THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT: A COMPARATIVE PERSPECTIVE

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When Alexis de Tocqueville and Gustave de Beaumont came to the United States in 1831, their ostensible reason for making the trip was to observe America's new prisons, which were regarded at the time as among the very best in the world.[1] We know from Tocqueville's famous work, *Democracy in America*,[2] that he was interested in much more than America's prisons. However, Tocqueville and Beaumont were faithful to their commission from the French government to carefully look at America's prison system. One example of their diligence in this regard is the fact that Tocqueville individually interviewed 63 prisoners at the Cherry Hill prison in Philadelphia and, upon their return to France, Beaumont and Tocqueville submitted a detailed and substantive report on the American penitentiary system, which included their views on the applicability of the American model to the French system. The young French commissioners were largely impressed with what they observed in the US penitentiaries. However, they did not see the American model as easily transferable to France. They recognised that France had a very different political system and a very different culture. Therefore, they did not suppose that 'France could suddenly undertake a general revolution in its prison system', but they did think that 'one may reasonably ask for step-by-step reforms in our prison system.'[3]

Interestingly, Tocqueville came to a similar conclusion regarding the transferability to France of American democratic practices and ideas more generally. While he thought there was much to be admired about American democracy, he also recognised that the US was a unique country, with distinctive mores and a particular history of origin. Because these factors significantly shape and determine legal practices and political institutions — and because France had a very different history and culture — he regarded himself as 'very far from thinking that we ought to follow the example of American democracy.'[4] Nevertheless, he did think France would benefit from 'gradually introducing democratic institutions into France' and that imparting to citizens 'those ideas and sentiments which first prepare them for freedom' was an important part of the process.[5]

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1 Hugh Brogan, *Alexis de Tocqueville: A Life* (Yale University Press, 2006) 143.

2 Alexis de Tocqueville, *Democracy in America* (Vintage Books, 1945) vol 1.

3 Brogan, above n 1, 233. See also Gustave de Beaumont and Alexis de Tocqueville, *On the Penitentiary System in the United States and its Application to France* (Southern University Press, 1964) 132–3.

4 de Tocqueville, above n 2, 342.

5 Ibid.

Thus, we see in Tocqueville's analysis three important insights as it concerns the borrowing of laws and political practices from one country to another. First, laws and legal and political institutions are not autonomous; they are directly related to a country's unique history, culture and environment. Second, because of this, it is neither easy nor always desirable to directly transfer laws from one country to another. Third, inasmuch as one country wishes to implement the laws of another, the process must be done carefully, gradually, step-by-step.

Tocqueville's analysis is relevant to making sense of the international problem-solving court movement in several respects. Here too visitors from other countries have come to observe an aspect of the American criminal justice system and have sought to transplant it to the legal systems of their home countries. One finds in observing this process that cultural and historical differences shape and determine the form the programs assume in different legal-cultural contexts and that the countries outside of the US believe (as did Tocqueville) that the processes of borrowing should be undertaken gradually, carefully and judiciously.

In my book, *Legal Accents, Legal Borrowing*,[6] I examine the process by which problem-solving courts, first developed in the US, have been transplanted to five other countries: England, Scotland, Ireland, Australia and Canada.[7] Along with Tocqueville, I see law and legal programs as inextricably linked to culture. The notion of a legal accent, in fact, is derived from a conception of law given to us by the cultural anthropologist, Clifford Geertz, who once wrote that the law has 'a distinctive manner of imagining the real.'[8] That is, the law tells the story about a particular culture, a particular people. The distinctiveness of the law, as such, provides a glimpse into the peculiar social realities of a given society. 'Law', moreover, according to Geertz, is local knowledge: 'local not just to place, time, class, and variety of issue, but as to accent.'[9] The notion of accent is especially helpful as it concerns a comparison among six English-speaking countries. Just

6 James L Nolan, Jr, *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement* (Princeton University Press, 2009).

7 For a fuller discussion of this international movement see Nolan, above n 6. Much of the discussion in this article is drawn from work on this larger book project. Between 1999 and 2008, I visited more than 50 different problem-solving courts around the world (some on multiple occasions) and made at least three research trips to each of the six countries represented in the study. At the various courts, I typically interviewed the judge, magistrate, or sheriff presiding over the court; witnessed court programs in operation; and spoke with other staff associated with the courts, including probation officers, treatment providers, lawyers, program directors, victim support personnel, medical doctors, evaluators and, in the case of aboriginal courts, elders and peacemakers. In addition to interviewing individuals working directly with the courts, in several instances I also interviewed government officials responsible for the initiation of specialty courts. I also attended a number of national and international conferences on problem-solving courts (including conferences in Canada, Australia, Scotland and the United States), where I talked with problem-solving court officials, attended relevant lectures and panel discussions and collected materials put out by the various courts. Un-cited quotes or references in this article are taken from statements made at local problem-solving court sites (that is, either in interviews with the author, or in statements made during court sessions, community meetings, court launchings, pre-court meetings, or treatment sessions) or at regional, national, or international conferences (that is, either in interviews with the author, or in statements made during speeches or panel discussions).

8 Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (BasicBooks, 1983) 184.

9 Ibid 215.

as the distinctive accents of a shared language often indicate very profound cultural and regional differences, so the varying accents of legal initiatives — such as problem-solving courts — within a shared common law tradition reflect significant political, cultural and historical differences.

As it concerns problem-solving courts, I found — particularly in the early years of the international movement — a clear difference between the US and the five other countries considered in the study. Specifically, a comparison of the development of problem-solving courts internationally reveals an important difference between an American disposition characterised by enthusiasm, boldness and pragmatism and the contrasting penchant of the other countries toward moderation, deliberation and restraint.

I ENTHUSIASM

Consider first the character of the American courts, beginning with the defining quality of enthusiasm. A visit to an American problem-solving court or a discussion with an American problem-solving court judge often reveals a great deal of commitment to and personal investment in these programs. Judges are 'true believers', if you will, and they believe that what they are invested in is something of profound historical significance.[10] Not only are they committed to their own local court programs, but they are often proselytisers, wishing to spread the 'good news' of problem-solving courts to their immediate judicial colleagues and quite literally to the rest of the world. Greg Berman, of the Center for Court Innovation, reflects the attitude of many in this community when he urges advocates to look 'for every possible opportunity — PSAs, op-eds, public events — to spread the gospel of problem-solving justice.'[11] Elsewhere, Berman and his colleague John Feinblatt again convey a religious-like commitment to problem-solving courts when they write of the 'conversion narrative experienced by many problem-solving judges'[12] and when they admonish supporters to 'begin to preach to the unconverted.'[13]

The title of an edited collection, put out by the Center for Court Innovation, refers to the movement as no less than 'a problem-solving revolution'.[14] Using similar language, a judge (and one of the leaders in the problem-solving court

10 For example, former Drug Czar Barry McCaffrey has said of drug courts, in particular: 'The establishment of drug courts, coupled with [their] judicial leadership, constitutes one of the most monumental changes in social justice in this country since WWII', quoted in National Association of Drug Court Professionals, 'Taking Drug Courts to Scale' (National Drug Court Month Field Kit, May 2007) 15.

