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PROBLEM-SOLVING COURTS, THERAPEUTIC JURISPRUDENCE AND THE CONSTITUTION: IF TWO IS COMPANY, IS THREE A CROWD?

JAMES DUFFY*

[Court costs, resource-intensive trials, booming prison populations and the obduracy of recidivism rates all present as ugly excesses of the criminal law adversarial paradigm. To combat these excesses, problem-solving courts have evolved with an edict to address the underlying issues that have caused an individual to commit a crime. When a judge seeks to help a problem-solving court participant deal with issues like addiction, mental health or poverty, they are performing a very different role to that of a judicial officer in the traditional court hierarchy. They are no longer the removed, independent arbiter — a problem-solving court judge steps into the ‘arena’ with the participant and makes active use of their judicial authority to assist in rehabilitation and positive behavioural change. Problem-solving court judges employing the principles of therapeutic jurisprudence appreciate that their interaction with participants can have therapeutic and anti-therapeutic consequences. This article will consider how the deployment of therapeutic measures (albeit with good intention) can lead to the behavioural manifestation of partiality and bias on the part of problem-solving court judges. Chapter III of the Commonwealth Constitution will then be analysed to highlight why the operation and functioning of problem-solving courts may be deemed unconstitutional. Part IV of this article will explain how a problem-solving court judge who is not acting impartially or independently will potentially contravene the requirements of the Constitution. It will finally be suggested that judges who possess a high level of emotional intelligence will be the most successful in administering an independent and impartial problem-solving court.]

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* BCom, LLB (Hons) (UQ), LLM (QUT); Lecturer, Queensland University of Technology: james.duffy@qut.edu.au. The author would like to thank Nigel Stobbs for his feedback on an earlier draft of this paper and John Pyke for some constitutional wisdom.

I INTRODUCTION

Berman and Feinblatt's traditional definition of a problem-solving court states that such a court seeks to 'address the underlying problems of individual litigants, the social problems of communities [and] the structural and operational problems of a fractured justice system.'¹ In Australia, drug courts, alcohol courts, mental health courts and domestic/family violence courts are all examples of problem-solving courts.² These courts have a forward-looking focus; an individual's past criminal conduct is not downplayed, but the problems that may have driven an offender's criminal behaviour are addressed in a more holistic fashion. According to King et al, the approach taken by problem-solving courts 'reflects a realisation by [traditional] courts and legislators that social problems may require social as well as legal solutions and that existing forms of judging need to be reconsidered.'³ The ambitious scope of problem-solving courts places the spotlight on the role of the judicial officer who convenes the court. In a traditional adversarial court, the skills required of a judge include a good understanding of the law, an excellent grounding in the rules of evidence and sound organisational and presentation skills. A problem-solving court judge must possess these skills and more. If a problem-solving court judge is prepared to address the root cause of an individual's offending, they need to figuratively enter and understand the world in which that offending has occurred. By acknowledging that criminal behaviour is rarely a calculated act by a rational agent, a problem-solving court becomes well placed to address the 'story' behind the offending.⁴ Whilst the problem-solving court judge is first and foremost an arbiter of fact and law, in this new environment a judge may also need to wear the hat of lawyer, sociologist, psychologist and even psychoanalyst.

Therapeutic jurisprudence considers the role of the law as a therapeutic agent⁵ and theoretically underpins the practice of problem-solving courts.⁶ Therapeutic jurisprudence advocates 'the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.'⁷ If problem-solving courts are prepared to attack the embedded causes of criminal offending as the problem (and the offending itself as a

¹ Greg Berman and John Feinblatt, 'Problem-Solving Courts: A Brief Primer' in Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 73, 78.

² For a brief description of these courts, see Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8.

³ Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) 139.

⁴ It is important to note that whether a criminal act is rational or not, a problem-solving court can still be utilised if the program criteria for that court have been met.

⁵ David B Wexler, 'Putting Mental Health into Mental Health Law — Therapeutic Jurisprudence' (1992) 16 *Law and Human Behavior* 27, 32.

⁶ Peggy Fulton Hora, William G Schma and John T A Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439, 440; Bruce J Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055, 1062.

⁷ Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy, and Law* 193, 196 (emphasis altered).

symptom of the problem), then the social sciences can inform the judge's role in achieving this end. Just as importantly, the social sciences can be utilised to identify the pitfalls a judge may encounter when working closely with a rehabilitating offender.

This article will consider the legal and psychological phenomena that impact upon a problem-solving court judge when they are attempting to implement therapeutic jurisprudence principles. Wexler suggests:

When therapeutic jurisprudence speaks of looking at the law as a potential therapeutic agent, it refers to looking at legal (and administrative) rules and procedures and at the roles of legal actors or 'players,' which typically include lawyers and judges but may include many other actors, such as therapists and employers ... The emphasis on roles of legal actors, especially when the actors operate in a relatively unconstrained legal field — with great discretion in other words — is particularly ripe for therapeutic jurisprudence analysis.⁸

The object is not to be 'microanalytic with a vengeance'⁹ when exploring the psychological phenomena that can negatively impact upon the judicial function. The reality of these psychological factors is that they can strongly influence the perception of the independence and impartiality of a problem-solving court judge. If a problem-solving court judge exercises non-judicial power in such a manner that their independence and impartiality are compromised, the institutional integrity of that court may be called into question. If the institutional integrity of a court is compromised by the exercise of non-judicial power, it will be operating unconstitutionally.¹⁰ To the extent that these issues highlight the potential unconstitutionality of problem-solving courts, they certainly have macro-analytic consequences for our legal system.

A problem-solving court will ultimately attempt to seize on the moment when an offender comes before the court, to make a positive, meaningful impact on that person's life. The authority of the court and the power invested in its judge to determine the fate of an offender reinforces the seriousness of an offence, but also represents a unique opportunity for an offender. The idea is that people will be most receptive to change when they are intensely unhappy with their current situation.¹¹ This places an offender in a fragile situation in relation to the problem-solving court judge. They are in a foreign and formal environment, surrounded by people with whom they would not usually associate. In this setting a problem-solving court participant may find it difficult to effectively communicate, let alone engage in meaningful introspection with regard to their offending. Cultural and language barriers as well as emotional flooding may

⁸ David B Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1 *Psychology, Public Policy, and Law* 220, 225 (citations omitted).

⁹ *Ibid* 234. Wexler uses this phrase when discussing therapeutic jurisprudence scholarship on legal roles. The analysis is micro-analytic as it focuses on the nuanced *application* of existing law, rather than therapeutic jurisprudence's potential impact on particular rules or particular procedures.

¹⁰ *Fardon v A-G (Qld)* (2004) 223 CLR 575.

¹¹ Astrid Birgden and Tony Ward, 'Pragmatic Psychology through a Therapeutic Jurisprudence Lens: Psycholegal Soft Spots in the Criminal Justice System' (2003) 9 *Psychology, Public Policy, and Law* 334, 334.

further add to the vulnerable position of a participant.¹² A problem-solving court judge must be cognisant of these factors and the resultant therapeutic and anti-therapeutic consequences that their words and processes may effect. If a judge is not aware of the effect an offender (and that offender's story) is having on their own thoughts and emotions, they are not in a position to regulate their behaviour and prevent feelings being acted upon in a way that undermines the goals of the problem-solving court.

In considering the constitutionality of problem-solving courts, this article will highlight some therapeutic measures often employed by problem-solving court judges. It will be shown (with reference to psychoanalytic literature) how the deployment of these therapeutic measures can lead to the behavioural manifestation of partiality and bias. Chapter III of the *Commonwealth Constitution* will then be analysed to highlight why the operation and functioning of problem-solving courts *may* be deemed unconstitutional. It will finally be suggested that judges who possess a high level of emotional intelligence will be the most successful in administering an independent and impartial problem-solving court.

II CATHARSIS, EMPATHY AND THE PYGMALION EFFECT

A Catharsis

For a problem-solving court judge to enter the world of a participant, the participant must be afforded the opportunity to tell their story. In spite of time constraints and busy law lists, processes that promote the opportunity for ongoing interaction between judicial officer and participant are conducive to positive therapeutic effect.¹³ King suggests that '[l]itigants value telling their story to a person in authority who listens and cares about the litigant's situation, being a part of the decision-making process and being treated with respect.'¹⁴ Clark acknowledges that 'giving traumatized individuals a chance to "tell their story" and engage in "account making" is a pathway to healing.'¹⁵ If a person is able to articulate links between an underlying problem (such as drug/alcohol abuse, mental health issues, and traumatic life events) and their criminal offending, the process can be deeply cathartic. Such introspection may be the result of a long standing judge-client relationship, or it may be client-driven and occur at an early stage of a problem-solving court process. In either event, the processes employed by a problem-solving court judge, and their demeanour,¹⁶ body language¹⁷ and warmth of expression,¹⁸ can all promote the cathartic process.

¹² Michael King, 'Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities' (2003) 28 *Alternative Law Journal* 172, 174.

¹³ *Ibid* 174-5.

¹⁴ Michael King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?' (2007) 32 *Alternative Law Journal* 91, 92.

¹⁵ Michael D Clark, 'A Change-Focused Approach for Judges' in Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 137, 142.

¹⁶ King, 'Applying Therapeutic Jurisprudence from the Bench', above n 12, 173, citing Carrie J Petrucci, 'Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic

The emotion experienced by a participant in a problem-solving court can act as a roadblock to effective communication. Whilst a judge cannot ensure that a participant experiences a cathartic episode, they can maximise the potential for catharsis to occur. Procedural justice literature highlights the importance of a judicial officer providing 'voice' and 'validation' for a problem-solving court participant.¹⁹ Voice means providing an environment where the participant can tell their story to an attentive court,²⁰ and validation involves the court acknowledging that it has heard the participant, values their contribution and will take their story into account.²¹ Voice, validation and mutual respect between judge and participant have been shown to increase the participant's satisfaction with judicial proceedings.²² King identifies 'respect' as 'the manner in which the judicial officer interacts with the [participant], whether the judicial officer takes time to listen to the participant, the tone of voice and language used and the body language of the judicial officer in interacting with the participant.'²³ If a problem-solving court judge is able to convey warmth (a caring manner that shows the judge is interested in the participant's wellbeing), empathy and genuine positive regard²⁴ to a participant, they are engaging in a therapeutic communication that engenders mutual respect.²⁵ Attention to these aspects of procedural justice (voice, validation and respect) has been shown to increase a participant's willingness to comply with the ultimate outcome of a case, even if adverse to them.²⁶

B Empathy

This article posits that genuine judicial empathy is an essential tool for helping people through tough periods of intrapersonal and/or interpersonal conflict. Problem-solving court judges employing a therapeutic approach are able to harness the power of their own emotions to guide participants through the

Violence Court That Utilizes Therapeutic Jurisprudence' (2002) 38 *Criminal Law Bulletin* 263, 288.

¹⁷ King, 'Applying Therapeutic Jurisprudence from the Bench', above n 12, 174.

