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To What Extent Would a Problem-Solving Family Court Help Young Offenders Construct More Durable Pathways Out of Crime?

James Garrity

Abstract

This article considers the problem-solving family court put forward by Sir James Munby, then-President of the Family Court, in his 2017 Parmoor Lecture to the Howard League for Penal Reform. It utilises constructivist pathways — a heuristic device rooted in developmental criminology — as a normative framework with which to discern effective and counterproductive problem-solving practice. Identifying a target population for this problem-solving court and explaining why a therapeutic mode better encourages prosocial pathway construction, as compared to the existing Youth Court, it closely examines the Family Drugs and Alcohol Court (FDAC) model. The article details how problem-solving family courts already help parents to successfully navigate pathways to desistance, and applies learning from this jurisdiction and overseas to Sir James’ prototype court and the inherent limitations of problem-solving practice.

1 Introduction

Problem-solving courts are used to address the causes of problematic behaviour, with each adapted to the specific needs of its target population. They share five core elements: tailored treatment programmes; recognising lifestyle factors; coordinating multiagency working; agreeing sentencing conditions with offenders; and judicial monitoring of rehabilitation.¹ Best practice is closely aligned with therapeutic jurisprudence, which holds that the legal process itself is a means of rehabilitating participants.² Similarly, its core principles map tightly onto key tenets of procedural justice.

For the purposes of this paper, a young offender is someone between the ages of ten and seventeen years old, who is formally charged with an offence.

Constructivist pathways are embedded in life-course developmental criminology and seek to create explanatory narratives around social processes and influences that motivate individual action.³ Individuals negotiate social institutions, structural influences, and personal experiences to construct unique pathways, which may go into and out of crime.⁴ Pathways towards crime are designated ‘antisocial’, while mainstream or desisting trajectories are ‘prosocial’.⁵

¹ Jennifer Ward, ‘Problem-Solving Criminal Justice: Developments in England and Wales’ (2018) 14(3) *Utrecht L Rev* 7.

² David Wexler, ‘Therapeutic Jurisprudence: An Overview’ (2000) 17 *TM Cooley L Rev* 125, 129.

³ Alan France and Ross Homel, ‘Societal Access Routes and Developmental Pathways: Putting Social Structure and Young People’s Voice Into the Analysis of Pathways Into and Out of Crime’ in Alan France and Ross Homel (eds), *Pathways and Crime Prevention: Theory, Policy and Practice* (Willan Publishing 2007) (*Pathways and Crime Prevention*) 9–11.

⁴ Jeanette Lawrence, ‘Taking the Developmental Pathways Approach to Understanding and Preventing Antisocial Behaviour’ in *Pathways and Crime Prevention* (n 3) 27.

⁵ Bears no relation to the statutory definition of ‘antisocial behaviour’ under the Anti-social Behaviour Act 2003.

This work is novel and interdisciplinary in nature, bringing a developmental criminology perspective to the problem-solving literature. Therapeutic jurisprudence is inherently multidisciplinary, and thus naturally suits the incorporation of another perspective, particularly one that can examine individual desistance.⁶ The pathways approach moves the conversation beyond myopic and ill-suited measures of outcomes. Research examining sociological understanding of why someone ceases offending, is missing from the problem-solving approach in England and Wales, and in the US.⁷ This paper's utilisation of constructivist pathways, which epitomise the long-term perspective essential to child first practice, goes some way to address that shortfall. While much ink has been spilt discussing the theory of problem-solving practice, there has been little on how to interpret its outcomes.⁸ I hope that this paper will add a qualitative element to a body of research which is otherwise quantitative, that is inappropriate to analysis of desistance over the life-course.

At the core of the pathways' conceptualisation is the notion of failed transitions.⁹ Children offend because the primary institutions of their early lives, home or school, did not equip them with the necessary skills to grow into productive, socially included adults. They stopped believing that they belonged and found in offending an alternative path. That cascade of failures, presided over by parents, teachers, and social workers, culminates in a young person in the docket, at the mercy of the criminal justice system. That is a collective failure, but the consequences of that failure are placed on the individual child. Society has a responsibility to rectify that series of oversights, not to condemn these hostages to circumstance. Problem-solving courts can

⁶ Wexler (n 2) 128.

⁷ Ward (n 1) 8.

⁸ Kimberly Kaiser and Kristy Holtfreter, 'An Integrated Theory of Specialised Court Programs: Using Procedural Justice and Therapeutic Jurisprudence to Promote Offender Compliance and Rehabilitation' (2016) 43(1) *Criminal Justice and Behaviour* 45, 47.

⁹ Lawrence (n 4) 37.

right communal wrongs. They could give young people the means of opening the doors that seemed closed to them, such that they can lead normal, fulfilling lives.

The most effective point to intervene in a developing criminal pathway is in the early to mid-teenage years.¹⁰ Subsequently, effective youth justice interventions produce short- and long-term savings: the former in terms of fewer disposals, reducing demand on police, and custodial estate, resources. As pathways to persistent offending in adulthood are usually rooted in adolescent offending, the adult criminal justice system could see an appreciable drop in the frequency and seriousness of offending over time. A system that reintegrates offenders back into the community would lessen the burden on social services, while judge-led interventions could serve as a model for interagency coordination that prevents parallel working and resultant waste of strained resources.

The Carlile, Taylor and Lammy Reviews all demonstrate political will for problem-solving reform in the Youth Justice System (YJS).¹¹ Beyond Westminster, the Northamptonshire Youth Offending Service (NYOS) and FDAC illustrate the extent to which local authorities and practitioners can implement ambitious change on a local level. Thus, these findings are actionable even without legislation.

