., 2004, at 1, 25 (noting the results of research indicating that judges and status hearings play a pivotal role in positive outcomes for high-risk drug offenders). See also Susan Finlay & Robin E. Wosje, Judges as Change Agents, Nev. Law., Dec. 2002, at 22, 22-23; Miller, supra note 68, at 1486 (judges are reconstituted as experts in informal methods of behavior modification).


[FN71]. Boldt & Singer, supra note 70, at 85.

[FN72]. Id.

[FN73]. There is one consequence of judicial involvement in the use of behavior modification practice that is particularly noteworthy. While the use of behavioral strategies is by no means new to the criminal justice system, historical practices have led to legal challenges. See, e.g., David Goldberger, Court Challenges to Prison Behavior Modification Programs: A Case Study, 13 Am. Crim. L. Rev. 37, 37-39 (1975). Past uses of punishment in behavior modification programs that utilized “aversive stimuli” in correctional settings have been met with considerable resistance and have come under the scrutiny of courts. See, e.g., Knecht v. Gillman, 488 F.2d 1136, 1337-38 (8th Cir. 1973). While these strategies used punitive measures characteristically different from the kinds of sanctions common in problem-solving courts, the same theoretical notions apply. Both embrace learning theory and use punitive consequences to “condition” behavior. The judicial imprimatur on behavior modification techniques reinforces the broad use of such strategies and also lends support to a deterministic view of human behavior that is at odds with traditional common law notions of free will. For a more focused discussion of this question, see John A. Bozza, “The Devil Made Me Do It”: Legal Implications of the New Treatment Imperative, 12 S. Cal. Interdisc. L.J. 55 (2002).

[FN74]. Alexander v. State, 48 P.3d 110, 115 (Okla. Crim. App. 2002) (finding the recusal issue was waived but that in future cases, a judge in that position must grant a request for recusal and have the case assigned to another judge).

[FN75]. Alexander, 48 P.3d at 115.

[FN76]. See, e.g., Julian King & Jim Hales, Department of Justice, Victorian Drug Court, Cost Effective Study: May 2002 to December 2004, Final Report 15-16 (2004) (noting that those who graduated from the drug court had much lower recidivism rates than nongraduates); Anspach et al., supra note 53, at 64 (describing how “only 9% of graduates
had a post-program arrest” compared to 41% of those terminated from the program); see also Jensen & Mosher, supra note 52, at 459.

[FN77]. Alexander, 48 P.3d at 113 (noting that pursuant to statute the primary role of the drug court judge is to keep the offender in treatment for as long as necessary to effect necessary behavioral change).


[FN80]. Id.

[FN81]. However, as a percentage of the whole, the number of drug court evaluations generally reported in the drug court and legal literature is quite small and generalizing is risky. Unfortunately, my review of the literature has indicated that there is no significant body of research evaluating the performance of mental health courts.

[FN82]. Marlowe et al., supra note 69.

[FN83]. See, e.g., Jensen & Mosher, supra note 52, at 452-53.

[FN84]. Marlowe et al., supra note 18, at 156.

[FN85]. Id. at 155.


[FN88]. Id.


[FN90]. Id.

[FN91]. See, e.g., Jensen & Mosher, supra note 52. Moreover, there are serious issues concerning the choice of comparison offenders. General comparisons of recidivism rates can be misleading because of inequities in the characteristics of the respective populations. Studies that attempt to use an experimental design with either random assignments or matched samples of experimental and control groups cannot account for the motivation factor for those who in the normal course of things want to be in a drug court program or do not. When clients are randomly assigned to the respective groups regardless of personal preference then there is a serious question as to whether the results really reflect what happens in the real world of drug courts.


[FN93]. See generally Hora et al., supra note 6, at 484 (describing the organization, impact, and philosophy of drug courts).


[FN96]. Hester, 815 A.2d at 549.

[FN97]. Id. at 550.

[FN98]. Huddleston et al., supra note 3, at 6.