¹⁸ Clark, above n 15, 142.

¹⁹ Michael S King, 'The Therapeutic Dimension of Judging: The Example of Sentencing' (2006) 16 *Journal of Judicial Administration* 92, 95.

²⁰ *Ibid.* See also Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 129.

²¹ King, 'The Therapeutic Dimension of Judging', above n 19, 95. See also Winick and Wexler, above n 20, 129.

²² Tom R Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' (1992) 46 *Southern Methodist University Law Review* 433; Winick, above n 6, 1089.

²³ King, 'The Therapeutic Dimension of Judging', above n 19, 95.

²⁴ Dear explains that genuine positive regard means 'acceptance of the [participant] and respecting his or her value as a person regardless of his or her behaviour. A distinction is drawn between accepting the person and accepting his or her behaviour, which might well be unacceptable': Greg E Dear, 'Therapeutic Communications from the Bench: A Psychological View' (2006) 1 *eLaw Journal: Murdoch University Electronic Journal of Law — Special Series* 147, 148 <<https://elaw.murdoch.edu.au/archives/issues/special/therapeutic.pdf>>.

²⁵ *Ibid.*

²⁶ Winick, above n 6, 1089. See also Tyler, above n 22, 437.

process.²⁷ They can access their own emotional intelligence to assess what a participant needs to see, hear, or do at any given point in time during the problem-solving court process. The emotional intelligence of judicial officers will naturally vary, and as a result there is danger in a judge dealing with emotions and empathising when they may not possess the emotional intelligence to do so effectively. Whilst emotional intelligence will be discussed later in this article, in the judge–offender context it is seen as a ‘competency’ that engenders judicial officers with the ‘ability’ to deal with a range of emotions presented to them.²⁸

For the purposes of this article, judicial empathy refers to the ability of problem-solving court judges to put themselves ‘in the shoes of another, to understand things from their perspective.’²⁹ If a judge is able to recognise the need of a participant that underlies their involvement with the problem-solving court, they can then accurately communicate back to the participant that their feelings have been heard and understood. The judge can successfully attend to the participant’s emotional needs. King notes that the art of listening

requires not only hearing what is said but understanding the intellectual and emotional content of what is being said. A party to legal proceedings often not only communicates what has happened but how the person felt about what happened.³⁰

Judicial empathy at its most effective will therefore encapsulate both cognitive and affective components.³¹ According to Winick, a participant’s words should be met with both an intellectual and emotional response.³² A problem-solving court judge must communicate that they not only understand the factual predicament of the individual, but also the individual’s emotions that accompany that predicament.³³

To the extent that Winick advocates judicial sympathy (in addition to empathy) when attending to the emotional needs of a problem-solving court participant, this author disagrees. Whilst empathy may assist a judge in ‘understanding

²⁷ The way a problem-solving court judge deals with emotion is an incredibly important aspect of the judge–participant dyad, but it must be supported by other judicial qualities and techniques. Knowledge of the subject area, understanding theories of addiction and mental illness, careful reality testing and promoting participant self-efficacy and self-determination are all examples of judicial characteristics or processes that complement the affective component of judging.

²⁸ See below Part V(B).

²⁹ Laurence Boulle, *Mediation — Skills and Techniques* (Butterworths, 2001) 136. Whilst this definition is given in the context of mediation, it is suggested that it is equally applicable to the problem-solving court context. In this article, mediation literature will be drawn upon to investigate some of the behavioural phenomena that may impact upon problem-solving court judges. Whilst some of this literature has been taken outside of its original context (and hence may express views not intended by the authors), these psychological and behavioural phenomena are of broader relevance, with obvious applicability to the problem-solving court environment.

³⁰ King, ‘The Therapeutic Dimension of Judging’, above n 19, 96.

³¹ These components are outlined in Gerald A Gladstein, ‘Understanding Empathy: Integrating Counseling, Developmental, and Social Psychology Perspectives’ (1983) 30 *Journal of Counseling Psychology* 467, 468.

³² Winick, above n 6, 1069.

³³ *Ibid.*

experientially as well as intellectually a world very unlike [their] own,³⁴ sympathy conflates the feelings of a judge with the feelings of the participant. This is reflected in the Greek origin of the word sympathy — *sympatheia*, meaning to suffer together. Little states that '[s]ince sympathy suggests an affinity between the sympathizing judge and the object of [their] sympathy, the risk arises that pity will blind the judge, rendering [them] less able to evaluate unfamiliar perspectives.'³⁵ For a problem-solving court judge, empathy is a powerful communicative tool, but sympathy is counterproductive. Whilst in common parlance we may view the ability to sympathise as a desirable human trait, in the judicial context, where independence and impartiality are paramount, it is a problematic emotion for a judge to experience.

When a problem-solving court judge establishes an empathic bond with a participant, it does not mean that the judge consequently supports or favours that participant. Boulle correctly notes that '[e]mpathy does not signify agreement, nor does it amount to sympathy with, or compassion for, another. It involves convincing a person that the listener has entered their world of perceptions, if only temporarily.'³⁶ Understood in this light, 'sympathy is an emotion, [whereas] empathy is a way of acquiring an emotion.'³⁷ Judicial partiality and bias can be the subtle and unfortunate consequences of a problem-solving court judge who remains unaware of the personal impact a participant's story is having upon them. When a problem-solving court judge attempts to identify with the emotional needs and wants that underpin criminal offending, there is a level of interaction that is different from ordinary conversation.³⁸ DeMayo suggests that '[e]ncouraging [a participant] to go beyond objectively stated positions to identify and address their private interests can result in the creation of an emotionally intimate atmosphere that includes the [judge] as a participant-observer.'³⁹ This intimate connection between judge and participant goes to the heart of problem-solving court methodology. It represents the active use of judicial authority to make a positive impression on a participant. This will be particularly effective if the participant has never had a person in authority take an interest in their welfare.⁴⁰ When a problem-solving court judge employs an empathic approach in such an environment, the participant's words 'are more likely to touch a responsive chord, particularly when [the participant] describes

³⁴ Laura E Little, 'Adjudication and Emotion' (2002) 3 *Florida Coastal Law Journal* 205, 210.

³⁵ *Ibid* 209.

³⁶ Boulle, above n 29, 136. Alexander and Howieson also draw a clear distinction between the concepts of empathy and sympathy. They describe empathy as 'the ability to put [oneself] in the other negotiator's shoes and to understand where that person is coming from in terms of feelings', and sympathy as 'involv[ing] compassion and impl[y]ing agreement with the other person': Nadja Alexander and Jill Howieson, *Negotiation: Strategy Style Skills* (LexisNexis Butterworths, 2nd ed, 2010) 146.

³⁷ Justin D'Arms, 'Empathy and Evaluative Inquiry' (2000) 74 *Chicago-Kent Law Review* 1467, 1479.

³⁸ Robert A deMayo, 'Practical and Ethical Concerns in Divorce Mediation: Attending to Emotional Factors Affecting Mediator Judgment' (1996) 13 *Mediation Quarterly* 217, 220.

³⁹ *Ibid*. DeMayo defines a participant observer as 'one who actively participates in an event while making professional observations of those at the center of the action': at 219.

⁴⁰ King, 'Applying Therapeutic Jurisprudence from the Bench', above n 12, 173.

an emotion that resonates with the [judge's] personal experience.⁴¹ Empathy can easily become sympathy when the personal values, feelings and sensitivities of a judge are triggered by the plight of a participant in a problem-solving court. The judge may lose the separateness of his or her own identity in the empathic process,⁴² in an environment that heightens the potential for emotional reaction.

C *The Pygmalion Effect*

The Pygmalion effect⁴³ is premised on the idea that an individual will modify his or her behaviour and thought processes to align them with the expectations of a person in authority. It is related to the theory of self-fulfilling prophecies — the proposal that 'persistently held self-beliefs can become a reality.'⁴⁴ Formally defined, the Pygmalion effect

is a special case of [self-fulfilling prophecy] whereby a person's (perceiver's) expectations of another (target) are transferred to, or otherwise have an influence on, the target such that the target ultimately modifies his or her behavior or achievement level in conformity with the expectations.⁴⁵

This phenomenon transfers neatly across to the problem-solving court context. In simple terms, it suggests that a problem-solving court judge with positive regard and high expectations for a participant can induce the participant to act in a way that meets those expectations.⁴⁶ Problem-solving court judges can rely upon goal-setting processes and behavioural contracting to outline their expectations for a participant. To help a participant meet those goals, a judge can boost the participant's self-esteem through positive language, expressed confidence in the ability of the participant and praise when the participant succeeds (and even sometimes when they fail). Makkai and Braithwaite suggest that praise in such an environment can have 'cognitive effects on individuals through nurturing law-abiding identities, building cognitive commitments to try harder, encouraging

⁴¹ DeMayo, above n 38, 219 (citations omitted).

⁴² Carl R Rogers and Barry Stevens, *Person to Person: The Problem of Being Human — A New Trend in Psychology* (Real People Press, 1967) 93.

⁴³ The Pygmalion effect takes its name from ancient Greek mythology. Pygmalion, a Cypriot king, carved a statue of the perfect woman out of ivory and named it Galatea. Through the strength of will and self-belief of the sculptor, and with the intervention of the goddess Venus, the statue then came to life: see D Brian McNatt, 'Ancient Pygmalion Joins Contemporary Management: A Meta-Analysis of the Result' (2000) 85 *Journal of Applied Psychology* 314, 314.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Michael King, when discussing strategies for judging in a problem-solving court, highlights the value of a judge having positive expectations of participants:

Low performance levels of repeat offenders may be due in part to the courts' and justice system's low expectations of them.

If a solution-focused judicial officer has high but not unrealistic expectations of participants and uses strategies demonstrating those expectations, it is likely to enhance the participant's performance in the court program.

Michael S King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009) 162.

individuals who face adversity not to give up ... and nurturing belief in oneself.⁴⁷

Whilst other theories relating to self-belief and self-fulfilling prophecies highlight the impact of expectation upon performance, the Pygmalion effect uniquely highlights ‘the impact that the expectations of persons who are in positions of authority have on the self-expectations and performance of those with whom they interact.’⁴⁸ McNatt suggests that the magnitude of Pygmalion effect that may be realised is linked to the previous achievement and self-expectancy levels of an individual.⁴⁹ Psychological literature suggests that the positive influence and expectations of a judge will produce a greater Pygmalion effect for individuals who are low achievers with limited self-efficacy⁵⁰ — and, to crudely generalise for a moment, some problem-solving court participants do possess such characteristics. Brockner’s work on behavioural plasticity theory posits that self-esteem and susceptibility to external influence are inversely related.⁵¹ If a problem-solving court judge gives credence to these theories, they are in a unique position to ‘build up’ the confidence and efficacy of individuals. Their positive external influences, exercised in an affirming problem-solving environment, have great potential to positively impact upon participants, particularly if the participants suffer from low self-esteem.