11 Greg Berman, 'The Hardest Sell? Problem-Solving Justice and the Challenge of Statewide Implementation' (Think Piece, Center for Court Innovation, 2004) 5.

12 Greg Berman, 'Judges and Problem-Solving Courts' (Think Piece, Center for Court Innovation, 2002) 22.

13 Greg Berman and John Feinblatt, 'Problem-Solving Courts: A Brief Primer' (Think Piece, Center for Court Innovation, 2001) 15.

14 Greg Berman, Aubrey Fox and Robert V Wolf (eds), *A Problem-Solving Revolution: Making Change Happen in State Courts* (Center for Court Innovation, 2004).

movement) has described the development as 'nothing short of revolutionary.' 'What we are doing here', she said, 'is no less than a complete revolution in jurisprudence.' Another judge, who was instrumental in the establishment of Phoenix's mental health court, describes the problem-solving court movement as 'radical, revolutionary, the trend of the future.' 'It's the future of the law', he says. 'It's the future of justice.'

Judge Judith Kaye, another problem-solving court enthusiast, takes note of 'how energising a problem-solving court can be for judges'[15] and reports on the passionate commitment of judges presiding over New York's various problem-solving courts, even among those who were initially sceptical of these programs. For Kaye, 'these firsthand evaluations from people I respect are compelling evidence from the front lines of the value and effectiveness of these courts.'[16] Beyond citing the testimonies of individual judges, Kaye reports on her direct experiences visiting various problem-solving courts in New York. She recalls, for example, her attendance at a family treatment court graduation ceremony: 'there were a lot of happy tears — including mine.'[17]

US problem-solving court advocates have even surveyed judges and presented evidence that problem-solving court judges have much higher rates of job satisfaction and feel better about themselves working in such a context.[18] Judge Tauber, in presenting drug courts to an international audience in Scotland, highlighted judicial satisfaction as a selling feature of the courts. 'I've talked to hundreds of judges who have done this work', he said. 'I have not found a judge yet who has done this work for a significant period of time who hasn't said it is the most satisfying work that he has done in his career as a judge. I think that speaks volumes.' Judicial enthusiasm, as such, is viewed as an asset to the movement. Laurie Robinson, former Assistant Attorney-General in the US Department of Justice, even argues that it is a feature of the movement that should be fostered: 'The energy, enthusiasm, and optimism embedded in the burgeoning problem-solving courts movement is a significant asset right now for the nation's beleaguered justice system, one that should be … nurtured.'[19]

It is a feature of the American variety of problem-solving courts that individuals in the importing countries take note of, sometimes with trepidation. An Irish judge, for example, observes that some might 'be frightened by the great American enthusiasm and the almost evangelical approach' to problem-solving courts. This judge also believes that it is a feature of the American approach that importing countries are not likely to embrace. He observes that problem-solving

15 Greg Berman (ed), 'What is a Traditional Judge Anyway?' (2000) 84(2) *Judicature* 78, 82.

16 Judith S Kaye, 'Delivering Justice Today: A Problem-Solving Approach' (2004) 22 *Yale Law and Policy Review* 125, 139.

17 Judith S Kaye, 'Making the Case for Hands-On Court', *Newsweek* (New York), 11 October 1999, 13.

18 Peggy Fulton Hora and Deborah J Chase, 'Judicial Satisfaction when Judging in a Therapeutic Key' (2004) 7(1) *Contemporary Issues in Law* 8, 18.

19 Laurie O Robinson, 'Commentary on Candace McCoy' (2003) 40 *American Criminal Law Review* 1535, 1539.

court advocates in the US 'might be slightly naive to assume that our sense of enthusiasm would match their sense of enthusiasm.'

II BOLDNESS

A second and related feature of the American version of these courts is a certain boldness in the actions of problem-solving court professionals, particularly the judges. In her book *A Nation Under Lawyers*,[20] Mary Ann Glendon identifies two types of judges: what she calls classical judges and romantic judges. The classical judge is characterised by 'modesty, impartiality, restraint and interpretive skill', whereas the romantic judge is 'bold, creative, compassionate, result-oriented and liberated from legal technicalities.'[21] While these are clearly ideal types in the Weberian sense, it is fairly safe to say that American problem-solving court judges tend toward the romantic, while judges in the five other regions tend toward the classical.

Judicial boldness, one of the defining qualities of Glendon's romantic judge, is apparent in the words and actions of American problem-solving court judges. American problem-solving court judges are activist judges. They are the leaders of the movement, directing initiatives both inside and outside the courtroom. As it concerns their actions in the courtroom, judges are bold in the sense that they recognise that the format of problem-solving courts affords them a great deal of power and discretion (beyond what they would have in a regular criminal court) and they are not afraid to use this increased power to 'solve the problems' of the individuals who come before them.[22]

American judges are aware of the influence that is theirs in such a novel judicial context. Judge Judy Harris Kluger, who served as a community court judge in Midtown, reflects on the kind of authority given to the problem-solving court judge:

> I've found that we as judges have enormous psychological power over the people in front of us. It's not even coercive power. It's really the power of an authority figure and a role model. You have power not only over that person, but over their family in the audience, over all the people sitting in that courtroom.[23]

20 Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (Farrar, Straus and Giroux, 1994).

21 Ibid 152.

22 Berman and Feinblatt, above n 13, 8; see also Berman and Feinblatt, above n 12, 5. In a section titled 'Using the Power of Judges', they write: 'Problem-solving courts make aggressive use of a largely untapped resource: the power of judges to promote compliance with court orders. Instead of passing off cases after rendering a sentence — to other judges, to probation departments, to community-based treatment programs or, in all too many cases, to no one at all — judges at problem-solving courts stay involved with each case over the long haul.'

23 Judy Harris Kluger, 'Judicial Roundtable: Reflections of Problem-Court Justices' (2000) 72(5) *New York State Bar Association Journal* 11.