The discussion concerning the application of problem-solving principles has been generated by the ‘paradox of success’ — the idea that those who remain in the YJS have more complex needs. American evidence suggests that problem-solving approaches are most effective for high-risk offenders, thus this paper offers a model

¹⁰ Lesley McAra and Susan McVie, ‘Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime’ (2010) 10(2) *Criminology & Crim Just* 179, 190.

¹¹ Gillian Hunter and others, *Time to Get it Right: Enhancing Problem-Solving Practice in the Youth Court* (ICPR 2020) 2 <https://justiceinnovation.org/sites/default/files/media/documents/2020-06/time_to_get_it_right_final.pdf> accessed 27 May 2022.

for dealing with the most pressing issue in modern youth justice practice.¹² The Government has made enthusiastic noises around problem-solving practice in the Youth Court, though little has been done since.¹³ Beyond the moral and utilitarian imperatives — remedying antisocial pathways in childhood could preclude a lifetime of offending — this paper seeks to revive the political momentum behind this mode of therapeutic jurisprudence. Problem-solving practice could serve adult offenders — in drug and domestic violence courts it already has — but Youth Justice is the movement’s most effective vanguard. Its success could improve the argument and practice for wider application.

Furthermore, procedural justice holds that public perceptions of fairness are more important than those of effectiveness in establishing the legitimacy of a justice system and thus maximising compliance, giving further impetus to examinations of rehabilitative and therapeutic court models.¹⁴ Not only are compassionate approaches — as opposed to punitive, deterrence-focused modes of justice — more morally legitimate as an exercise of state power over the individual, but they induce greater compliance with the law and its institutions. If we conceive of offending as behaviour rooted in alternative, antisocial pathways; deterrence should not be a primary objective of a YJS. The decision to offend is not an isolated choice in the moment, but the consequence of a lifetime of decisions, experiences, and socialisation. Antisocial pathways are inculcated by a failure to make the required

¹² *ibid* 12.¹³ *ibid* 24.¹⁴ Mike Hough and others, *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for UK* (LSE 2013) 13 <http://eprints.lse.ac.uk/50440/1/Jackson_Attitudes_sentencing_trust_2013.pdf> accessed 27 May 2022.

¹³ *ibid* 24.¹⁴ Mike Hough and others, *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for UK* (LSE 2013) 13 <http://eprints.lse.ac.uk/50440/1/Jackson_Attitudes_sentencing_trust_2013.pdf> accessed 27 May 2022.

¹⁴ Mike Hough and others, *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for UK* (LSE 2013) 13 <http://eprints.lse.ac.uk/50440/1/Jackson_Attitudes_sentencing_trust_2013.pdf> accessed 27 May 2022.

transitions between developmental life periods, and one cannot simply revert to a prosocial access route for which they do not have the prerequisite competencies.¹⁵ The YJS should seek to facilitate the personal and common turning points that allow for long-term desistance, offering the young offender a chance to construct a pathway out of crime.

There is a concerning ignorance of criminological theory in criminal justice practice.¹⁶ As the discipline is concerned with explaining and understanding offender behaviour, this seems a critical deficit. If the object of criminal justice systems is the reduction of aggregate harm and the appreciation of a collective social product, we must seek to engage theory to understand how and why legal processes effect the outcomes that they do. To do so, this paper will utilise developmental criminology to understand the effect of legal processes across the life course. If policy makers are concerned with efficacy and not ideology, this is where they should start — looking through the lens of what we know to work and why.

That lack of professional literacy must go some way to explain the narrow focus on recidivism, which is inexplicably retained in the academic literature. The success of welfarist systems can only be judged over the long term.¹⁷ Most studies on specialised courts still focus on recidivism, though this has begun to change.¹⁸ Critically, measures of reoffending claim objectivity where there is none.¹⁹ Policy makers can set the terms of reference to serve their own ends; narrow the definitions to assert success or widen their scope to justify reform.²⁰ Recidivism is not a measure of rehabilitation or

¹⁵ Lawrence (n 4) 47.

¹⁶ Stephen Case and Kathy Hampson, 'Youth Justice Pathways to Change: Drivers, Challenges and Opportunities' (2019) 19(1) YJ 25, 34.

¹⁷ McAra and McVie (n 10) 200.

¹⁸ Kaiser and Holtfreter (n 8) 58.

¹⁹ Tim Bateman and Alexandra Wigzell, 'Exploring Recent Trends in Youth Justice Reconstructions: A Challenge to the Complexity Thesis' (2020) 20(3) YJ 252, 256.

²⁰ *ibid* 253.

reintegration.²¹ Instead, it is an absence of detected antisocial behaviour. It neither indicates that the person in question has ceased offending — as most criminality is undetected — nor that they have established or maintained a prosocial trajectory by going into education or work, starting a family, or desisting from substance misuse.²² It is not an appropriate measure of success for a rehabilitative system of justice, as it says nothing meaningful about the outcomes of its processes. The constructivist pathways normative framework, outlined below, offers a better understanding of how justice systems should be modified to effectively rehabilitate and reintegrate their subjects.