The Pygmalion effect does have a negative psychological counterpart and problem-solving court judges need to be aware of this phenomenon. The Golem effect exists where low expectations from an authority figure result in low performances of the target.⁵² It is not difficult to conceive of a scenario where a problem-solving court judge becomes frustrated with a participant and feels like giving up. In that situation, the warmth and supportive climate of the court may be lessened, the participant may be afforded less time and participation in the process and the verbal and non-verbal feedback of the judge may trend towards the negative (or ambivalent). Even well-intending judges may fall foul of the Golem effect. By consistently setting low and easily achievable goals for a participant, a judge may not be promoting meaningful change and rehabilitation. The participant may come to believe that the judge’s modest goal-setting represents the modest expectations that the judge holds for the participant’s future. The trick for problem-solving court judges is to establish a ‘good read’ of their target — to have high hopes and set high targets for participants, without setting them up to fail.

This Part has suggested that problem-solving court judges who provide opportunities for catharsis and understand the importance of empathy and the Pygmalion effect are more likely to aid in the meaningful rehabilitation of a problem-

⁴⁷ Toni Makkai and John Braithwaite, ‘Praise, Pride and Corporate Compliance’ (1993) 21 *International Journal of the Sociology of Law* 73, 74.

⁴⁸ McNatt, above n 43, 315.

⁴⁹ *Ibid* 316.

⁵⁰ See generally *ibid*.

⁵¹ See Joel Brockner, *Self-Esteem at Work: Research, Theory and Practice* (Lexington Books, 1988).

⁵² McNatt, above n 43, 316.

solving court participant. The difficulty with these approaches is that they leave a judge open to allegations of partiality and bias. It is therefore important to examine how well-intended psychological processes can be sidetracked. There is a large body of psychoanalytic literature that has studied intrapsychic conflict,⁵³ and judges are beginning to understand the importance of this literature to their own problem-solving court practices.

III THE PITFALLS

A Countertransference

Academics have noted that just as the judge's personal qualities can impact upon a court participant, so too can the personal qualities of the participant influence the judge.⁵⁴ Countertransference has been identified as 'the term used to describe feelings evoked in the therapist by the client'.⁵⁵ It involves a counselor's 'reactions to the client that stem from the counselor's unresolved personal issues'.⁵⁶ According to Burwell-Pender and Halinski, countertransference arises 'when a counselor's past or present experiences are realized in his or her client's present situation'.⁵⁷ Whilst these descriptions are couched in terms of a doctor-patient relationship (or counsellor-client relationship), countertransference is a broader phenomenon with obvious relevance to the problem-solving court environment. There is danger in a problem-solving court judge transferring or externalising their feelings onto a participant, where those feelings stem from the judge's prior experiences and relationships.⁵⁸ A positive experience with a rehabilitated drug court participant may see a problem-solving court judge 'buy in' to their own ability to reform and rehabilitate other drug court participants, regardless of the participants' differing backgrounds and patterns of offending. Whilst this can be a positive, such an approach would be detrimental to an offender who had no interest in rehabilitation and was consistently flouting the conditions of their rehabilitation program. A participant in a domestic violence court suffering from depression may remind a judge of a family member's personal battle with mental health issues. As a result, the judge may offer opportunities to and downplay the indiscretions of one domestic violence court

⁵³ 'Intrapsychic or internal conflict is conflict that resides within the individual. Psychodynamic psychiatry, derived from psychoanalytic theory and technique, is the branch of psychiatry that studies the individual's internal states, particularly those dealing with conflict': Susan Fukushima, 'What You Bring to the Table: Transference and Countertransference in the Negotiation Process' (1999) 15 *Negotiation Journal* 169, 170.

⁵⁴ See especially Winick, above n 6, 1070. See also, in the lawyer-client context, Marjorie A Silver, 'Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship' (1999) 6 *Clinical Law Review* 259.

⁵⁵ Daniel Bowling and David Hoffman, 'Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation' (2000) 16 *Negotiation Journal* 5, 11.

⁵⁶ Lezlie Burwell-Pender and Kate H Halinski, 'Enhanced Awareness of Countertransference' (2008) 36(2) *Journal of Professional Counseling: Practice, Theory, and Research* 38, 41 (citations omitted).

⁵⁷ *Ibid* 41-2 (citations omitted).

⁵⁸ Winick, above n 6, 1070.

participant, where they would not do so for another. Viewed in this light, countertransference poses a significant threat to the independence and impartiality of a judicial officer. Silver colourfully and correctly notes that '[h]uman beings carry emotional baggage from early relationships and unload that baggage in the relationships they form later in life.'⁵⁹ Judges are human beings and that makes them imperfect creatures. Their thought processes and actions cannot help but be shaped by their relationships and life experiences, be they positive or negative. The trick for problem-solving court judges is to be present with the participant before them, but be cognisant as to how their personal issues may be colouring their current experience.

When a problem-solving court judge experiences positive countertransference, they may over-identify with the participant before them. The judge's own emotional, behavioural and cognitive experiences may see the judge positively identify with the predicament of a participant, leading to a loss of 'neutrality or objectivity, blurring boundaries, over-praising, [and] excessive care-taking'.⁶⁰ Inappropriate judicial behaviour is just as likely to eventuate from negative countertransference. Winick notes that problem-solving court judges will inevitably have had prior experiences with criminal offenders that produced negative and frustrated emotions. In regard to countertransference, he argues that

[t]he reemergence of these negative feelings engendered in prior relationships with offenders may produce a negative counter-transference toward the individual appearing in the problem solving court that might compromise the problem solving court judge's ability to play the therapeutic role contemplated.⁶¹

In light of the threat countertransference poses to judicial impartiality, it is important to note that it can be managed by an experienced problem-solving court judge. A distinction can be drawn between countertransference feelings and countertransference behaviours (that is, the internal and external reactions to countertransference).⁶² Whilst countertransference feelings may be an unavoidable by-product of the judge-client dyad,⁶³ an emotionally intelligent judge will rely upon their *emotional self-awareness* to detect signs of countertransference, and *emotional self-regulation* to prevent any countertransference behaviour that may compromise impartiality.

B *Emotional Contagion*

Emotional contagion is another psychological phenomenon that has the potential to impact upon a problem-solving court judge's impartiality. Emotional contagion 'refers to the tendency to catch (experience/express) another person's emotions.'⁶⁴ One formal definition of emotional contagion (sometimes referred

⁵⁹ Silver, above n 54, 263.

⁶⁰ Burwell-Pender and Halinski, above n 56, 42.

⁶¹ Winick, above n 6, 1070.

⁶² Burwell-Pender and Halinski, above n 56, 43.

⁶³ Ibid, using the phrase 'client-counselor dyad'.

⁶⁴ Masanori Kimura, Ikuo Daibo and Masao Yogo, 'The Study of Emotional Contagion from the Perspective of Interpersonal Relationships' (2008) 36 *Social Behavior and Personality* 27, 27

to as ‘primitive emotional contagion’ or ‘implicit emotional contagion’) describes the construct as ‘the tendency to automatically mimic and synchronize facial expressions, vocalizations, postures, and movements with those of another person and, consequently, to converge emotionally.’⁶⁵ Emotional contagion is a threat to judicial impartiality because a problem-solving court judge can be affected by the mood and emotions of a participant.⁶⁶ The difficulty for problem-solving court judges lies in combating the non-cognitive nature of the mechanism.⁶⁷ When a judge engages in empathy, they seek to *understand* a conflict from the perspective of a participant. If emotional contagion is present but undetected during the empathic process, a judge may begin to *feel* the same way as a participant about their struggles and rehabilitation. This may see a problem-solving court judge catch the optimism and excitement of a drug court participant on a good day. If the judge is influenced by this optimism and fails to ‘reality test’ the participant (with an eye on their previous program compliance), they may be setting the participant up for future failure. Optimistic goal-setting in such a situation may be entirely inappropriate if the participant is usually apathetic or even negative towards their prospects of rehabilitation. The emotional convergence between judge and participant may physically manifest itself in vocal, postural and expressional imitation. If the judge remains unaware of the emotional contagion, their own physical reciprocity of affective expression is bound to lead to perceptions of partiality.⁶⁸

A problem-solving court judge who applies the principles of the Pygmalion effect and engages in judicial empathy does not automatically suffer from countertransference and emotional contagion. This conclusion is supported by literature⁶⁹ that draws a sharp distinction between the ‘sophisticated cognitive forms of empathy and the primitive, basic process of emotional contagion’.⁷⁰ It is, however, suggested that problem-solving court judges who genuinely care about the participants before them, who seek to identify the emotional drivers of conflict and to address the problems that underlie offending, are vulnerable to emotional transfer and affect. Problem-solving court judges attempting to judge in a therapeutic key are potentially strong conduits for countertransference and emotional contagion. Even if judicial ‘empathy does not directly induce sympathy’ (through countertransference and emotional contagion), ‘it can certainly set

(emphasis altered), citing Elaine Hatfield, John T Cacioppo and Richard L Rapson, *Emotional Contagion* (Cambridge University Press, 1994) 7.

⁶⁵ Hatfield, Cacioppo and Rapson, above n 64, 5, quoting John G Carlson and Elaine Hatfield, *Psychology of Emotion* (Harcourt Brace Jovanovich College Publishers, 1992) 153–4.

⁶⁶ It is worth noting that the issue of emotional contagion in problem-solving courts should not always carry negative connotations. Skilful judges frequently take advantage of this phenomenon, in the hope that the positive and optimistic mood they bring to a court will ‘rub off’ on the parties. This form of emotional contagion would seem to have a lot in common with the Pygmalion effect.

⁶⁷ D’Arms, above n 37, 1483.

⁶⁸ See Tricia S Jones and Andrea Bodtker, ‘Mediating with Heart in Mind: Addressing Emotion in Mediation Practice’ (2001) 17 *Negotiation Journal* 217, 226.

⁶⁹ Hatfield, Cacioppo and Rapson, above n 64, 5.

⁷⁰ R William Doherty, ‘The Emotional Contagion Scale: A Measure of Individual Differences’ (1997) 21 *Journal of Nonverbal Behavior* 131, 132, citing *ibid.*

the stage for [judicial] sympathy',⁷¹ with partiality and bias playing the lead roles.