Judge Rosalyn Richter, another former Midtown community court judge, agrees with Kluger; she recalls a meeting at the Midtown community court in which 'defendants said that having a judge monitor what they were doing affected them almost as much as having a sentence over their heads.'[24]

Florida judge Cindy Lederman reflects more specifically on the substance of the new form of judicial monitoring. As a problem-solving court judge, says Lederman, 'I'm not sitting back and watching the parties and ruling. I'm making comments. I'm encouraging. I'm making judgment calls. I'm getting very involved with families. I'm making clinical decisions to some extent, with the advice of experts.'[25] It is a role, she says that requires 'courage' and a willingness to move beyond the role of 'referee or spectator' and become a 'participant in the process.'[26] Given this format, Lederman believes that the wrong type of judge could be a 'disaster.'[27] That is, she concedes that potential harm could come from the increased discretion given to the judge in the context of problem-solving courts. Contrasting her role with that of a judge in a conventional criminal court, Lederman acknowledges: 'So I have much greater opportunities, I think, to harm someone than I would if I just sat there, listened and said guilty or not guilty.'[28]

As reflected in Lederman's comments, the kind of judicial monitoring found in problem-solving courts is often characterised by a personal and informal style of engagement. Physical contact between judge and clients is not uncommon. Not a few American judges are comfortable with offering hugs. American judges, in fact, engage in a range of unusual judicial behaviours, including allowing clients to visit their chambers, arriving in court wearing acupuncture needles instead of the traditional black robe and promising judicial cartwheels for 90 consecutive days of counselling. Thus, in a number of ways, problem-solving court judges boldly step beyond the parameters of their traditional roles. As one American problem-solving court judge put it: 'We are the judges who get to colour outside the lines.'

Not all judges in new American specialty courts think that these boundaries should be so eagerly transgressed. A domestic violence court judge in Minnesota believes the 'judiciary is backsliding in terms of what are appropriate boundaries.' In reference to some of the actions of other problem-solving court judges, she says, 'I do not want to be a chemical dependency counsellor. I don't want to run AA meetings in my courtroom and sing 'Kumbaya'.' She makes clear that she is not opposed to therapy: 'I'm all for therapy. I'm all for treatment.' It is just that in her view, it is not the role of the judiciary to function in a therapeutic capacity. As she puts it: 'Judges need to be judges and need to have a certain distance from what's going on … If we get too involved in cases, how do we fairly and impartially dispense justice? How do we maintain our credibility?'

24 Rosalyn Richter, 'Judicial Roundtable: Reflections of Problem-Court Justices' (2000) 72(5) *New York State Bar Association Journal* 11.

25 Berman (ed), above n 15, 82.

26 Ibid 80.

27 Ibid.

28 Ibid 82.

She adds that she is 'all for society solving its problems', but she does not believe 'the courts should be in the mix of trying to solve society's problems.' In spite of her personal reservations about a therapeutic, problem-solving orientation she recognises that she is 'clearly in the minority', that she goes 'against the tide' and that, irrespective of her views, 'the train has left the station.'

Most judges involved in the movement, thus, are more willing to colour outside the lines — which involves, among other things, employing a wider range of judicial options for dealing with clients. Freed from the sometimes frustrating constraints of mandatory minimum sentence guidelines, problem-solving court judges now have greater discretion. They can, as we have seen, impose a variety of sanctions, including community service, increased attendance at 12-step meetings, involvement in 'quality of life' groups, compulsory participation in anger management classes and short periods in jail. As community court judge Rosalyn Richter explains, 'problem-solving courts have broadened the judicial horizon' and have 'given judges more choices than [they] have ever had.'[29] Comparatively, the US is unique in the variety of sanctions that judges can impose in the context of problem-solving courts.

Given the missionary manner in which problem-solving court judges have advanced the movement and acquired these expanded powers, it is not surprising that problem-solving court judges — particularly the movement's early leaders — were described as 'mavericks … dynamic individuals … free-thinking, charismatic, and well-connected', for whom 'salesmanship' was a defining quality of their leadership.[30] In keeping with this, Michael Shrunk, a district attorney in Portland, Oregon, seeks a certain type of person when recruiting new problem-solving court judges, as commissioned by his presiding judge. Among other qualities, Shrunk looks for a 'risk-taker', someone who is 'non-traditional', a 'proactive judge rather than a reactive judge.'[31]

The proactive nature of problem-solving court judges finds expression outside the courtroom as well.[32] In this sense, problem-solving judges are a far cry from the classical judge Tocqueville observed in early nineteenth-century America. Tocqueville identified as one of the 'essential' characteristics of the American judge that 'he cannot act until the cause has been duly brought before the court.' Tocqueville described American judicial power as 'devoid of action', in that the judge 'does not pursue criminals, hunt out wrongs, or examine evidence of its own

29 Richter, above n 24, 11.

30 Aubrey Fox and Robert V Wolf, 'The Future of Drug Courts: How States are Mainstreaming the Drug Court Model' (Think Piece, Center for Court Innovation, 2004) 5–6.

31 Berman (ed), above n 15, 81.

32 Berman, above n 12, 5, 24, observes: 'Problem-solving courts tend not to confine their reformist energies to the four walls of the courthouse. In addition to re-examining individual case outcomes, problem-solving courts also seek to achieve broader goals in the community at large, using their prestige to affect [sic] change outside the courtroom without compromising the integrity of the judicial process within the courtroom … Outside the courthouse walls, problem-solving courts have asked judges to reach out to communities, to broker relations with government and non-profit agencies and to think through the real-life impacts of judicial decisions. As judges have performed this work, they have called into question the independence and neutrality of the judiciary and even the separation of powers doctrine'.

accord.' Such action would 'do violence to the passive nature of his authority.'[33] The problem-solving court judge, in direct contrast, is full of action. Community court judges, for example, regularly meet with local residents and are often very visible in the community. Consider Alex Calabrese's description of his role as judge of the Red Hook Community Justice Center:

> I enjoy walking through Red Hook and talking with the residents about their concerns. I make a point of attending community meetings on a regular basis to hear residents' concerns about specific crime issues, such as drug dealing or prostitution at certain locations … The meetings keep me informed about every problem location.[34]

Calabrese tells the story of the time when he was the 'grand marshal of a local waterfront arts festival' and a local resident 'whispered in [his] ear' about a candy store that was selling illegal drugs. With this information, he set in motion law-enforcement action that led to the eventual closing of the 'candy' store.[35]

Drug court judges are also activist judges. Their actions outside the courtroom have included visiting clients at their place of work, lobbying Congress for funding, pulling together various resources to support the court's treatment and education programs, promoting the courts via the local media and even raising funds to support their local programs.[36] The latter is an activity that judges in other countries find particularly worrying.

National conferences are an important forum for the encouragement of such judicial activism. In reference to the infectious enthusiasm of the annual National Association of Drug Court Professionals ('NADCP') meetings, for example, Jeffrey Tauber recalls, '[w]hen [people] came to our conference, they felt they were part of a movement, something larger than themselves … People felt so high after that, they'd go home and slay dragons.'[37] Judge Peggy Hora likewise speaks of conferences as places where 'those who see the law as a healing instrument … attempt to bring new sheep into the fold.'[38] As such comments indicate, the American problem-solving court movement has been largely a grassroots effort led by practitioners within the judicial branch. The other countries (as we will see) have, in contrast, tended to rely on and wait for the initiation and direction of the other branches of government.