[FN100]. Marlowe et al., supra note 69, at 5 (noting inter alia that conducting judicial status hearings is a costly and time consuming practice).


[FN102]. While the fundamental elements of probation's conceptual model may be generally recognized, there is relatively little information about the characteristics of probationers and probation practices. See Petersilia, supra note 101, at 155.

[FN103]. Although broad discretion is allowed for the imposition of conditions of supervision, they are generally required to be reasonably related to rehabilitation or some other recognized goal of the criminal sanction. Id. at 164. See Ellis v. State, 470 S.E.2d 495, 496 (Ga. Ct. App. 1996) (holding that the condition that probationer not be at a location where children under the age of eighteen are present was too vague to be reasonably related to rehabilitation); State v. Wickenhauser, 423 S.E.2d 344, 347 (S.C. 1992) (holding that the condition that a person convicted of a DUI not be found in a place where alcoholic beverages are served on the premises is not reasonably related to rehabilitative function).


[FN105]. Id. at 47-50.

[FN106]. While the concept of community supervision encompasses parole, parole supervision is not addressed here, as it is more commonly an administrative rather than a judicial function.


[FN108]. Id.


[FN111]. Id. at 179-85.


[FN113]. See Goldkamp, supra note 55, at 932-34 (arguing that probation, for a number of reasons, is no longer relevant as a helping agency in the fight against addiction); see also Cooper, supra note 63, at 22 (describing probation as “spectacularly ineffective” with addicted offenders).

[FN115]. Id. at 165-67 (describing research indicating that probation conditions are often not enforced).

[FN116]. The Erie County Court of Common Pleas has also operated a Drug Treatment Court and a Mental Health Treatment Court since 2002. See Mercyhurst Coll. Civic Inst., Erie County Treatment Court Year 1: Mental Health Court Status Report (2003), http://www.civicinstitute.org/ci/docs/ecmh03.pdf; Mercyhurst Coll. Civic Inst., Erie County Drug Treatment Court Evaluation Level III and IV Offenders (2004), http://www.civicinstitute.org/ci/docs/ectc_jan02_jun03.pdf.

[FN117]. Mercyhurst Coll. Civic Inst., Sanction Certainty: An Evaluation of Erie County's Adult Probation Sanctioning System, Final Report 2005, app. B, 52-53 (2005), http://www.civicinstitute.org/ci/docs/sanctioncertainty05.pdf [hereinafter Mercyhurst Coll. Civil Inst., Sanction Certainty Y 2005]. The system of sanctions was referred to as the “matrix” system because it utilized preestablished responses to specified violations of probation conditions. For an initial technical violation, such as drug or alcohol use, a typical response would be a verbal reprimand and, if not otherwise previously initiated, counseling would be ordered. On the next occurrence, the response would likely involve a written warning and/or a meeting with a supervisor. It was not until the fourth violation of conditions or upon an earlier occurrence of a more serious violation, such as an arrest for a new crime, that arrest, incarceration, and request for revocation would be initiated. Id.

[FN118]. Id.

[FN119]. Id.

[FN120]. Id. at app. E, 58, app. F, 59.


[FN122]. Id.

[FN123]. Id. See generally Marlowe & Kirby, supra note 28 (describing the ways in which behavioral consequences, primarily sanctions, can be employed most effectively and noting that predictability and immediacy are important considerations).


[FN125]. See 61 Pa. Cons. Stat. § 309.1 (2006) (“Probation officers heretofore or hereafter appointed by any court of record of this Commonwealth are hereby declared to be peace officers, and shall have police powers and authority throughout the Commonwealth to arrest with or without warrant, writ, rule or process, any person on probation, intermediate punishment or parole under the supervision of said court for failing to report as required by the terms of his probation, intermediate punishment or parole or for any other violation of his probation, intermediate punishment or parole.”); Gagnon v. Scarpelli, 411 U.S. 778, 783-85 (1973).


[FN128]. Id.

[FN129]. Id.