IV THE CONSTITUTIONALITY OF PROBLEM-SOLVING COURTS

One of the interesting tensions surrounding problem-solving courts is whether the functioning of these courts, and the powers exercisable by their constituent judges, are constitutionally valid. There is a danger that when judges attempt to employ therapeutic measures in the courtroom, their good intentions may blur the lines between the different branches of government.⁷² Freiberg notes that

[p]roactive judging, which requires the presiding officer to act as judge, mentor, supervisor and service broker threatens some of the core judicial values such as impartiality, fairness, certainty and the separation of powers between the judiciary and the executive. In what role do judges act when they seek or arrange the provision of services? Is due process met when judges both hand down sentences and supervise and deal with breaches of their orders?⁷³

To understand whether the proactive judging role in problem-solving courts is constitutional, an analysis of ch III of the *Commonwealth Constitution* is necessary. The layout of the *Constitution* reflects the separation of powers in Australia:⁷⁴ ch I establishes the Parliament, ch II establishes the executive government and, most importantly for present purposes, ch III establishes the judicature. To ensure that the doctrine of separation of powers achieves its desired outcome, there needs to exist both an *institutional* and *functional* separation of powers between the three branches of government.⁷⁵

The effect of ss 71 and 77(iii) of the *Constitution*, interpreted in light of *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*'),⁷⁶ is that Commonwealth judicial power can only be exercised by the High Court of Australia, federal courts created by the Commonwealth Parliament, and state and territory courts vested with federal jurisdiction. In addition, the Commonwealth Parliament cannot confer non-judicial power on these courts.⁷⁷ If a problem-solving court is created and given its jurisdiction by a piece of Commonwealth legislation, then (with certain possible exceptions) it may be unconstitutional for

⁷¹ D'Arms, above n 37, 1479.

⁷² Berman and Feinblatt, above n 1, 82.

⁷³ Freiberg, above n 2, 23 (citations omitted).

⁷⁴ See *R v Davidson* (1954) 90 CLR 353, 380–1 (Kitto J).

⁷⁵ See Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 8th ed, 1998) 19. Scott Guy writes in *Constitutional Law* (Pearson, 2010) 89:

The doctrine of the separation of powers asserts that governmental functions can be divided into three categories: legislative, executive and judicial; that the organs of government should be similarly divided into the legislative, executive and judiciary [(institutional separation)]; and that each institutional function of government should be exercised only by the relevant organ of government.

A strict separation of powers is not found in Australia, as our nation has adopted the Westminster system of government and adheres to the doctrine of responsible government.

⁷⁶ (1956) 94 CLR 254.

⁷⁷ *Ibid.*

a problem-solving court judge to exercise non-judicial power consistently with that legislation.⁷⁸

⁷⁸ In *ibid* 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (emphasis added), it was stated that ‘the *Constitution* does not allow the use of courts established by or under Chap III for the discharge of functions which are not in themselves part of the judicial power *and are not auxiliary or incidental thereto*.’ An argument could be mounted that the non-judicial powers exercisable by a problem-solving court are incidental to the effective exercise of their judicial power. The reality, however, is that the expansion of the judicial officer role in a problem-solving court — from adjudication to helping an offender solve underlying problems — may involve an exercise of non-judicial power that is more than simply ‘incidental’ to the exercise of judicial power. Much would turn on how broadly the courts are prepared to interpret the phrase ‘auxiliary or incidental thereto’. Whilst the phrase has been used in the *Boilermakers’ Case* (and the word ‘incidental’ in *R v Joske; Ex parte Shop Distributive and Allied Employees’ Association* (1976) 135 CLR 194), its scope has not been seriously considered. Additionally, it is suggested that when considering whether a conferral of non-judicial power under Commonwealth legislation is incidental to the exercise of judicial power, the same factors would be relevant irrespective of whether the conferral is on a federal or a state court: *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144. A second exception to the principle that the Commonwealth Parliament cannot confer non-judicial power on ch III courts lies in the ‘*persona designata*’ rule. In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 584 (Bowen CJ and Deane J) it was held that

[t]here is nothing in the *Constitution* which precludes a justice of the High Court or a judge of [the Federal Court] or any other court created by the Parliament under Ch III of the *Constitution* from, in his personal capacity, being appointed to an office involving the performance of administrative or executive functions including functions which are quasi judicial in their nature.

An argument could be made that when problem-solving court judges are exercising non-judicial power, they are acting in a personal capacity and not as ch III judges exercising non-ch III power. Much would depend on the nature of the power conferred on the judges by legislation. In *Hilton v Wells* (1985) 157 CLR 57, 73 (Gibbs CJ, Wilson and Dawson JJ) it was stated that

the nature of the power conferred is of importance in deciding whether the judge on whom it is conferred is intended to exercise it in his capacity as a judge or as a designated person. If the power is judicial, it is likely that it is intended to be exercisable by the judge by virtue of that character; if it is purely administrative, and not incidental to the exercise of judicial power, it is likely that it is intended to be exercised by the judge as a designated person.

It is important to acknowledge, however, that the power of a problem-solving court judge to exercise non-judicial power in their personal capacity would not be unlimited. Non-judicial functions cannot be conferred without the judge’s consent, and ‘no function can be conferred that is incompatible either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power (“the incompatibility condition”): *Grollo v Palmer* (1995) 184 CLR 348, 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ). Finally, it could be argued that a Commonwealth Parliament conferral of non-judicial power on a state problem-solving court may in some circumstances be seen as valid. In *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 178, Isaacs J stated that

some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. ... Other matters may be subject to no *a priori* exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government.

The High Court has acknowledged the difficulties in labelling certain powers as judicial and others as non-judicial (administrative or executive). As a result, the High Court has stated that when ‘classifying the nature of a power impugned, regard may properly be had to the repository entrusted by the Parliament to exercise the power’: *Pasini v United Mexican States* (2002) 209 CLR 246, 265 [53] (Kirby J), citing *Cominos v Cominos* (1972) 127 CLR 588, 599 (Gibbs J), 605–6 (Stephen J). A problem-solving court, vested with a (non) judicial power, would be expected to exercise that power in a court-like fashion. It is possible that the High Court would uphold the power of Parliament to confer non-judicial powers on problem-solving courts ‘that, “chameleon like”, took their character from the repository in question’: *Pasini v United Mexican States* (2002) 209 CLR 246, 267 [59] (Kirby J) (citations omitted).

These arguments are all perhaps academic. Whether by accident or design, almost every problem-solving court in Australia is established by state legislation. Given the wider scope of

The ability of state courts to exercise judicial and/or non-judicial power is subtly different to that of federal courts. The principal reason for this is that there is no constitutional requirement for separation of judicial power at the state level.⁷⁹ Castan notes that:

The *Commonwealth Constitution* ... makes no mention of the judicial power of the states or territories, and only refers to the state courts as potential holders of federal jurisdiction ... Thus, the assumption was made that the *Commonwealth Constitution* enforced no limits on the state Parliaments' conferrals of power on state courts; judicial power can be vested in non-judicial bodies, and state courts could be vested with mixed judicial and non-judicial powers, as the *Boilermakers'* principles did not apply.⁸⁰

In the case of *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')⁸¹ this assumption was altered and a majority of the High Court held that the conferral of non-judicial power on a state court may be incompatible with the role of a state court as a repository of federal judicial power.⁸² To state it another way,

state legislatures to invest their courts with non-judicial powers (with limitations discussed below), many of the problems surrounding Commonwealth Parliament conferrals of non-judicial power on ch III courts can be neatly sidestepped.

⁷⁹ *Peacock v Newtown Marrickville and General Co-Operative Building Society No 4 Ltd* (1943) 67 CLR 25; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *City of Collingwood v Victoria [No 2]* [1994] 1 VR 652; *Gilbertson v South Australia* [1978] AC 772; *Nicholas v Western Australia* [1972] WAR 168.

⁸⁰ Melissa Castan, *Constitutional Law* (Pearson, 2008) 139.

⁸¹ (1996) 189 CLR 51.

⁸² *Kable* had been convicted of the manslaughter of his wife. While in custody, it was alleged that he had sent a series of threatening letters through the mail. Section 5 of the *Community Protection Act 1994* (NSW) provided that the Supreme Court of New South Wales could make an order of continued detention (for up to six months) if it was satisfied that *Kable* was more likely than not to commit a serious act of violence and it was appropriate for the protection of a particular person, or the community in general, to keep him in custody: *ibid* 62–4 (Brennan CJ). A majority of the High Court held that the legislation was incompatible with ch III of the *Constitution*: at 106–7 (Gaudron J), 124 (McHugh J), 127–8 (Gummow J). Gaudron J captured the essence of the High Court's reasoning when she stated at 106–7 that

[t]he power purportedly conferred by s 5(1) of the Act requires the making of an order, if the conditions specified in s 5(1) are satisfied, depriving an individual of his liberty, not because he has breached any law, whether civil or criminal, but because an opinion is formed, on the basis of material which does not necessarily constitute evidence admissible in legal proceedings, that he 'is more likely than not' (s 5(1)(a)) to breach a law by committing a serious act of violence as defined in s 4 of the Act. That is the antithesis of the judicial process ... It is not a power that is properly characterised as a judicial function, notwithstanding that it is purportedly conferred on a court and its exercise is conditioned in terms usually associated with the judicial process.

Moreover, when regard is had to the precise nature of the function purportedly conferred by s 5(1), the matters to be taken into account in its exercise and its contrariety to what is ordinarily involved in the judicial process, the effect of s 5(1) is, in my view, to compromise the integrity of the Supreme Court of New South Wales and, because that court is not simply a State court but a court which also exists to exercise the judicial power of the Commonwealth, it also has the effect of compromising the integrity of the judicial system brought into existence by Ch III of the *Constitution*.

The author is not positioning Gaudron J's judgment as the leading decision or primary articulation of *Kable* principles. McHugh J and Gummow J agreed on the result for similar reasons: at 124 (McHugh J), 127–8 (Gummow J). Toohey J was also in the majority, but limited the *Kable* incompatibility test to circumstances where the state court was actually exercising federal jurisdiction: at 96, 98–9. Brennan CJ and Dawson J were in dissent.

ch III of the *Constitution* ‘impliedly prevents the Parliament of a State from conferring powers on the Supreme Court of a State which are repugnant to or inconsistent with the exercise by it of the judicial power of the Commonwealth.’⁸³ The thought process behind this restriction on state legislative power is related to the integrated judicial system (the ‘autochthonous expedient’)⁸⁴ that is provided by ch III of the *Constitution*. Gaudron J explains that

State courts, when exercising federal jurisdiction ‘are part of the Australian judicial system created by Ch III of the *Constitution* and, in that sense and on that account, they have a role and existence which transcends their status as courts of the States’ ... [this] directs the conclusion that Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth.⁸⁵

The post-*Kable* consequence for problem-solving courts created by state legislatures is that they may be vested with non-judicial power, to the extent that the exercise of those powers is not repugnant to or incompatible with the exercise of Commonwealth judicial power (‘*Kable* incompatibility test’). This would be the case even if the problem-solving court was not actually exercising federal jurisdiction.⁸⁶

A series of post-*Kable* High Court decisions has helped to clarify the *Kable* incompatibility test and its reach into the state sphere. A narrow (and perhaps artificial) reading of *Kable* may have suggested that the *Kable* principles only applied to the Supreme Courts of the states. However, the case of *North Australian Aboriginal Legal Aid Service Inc v Bradley* (‘*Bradley*’)⁸⁷ established that ch III of the *Constitution* also limits the power of territory courts to exercise non-judicial power, as they too are a repository of Commonwealth judicial power. *Bradley* involved a constitutional challenge to the appointment of a Chief Magistrate in the Northern Territory pursuant to the *Magistrates Act 1977* (NT). The *Magistrates Act* was challenged on the basis that it ‘authorised the appointment of a Chief Magistrate to age sixty-five but with remuneration fixed only for the first two years of the term.’⁸⁸ In rejecting this challenge and dismissing the appeal, the High Court accepted the proposition that ‘it is implicit in the terms of Ch III of the *Constitution*, and necessary for the preservation of that structure,

⁸³ *Kable* (1996) 189 CLR 51, 100 (Gaudron J).