The increasing boldness of problem-solving court judges is arguably reflective of a more widespread reality in the American judiciary. In the area of civil litigation, for example, observers note the manner in which new managerial practices give more power and authority to judges, thus fostering a more inquisitorial than

33 de Tocqueville, above n 2, 103–4.

34 Alex Calabrese, 'Neighborhood Justice: The Red Hook Community Justice Center' (2002) 41 *The Judges' Journal* 7, 9.

35 Ibid.

36 James L Nolan Jr, *Reinventing Justice: The American Drug Court Movement* (Princeton University Press, 2001) 94–9.

37 Fox and Wolf, above n 30, 5–6.

38 Harrison et al (eds), *Drug Courts: Current Issues and Future Perspectives* (Office of International Criminal Justice, 2002) 278.

adversarial form of adjudication.[39] In her discussion of these practices, the Italian sociologist Maria Rosaria Ferrarese notes a shift in the US legal system from the 'former image of the judge as 'supervisor of the trial'' to a situation in which judges are 'too powerful … too intimate with the parties, and too emotionally interested in the outcome of the controversy.'[40] Along with increased judicial power, Ferrarese identifies a complementary feature of the American judiciary that is also evident in the American problem-solving court movement, namely, a distinctively pragmatic orientation.

III PRAGMATISM

Advocates of problem-solving courts see pragmatism as an important and defining feature of problem-solving courts. Greg Berman, for example, describes the development of problem-solving courts as 'a deeply pragmatic movement.' It's the feature of the courts he finds particularly appealing — a viewpoint shared by others in the movement. An American domestic violence court judge, for example, says that her commitment to problem-solving courts stems more from 'practical than philosophical considerations.' In sum, she says, 'to me, if it works, do it.' One rightly questions whether to be pragmatic is to eschew philosophy or theory. Indeed, Richard Posner, today's leading legal pragmatist, himself admits that 'legal pragmatism ... is a theory.'[41] Regardless of whether or not problem-solving court judges recognise it as such, many operate within an essentially pragmatic frame of reference.

Problem-solving court judges repeatedly defend these programs on the grounds of program efficacy. So common is this defence that Eric Lane highlights 'efficiency' as one of the 'foundational premises on which problem-solving courts rest.'[42] According to supporters, these courts save money because treatment is cheaper than jail, they reduce the recidivism rates of participants, and they more effectively address the underlying problems of offenders. Again and again, supporters argue that these courts work — that they are more effective than the alternative. Judith Kaye, in one of her first discussions of problem-solving courts, highlights the central place of efficiency in New York's court reform efforts. The focus of reform, she writes, 'is to make sure that we do what we do efficiently.'[43]

39 See, eg, Judith Resnik, 'Managerial Judges' (1982) 96 *Harvard Law Review* 376; Arthur Miller, 'The Adversary System: Dinosaur or Phoenix' (1984) 69 *Minnesota Law Review* 1.

40 Maria Rosaria Ferrarese, 'An Entrepreneurial Conception of the Law? The American Model Through Italian Eyes' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth, 1997) 157, 168.

41 Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press, 2003) 76–7. Not all pragmatists, however, would agree with Posner on this point.

42 Eric Lane, 'Due Process and Problem-Solving Courts' (2003) 30 *Fordham Urban Law Journal* 955, 956.

43 Judith S Kaye, 'Lawyering for a New Age' (1998) 67 *Fordham Law Review* 1, 3.

Of these efforts, she specifically states that 'efficiency is a key value.'[44] In a statement endorsing drug courts, President George W Bush similarly highlighted the central import of efficiency: 'Drug courts are an effective and cost efficient way to help non-violent drug offenders commit to a rigorous drug treatment program in lieu of prison.'[45]

This disposition is so pronounced that it sometimes seems that the efficacy and problem-solving capabilities of these courts outweigh other considerations. This is certainly reflected in Judge Stanley Goldstein's summary of the purposes of the courts. He once told a group of other American drug court judges: 'As long as whatever you do is designed to get them off drugs and put them back out on the street in a position where they can fight using drugs, whatever you do to accomplish that is fine.' Given this sentiment, I sometimes asked American judges whether the apparent departure from the more cautious restraints of the common law tradition bothered them at all. Many said it did not. One New York judge, for example, said, 'it was never a concern of mine.' Why?

> We weren't making any headway and we are not stupid. So why don't we try different approaches? Our job is to make sure justice is done. Our job is also to punish, but what's the point of punishing if it doesn't work ... When they developed the common law, they didn't have these problems ... But we do now, so let's deal with it.

Ellen Schall makes a very similar argument. 'The reason we got into problem-solving courts', says Schall, 'is because it wasn't working for a judge to sit there and process.'[46] According to Schall, moreover, 'the system from which the problem-solving courts have emerged was a failure on any count. It wasn't a legal success. It wasn't a social success. It wasn't working.'[47] The central preoccupation with efficacy among American problem-solving court advocates has led some to warn against a departure from principles once more central to the aims of the criminal justice system. Timothy Casey, for example, reviews the common arguments that problem-solving courts are more ''effective' than the institutions they replaced', but he also warns that efficiency, as such, 'should only be considered as ancillary to the primary objective of providing a fair and neutral method of resolving disputes.'[48] Whether or not problem-solving courts are as effective as many advocates claim is another question. But that advocates think in such clearly pragmatic terms and justify the programs on these grounds is undeniable.

44 Ibid. In a more recent piece, Judith S Kaye, 'The State of the Judiciary 2002: We Are Strong Together' (Speech delivered at the State of the Judiciary 2002, New York, 14 January 2002) <www.courts.state.ny.us/CTAPPS/StofJud2002.pdf>, Kaye again underscores the central focus of efficiency in the problem-solving court model: 'Problem-solving courts bring together prosecution and defense, criminal justice agencies, treatment providers and the like, all working with the judge toward a more *effective* outcome than the costly revolving door' (emphasis added).