Constructivist pathway theory is rooted in developmental criminology, conceiving life as constituted of distinct developmental stages.²³ Each stage has associated developmental tasks — the behaviours and competencies that one must acquire to successfully ‘transition’ to the next stage. Developmental stages are governed by a primary social institution (school, work) which communicate these tasks.²⁴ The pathway is a heuristic device for charting and interpreting the choices made by individuals in relation to these institutions, developmental transitions, and their unique trajectory through life.²⁵

People cannot be understood either as entirely independent of, or subject to, social forces. Pathways are constructed within societal access routes. These broad routes are perceived differently by different people, depending on their local cultural context.²⁶ This context can determine which pathways are considered acceptable, and ‘not for me’.²⁷ Those brought up in deprived communities, exposed to

²¹ McAra and McVie (n 10) 184.

²² Bateman and Wigzell (n 20) 253.

²³ France and Homel (eds), *Pathways and Crime Prevention* (n 3) 3.

²⁴ Lawrence (n 4) 33.

²⁵ *ibid* 28.

²⁶ France and Homel, ‘Societal Access Routes and Developmental Pathways’ (n 3) 13, 20.

²⁷ Jacqueline Goodnow, ‘Adding Social Context to Developmental Analyses of Crime

high levels of crime will negotiate and construct their pathways in relation to that crime.²⁸ Crime is a natural feature of life, and thus not taboo. Criminal behaviour is an option.²⁹

Antisocial pathways are an alternative to conventional access routes. They become attractive when people fail to progress through typical, prosocial transitions.³⁰ Falling back on redundant behaviours ill-suited to a new institutional context, young people find themselves in a 'person-by-institution bad fit'.³¹ Antisocial pathways exist as the only structure for those in this position. Often, offending and substance-misuse manifest through boredom, an alternative form of leisure for persistent truants and those excluded from school.³² As young people find initial success in these easily mastered activities, they fall into antisocial pathways. Subsequently, life period tasks form the backdrop of movements into and out of crime.³³

Several factors can facilitate antisocial pathway construction.³⁴ Chief among these are tightly bonded social networks based on an immediate locale of family and street.³⁵ In contrast to peers whose networks are built around primary social institutions like school and college, children with tight social networks often report an apathetic and fatalistic outlook on their futures.³⁶ Where networks contain other young offenders, they can draw children into and maintain criminality.³⁷ As tighter networks do not yield the opportunities of a

Prevention' in *Pathways and Crime Prevention* (n 3) 56.

²⁸ France and Homel, 'Societal Access Routes and Developmental Pathways' (n 3) 20.

²⁹ Goodnow (n 28) 57.

³⁰ Lawrence (n 4) 38.

³¹ Lawrence (n 4) 36.

³² Colin Webster and others, *Poor Transitions: Social Exclusion and Young Adults* (Policy Press 2004) 29.

³³ Lawrence (n 4) 37.

³⁴ Hazel Kemshall and others, 'Young People, Pathways and Crime: Beyond Risk Factors' in *Pathways and Crime Prevention* (n 3) 89.

³⁵ *ibid* 97.

³⁶ *ibid* 98.

³⁷ Webster and others (n 30) 30.

diverse social network, people have fewer opportunities to move away from a social group facilitating escalating offending behaviour; and often they do not want to.³⁸ Young offenders are caught in a state of ‘risk stagnation’, where they refuse to believe that they can change their situation.³⁹ Instead, they commit to an antisocial pathway, supported by a social scaffolding helping them develop criminal proficiencies and entrench patterns of antisocial behaviour.⁴⁰

However, pathways are not deterministic. Changes in direction are to be expected and are conceptualised as turning points.⁴¹ These can be typical life period transitions, such as moving away from home or committing to a relationship, or intensely personal, like bereavement; they occur when someone ‘comes to a consciousness-raising decision that triggers a change in orientation and direction’.⁴² The effect of critical moments is entirely unpredictable, dependent on the person in question and their position in their life-course.⁴³

Interventions, therefore, must seek to facilitate these turning points. The purpose of any rehabilitative justice system, particularly problem-solving justice — rooted in the therapeutic jurisprudential doctrine that crime is the consequence of underlying problems that should be remedied by courts — is long-term desistance from crime.⁴⁴ Pathways literature outlines how we can make future offending less likely. If we conceive of antisocial behaviour as a consequence and magnifier of failed prosocial transitions, then we must address their root causes: tightly bonded, locality-centred association, school exclusion,

³⁸ *ibid* 30.

³⁹ Kemshall and others (n 35) 98.

⁴⁰ Goodnow (n 28) 59.

⁴¹ Lawrence (n 4) 40.

⁴² Lawrence (n 4) 41.

⁴³ Robert MacDonald, ‘Social Exclusion, Youth Transitions and Criminal Careers: Five Critical Reflections on ‘Risk’’ in *Pathways and Crime Prevention* (n 3) 121.

⁴⁴ Bruce Winick, ‘Therapeutic Jurisprudence and Problem-Solving Courts’ (2003) 30 *Fordham Urb LJ* 1055.

personal trauma, and early childhood abuse.⁴⁵

Systems need to tackle why the offender failed to transition and promote prosocial pathway construction going forward. The former may involve counselling or training, or directing institutional-personal change, like moving schools or prohibiting contact with certain peers; in order to allow a child to break away from locality-based networks.⁴⁶ Once the scaffolding supporting an antisocial pathway has been removed, the disposed needs the tools to construct a prosocial one. In the same way that social bonds can maintain engagement in illegal activity, they can motivate engagement in the tasks of school and work by seeding and reinforcing values.⁴⁷ Sustaining social systems like work and close personal relationships alter negative pathways and maintain positive ones.⁴⁸ A simpler way of asking whether an intervention induces an offender to construct prosocial pathways, is to ask if it will help them build what we recognise as a ‘life’ — with its trappings of work and partnership. Problem-solving interventions need to facilitate skill acquisition, prosocial network development and institutional engagement necessary for navigation of a conventional, prosocial pathway.