⁸⁴ *Boilermakers’ Case* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

⁸⁵ *Kable* (1996) 189 CLR 51, 103. Similar sentiments are expressed by McHugh J at 114–15.

⁸⁶ Toohey J (who was part of the majority in *Kable*) limited the incompatibility test to a situation where a state court was actually exercising federal jurisdiction. His judgment therefore differs from the rest of the majority. His Honour stated at *ibid* 94 (emphasis added) (citations omitted) that

[t]o the extent that they are invested with federal jurisdiction, the federal courts and the courts of the States exercise a common jurisdiction. It follows that *in the exercise of its federal jurisdiction* a State court may not act in a manner which is incompatible with Ch III of the *Commonwealth Constitution*.

⁸⁷ (2004) 218 CLR 146.

⁸⁸ *Ibid* 161 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal.⁸⁹

The immediate effect of *Bradley* upon problem-solving courts is pronounced. If a problem-solving court is operating under the auspice of a state or territory Magistrates Court, then the *Kable* restrictions on the exercise of non-judicial power will apply to that court. Even if a problem-solving court is not acting as a division of the Magistrates, District or Supreme Court of a state or territory, if it is a possible receptacle for Commonwealth judicial power, then its powers are limited by the *Kable* incompatibility test.⁹⁰ The drug courts in Queensland provide a good example. Under s 9(1) of the *Drug Court Act 2000* (Qld) the Governor in Council may declare one or more Magistrates Courts to be drug courts. Section 10(2) declares that nothing within the Act prevents a drug court magistrate exercising the jurisdiction of a Magistrates Court at any time. As a drug court can exercise the powers of the Magistrates Court and the Magistrates Court can exercise the judicial powers of the Commonwealth, it would appear that this problem-solving court is subject to the *Kable* incompatibility test. A similar outcome would result from the New South Wales drug court legislation. Section 24 of the *Drug Court Act 1998* (NSW) grants the New South Wales Drug Court the criminal jurisdiction of the District Court and all of the functions of that Court exercisable in relation to its criminal jurisdiction, the criminal jurisdiction of a Local Court and all of the functions of such a court exercisable in relation to its criminal jurisdiction, and any other jurisdiction conferred on it by another Act of Parliament. The *Kable* incompatibility test applies to the New South Wales Drug Court, as the criminal jurisdiction of both the District Court and the Local Court provides for the exercise of the judicial power of the Commonwealth.

In the same year that *Bradley* was decided, the High Court delivered a decision that further clarified the *Kable* incompatibility test. In *Fardon v Attorney-General (Qld)* (*'Fardon'*)⁹¹ the High Court considered the application of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), an Act that authorised the continued detention of a sex offender (without their being charged for an offence) on the basis that they constituted a serious danger to the community. Fardon was initially imprisoned for committing rape, and 20 days after his release he committed further offences of rape, sodomy and assault occasioning bodily harm.⁹² Fardon appealed against the constitutionality of the *Dangerous*

⁸⁹ Ibid 163.

⁹⁰ This point was made emphatically by Kirby J in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 560 [208]–[209]:

Moreover, the *Kable* principle is implied from a unique provision which empowers the Federal Parliament to make laws investing 'any court of a State' with 'federal jurisdiction'.

If the *Constitution* had meant to restrict integration to investing only the State Supreme Courts with federal jurisdiction, it could have said so. Instead, the constituent parts of the integrated Judicature were extended to include other courts, indeed 'any' court of a State. If, therefore, a tribunal within a State qualifies as a 'court' and is able to be invested with federal jurisdiction, it must meet the *Kable* requirements.

⁹¹ (2004) 223 CLR 575.

⁹² Ibid 587 (Gleeson CJ).

Prisoners (Sexual Offenders) Act on the basis that it authorised the Supreme Court to exercise judicial power inconsistently with ch III of the *Constitution*.⁹³ The High Court upheld the validity of the Act, as it ‘did not impair the *institutional integrity* of the Supreme Court of Queensland in such a fashion as to be incompatible with the Court’s constitutional position as a potential repository of federal judicial power.’⁹⁴ As all members of the majority (Gleeson CJ, McHugh J, Gummow J, Hayne J, and Callinan and Heydon JJ) relied upon ‘institutional integrity’ as the new touchstone for applying the *Kable* incompatibility test⁹⁵ and the main indicia behind institutional integrity have been identified as independence and impartiality,⁹⁶ the criterion for the operation of the *Kable* test has been narrowed.⁹⁷

As a result, we can conclude that problem-solving courts enacted by state legislation are not subject to the same limitations regarding non-judicial power as federal courts. The constitutional validity of these courts will only be in issue when they exercise non-judicial power in a way that compromises the independence and impartiality of the court as a possible repository of federal judicial power. These sentiments were echoed most recently by the High Court in *South Australia v Totani* (‘*Totani*’).⁹⁸ French CJ reiterated that

⁹³ Counsel for Fardon outlined at *ibid* 577 (S R Southwood QC) (during argument) why the legislation should have been held to be unconstitutional:

Sections 8 and 13 [of the Act] are repugnant to Ch III because they purport to give the Court power to order: the civil commitment to prison; detention in prison on the basis of a risk of re-offending in the future in the absence of a crime, a trial and a conviction; imprisonment without application of established principles relating to civil commitment for mental illness; punishment of a class of prisoner selected by the legislature in a manner inconsistent with the essential character of a court and the nature of judicial power; and to subject a prisoner to double punishment for previous crimes.

⁹⁴ *Ibid* 576 (emphasis added). This quote is from the head note.

⁹⁵ *Ibid* 591 [15] (Gleeson CJ), 598 [35] (McHugh J), 614 [90], 617–18 [102] (Gummow J), 648 [198] (Hayne J), 652–3 [212]–[213] (Callinan and Heydon JJ).

⁹⁶ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ) (citations omitted):

But as is recognised in *Kable, Fardon ... and ... Bradley*, the relevant principle is one which hinges upon maintenance of the defining characteristics of a ‘court’, or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to ‘institutional integrity’ alludes ...

An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.

⁹⁷ Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks’ Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 8th ed, 2009) 1150.

⁹⁸ (2010) 242 CLR 1. *Totani* involved a constitutional challenge against the validity of s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA). That section provided: ‘The Court must, on application by the Commissioner, make a control order against a person (the defendant) if the Court is satisfied that the defendant is a member of a declared organisation’ (see *Totani* (2010) 242 CLR 1, 24 [17] (French CJ)). On application by the Commissioner of Police under s 8 of the Act, the Attorney-General, under s 10(1), could make a declaration in respect of an organisation if satisfied that members of the organisation associate to commit serious crimes that threaten public safety (see *Totani* at 23 [12] (French CJ)). On 14 May 2009, the Attorney-General for South Australia made a declaration regarding the Finks Motorcycle Club. On 25 May and 4 June 2009, the Commissioner applied for control orders against Donald Hudson and Sandro Totani, alleging each was a member of the club: at 21–2 [6] (French CJ). The effect of a control order was to place restrictions upon the freedom of association and communication of the person

[t]he absence of an entrenched doctrine of separation of powers under the constitutions of the States at Federation and thereafter does not detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of the courts of the States. Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.⁹⁹

The Chief Justice made explicit that this ‘ample allowance for diversity in the constitution and organisation of [state] courts’ existed despite *Kable* limitations on state legislative power and those decisions which further refine the *Kable* incompatibility test.¹⁰⁰

The difficulty in assessing the constitutional validity of problem-solving courts is magnified by the High Court’s equivocal stance as to when the independence and impartiality of a state court will be undermined.¹⁰¹ The concern has been expressed that these aspirational terms are difficult to precisely define and that as a result questions remain as to ‘just how independent and impartial a State court must remain to avoid offending Chapter III [of the *Constitution*].’¹⁰² Gleeson CJ held in *Bradley* that ‘there is no single ideal model of judicial independence, personal or institutional’,¹⁰³ and it is submitted in this article that there should not be. The characteristics of judicial independence and impartiality do not exist in a vacuum; they take their flavour from forum and context. Judicial independence and impartiality may look very different in a problem-solving court compared to in a criminal trial in a Supreme Court, but that does not mean that the institutional integrity of a problem-solving court is in any way lessened. Indeed, the High Court commented in *Forge v Australian Securities and Investments Commission* (*Forge*)¹⁰⁴ that ‘judicial independence and impartiality may be ensured by a number of different mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court.’¹⁰⁵

to whom it applies and others who might wish to communicate with them: at 22 [7] (French CJ). Gummow J, who was in the majority of the High Court, held at 67 [149] that

the practical operation of s 14(1) of the Act is to enlist a court of a State ... in the implementation of the legislative policy stated in s 4 by an adjudicative process in which the Magistrates Court is called upon effectively to act at the behest of the Attorney-General to an impermissible degree, and thereby to act in a fashion incompatible with the proper discharge of its federal judicial responsibilities and with its institutional integrity.

⁹⁹ *Totani* (2010) 242 CLR 1, 45 [66].

¹⁰⁰ *Ibid* 46 [68].

¹⁰¹ Brendan Gogarty and Benedict Bartl, ‘Tying *Kable* Down: The Uncertainty about the Independence and Impartiality of State Courts Following *Kable v DPP (NSW)* and Why It Matters’ (2009) 32 *University of New South Wales Law Journal* 75, 76.

¹⁰² *Ibid* 92.

¹⁰³ (2004) 218 CLR 146, 152.

¹⁰⁴ (2006) 228 CLR 45.

¹⁰⁵ *Ibid* 82 (Gummow, Hayne and Crennan JJ).

If independence relates to the constitutional situation of the judiciary¹⁰⁶ and is conceived as the separation of the judiciary from the executive and legislature, then attention will be drawn to problem-solving courts and their cooperative efforts with the community and the executive. Whilst these collaborative efforts between the judiciary and executive increase the *potential* for the independence of problem-solving courts to be compromised, it does not logically follow that the institutional integrity of the problem-solving court *will* be compromised.