45 National Association of Drug Professionals, above n 10, 15.

46 Berman (ed), above n 15, 83.

47 Ibid.

48 Timothy Casey, 'When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy' (2004) 57 *SMU Law Review* 1459, 1502.

Maria Ferrarese rightly notes the extent to which 'pragmatism', with its emphasis on 'efficaciousness' is 'a philosophy of markedly American inspiration.'[49] While American problem-solving court judges do not typically cite the work of such philosophical pragmatists as John Dewey or Richard Rorty, or even legal pragmatists such as Oliver Wendall Holmes Jr or Richard Posner, they do in important respects express views and experiment with judicial practices in a manner consistent with the ideas put forth by these thinkers.[50] If Posner is correct in his view that American judges are largely pragmatic and that, moreover, 'in twenty-first century America there is no alternative to legal pragmatism',[51] then problem-solving court practices represent only the most recent and visible manifestation of a legal orientation with deep roots in American legal culture. If, like therapeutic jurisprudence, pragmatism is a conspicuously American orientation, one wonders about the nature and extent of its transferability. Posner himself observes that both philosophical pragmatism and adjudicative pragmatism are essentially American dispositions that 'may not travel well to other countries.'[52] In the case of problem-solving courts, while there is certainly evidence (in some cases even increasing evidence) of pragmatism, the quality is still most pronounced in the US. The other countries, in contrast, reflect a very different set of defining qualities.

IV MODERATION

The first distinguishing feature of courts in the non-US regions is moderation, which in certain respects represents a direct contrast to the boldness and enthusiasm of legal actors in the American courts. Whereas problem-solving courts are seen in the US as a revolutionary panacea, in the other locations, individuals do not speak of these programs as a universal remedy to society's pressing social difficulties or as something that promises to transform or revolutionise the country's criminal justice system. Instead, problem-solving courts are viewed as one type of program, among others, that may be worth trying.

Judge Bentley of Toronto is clear on this point. His comments in this regard were offered in the context of a discussion about Proposition 36, an initiative passed in California in 2000 that mandated treatment for low-level drug offenders. Interestingly, most drug court judges in the US initially opposed Proposition 36, because they saw it as a thinly veiled step toward drug legalisation. They also saw it as undermining the coercive powers of drug court judges, because it would

49 Maria Rosaria Ferrarese, 'An Entrepreneurial Conception of the Law? The American Model through Italian Eyes' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth, 1997) 157, 162.

50 One specific reference to the work of legal pragmatists was made by Greg Berman, who in an interview noted that he had been reading some of the 'Richard Posner pragmatism stuff" and said he thought that 'there is a lot there' that is relevant to problem-solving courts.

51 Posner, above n 41, 94.

52 Richard A Posner, 'Pragmatic Adjudication' in Morris Dickstein (ed), *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Duke University Press, 1998) 250.

take away their ability to impose sanctions. Bentley found the strong opposition to Proposition 36 among American drug court judges a bit perplexing.

> *I* was never suggesting, and I was hoping they weren't suggesting, that this is *the* answer. If you think it's *the* answer, then of course what they've done in California is wrong. But if you don't think it's *the* answer, it's just *an option* ... I mean, you have a whole spectrum of options. And drug courts can't possibly work for all people ... you have to have all these other options.

Richard Schneider and his colleagues make a similar point about Canadian mental health courts. They expressly acknowledge that Canadian mental health courts 'are not a complete solution, but rather, a part of the solution.'[53] Indeed, they see mental health courts as only a 'bandage' response to the plight of a beleaguered mental health care system and they would prefer the reinvigoration of mental health programs outside of the criminal justice system to the further proliferation of mental health courts. As reflected in these views, Canadian problem-solving court judges are more modest; they do not see problem-solving courts as a cure-all. Rather, they see them as one attempt, among others, to deal with a number of complex and difficult social problems.

Officials in other countries express similar views. The Scottish, for example, recognise that their more modest take on problem-solving courts stands in contrast to the celebratory disposition of American problem-solving court advocates. When she first began arguing in the Scottish Parliament in favour of drug courts, Roseanna Cunningham would qualify her support by making clear that she did not regard drug courts as a panacea. In January of 2000, for example, she said that drug courts 'are not the whole answer, but they are part of the answer.'[54] She repeated this assertion in November of the same year: 'they are not the complete answer, but they may be part of an answer.'[55]

In the same parliamentary discussion, Scottish Member of Parliament ('SMP') Phil Gallie welcomed Cunningham's 'point that the establishment of drugs courts' represents only 'part of an answer', while SMP Bill Aitken, though a supporter of the initiation of a pilot drug court, cautioned: 'we do not consider drugs courts to be the panacea that will change everything.' Instead, said Aitken, 'we should go ahead with the pilot, but we should do so with a degree of realism.'[56] Gillian Oghene of the Fife drug court agrees that in defending drug courts, 'you have to be realistic and honest' and she warns against creating a situation where 'people expect too much.' Moira Price of Glasgow makes a similar point: 'You're setting yourself up for a fall if you claim that [drug courts] would work for everyone, since nothing ever will.' Price continues:

53 Richard Schneider, Hy Bloom and Mark Heerema, *Mental Health Courts: Decriminalizing the Mentally Ill* (Irwin Law, 2007) 8.

54 Scotland, Parliament Official Report, 20 January 2000, vol 11, No 4, col 304.

55 Scotland, Parliament Official Report, 2 November 2000, vol 8, No 15, col 1265.

56 Scotland, Parliament Official Report, 2 November 2000, vol 8, No 15, col 1285, col 1277.

> It can never work completely when it's in isolation from everything else. You have to do different things, helping people at different stages ... We're set up to deal with one particular problem, and we're not saying that we'll cure everything else. We can deal with what we're set up to deal with, and you need other things to deal with other problems.

The Irish are equally modest about what they believe problem-solving courts can ultimately achieve. The first major report on drug courts issued by the Irish government asserts: 'Drug Courts are not a panacea, they are not a universal remedy for the drug problem.'[57] Individual Irish judges express similar views. Judge Haughton, for example, makes clear that these courts are 'not the answer to everything' but are 'a useful part of the criminal justice system ... It has its place, but it's just part of the system.' Judge Hogan likewise says that he doesn't 'want to see drug courts being built up as the savior of everything' — a not-very-oblique reference to rhetoric emanating from the US, where 'there's a tendency to do that.' Hogan believes 'that's a wrong tendency.' In discussing the significant number of offenders assigned to the Dublin drug court whose orders were later terminated, Haughton puts forth a view consistently advanced by Irish officials: the 'fact that the Drug Court approach is not a panacea for all drug misusing offenders.'[58]

Moderation is also evidenced by the fact that those in the non-US regions harbour fewer illusions that the perennial problems addressed in these courts will ever be fully solved. Australian criminologist Arie Freiberg prefers the 'slightly less hubristic' term 'problem-oriented' over 'problem-solving' (which, as he explains, 'signifies the effort rather than the result') — a viewpoint that he acknowledges 'is possibly more pessimistic than [that of] American promoters of this concept.'[59] Interestingly, Freiberg sets himself apart from the Americans in another sense when he writes that though he 'can be identified as a supporter of the problem-oriented court experiment' he is 'not messianic about it.'[60]

Another example of the contrast between American boldness and the relative moderation of the other countries is the differing treatment goals: total abstinence in the US and harm reduction or harm minimisation in the other countries. Though this perspective is reflected in a number of initiatives (eg, prostitution courts in Australia and needle-exchange programs in Canada and elsewhere), it is particularly evident in the operation of drug treatment programs in various problem-solving courts. To graduate from a US drug court, participants often must achieve a condition of total abstinence (including from alcohol), whereas in the other countries, the programs are satisfied with a reduction in use (and don't usually require abstinence from alcohol). Moreover, the other countries are much

57 Working Group on Courts Commission, 'Fifth Report' (Report, Dublin Drug Courts, 1998) 13.

58 Gerard Haughton, 'The Irish Experience of Drug Courts' (Paper presented at the European Perspectives on Drug Courts Conference, Strasbourg, France, 27 March 2003).