[FN130]. Informal interviews and written summaries from these participants demonstrated a positive view of their participation in the pilot study. Id. at app. H, 63-64.

[FN131]. Id. at 13.

[FN132]. Id.


[FN134]. Id. at 13-15.
Because of differing start dates on supervision, the actual period during which offenders were studied varied between six and twelve months.

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his termination from a drug court program).

[FN159]. But see Alexander v. State, 2002 OK 23, 48 P.3d 110, 115 (ruling that judge who was a part of the drug court team must recuse himself from participating in a termination hearing upon defendant's filing of Motion to Recuse).

[FN160]. See, e.g., 730 Ill. Comp. Stat. 166/35(a)(4) (holding that failure to comply with conditions may lead to reinstatement of criminal proceedings). But see State v. Jakabowski, 2003 ME 58, 822 A.2d 1193, 1195 (noting that Maine allows for participation in drug court as a condition of bail, with the failure to comply resulting in revocation of bail).

[FN161]. See, e.g., Ga. Code Ann. § 16-13-2(a) (2004) (providing for placement in a drug court program following adjudication without a finding of guilt. If the terms are violated, then probation is revoked and the court proceeds to sentencing.); see also State v. Bellville, No. 5-476/04-1634, 2005 Iowa App. LEXIS 963, at 2-6 (Iowa Ct. App. 2005) (according to plea agreement, defendant was sentenced to consecutive jail sentences upon revocation from drug court program).


[FN163]. This does not mean that other departments would not require additional resources, nor does it necessarily mean that additional resources would not have contributed to improved results. Survey results indicated that officers believed that SC required more time for supervision and that more alternatives may have been helpful. Mercyhurst Coll. Civic Inst., Sanction CertaintyY 2005, supra note 117, at 37, 40-41.

[FN164]. Id. at 6.

[FN165]. Id. at 22.


[FN170]. Id. at 6.


[FN172]. Marlowe & Kirby, supra note 28, at 11-12.

[FN173]. Id. at xi.


[FN175]. Marlowe & Kirby, supra note 28, at vii (commenting on the well-established behavioral principle that reward and punishment are relative; that is, what is punishing or rewarding to one is not necessarily punishing or rewarding to another).


[FN178]. Id. at 42.

[FN179]. Id. at 42-43.

[FN180]. Id. at 38.

[FN181]. Id.

[FN182]. Id. at 39.


[FN184]. Id. at app. H, 63-64.

[FN185]. Id.


[FN187]. Id. at 63-64.

[FN188]. Petersilia, supra note 101, at 169-71 (observing that probation is organized through more than 2,000 agencies with probation as a branch of the court in only one-quarter of the states).

[FN189]. Jensen & Mosher, supra note 52, at 445 (estimating that state and federal governments have invested more than one billion dollars in drug courts alone).

[FN190]. Huddleston et al., supra note 3, at 11-12.

[FN191]. Marlowe et al., supra note 69, at 7.

[FN192]. Id. at 5.

[FN193]. Id. at 4-5.


[FN196]. Judges typically have broad discretion in setting conditions for offenders to remain in the community. See generally Nat R. Arluke, A Summary of Parole Rules--Thirteen Years Later, 15 Crime & Delinquency 267, 268-69 (1969) (surveying notable changes in parole rules that have occurred in various states). The guiding parameter is whether the condition is reasonably related to the goal of rehabilitation. Id.

[FN197]. Huddleston et al., supra note 3, at 7; Glaze & Palla, supra note 107, at 2.


[FN200]. Morris B. Hoffman, Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous, 29 Fordham Urb. L.J. 2063, 2089 (2002). While Hoffman has made a compelling argument that empirical research has not been able to demonstrate the effectiveness of drug courts, the use of contingency management per se within the problem-solving court model has not been independently studied.

[FN201]. See Bozza, supra note 73, at 63-64. It also might be a good opportunity to give some serious thought to just how involved courts should be in the increasingly more sophisticated efforts to modify behavior that inevitably will be
forthcoming.