It is suggested that problem-solving courts are shielded (to a large degree) from criticism of their independence where they possess an impartial judicial appointment process and where their judges have security of tenure and remuneration and are provided with adequate legal training.¹⁰⁷ It is worth reinforcing the point that in *Fardon* and *Baker v The Queen* (*'Baker'*)¹⁰⁸ the *Kable* incompatibility doctrine did not apply, as in those cases a 'sufficient quantum of judicial independence and impartiality was maintained by providing for judicial discretion and due process under the legislation.'¹⁰⁹ When problem-solving court judges operate in a therapeutic manner and when they seek or arrange the provision of services to aid a participant's rehabilitation, they are not usurping the role of the executive. They are not masquerading as 'do gooder' amateur psychiatrists, driven by 'pop-psychopharmacology' and 'fuzzy-headed notions' of therapeutic jurisprudence.¹¹⁰ In many ways, problem-solving court judges are facilitators, not service providers. As King highlights, in a problem-solving court context 'the Executive and community agencies — not the court — provide support and treatment services while the court has a supervisory role over the participants.'¹¹¹ It is perhaps for this reason that there has been, as King notes, a change of rhetoric from 'problem-solving courts' to 'solution-focused courts'.¹¹² The term 'problem-solving court' suggests that it is the court that helps a participant solve the underlying problems that have led to their offending. Critics have seized on these semantics to suggest that problem-solving court judges are 'robed therapeutic administrators',¹¹³ operating under the cloak of pseudoscience, attempting to solve psychological problems in which they have no experience. These criticisms are simply (albeit eloquently) overstated. The reality is that a problem-solving court judge is a *facilitator* of positive behav-

¹⁰⁶ Michael S King, 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' (2010) 19 *Journal of Judicial Administration* 133, 148, citing Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2nd ed, 2007) 5–6.

¹⁰⁷ See Gogarty and Bartl, above n 101, 99.

¹⁰⁸ (2004) 223 CLR 513.

¹⁰⁹ Gogarty and Bartl, above n 101, 91 n 96.

¹¹⁰ Morris B Hoffman, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1440, 1479.

¹¹¹ King, 'Judging, Judicial Values and Judicial Conduct', above n 106, 146.

¹¹² *Ibid* 137. See also Michael S King, 'Should Problem Solving Courts Be Solution-Focused Courts?' (2011) 80 *Revista Juridica Universidad de Puerto Rico* (forthcoming) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1725022>.

¹¹³ Hoffman, above n 110, 1527.

ioural change, rather than an institution that makes the change.¹¹⁴ Catharsis, empathy and the Pygmalion effect all facilitate the possibility of positive behavioural change and rehabilitation of a participant. They are not treatments ‘administered’ to a participant to help them solve their problems.

Impartiality is likewise a judicial value that must be assessed within the working context of a problem-solving court. The Australian *Guide to Judicial Conduct* lists the broad indicia of judicial impartiality: ‘to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides.’¹¹⁵ These indicia of impartiality sit uncomfortably with the functioning of problem-solving courts, which have active judicial involvement as a defining feature.¹¹⁶ There is no doubt that increased judicial interaction with a participant heightens the possibility of partiality. Direct conversations involving positive body language and warmth of expression, reality-testing based on theories of addiction and mental illness, and collaboratively worked strategies designed to promote self-efficacy and offender self-determination all place stressors on the impartiality of the problem-solving court judge. In the context of drug courts, Hoffman notes that

it is de rigeur that drug courts cannot operate successfully without the ‘cooperation’ of the judge, prosecutors, police, sheriffs, and defense lawyers. The very instant this ‘cooperation’ is achieved, the protections inherent in the adversary nature of our system are put at risk.¹¹⁷

There is no doubt that Hoffman is correct in this regard and that the collaborative rather than adversarial nature of problem-solving courts places stressors upon the impartiality of a problem-solving court judge. That acknowledged, collaboration and the quantum of judicial involvement in a proceeding are, of themselves, a weak measure of judicial impartiality. King pertinently suggests that

giving undue emphasis to the quantum of judicial intervention in considering impartiality is to ignore the multiplicity of situations where judicial involvement is needed. Although excessive judicial involvement in any proceeding has the potential to not only raise issues as to impartiality but to compromise the very purpose of the proceedings, it is the nature of the particular proceedings

¹¹⁴ King, *Solution-Focused Judging Bench Book*, above n 46, 4 (citations omitted) notes that in solution-focused judging

the court is more a facilitator and a change agent than an institution that makes the change. The court sees participants as being able to engage in the natural change process themselves, with the support of the judicial officer and the court team. Indeed, the fact that much positive behavioural change in individuals with problems occurs without the intervention of authorities or treatment agencies supports the proposition that change is natural.

¹¹⁵ Australian Institute of Judicial Administration, above n 106, 3. It is interesting to note that this guide, when discussing the issue of impartiality, notes that it is not a blanket concept that can be precisely defined and adhered to in all contexts:

The application of the requirement of impartiality is always subject to considerations of necessity. This may mean that in a small court, or in a court that sits in an isolated location, or in a court such as the High Court where members have a constitutional responsibility to sit, the significance of [impartiality issues] will differ.

¹¹⁶ Berman and Feinblatt, above n 1, 79.

¹¹⁷ Hoffman, above n 110, 1524.

and the nature of the involvement that are important in considering whether impartiality and other judicial values have been affected.¹¹⁸

To state it another way, judicial impartiality should be assessed according to the quality of involvement and intervention rather than the quantum.

Given the above discussion on the *Kable* incompatibility doctrine and issues of independence and impartiality, this article suggests that generally,¹¹⁹ there are good reasons which militate against the conclusion that problem-solving courts operate unconstitutionally:

- 1 The separation of powers between executive, legislature and judiciary is not strictly provided for under state constitutions.
- 2 The High Court has acknowledged that state legislatures may vest state courts with non-judicial powers and that ‘the full panoply of principle emanating from *Boilermakers* and the separation of judicial power in Ch III applicable at the federal level, does not apply at State level.’¹²⁰ At a very base level, state problem-solving courts can exercise a degree of non-judicial power.
- 3 Sections 4AAA and 4AAB of the *Crimes Act 1914* (Cth) specifically envisage that functions and powers which are neither judicial, nor incidental to the exercise of judicial power, may be conferred on judges and magistrates in the states and territories.¹²¹
- 4 The refined *Kable* incompatibility test, revolving around notions of institutional integrity, independence and impartiality, sets a high threshold for the invalidation of state legislation.¹²² McHugh J noted in *Fardon*:

The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court’s capacity to exercise federal jurisdiction impartially and according to federal law.¹²³

This seems to suggest that only in an extreme case would the exercise of non-judicial power by a problem-solving court be sufficient to compromise the institutional integrity of that court. The exercise of non-judicial power would need to be of such a nature (and magnitude) that a state judge or

¹¹⁸ King, ‘Judging, Judicial Values and Judicial Conduct’, above n 106, 150.

¹¹⁹ It is difficult to draw sweeping conclusions about the constitutionality of different problem-solving courts without considering the enacting legislation which governs the jurisdiction and powers of specific courts. Despite this acknowledgment, point number 5 below suggests that most enacting legislation will be drafted in a way that is cognisant of the *Kable* incompatibility doctrine and its reach into the state sphere.

¹²⁰ George Winterton et al, *Australian Federal Constitutional Law: Commentary and Materials* (Lawbook, 2nd ed, 2007) 1162.

¹²¹ Whilst this section has never been contemplated in respect of problem-solving courts, its broad wording could potentially cover the conferral of non-judicial power on judges and magistrates in the states and territories.

¹²² Winterton et al, above n 120, 1159.

¹²³ (2004) 223 CLR 575, 600–1 [41].

magistrate could no longer be said to be acting in an independent or impartial manner.

- 5 It is unlikely that state legislatures would enact legislation (whether intentionally or by accident) that compromises the institutional integrity of their own courts.¹²⁴ As Wheeler points out, ‘careful legislative drafting and design will do much to shield a state law from a successful *Kable* doctrine challenge’.¹²⁵ This means that unless legislation creating a problem-solving court overtly directs or authorises the use of non-judicial power in a way that compromises the independence and/or impartiality of the court, it will be difficult to prove that the legislation is unconstitutional.¹²⁶ In light of the High Court decision in *Kirk v Industrial Court of New South Wales* (*‘Kirk’*),¹²⁷ careful legislative drafting must avoid any ‘attempt to remove or limit the supervisory jurisdiction of the [state] supreme courts’ with respect to jurisdictional error.¹²⁸
- 6 No challenge to the constitutionality of problem-solving courts has been made in any other country in the world. The idea of problem-solving courts grew out of the United States in the late 1980s¹²⁹ and it is significant that no constitutional challenge to problem-solving courts has been made in America, given that it (too) has constitutionalised the separation of powers and its Bill of Rights (Sixth Amendment of the *United States Constitution*)

¹²⁴ Ibid 601 [43].

¹²⁵ Fiona Wheeler, ‘The *Kable* Doctrine and State Legislative Power over State Courts’ (2005) 20(2) *Australasian Parliamentary Review* 15, 25.

¹²⁶ The two recent cases that invoked the *Kable* doctrine, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 and *Totani* (2010) 242 CLR 1, are examples where the legislature directed/authorised the use of non-judicial power in a way that compromised the institutional integrity of the court and/or was repugnant to the judicial process.

¹²⁷ (2010) 239 CLR 531.

¹²⁸ Wendy Lacey, ‘*Kirk v Industrial Court of New South Wales*: Breathing Life into *Kable*’ (2010) 34 *Melbourne University Law Review* 641, 649. According to the majority in *Kirk* (2010) 239 CLR 531, 581 [99]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted):

the supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of ‘distorted positions’. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.

This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.

¹²⁹ King et al, above n 3, 138.

guarantees the right to a fair and impartial tribunal. There are currently more than 2000 problem-solving courts in the United States and '[a]ll State Chief Justices and the American Bar Association have endorsed the expansion of this form of justice.'¹³⁰

- 7 King et al argue that it is unlikely a constitutional challenge to problem-solving courts will be made, as such a challenge is not in the interests of either prosecution or defence:

The prosecution, being part of the executive, is unlikely to challenge a program the executive has had a part in establishing and maintaining. Further, the defendant is unlikely to challenge a program that, in many cases, is voluntary and/or involves the possibility of avoiding a prison term.¹³¹

- 8 Problem-solving courts are often concerned with offenders post-conviction and prior to sentence.¹³² Given that many problem-solving courts require a defendant to consent to departures from normal procedural fairness processes,¹³³ it is difficult to see how slight incursions into independence and impartiality (in this context) would damage the institutional integrity of the court to the extent that it was operating unconstitutionally.