Consequently, I will assess the durability of pathways out of crime facilitated by existing and proposed justice systems by the extent that they –

- (1) Move offenders away from antisocial pathways; and
- (2) Facilitate turning points and provide offenders with opportunities to construct prosocial pathways.

⁴⁵ Lawrence (n 4) 46.

⁴⁶ Per Breanna Boppre, Emily Salisbury and Jaclyn Parker, ‘Pathways to Crime’ in Henry Pontell (ed), *Oxford Research Encyclopaedias: Criminology and Criminal Justice* (OUP 2018) 8. Self-efficacy refers to the personal confidence or ability to achieve specific goals.

⁴⁷ Goodnow (n 28) 59.

⁴⁸ Alan Hayes, ‘Why Early in Life is Not Enough: Timing and Sustainability in Prevention and Early Intervention’ in *Pathways and Crime Prevention* (n 3) 214.

Recognising that pathways are distinctly individual constructions, built on experience and sociocultural influences, systems that are less prescriptive and allow for bespoke interventions will be considered more likely to achieve these two objectives.

It is by this rubric that I argue that a problem-solving court — situated within the expanded jurisdiction of the Family Court — *will* help young offenders construct more durable pathways out of crime. This paper will explore why the Youth Court consistently fails to alter emergent pathways; and examine the extent to which nascent problem-solving bodies like Youth Referral Order review panels are improving YJS outcomes. It will move on to analyse public child proceedings, with a particular focus on the Family Drug and Alcohol Courts — a problem-solving court already operating within the Family Court. In examining how it aids pathways to desistance, analogous to pathways out of crime, this paper will demonstrate that tailored FDAC interventions cultivate higher levels and sustainability of desistance. It will further draw out how to better implement problem-solving justice in the Family Court context. Finally, analysis of pathways produced by the existing YJS, problem-solving and child-focused practice, will be synthesised to critically evaluate whether Sir James’ proposals would manifest lasting pathways out of crime.⁴⁹ Additional comment is made on practical issues of implementation. While problem-solving justice is no panacea, there is compelling reason to look at its application beyond young offenders.

⁴⁹ Sir James Munby was President of the Family Division of the High Court from 2013 to 2018.

2 Does the Youth Court Fail to Facilitate Pathways Out of Crime for the Most Serious Offenders?

‘Children’s participation in the Youth Court remains an aspiration rather than a reality.’⁵⁰

The modern Youth Court is a creature of compromise. Formerly the Juvenile Court, it was created by the Children Act 1908 with joint civil and criminal jurisdiction; the former was spun off into the Family Court by the 1989 Act.⁵¹ It acquired its contemporary moniker and mission — preventing offending while having regard to the welfare of the young person — through the Criminal Justice Act 1991.⁵² Its caseload has fallen by three quarters over the last decade.⁵³ Simultaneously, the ‘paradox of success’ has meant that those who remain are the most serious offenders, ones to whom a diminished Youth Court struggles to deliver basic services in a timely manner.⁵⁴ While the notion that this ‘hard core’ reoffend at higher rates is unsubstantiated, they are demonstrably subject to severe hardship.⁵⁵ They are disproportionately in care, poor and victims of childhood abuse, with high incidences of mental health and learning difficulties.⁵⁶ That is sadly inevitable; antisocial pathways follow from structural and relational adversity early in life.⁵⁷ A narrative promulgated by the Carlile and Taylor inquiries, that the Youth Court is structurally incapable of helping those children navigate pathways out of offending, continues to gain steam.⁵⁸ The extent to which it is a

⁵⁰ Tim Bateman in Hunter and others (n 11) iii.

⁵¹ Stephen Case, *Youth Justice: A Critical Introduction* (Routledge 2018) 30, 156.

⁵² *ibid* 157; Bowen and Whitehead (n 12) 25.

⁵³ Hunter and others (n 11) 2.

⁵⁴ *ibid* 31, 33.

⁵⁵ Bateman and Wigzell (n 20) 263.

⁵⁶ Hunter and others (n 11) 6.

⁵⁷ McAra and McVie (n 10) 189.

⁵⁸ Charlie Taylor, ‘Review of the Youth Justice System in England and Wales’

political construction is immaterial: 64 per cent of children subject to Youth Rehabilitation Orders (YROs) and 69 per cent of those sentenced to custody reoffend within the year.⁵⁹ These metrics, though flawed, are indicative of a failing system.

The ‘complexity thesis’ refers to the consensus among youth justice professionals that children in their charge are in more acute need than previous cohorts, and has been employed to explain away the decline in positive contact outcomes.⁶⁰ Practitioners report higher rates of mental health and cognitive problems, and more difficult backgrounds, characterised by family breakdown and intergenerational offending.⁶¹ This narrative has been accepted with little interrogation.⁶² Although these accounts *are* representative of the complex pathologies of repeat offenders, the problems are not new. Such accounts reflect the concentrated need that has always been present in children that offend. A cultural shift regarding the discussion of mental health and socio structural inequalities, has meant that children and professionals are more willing to discuss these issues openly.