59 Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Adminstration* 8, 25 n 5.

60 Arie Freiberg, 'Specialised Courts and Sentencing' (Paper presented at the Probation and Community Corrections: Making the Community Safer Conference, Perth, Australia, 23–4 September 2002) 6.

more likely to use methadone as a form of treatment, whereas in the US, methadone maintenance is much less popular (and in many programs is strictly forbidden).

V DELIBERATION

A second feature of the non-US problem-solving courts is deliberation. In part, deliberation refers to the extent to which judges allow the formation of these courts to take place within the deliberative processes of the other branches of government. In the cases outside of the US, problem-solving court programs are not typically initiated or advanced until there has been legislative approval, the establishment of an investigative working group, a long discussion among relevant parties, the establishment of a pilot scheme, and/or re-evaluation based on the results of a pilot scheme. In the US, problem-solving courts usually start at the local level, often without legislative approval or discussion. Instead of boldness, then, problem-solving courts in the other regions are characterised by caution and deliberation — caution with respect to the extent to which judges are willing to act outside of legally defined and legislatively approved limits on their actions, and deliberation about whether to start the programs and/or to expand problem-solving courts after they have been piloted for a specified period of time.

In all five non-US regions, officials generally took longer to initiate courts, which were more typically established in a top-down rather than a grassroots manner. In some countries, the courts were established and/or given direction by the legislature. As a direct consequence, problem-solving court proposals necessarily passed through a deliberative body. Thus, one finds in places like Scotland and Australia considerable parliamentary discussion and debate about the merit, scope and desirability of these courts long before a judge would ever sit as a problem-solving court judge. In other countries (eg, England, Canada and Ireland), direction and/or funding for problem-solving courts often came from the executive branch. In these instances, the judiciary had to wait for the government's initiative and financial support. In some cases, though there had been interest in starting a problem-solving court at the local level, without the government's support, plans for the new court were never realised. Calgary, for example, wanted a drug court and applied for federal support to start one. The federal government did not accept its proposal and therefore Calgary did not get a drug court.

Processes of deliberation are also evident in the efforts of various working groups set up to explore the possibility of experimenting with problem-solving courts, particularly in Scotland and Ireland. These groups are comprised of representatives from a number of disciplines. With so many perspectives and interests involved, finding common ground and establishing program parameters acceptable to the various agencies often results in difficult and lengthy processes of deliberation. In the establishment of the Dublin drug court, judges were unwilling to start the court until all the contributing services were in place — thus rejecting the American advice to 'just do it' and move forward in a more hurried manner (as

they were encouraged to do by a visiting American judge). It should also be noted that the working groups have typically studied related court programs in other countries to inform their analyses, an approach one does not often find in the US (where the focus tends to be more specifically on what occurs in the US).

Deliberation, moreover, does not end with the initiation of the court programs. It has been a common practice in the five non-US countries to establish pilot schemes before launching courts on a more permanent or widespread basis. The very notion of a pilot scheme (that is, testing before fully committing to a new program) is emblematic of the more cautionary approach typical in the other countries. Thus, Australia is not the only country that, as Arie Freiberg puts it, 'tiptoes carefully, slowly, and most times reluctantly', in contrast to the American tendency to tread 'boldly, rapidly, and sometimes foolishly.'[61] Indeed, all five non-US countries preferred a more careful and gradual approach to initiating problem-solving courts, very much in keeping with the sort of borrowing process advocated by Tocqueville.

The continuation of the deliberative process is also evident in the manner in which the non-US countries have made significant legislatively initiated adjustments to programs after they have been established. England's Drug Treatment and Testing Orders ('DTTOs') — one of the first iterations of drug courts in England — were essentially scrapped six years after the launch of the first pilot programs. The Perth drug court was substantively altered through legislative action more than two years after it was initiated. Legislation directing the Sydney drug court has been amended several times — which is especially relevant in this instance, given that team members return to the legislation for guidance 'over and over again.' Scottish sheriffs had to wait several years before the legislature gave them authority to impose intermediate sanctions (ie short stints in jail). As these examples make clear, processes of deliberation continue even after problem-solving courts have been launched.

In addition to the role that the executive and legislative branches continue to play in the non-US countries, we also find ongoing deliberation and critical self-reflection within the judiciary itself. This is particularly pronounced in Australia, where magistrates openly worry about how therapeutic jurisprudence and problem-solving approaches might violate commitments to natural and open justice. Even without the pressures from legislative action, judges and magistrates have made certain adjustments to courtroom practices — sometimes in direct response to these concerns. In Calgary, for example, the domestic violence court eventually gave the victim support agency, HomeFront, a less prominent place in the courtroom out of concerns that the plaintiff/victim was being given an unfair advantage in court proceedings. A Western Australian magistrate disallowed clapping in certain instances after observing client disapproval of the practice. After running the Dandenong drug court in Victoria, Australia for three years, Magistrate Margaret Harding decided to move away from review sessions with

61 Arie Freiberg, 'Three Strikes and You're Out — It's Not Cricket: Colonization and Resistance in Australian Sentencing' in Michael Tonry and Richard S Frase (eds) *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001) 53.

everyone in attendance to individual reviews. She found that 'everybody was happy with that' and 'seemed to prefer it.' In particular, she found that participants were more open when meeting with her individually in court and therefore decided to leave the new format in place.

This is not to suggest that one never finds such critical self-reflection and subsequent adjustments in the United States. American problem-solving courts have also, in some cases, been altered over time in light of related concerns. For example, many of the early drug courts were pre-adjudicative. As a consequence, clients were under intensive judicial monitoring and were potentially subjected to periods of incarceration, though they had never entered a guilty plea. Over time, the post-adjudicative model has become more common. Other courts have had to make significant revisions in response to net-widening tendencies, where drug court programs had become too large and unwieldy. These are no small adjustments. That said, the tone (or accent) of American problem-solving courts tends more toward a salesmanship and a 'we-have-the-answers' orientation, which is very different from the more modest and self-critical tone common in the other countries.