It would not be misleading to suggest that since the decision in *Kable*, the High Court has applied the *Kable* incompatibility doctrine in a 'guarded and restrained way.'¹³⁴ The fact that Kirby J retired from the High Court in February 2009 could indicate that the doctrine will continue to apply infrequently (at least for the short term).¹³⁵ This is not to suggest that problem-solving courts have

¹³⁰ Ibid 142. The absence of a constitutional challenge to problem-solving courts in the United States may have much to do with its 'dynamic approach to the relationship between judicial and non-judicial realms': Guy, above n 75, 102. Guy states (emphasis in original) that the United States Supreme Court has emphasised that its 'principal objective is to protect against an *undue* or *excessive* concentration of power, rather than embracing an essentially rigid or strict separation between the three branches [of government]', citing *United States v Nixon*, 418 US 683 (1974) in support. That said, an argument has still been made in the American problem-solving court literature that the functioning of drug courts is in breach of the separation of powers doctrine: see Hoffman, above n 110, 1523–8. There is no doubt that the Australian High Court has taken an interest in the United States approach to separation of powers — the idea that 'it is legitimate for there to be *some* interference by one governmental branch into other branches to produce efficacious and more progressive governance': Guy, above n 75, 106 (emphasis in original). It could be argued that the decisions of the High Court in cases such as *Grollo v Palmer* (1995) 184 CLR 348 and *Hilton v Wells* (1985) 157 CLR 57 represent a more flexible and perhaps pragmatic approach to the relationship between judicial and non-judicial power in Australia. In such an environment, state legislation conferring modest non-judicial power on a problem-solving court may be seen as both 'constitutionally permissible and politically desirable ... [a move] required to respond to the increasing complexity of contemporary society': Guy, above n 75, 113 (making the point more broadly, without direct reference to problem-solving courts).

¹³¹ King et al, above n 3, 226.

¹³² Ibid 224.

¹³³ See, eg, *Drug Court Act 2000* (Qld) s 11.

¹³⁴ See Wheeler, above n 125, 22.

¹³⁵ Kirby J favoured a more expansive implementation of the *Kable* incompatibility doctrine as evidenced by his Honour's dissenting judgments in *Fardon* (2004) 223 CLR 575, *Baker* (2004) 223 CLR 513 and *Forge* (2006) 228 CLR 45. The *Kable* doctrine has only been applied twice by the High Court since 1996: see *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *Totani* (2010) 242 CLR 1. These cases have prompted academic commentary which suggests a possible resurgence of the *Kable* principle: see, eg,

‘free rein’ in the exercise of their powers. Indeed, Spigelman CJ in the New South Wales Court of Appeal decision of *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* stated that ‘[t]he reasoning of the majority in *Kable* was not confined to the *character* of a function or power conferred by a state law. Some of the reasoning encompasses the *manner* in which a function or power is to be performed.’¹³⁶ Whilst the High Court in cases like *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* has been quick to acknowledge ‘the impossibility of making an exhaustive statement of the minimum characteristics of such an independent and impartial tribunal’,¹³⁷ it did observe that ‘the conditions which must exist for courts in this country to administer justice according to law are inconsistent with some forms of external control of those courts appropriate to the exercise of authority by public officials and administrators.’¹³⁸

This means that an appellate court reviewing the constitutionality of a problem-solving court can consider the extent to which state legislation vests non-judicial power in that problem-solving court. In addition, an appellate court can consider the manner and magnitude in which that non-judicial power is actually being exercised. If the therapeutic and non-judicial activities of the problem-solving court judge impact (or appear to impact) upon their independence and impartiality, then the functioning of the problem-solving court is susceptible to the *Kable* incompatibility test.¹³⁹ If the problem-solving court judge fuses the role of the judiciary and executive to such an extent that the institutional integrity of the court is distorted, then again the functioning of the problem-solving court becomes susceptible to the *Kable* incompatibility test.¹⁴⁰ In reality, any constitu-

Ayowande A McCunn, ‘The Resurgence of the *Kable* Principle: *International Finance Trust Company*’ (2010) 17 *James Cook University Law Review* 110; Elizabeth Southwood, ‘Comment: Extending the *Kable* Doctrine: *South Australia v Totani*’ (2011) 22 *Public Law Review* 89.

¹³⁶ (2000) 181 ALR 694, 698 (emphasis in original).

¹³⁷ (2008) 234 CLR 532, 553 [10] (Gummow, Hayne, Heydon and Kiefel JJ), citing *Bradley* (2004) 218 CLR 146, 163 [30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

¹³⁸ *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 553 [10] (Gummow, Hayne, Heydon and Kiefel JJ).

¹³⁹ In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 [81], Gaudron J stated:

Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system. Because State courts are part of the Australian judicial system created by Ch III of the *Constitution* and may be invested with the judicial power of the Commonwealth, the *Constitution* also requires, in accordance with *Kable* ... that, for the maintenance of public confidence, they be constituted by persons who are impartial and who appear to be impartial even when exercising non-federal jurisdiction.

¹⁴⁰ The extent to which a problem-solving court judge can exercise non-judicial functions usually associated with the executive does not give rise to a precise answer. In his address at the 17th Annual Conference of the Australian Institute of Judicial Administration, Sir Anthony Mason stated that

to treat court adjudication as if it is something less than the main game, in the context of Ch III courts under the *Constitution*, is to turn constitutional tradition on its head.

Courts are courts; they are not general service providers who cater for ‘clients’ or ‘customers’ rather than litigants. And if courts describe themselves otherwise than as courts, they run the risk that their ‘clients and their ‘customers’ will regard them, correctly in my view, as something inferior to a court.

tional challenge based on *Kable* principles is likely to focus on the *legislation* that establishes the problem-solving court (and confers on it jurisdiction and functions) rather than on the individual exercise of jurisdiction and functions. Whilst legislation creating problem-solving courts often confers broad powers on a problem-solving court judge, there is no problem-solving court legislation in Australia that curtails the discretionary decision-making power of a judge. Given this constitutionally benign legislative backdrop, the words of Callinan and Heydon JJ in *Fardon* are apposite:

So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the *Constitution*.¹⁴¹

Despite the constitutional focus on legislation which may erode the institutional integrity of state courts, much still falls on the shoulders of an individual problem-solving court judge to ensure that the processes they administer and the behaviour they present are consistent with the aspirational (if imprecise) ideals of independence and impartiality. In a problem-solving court where a therapeutic relationship between judge and participant develops, ‘bond[s] [result] from [the] interplay among the participant’s own pleasure with [their] success, [their] resulting gratitude toward the judge, and the judge’s pride in the participant’s progress.’¹⁴² The irony is that these personal relationships between judge and participant make problem-solving courts so effective, whilst at the same time placing pressure on the impartiality of the judge. Little argues that the

trick for therapeutic jurisprudence is to make possible this success, while at the same time discouraging a judge from demonstrating partiality toward the participant that can threaten the judge’s independence, credibility, and fairness toward others affected by [their] adjudicatory role.¹⁴³

To this end, the principles of therapeutic jurisprudence can be evoked to consider the role emotional intelligence might play in the performance of a problem-solving court judge.

Sir Anthony Mason, ‘The Future of Adversarial Justice’ in Michael O’Connell (ed), *Conference Proceedings: 17th Annual Conference of the Australian Institute of Judicial Administration — A Collection of Papers* (Australian Institute of Judicial Administration, 2000) 23, 29.

¹⁴¹ (2004) 223 CLR 575, 656 [219].

¹⁴² Little, above n 34, 212.

¹⁴³ *Ibid.*

V EMOTIONAL INTELLIGENCE¹⁴⁴

Given the intersubjective dynamics¹⁴⁵ of a problem-solving court, where the judge and participant are in a relationship of mutual influence, it follows that a judge must intelligently attend to his or her *own* emotions in order to maximise the chance of participant rehabilitation and positive behavioural change. Weisinger defines emotional intelligence as ‘the intelligent use of emotions’¹⁴⁶ — an individual develops awareness of their emotions and uses them to beneficially aid their thinking and behaviour. Mayer, Caruso and Salovey suggest that

[e]motional intelligence refers to an ability to recognize the meanings of emotions and their relationships, and to reason and problem-solve on the basis of them. Emotional intelligence is involved in the capacity to perceive emotions, assimilate emotion-related feelings, understand the information of those emotions, and manage them.¹⁴⁷

A *Emotional Self-Awareness*

The qualities of emotional self-awareness and emotional self-regulation are key indicators of intrapersonal intelligence, one of the ten multiple intelligences identified by psychologist Howard Gardner.¹⁴⁸ Emotional self-awareness as an intrapersonal skill involves becoming consciously aware of emotions and understanding the factors that drive one’s emotional response.¹⁴⁹ An individual no longer passively experiences emotions; they attempt to identify emotions consciously, as opposed to experiencing them subconsciously.¹⁵⁰ It has been suggested in this article that empathy (a desirable judicial quality) can easily translate into sympathy (perhaps a desirable human quality, but an undesirable judicial quality) when the personal emotions of the problem-solving court judge are stimulated by the circumstances of a case. Self-awareness on the part of the problem-solving court judge can make these affective experiences conscious and self-regulation can stop these emotional triggers from being acted upon in a way that is detrimental to the fair hearing of a participant. Emotional self-awareness involves a problem-solving court judge being aware of both their mood and their

¹⁴⁴ This Part draws upon previous work of the author in a different context. See James Duffy, ‘Empathy, Neutrality and Emotional Intelligence: A Balancing Act for the Emotional Einstein’ (2010) 10 *Queensland University of Technology Law and Justice Journal* 44.

¹⁴⁵ See Joseph Natterson, *Beyond Countertransference: The Therapist’s Subjectivity in the Therapeutic Process* (Jason Aronson, 1991) 29 (emphasis altered), where the author notes that in all human dyadic impingements, each person influences the other, no matter how obscure this process may be. Both parties are coequal contributors. Their respective fantasies and desires, values and goals, are engaged in continuous struggle, through which both persons are continually changing. This intersubjective experience should be regarded as the basic precondition for any theoretical understanding of psychotherapeutic process.

¹⁴⁶ Hendrie Weisinger, *Emotional Intelligence at Work: The Untapped Edge for Success* (Jossey-Bass, 1998) xvi.

¹⁴⁷ John D Mayer, David R Caruso and Peter Salovey, ‘Emotional Intelligence Meets Traditional Standards for an Intelligence’ (1999) 27 *Intelligence* 267, 267 (citations omitted).

¹⁴⁸ See Howard Gardner, *Intelligence Reframed: Multiple Intelligences for the 21st Century* (Basic Books, 1999) 43.

¹⁴⁹ Daniel Goleman, *Working with Emotional Intelligence* (Bantam Books, 1998) 55.

¹⁵⁰ *Ibid* 55–6.

feelings about that mood.¹⁵¹ If a judge is unable to process their emotions with respect to the topic of the hearing and a participant's background, involvement in crime and progress towards rehabilitation, then the emotional persuasion of the judge may inadvertently manifest itself in biased words, interventions and behaviours. If a problem-solving court judge remains unaware of their own feelings, and does not appreciate the intrapersonal and interpersonal drivers behind their emotional cognition, they are not in a position to assess the impartiality of their processes. If emotional intelligence is conceived of as a staged process, Goleman correctly premises the importance of (judicial) self-awareness as a first step when — in the words of Krone and Dougherty — he contends that the 'personal emotional competency of self-awareness contributes to self-regulation that, in turn, undergirds the development of social skills'¹⁵² (such as conflict management).