Children who persistently offend have always been victims of multifaceted disadvantage.⁶³ It is only now that we are ready to recognise this fact. Young offenders have always been ill-served by a Youth Court insufficiently adapted to their needs; that emphasises punishment over rehabilitation. However, we must draw a distinction between the success of the diversionary whole and the outcomes of Youth Court contact. The latter have worsened as the number of children processed has fallen from its 2007–08 peak. This further supports the notion that Youth Court disposals are counterproductive for persistent serious offenders.

Ministry of Justice (Cm 9298, 2016) 8.

⁵⁹ Case and Hampson (n 17) 29; Taylor (n 59) 3.

⁶⁰ Bateman and Wigzell (n 20) 255.

⁶¹ Hunter and others (n 11) 12.

⁶² Bateman and Wigzell (n 20) 255.

⁶³ McAra and McVie (n 10) 185.

Taylor and others describe an environment that alienates young people, preventing the voluntary and informed engagement needed for legal processes to have prosocial outcomes.⁶⁴ Youth Courts operate as modified adult criminal courts. Observers report children find it difficult to communicate and to understand their sentences, which is compounded by a culture of allocating junior advocates who do not have the experience to explain it to them.⁶⁵ Alienation only diminishes self-efficacy and further pushes offenders along antisocial trajectories, compromising their perception of the court's legitimacy and thus willingness to comply with orders, as well as colouring their view of other social institutions. Youth Courts entrench antisocial pathways by imposing stigmatic and legal barriers to prosocial engagement. Custodial sentences isolate children from family and concentrate the influence of antisocial peers.

Taylor highlighted the plight of a girl subject to an electronic-tag curfew. She missed her curfew by seventeen minutes, but the court was only capable of determining her guilt or innocence.⁶⁶ He argued that it was indicative of a court lacking the flexibility to meet the needs of young offenders. Both the Carlile and Taylor reviews thus recommended the implementation of problem-solving, judicial monitoring approaches — the latter in the shape of Scottish Children's Hearings — to better coordinate interventions and support.⁶⁷ Taylor's Children Panels were explicitly problem-solving bodies, which left findings of guilt to the Youth Court, assuming responsibility for developing plans of rehabilitation in lieu of sentencing.⁶⁸ Although Taylor's recommendations have seen little uptake, the enthusiasm for problem-solving has remained among practitioners.⁶⁹ The most prominent of these locally-led efforts are the YRO Review Panels,

⁶⁴ Winick (n 45) 1072.

⁶⁵ Taylor (n 59) 27.

⁶⁶ *ibid* 28.

⁶⁷ Hunter and others (n 11) 8; Taylor (n 59) 30.

⁶⁸ Taylor (n 59) 32.

⁶⁹ Case and Hampson (n 14) 29.

which seek to implement the essence of problem-solving practice in post-sentencing monitoring.

Problem-solving courts have antecedents in tribal systems of justice and welfarist juvenile courts, pioneered in America at the turn of the twentieth century.⁷⁰ Their modern incarnation arose in Florida in 1989, where traditional sentences were doing little to restrain an overwhelming caseload of non-violent drug offences.⁷¹ All subsequent courts have materialised in that context — when adversarial courts fail to resolve problems that animate recurrent offending amongst certain groups.⁷² They have expanded into disparate specialisms like domestic violence, indigenous communities, and mental health.⁷³ Through its interactions with the latter, problem-solving courts have taken on the substance of therapeutic jurisprudence, which emphasises legal processes' capacity to act as rehabilitative or 'therapeutic' agents. It sees law and practitioners as social actors, and considers how processes can be modified to aid recovery.⁷⁴ Subsequently, problem-solving approaches are inherently malleable. They adapt the model to serve the needs of the target group, utilising specialised settings and staff.⁷⁵ Therapeutic jurisprudence seeks to incorporate developments from psychology, criminology, and social work literature to enhance the therapeutic potential of the law.⁷⁶ The judge is central to the problem-solving court. There they are is not a neutral arbiter but the leader of a team.⁷⁷ This is particularly valuable in treating children, who benefit immensely from having a constant authority figure that communicates care, throughout the ups and downs of rehabilitation.⁷⁸

⁷⁰ Natasha Bakht, 'Problem Solving Courts as Agents of Change' (2005) 50 *Crim LQ* 224, 225; Winick (n 45) 1056.

⁷¹ Winick (n 45) 1056.

⁷² Bakht (n 71) 227.

⁷³ *ibid* 247.

⁷⁴ Wexler (n 2) 127.

⁷⁵ Bowen and Whitehead (n 12) 6.⁷⁶ Kaiser and Holtfreter (n 8) 48.

⁷⁶ Kaiser and Holtfreter (n 8) 48.

⁷⁷ Bakht (n 71) 252.

⁷⁸ Joanna Adler and others, 'What Works in Managing Young People Who Offend? A

Continuity is essential, and part of the five components of therapeutic jurisprudence, outlined by Winick and Wexler:

- ‘Ongoing judicial intervention;
- Responsiveness to behaviour;
- Integration of treatment services with judicial case processing;
- Multidisciplinary involvement; and
- Collaboration with communication-based and government organisations.’⁷⁹

While specialised courts emerged separately from therapeutic jurisprudence, modern best practice incorporates its principles.⁸⁰ In spite of problem-solving’s theoretical agnosticism, Kaiser and Holtfreter argue that its positive effects can be understood through a model integrating the core of Wexler’s jurisprudence and the essence of procedural justice.⁸¹ Judicial monitoring, the salient element in court-centred rehabilitation, creates a relationship of trust that improves engagement and enhances compliance with the wider justice system. Participants feel that they have been ‘heard out’ and that impression of fairness translates to feeling that the system and its decisions are legitimate.⁸² Problem-solving justice is effective in part because welfarist courts are perceived to be fair. Research indicates offender compliance is contingent more on perceptions of fairness than efficacy; prima facie, the effective justice system is the one people comply with.⁸³ Feelings of group belonging are not nuanced.⁸⁴ How a young person feels about authority correlates with their willingness to engage in the life-stage institutions and activities that embed prosocial pathway progression. Alternatively, if a young person feels the state is indifferent and arbitrary, they are likely to

Summary of the International Evidence’ (Ministry of Justice, 2016).