VI RESTRAINT

This sense of caution and deliberation relates directly to — and will be further illustrated by — a final feature of the non-US courts: the notion of restraint. Recall the opposing ideal types of romantic and classical judges. One of the features of the classical judge, in Glendon's typology, is restraint. She identifies three types of restraint: structural, interpretive and personal.[62] All three are evident in the judicial mentality and practices among the non-US problem-solving court judges. Consider examples from the comparative data to illustrate each.

Structural restraint refers to those limits placed on the judge by the other branches of government, by the federalist system (eg, in the US) and by the court's place in the hierarchy of the judiciary. As we have seen in the other countries, the courts are clearly more deferential to the direction and guidance of the other branches of government. Court officials are reluctant to initiate programs independent of the executive and legislative branches. Structural restraint, as such, is perhaps most pronounced in England and Wales.

British domestic violence court judges and magistrates do not have the authority to bring defendants back to court for ongoing judicial reviews, which are typically a central feature of problem-solving court programs (even the less therapeutically inclined domestic violence courts in the US). Those working in British domestic violence courts, however, are very clear that, even if they wished to implement this feature, such a practice could only be realised in their programs if granted by the legislature. According to a review of the Leeds domestic violence court, movement in this direction would require 'legislative changes.' It could only be

62 Glendon, above n 20, 118.

achieved 'through a new legislative framework.' An official at the Leeds domestic violence court similarly states that the court cannot bring clients back for review because 'there is no statutory basis for that.' To add reviews or other forms of more proactive judicial engagement would 'really need to be parliamentary-driven.'

Officials working with DTTOs and other drug court-like programs in England and Wales have likewise been largely deferential to the dictates of the government, clearly lacking the enthusiasm and entrepreneurial energy of American problem-solving court advocates. An official at the Croyden DTTO explained the reasons for starting a program in Croyden: 'We've been basically told to get on with it. Here's the legislation. Here are the Home Office guidelines. Work with it.' On whether DTTOs should be introduced across the UK, another said: 'It will be for the government to decide ... We are going to have to do what the government says.' Also, when the government decided to scrap DTTOs altogether and introduce Drug Rehabilitation Requirements ('DRRs') within a new Community Order scheme in 2005, there were no strong public statements from magistrates or probation officers one way or the other in response. Instead, they simply followed the new legislative guidelines and 'worked with it.'

Deference to the legislature is also evident in Australia, where a variety of problem-solving courts have been created through acts of parliament. Judge Murrell makes very clear that the Sydney drug court is a 'legislatively based court.' *The Drug Court Act 1998* (NSW), which passed on 'a bipartisan basis' specifies in some detail the purpose, processes and parameters of the court. For example, it spells out who is eligible for the program, it provides a legislative basis for rewarding and sanctioning participants and it sets the standards for participant termination from the program. The act also specifies that any 'final sentence' imposed on a participant 'cannot be greater than the initial sentence' — which, again, according to Murrell, is clearly and specifically spelled out in the 'statute under which I operate.' Legislatively determined standards are important, according to Murrell, because, though she believes Australian judges exercise more personal restraint than do American judges, 'it's desirable to have other restraints, which are not simply reliant on the personalities of each individual judge.' Thus, for a number of reasons, Judge Murrell feels strongly that 'the fact that it is legislatively based is significant.'

The second type of restraint — interpretive restraint — refers to those limits required by judicial deference to constitutional precepts, statutory law and legal precedent. Consider several examples of interpretive restraint from non-US problem-solving courts. In Britain's first community court, Judge Fletcher has considerable authority and discretion. However, he recognises the limits within which he must operate. Like other British judges, he realises that he is 'hidebound by maximum sentences' and he can only 'use the tools that government' gives him. As with magistrates and judges in other British problem-solving courts, he is limited by statutory law in terms of his power to impose intermediate sentences. As one Liverpool official put it, 'Judge Fletcher is very limited on what he can actually impose.'

The ongoing interpretation of statutory law is also evident in Australia. Not only were courts set up by the legislative and executive branches of government, but judges continue to consult the particularities of statutory law as they attempt to run their programs. Officials in the Sydney drug court go back to the Drug Court Act 'over and over' to make sure they are 'on the right track.' The first judge of the Perth drug court had to work within existing bail legislation, which in her view seriously limited the court's effectiveness. Only later did the Parliament of Western Australia give the court greater discretion and leverage. Such judicial deference to the dictates of statutory law is also found in Victoria, where magistrates essentially refused to send offenders to a certain diversion program because, according to their interpretation, statutory justification for such action did not exist.

In Canada, the very genesis of aboriginal courts can be traced to the 1999 amendment to the Canadian *Criminal Code*, s 718.2(e),[63] and the two Supreme Court interpretations of this legislation. Officials make clear that without s 718.2(e), the Gladue courts in Toronto simply would not exist. Also, while other problem-solving courts in Canada did not come into being as a direct result of parliamentary acts, problem-solving court judges have made considerable efforts to justify new initiatives through reference to existing statutory law and many hope for the eventual passage of legislation that would expand problem-solving court powers.

The final type of restraint identified by Glendon is personal restraint, which refers to the limits the judge places on herself in her efforts to be fair, impartial, objective and dispassionate. Arguably, this is the type of restraint that, when exhibited, most clearly reveals the habits of mind of a local legal culture. As we have found, problem-solving courts give judges greater power and discretion. In some places — such as England — this expanded authority is limited by structural restraints, eg, the strength of probation and the limitations of the magistracy. Both in England and in other countries (where such limitations do not exist), however, judges and magistrates still intentionally hold themselves in check, even when they could, if they wished, act with more discretion.

Given the expanded parameters of problem-solving courts, in fact, some even recognise that personal restraint, as such, is all the more important. This kind of understanding is particularly evident in Australia, where judges both acknowledge and worry about the potential for a blurring of boundaries inherent in the problem-solving court format. Australian judges may agree with American judges that problem-solving courts provide a setting in which judges can '[colour] outside the lines', but they believe that precisely because of this freedom, judges should be all the more careful to curb their own artistic license (pushing this metaphor a bit further) so that the final 'drawing' is still recognisable as a court of law.

Problem-solving court officials in both Canada and Australia express this basic view. Judge Gay Murrell, for example, says that 'despite a lack of protective

63 *Criminal Code*, RSC 1985, c 3, s 718.2(e).

conventions' in problem-solving courts, judges must strive to 'maintain judicial impartiality and ensure that participants receive procedural fairness.'[64] Tina Previtera of Queensland similarly observes that the 'evolving nature' of problem-solving courts means that the 'richness and history' that previously 'safeguarded' a 'defendant's legal protection' is not as available to a judge in this context. Without the binding influence of 'tradition and precedent', says Previtera, 'we must charge ourselves with the responsibility therefore to ensure that therapeutic considerations do not over-ride long standing freedoms and rights.'[65] Jelena Popovic likewise admonishes fellow practitioners to 'strive to ensure that we are not trampling over the rights of court users.'[66] A summary statement issued by conferees at a problem-solving court conference in Toronto noted that 'one of the risks of a less traditional posture is that the boundaries between individuals can become blurred' and thus warned that 'in spite of the informality ... the judge must maintain sufficient detachment.'