Self-awareness as an intrapersonal intelligence becomes more involved with an increased understanding of meta-emotions (the way we feel about having certain emotions — emotions about emotions).¹⁵³ If a judge cannot identify how they feel about their current emotional state, there will be no inquiry as to whether those feelings or emotions are appropriate for the particular context. Take the previous example of a domestic violence court participant who suffers from depression.¹⁵⁴ This participant reminded the problem-solving court judge of a personal family member's battle with mental health issues. If the judge is feeling sadness and sympathy for the participant, an inquiry into their meta-emotions should signal that these feelings may be inappropriate in the context of the hearing and may lead to party perceptions of favouritism and bias. Ideally a judge would be aware of the feelings aroused in them by a participant (emotion), assess whether those emotions are appropriate for the situation they are in (meta-emotion) and choose to act, or refrain from acting, on those emotions (self-regulation). If a problem-solving court judge is unaware of their meta-emotions, they will see no need for cognitive or behavioural self-regulation, and this can seriously jeopardise perceptions of impartiality.

Rapport is strengthened if a problem-solving court judge is able to use an empathic approach to accurately perceive the meta-emotions of a participant and commence dialogue around these meta-emotions. Importantly, Jones and Bodtker note that differences in meta-emotions can form the basis of misunderstanding and conflict.¹⁵⁵ They highlight this problem with an example: 'I would be ashamed about being angry, so I assume that you also would/should be ashamed about being angry'.¹⁵⁶ This form of 'egocentric attribution bias' may mean that when a problem-solving court judge discovers that the participant does

¹⁵¹ Daniel Goleman, *Emotional Intelligence* (Bantam Books, 1995) 47.

¹⁵² Kathy Krone and Debbie Dougherty, 'Book Review: *Working with Emotional Intelligence* by Daniel Goleman' (1999) 13 *Management Communication Quarterly* 337, 338, citing Goleman, above n 149.

¹⁵³ Jones and Bodtker, above n 68, 239.

¹⁵⁴ See above Part III(A).

¹⁵⁵ Jones and Bodtker, above n 68, 240.

¹⁵⁶ *Ibid.*

not share his or her meta-emotions, the judge is 'likely to make negative judgments and attributions about the other which lead to or exacerbate conflict.'¹⁵⁷ It will be detrimental for a problem-solving court judge to assume that their own meta-emotions are shared by the participant with whom they are attempting to establish a rapport. Misinterpretation of meta-emotion can lead to frustration on behalf of the participant and a loss of trust in the problem-solving court judge. Whilst a participant may feel that their side of the dispute has been heard, a judge's misinterpretation of a participant's meta-emotions may leave a participant feeling that they have not been understood. This is consistent with psychological writing on empathy, which explains effective empathy in terms of cognitive and affective components.¹⁵⁸ If a judge is able to accurately perceive (and communicate about) a participant's meta-emotion(s), this can lead to powerful and authentic empathy — an 'important step toward emotional perspective taking, which is strongly linked to the use of more socially competent, collaborative conflict management.'¹⁵⁹

Finally, judicial self-awareness has a role to play in circumventing the effect of countertransference and emotional contagion. The presence of countertransference can see a judge's emotional state altered by a participant who triggers the recall of previous experiences of the judge. Self-awareness of emotion will allow a problem-solving court judge to detect the effects of countertransference, whilst self-awareness of meta-emotion or meta-cognition will prompt a judge to consider the appropriateness of the countertransference-induced emotions. The conflation of a judge's previous personal issues and experiences with the present circumstances of a problem-solving court participant can be managed. It would certainly be inappropriate to stigmatise the occurrence of countertransference, as it is a construct that occurs automatically (often subconsciously) and unavoidably due to the judge–client dyad.¹⁶⁰ Countertransference behaviours, however, are not an unavoidable by-product of countertransference feelings, and this is how the construct of countertransference can be managed. It is only through emotional self-awareness that countertransference feelings can be detected and countertransference behaviours can be avoided.

Emotional self-awareness can ensure that the independence and impartiality of a problem-solving court judge is not adversely affected by emotional contagion. Given the speed with which emotional contagion can occur, a sudden change in mood or outlook can suggest to a judge that they are being influenced by a party. If a problem-solving court participant has a positive mindset, and is smiling and charismatic, then judges may find themselves feeling upbeat about the participant's prospects. If a participant is lethargic, non-communicative and frowning, a judge may become frustrated, angry and unmotivated to help the participant. Self-awareness as an element of intrapersonal intelligence promotes emotional introspection. As the afferent feedback generated by a judge in response to

¹⁵⁷ *Ibid.*

¹⁵⁸ Gladstein, above n 31, 468.

¹⁵⁹ Jones and Bodtker, above n 68, 241 (citations omitted).

¹⁶⁰ See Burwell-Pender and Halinski, above n 56, 43.

‘elementary motor mimicry’¹⁶¹ can be so quick, a problem-solving court judge may be able to name their felt emotions, but have no idea why they are being experienced. In this fashion, underdeveloped or non-existent meta-emotions can signal a warning to a judge that their emotional reactions are not proactive — they are a reactive response that has been ‘caught’ from another party. Ultimately, because of the speed at which emotional contagion occurs,¹⁶² self-awareness will need to be coupled with ongoing self-assessment throughout a problem-solving court hearing. It is simply not possible for a judge to diagnose and manage emotional contagion as it occurs. Emotional contagion is present to differing degrees in a myriad of contexts (including problem-solving courts) and more often than not, its effect is benign. As a psychological phenomenon, it does have the potential to influence the impartiality of a judge and to that extent, the necessity of self awareness as a precursor to emotional self-regulation is evident.

B *Emotional Self-Regulation*

If emotional self-awareness involves a conscious step towards understanding what emotions are being experienced, then emotional self-regulation represents the skill of regulating behaviour based upon those emotions.¹⁶³ This form of intrapersonal intelligence can prevent certain feelings from being acted upon in a way that undermines the fairness of a problem-solving court hearing. Emotional self-regulation can help to maintain the appearance of impartiality whilst a judge develops rapport and strives to be emotionally honest and present with a participant.¹⁶⁴ At an intrapersonal level, what this really boils down to for a judge is the ability to identify the emotions they are experiencing and decide consciously to act or not act upon them. Schreier argues that ‘[t]he most salient aspect of emotional regulation competence is that one exercises conscious choice, to the extent possible, as to how, whether, and when to express (in contrast to feel) an emotion.’¹⁶⁵ The importance of emotional self-awareness is again emphasised because a judge cannot consciously act, or refrain from acting, upon emotions to which they are oblivious.

¹⁶¹ R William Doherty, ‘Emotional Contagion and Social Judgment’ (1998) 22 *Motivation and Emotion* 187, 187.

¹⁶² Hatfield, Cacioppo and Rapson ‘have argued that the process of emotional contagion is much too automatic, fast and fleeting, and too ubiquitous to be accounted for by [overly] cognitive, associative, or self-perception processes’: Doherty, ‘The Emotional Contagion Scale’, above n 70, 131, citing Elaine Hatfield, John T Cacioppo and Richard L Rapson, ‘Primitive Emotional Contagion’ in Margaret S Clark (ed), *Emotion and Social Behavior* (Sage, 1992) 151 and Hatfield, Cacioppo and Rapson, above n 64. It is therefore cautiously suggested that a problem-solving court judge may become aware of the affects of emotional contagion, by coupling strong emotional self-awareness with continuous emotional self-assessment. Whilst emotional contagion can occur extremely quickly, automatically and often unconsciously, the fact that it physically manifests itself through the mimicking and synchronisation of expressions, vocalisations, postures and movements suggests that it can be independently diagnosed.

¹⁶³ See Lori S Schreier, ‘Emotional Intelligence and Mediation Training’ (2002) 20 *Conflict Resolution Quarterly* 99, 103.

¹⁶⁴ *Ibid* 101.

¹⁶⁵ *Ibid* 103.

A judge's ability to emotionally self-regulate is a learnable competency; the '[s]kill [of] understanding that inner emotional state[s] need not correspond to outer expression, both in oneself and in others'.¹⁶⁶ Writers such as Lynn reinforce staged models of emotional intelligence where skills such as self-awareness and self-control, empathy, social expertness (building relationships and using emotions positively in relationships), personal influence and mastery of purpose and vision are all identified.¹⁶⁷ Importantly, Lynn views these competencies as interrelated and necessary precursors to each other.¹⁶⁸ This means that a problem-solving court judge will not be able to properly empathise or establish meaningful relationships and rapport with a participant, and their degree of personal influence with a participant will be diminished, if (as a starting point) they are not emotionally aware and are unable to emotionally self-regulate. Emotional self-awareness and emotional self-regulation are the cornerstones of emotional intelligence theory, and therapeutic judging techniques incorporating catharsis, empathy or the Pygmalion effect will be unsuccessful in their absence.

VI CONCLUSION

Problem-solving court judges employing the principles of therapeutic jurisprudence are engaging in a 'court-craft'¹⁶⁹ that is vastly different to that of a judge in the traditional court hierarchy. Applying tough legal sanctions to criminal offending may appease the punitive wishes of the wider public, but by dealing with the story behind a participant's offending, problem-solving court judges can begin to facilitate *social* solutions to *social* problems.¹⁷⁰ Judges working in this non-traditional role must possess both strong interpersonal and intrapersonal skills. These skills are essential if the judge is to make active use of his or her judicial authority to facilitate positive behavioural change with a participant. Collaboration with the executive and cooperation with the different actors in a problem-solving court places the spotlight on the independent and impartial administration of these courts. This article has highlighted that problem-solving courts are susceptible to constitutional challenge if their lack of independence and impartiality is sufficient to compromise their institutional integrity. Problem-solving court judges must ensure that their active and very personal involvement with participants does not compromise their individual behaviour and the processes they must administer. In the words of former High Court Chief Justice Sir Harry Gibbs, 'the independence and authority of the judiciary, upon which

¹⁶⁶ Carolyn Saarni, 'Emotional Competence: A Developmental Perspective' in Reuven Bar-On and James D A Parker (eds), *The Handbook of Emotional Intelligence: Theory, Development, Assessment, and Application at Home, School, and in the Workplace* (Jossey-Bass, 2000) 68, 77.

¹⁶⁷ Adele B Lynn, *The EQ Difference: A Powerful Plan for Putting Emotional Intelligence to Work* (AMACOM, 2005), 39–40, cited in King et al, above n 3, 243–4.

¹⁶⁸ Lynn, above n 167, 40.

¹⁶⁹ Jelena Popovic, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2002) 20(2) *Law in Context* 121, 128.

¹⁷⁰ Freiberg, above n 2, 9.

the maintenance of a just and free society so largely depends, in the end has no more secure protection than the strength of the judges themselves'.¹⁷¹

¹⁷¹ Sir Harry Gibbs, 'Foreword' in Justice B H McPherson, *The Supreme Court of Queensland 1859–1960: History Jurisdiction Procedure* (Butterworths, 1989) iii.