⁷⁹ Kaiser and Holtfreter (n 8) 56.

⁸⁰ *ibid* 45.

⁸¹ *ibid* 47, 56.

⁸² Bowen and Whitehead (n 12) 5.

⁸³ *ibid*.

⁸⁴ Kaiser and Holtfreter (n 8) 50.

experience ‘risk stagnation’ that will push them towards antisocial associations and behaviours.⁸⁵ Problem-solving courts can thus be understood through the transposition of these two theories: they work when they reflect the essence of therapeutic jurisprudence and procedural justice. These principles embody effective practice because they encourage prosocial engagement and identification.

Pathways can determine whether practices are therapeutic, in a process seeking to facilitate desistance from crime. Judges should take pains to ensure that participants do not feel coerced, treating them with dignity and respect. They should persuade, allowing participants the psychological benefits of the perception of choice.⁸⁶ Motivational interviewing techniques empathetically highlight discrepancies between an individual’s behaviour and their underlying goals, creating motivation for change.⁸⁷ For treatments to be effective, people must recognise that they have a problem. Judges can assist with, not solve those problems.⁸⁸ This is particularly important when we consider that ‘risk stagnation’ is manifested by a sense of powerlessness and a lack of choice. For participants to move forward, they must develop a sense of agency through the problem-solving process. Mandating treatment is antithetical to that goal and thus facilitating a pathway to desistance. More recent evidence concerning the outcomes of mandatory drug treatments and community supervision orders indicates that this is as much an issue of framing. Giving participants the option of returning to court, however undesirable, is enough to create the important illusion of choice.⁸⁹

Youth Referral Order Review Panels have been successful insofar as they implement problem-solving practice, but limitations borne of the law and its status as a local initiative have restrained it from realising

⁸⁵ Kemshall and others (n 35) 127.

⁸⁶ Winick (n 45) 1077.

⁸⁷ *ibid* 1081.

⁸⁸ *ibid* 1067.

⁸⁹ *ibid* 1074.

its full potential. The NYOS first introduced panels in response to Lord Carlile's call for age-appropriate modifications to criminal justice processes.⁹⁰ The freedom allotted to Youth Offending Teams in designing local service delivery, allowed for the pilot scheme to take place without Westminster involvement. The panels were designed to address a perceived lack of engagement with YROs.⁹¹ Such orders task local services with overseeing retributive and reparative undertakings in the community, while resolving a young person's criminogenic needs and supporting participation in education or work.⁹² The NYOS utilised a problem-solving approach, bringing magistrates onto premises to engage with young people directly; to acknowledge the small steps taken against adversity towards a law-abiding life.⁹³ In informal settings, magistrates use motivational interviewing to draw out problems in the home, education, employment or with their mental or physical health — including substance abuse problems — coordinating solutions with attending care workers and parents, to aid the successful completion of orders.⁹⁴ Magistrates receive training in these techniques and in accommodating mental health or learning difficulties.⁹⁵ Participants, whose disadvantaged backgrounds contributed to their difficulties with compliance, attributed positive outcomes to the panels, like school reengagement or successful apprenticeships.⁹⁶ Magistrates felt the environment allowed young people to communicate the reality of their lives and how much help they needed to get back on track.⁹⁷ They congratulated defendants on work done but held them to account when promises remained unfulfilled.⁹⁸ Unfortunately, magistrates can

⁹⁰ Ward (n 1) 13.

⁹¹ Jenni Ward and Kathryn Warkel, 'Northampton Youth Offending Service Review Panel Evaluation' (Middlesex University, 2015) 4.

⁹² *ibid.*

⁹³ *ibid* 5, 6.

⁹⁴ Ward and Warkel (n 92) 10; Lawrence (n 4) 46.

⁹⁵ Ward and Warkel (n 92) 8.

⁹⁶ *ibid* 14.

⁹⁷ *ibid* 15.

⁹⁸ Hunter and others (n 11) 29.

only take part in a personal capacity, because the provision in the Criminal Justice and Immigration Act 2008 to have courts carry out periodic reviews has not been commenced.⁹⁹

Though taken from a small evaluative base, YRO panels have had documented success in encouraging prosocial engagement that builds pathways out of crime.¹⁰⁰ Interviewed participants expressed a simple desire for social inclusion: ‘I want a job; I want to get a place to live’ said one, attributing past offending to having too much time on his hands.¹⁰¹ Antisocial routes become attractive when conventional access routes are perceived to be beyond reach.¹⁰² The time children would have spent in school, if not for truancy or exclusion, is monopolised by antisocial peers who engage in and enable delinquency as a form of leisure. Filling that time with education or training separates young people from prolonged and concentrated pressure to offend. They develop indispensable skills, acting to motivate and sustain prosocial pathways. Another participant secured a catering apprenticeship through the YOS. The work made him happier, giving him purpose and routine that he needed to break his patterns of acquisitive offending.¹⁰³ Magistrates conveyed that continued success would allow them to seek an early end to his order. These incentives are powerful as they give the young person agency in the rehabilitative process, which helps remedy a lack of self-efficacy common to antisocial pathways. In encouraging children to recommit to education and training, the YRO panels reintegrate young people and bestow personal agency sorely lacking in more retributive community sentencing.¹⁰⁴

Problems remain where panels are constrained by limited legal authority, notably in coordinating local authority agencies. Artificial

⁹⁹ *ibid* 28.