In Australia and other countries, judges, though given license to stray beyond the boundaries of traditional judicial practices, nevertheless maintain what they understand to be appropriate judicial reserve. Judge Richard Schneider of the Toronto mental health court, for example, believes that the judge should guard against too much familiarity. 'By becoming too intimate with the procedure', says Schneider, 'you lose that distance and therefore the impact that you have when you do get involved. The closer you get, that sort of impact I think is reduced.' Similarly, even when Scottish sheriffs were finally given the authority to impose intermediate sanctions they still hesitated to use this power and worried about imposing what could, in effect, be sanctions disproportionate to the offences committed. Also in Scotland, youth court judges, though encouraged to relate with clients in a more personal and interactive manner, resisted such engagement, believing that it is not 'really part of a judge's job to get too close to the accused.'

An Irish judge who was encouraged to speak to a client in open court about certain matters ultimately refused, believing such interaction to be patronising and unfair to the accused. Moreover, judges in all five non-US regions, with only a few exceptions, resist engaging in the expressive, theatrical and emotive form of courtroom behaviour one finds in many American problem-solving courts. Not only do nearly all non-US judges considered here find the prospect of hugging clients 'appalling' behaviour for a judge, but many are also against clapping in the courtroom, holding graduation ceremonies, interacting in an overly personal manner, or even expressing emotions. Judicial reticence to engage in this manner, again, often has more to do with cultural dispositions than it does with any kind of formal legal and structural restrictions. Many non-US problem-solving court judges simply see such behaviour as nonsensical, beyond the pale, inappropriate and unbecoming of a judicial officer.

64 Gay Murrell, 'Breaking the Cycle: NSW Drug Court' (2000) 77 *Reform* 20, 23–4.

65 Tina Previtera, 'The Queensland Drug Court: Therapeutic Jurisprudence in Practice' (Paper presented at the State Legal Educator's and Young Lawyers Conference, Brisbane, Queensland, 9 June 2006) 7.

66 Jelena Popovic, 'Court Process and Therapeutic Jurisprudence: Have We Thrown the Baby Out with the Bathwater?' (2006) 1 *eLaw Journal: Murdoch University Electronic Journal of Law (Special Series)* 60, 76 <https://elaw.murdoch.edu.au/archives/issues/special/court_process.pdf>.

VII CONCLUSION

These views about American practices reflect a rather complicated attitude toward the United States — what I have termed, 'ambivalent anti-Americanism'. That is, even while these countries are readily adopting American-inspired legal innovations, those involved in the transplantation process also worry out loud about American cultural imperialism and they seek to eliminate or replace that which they see as the off-putting extremes of the American version of problem-solving courts. It is in this context that Irish and Australian judges object to the 'demonstrative' and 'theatrical' behaviour of some American judges. A Canadian judge explained how he had to sell problem-solving courts to sceptical Canadian officials by pitching the programs in explicitly anti-American terms. Why so? Because, as he put it, 'we have to be very careful in Canada, because although Canadians love Americans they also dislike Americans because of cultural imperialism.'

Arguably, the sentiments conveyed here are emblematic of more general attitudes toward the US globally. Consider the findings of an extensive international survey conducted by the Pew Charitable Trust, 'What the World Thinks in 2002'. As reported in the summary of survey findings, 'opinions about the US ... are complicated and contradictory. People around the world embrace things American and, at the same time, decry US influence on their societies ... US global influence is simultaneously embraced and rejected by world publics.'[67] Jonathan Freedland rather graphically makes the same point regarding the apparently contradictory nature of British attitudes toward America: 'We simultaneously disdain and covet American culture, condemning it as junk food even as we reach for another helping — a kind of binge-and-puke social bulimia.'[68] This ambivalent anti-Americanism represents a curious and fascinating paradox, a deeper understanding of which is all the more important in light of recent world events.

Though importers of American-inspired problem-solving courts often speak in terms of adaptation, the question remains whether they are, in fact, adapting the programs to suit their own needs, or whether they are importing more of American culture than they realise or would care to admit. In a cautionary tone not dissimilar to that advanced by Tocqueville, Jack Hiller warns that the transplantation of law brings with it a lot of cultural 'baggage'. As he puts it, '[a] country can probably adopt and adapt any law or body of laws from another culture' but he goes on to say that 'such laws ... carry with them so much imperceptible and incommensurable cultural 'baggage' that the receiving country will inevitably experience far more internal cultural change than it either realized, intended or would have intended.'[69]

This notion of incommensurable cultural baggage is similar to ideas put forth in Gunther Teubner's discussion of legal borrowing. Teubner even calls into

67 The Pew Global Attitudes Project, 'What the World Thinks in 2002' (Project, The Pew Research Center for the People and the Press, 2002).

68 Jonathan Freeland, *Bring Home the Revolution: The Case for a British Republic* (Fourth Estate, 1998).

69 Jack A Hiller, 'Language, Law, Sports and Culture: The Transferability or Non-transferability of Words, Lifestyles, and Attitudes Through Law' (1978) 12 *Valparaiso University Law Review* 433, 434.

question the appropriateness of the 'legal transplant' metaphor, preferring instead the notion of a 'legal irritant' — such that the importation of a legal rule results not in some kind of successful synthesis, but rather 'works as a fundamental irritation which triggers a whole series of new and unexpected events.'[70] Both Hiller and Teubner, thus, anticipate fundamental, albeit usually unintended, change as a consequence of legal borrowing.

The ultimate consequences, unintended or otherwise, of the globalisation of problem-solving courts are, of course, beyond the scope of this paper. The continuing development of this important international legal movement certainly invites further attention and analysis. At this point, however, I would tentatively conclude that the differences between problem-solving courts in the US and in the other five countries are pronounced and that with respect to these six cases, America represents an interesting exception to the practices and sensibilities of courts in the other five countries. In light of ideas put forth by Tocqueville, Teubner and Hiller, however, the comparativist does well to pay close attention to the degrees to which boldness, enthusiasm and pragmatism replace, are rejected by, or in some fashion alter legal cultures that at least initially appear more disposed toward moderation, deliberation and restraint.

70 Gunther Teubner, 'Legal Irritants, How Unifying Law Ends up in New Divergences' in Peter A Hall and David Soskice (eds), *Varieties of Capitalism* (Oxford University Press, 2001) 418.