¹⁰⁰ *ibid* 30.

¹⁰¹ Ward and Warkel (n 92) 12.

¹⁰² Lawrence (n 4) 38.

¹⁰³ Ward and Warkel (n 92) 13.

¹⁰⁴ *ibid* 15.

delineations in provision and a culture of ‘passing the buck’ have created parallel systems in and outside YOSs.¹⁰⁵ This failure of cohesion obviously wastes scarce resources but increases the risk that young people will fall between the gaps, isolating them when they need support. Hunter had to recommend that social service case workers be compelled to attend the hearings of children in their charge.¹⁰⁶ Clearly there is a vacuum of interagency coordination and accountability, that problem-solving judges could fill, but volunteer magistrates cannot exercise their powers outside of court. Even in court, where judges can order children’s services to carry out investigations, they rarely do so.¹⁰⁷ If a problem-solving court is to be successful, it must allot more substantial powers to judges in their guise as a nexus of joined up working and train them to use those powers routinely.

3 Do Problem-Solving Family Courts Generate Sustainable Pathways Out of Trouble?

‘The essence of FDAC is that a specially trained judge, backed by a multidisciplinary specialist team working with other professionals, uses regular court reviews without lawyers present as the problem-solving forum for engaging parents in tackling problems that put their children at risk of harm.’¹⁰⁸

The Family Drug and Alcohol Court (FDAC) is an alternative to ordinary care proceedings involving substance misuse.¹⁰⁹ Introduced in response to the 2003 report *Hidden Harm*, highlighting widespread

¹⁰⁵ Hunter and others (n 11) 27; Taylor (n 59) 14.

¹⁰⁶ Hunter and others (n 11) 28.

¹⁰⁷ Children Act 1989 s 38(6).

¹⁰⁸ Jo Tunnard, Mary Ryan and Judith Harwin, *Problem Solving in Court: Current Practice in FDACs in England - Final Report* (Lancaster University 2016) 3.

¹⁰⁹ Judith Harwin and others, *After FDAC: Outcomes Five Years Later - Final Report* (Lancaster University 2016) 1.

parental substance misuse, the 2008 pilot was funded by three inner-London Boroughs; where it featured in 62 per cent of care proceedings.¹¹⁰ A working group led by Judge Nicholas Crichton adapted the American Family Drug Treatment Court, which used judge-led non-adversarial hearings to determine and monitor treatment for drug dependent parents.¹¹¹ Emphasising the role of the judge and judicial continuity, the FDAC uses an ‘integrated’ model in which a single judge has jurisdiction over care proceedings and treatment intervention.¹¹² At the successful conclusion of the pilot in 2012, the model was rolled out with the support of then-President of the Family Court, Sir James Munby. The wider rollout takes place within a new legal framework — the 2014 Children and Families Act — which introduced a statutory requirement of twenty-six weeks for normal completion of proceedings.¹¹³

Consequently, the FDAC model is built around the eighteen-week ‘trial for change’. This intervention is formulated by the multidisciplinary team after an initial assessment consisting of observation and interviews.¹¹⁴ It is then presented to parents at the Intervention Planning Meeting, and an agreed plan is presented to the court. The Plan forms the basis of the intervention, coordinated by a FDAC key worker who liaises with treatment providers and conducts weekly meetings and drug testing. Their reports are fed into the fortnightly Non-Lawyer Review Hearings, in which specially trained judges employ motivational interviewing techniques to identify

¹¹⁰ Stephen Whitehead, ‘Building Better Courts: Lessons from London’s Family Drug and Alcohol Court’ (*New Economics Foundation*, 2014).

¹¹¹ *ibid.*

¹¹² Judith Harwin and others, ‘Child and Parent Outcomes in the London Family Drug and Alcohol Court Five Years On: Building on International Evidence’ (2018) 32 *Int J Law Policy Family* 140, 148.

¹¹³ *ibid.* 151.

¹¹⁴ Jo-Ann Maycock, Sheena Webb and Tom Borro, ‘Combining Expert Assessment and Intervention During FDAC Proceedings and Trauma Informed Approaches’ [2017] *Fam Law* 1119.

problems and solutions, as well as praise progress.¹¹⁵ Judges strongly adhere to problem-solving principles, clearly communicating decisions and consequences to parents, while cultivating a relationship of trust.¹¹⁶ The FDAC model offers the clearest measure for the effectiveness of problem-solving in the Family Court, and given the extensive reference made to its success by Sir James, we can infer that his proposals involve the implementation of much of its techniques and structure.¹¹⁷

However, parental desistance is not the overriding goal of the FDAC process. The system is designed to identify parents that are capable of immediate change, but most are not.¹¹⁸ The welfare of the child, the court's paramount principle, demands that a permanent placement be arranged promptly. This results in a truncated process, extended at most to twenty-six weeks.¹¹⁹ Though a higher proportion of mothers (35 per cent) are reunited with their children compared to those in ordinary proceedings (21 per cent), less than half cease misuse by the end of proceedings.¹²⁰ The creation of pathways to desistance is simply not the objective of proceedings, and this is reflected in studies of its efficacy. There is no data as to whether most mothers, whose children were taken into care, benefited from the FDAC process.¹²¹ Those that were reunited with their children benefited from the 'FDAC effect' as 58 per cent were estimated to have sustained cessation over the five-year follow-up.¹²² This suggests that while the proceedings' ultimate focus detracts from the accessibility of its facilitated pathways, the ones it produces are sustainable.

¹¹⁵ *ibid* 29.

¹¹⁶ *ibid* 25.

¹¹⁷ Sir James Munby, 'Children Across the Justice Systems' (Parmoor Lecture, Howard League for Penal Reform, 2017) 6.

¹¹⁸ MacDonald (n 44) 117.

¹¹⁹ Maycock, Webb and Borro (n 120).

¹²⁰ Harwin and others, *After FDAC* (n 110) 20.

¹²¹ *ibid* 8.

¹²² *ibid* 24.

Drug-dependent pathways are a mode of antisocial pathway and are similarly rooted in social exclusion. Although adolescent drug use is not causally related to crime, it is largely transitory and exists only as a marker of problems which themselves may induce disengagement from prosocial pathways; drug dependency is, like crime, effectively an alternative pathway.¹²³ Notwithstanding that dependency can drive criminal behaviour (unlike casual use), it too is engendered and progressed through association with tightly-bonded networks, it both drives and is driven by social exclusion, and prevents the development of skills, networks and proficiencies necessary to return to a prosocial pathway.¹²⁴ The utility of the pathways metaphor is that it strips out the specialist language of the criminal justice system to allow for cross-disciplinary discussions; particularly where multi-agency working is required, as in the problem-solving context.¹²⁵ How problem-solving courts deal with dependency could be directly analogous to its capacity to rehabilitate offenders — to facilitate desistance from criminal pathways. Indeed, substance abuse desistance will often be part of that process.

Nevertheless, there are key differences between the operative contexts of the FDAC and YJS. A limitation of the FDAC comparison to a criminal justice context is that the majority of those engaged by FDACs are women, while most young and adult offenders are male.¹²⁶ Women could respond better to problem-solving interventions, a result of endocrinological or socialised differences. Their pathways to crime are distinct, with familial and personal relationships having a larger bearing on offending.¹²⁷ Those differences might shape the contours of turning points away from crime. Furthermore, FDAC parents are at different developmental stages. Over three quarters of

¹²³ Kemshall and others (n 35) 103.

¹²⁴ MacDonald (n 44) 116.

¹²⁵ Kaye Haw, 'Risk Factors and Pathways Into and Out of Crime: Misleading, Misinterpreted or Mythic? From Generative Metaphor to Professional Myth' in *Pathways and Crime Prevention* (n 3) 72.

¹²⁶ Hunter and others (n 11) 11.

¹²⁷ *ibid* 6, 16.

mothers were between the ages of twenty and forty, having made early adulthood transitions that are thought to encourage natural desistance, like moving out of the family home.¹²⁸ This indicates that FDACs address less transitory and more entrenched patterns of antisocial behaviour.¹²⁹ In contrast, the threat of child removal is considered an important element of sustaining engagement with treatment, and children are often a powerful motivator for constructing pathways out of trouble, outside of care proceedings.¹³⁰ None of these go so far as to defeat the purpose of comparison, but will be considered when assessing Sir James' reforms .

Sustainable pathways to desistance, like those out of crime, have two elements: altering antisocial pathways and assisting prosocial pathway progression. FDACs, while largely succeeding in the former, need to do more to promote the social reintegration of recovering parents.

A key element of immediate and longer-term positive change is the perception of possible self. The FDAC process manifests turning points by helping parents internalise the possibility of change. Two elements facilitate this perception: in applying principles of procedural fairness (clear and open communication) in court, parents believe they are given a 'fair shake' and are encouraged to take responsibility for their rehabilitation.¹³¹ Secondly, the counselling and additional therapies available through the 'trial for change' give parents the tools to address traumas that underlie the antisocial behavioural patterns that have held them back.¹³² Believing that they can change, participants move beyond a state of 'risk stagnation' in which they refuse to abandon antisocial networks out of a sense of belonging and

¹²⁸ Harwin and others, *After FDAC* (n 110) 13; Webster and others (n 33) 2.

¹²⁹ Harwin and others, *After FDAC* (n 110) 15.

¹³⁰ Whitehead (n 111).

¹³¹ Kaiser and Holtfreter (n 8) 48.

¹³² Paul Mazerdle and others, 'Repeat Sexual Victimization Among an Offender Sample: Implications for Pathways and Prevention' in *Pathways and Crime Prevention* (n 3) 161, 164.

hopelessness.¹³³ This drives the willing engagement necessary for programme success — judges cannot order recovery; they can only assist and encourage it.¹³⁴

FDACs do not go far enough to reintegrate participants at the end of the trial for change. Saliiently, there are no resources for bringing mothers into employment, a key sustaining system for prosocial pathways.¹³⁵ However, socio structural factors — a dearth of affordable childcare and flexible working — make it difficult for single mothers to work. Moreover, the type of work available must be of sufficient quality. Low-waged and temporary employment is ineffectual, and Government welfare-to-work programmes have consistently failed to yield the required standard.¹³⁶ Though YRO review panels have seen individual examples of success, a problem-solving YJS would still encounter the same problems. Additionally, the process does not address the familial estrangement suffered by addicts and thus utilise the family as another key sustaining system. The estrangement wrought of substance dependency often aggravates abuse, concentrating the influence of antisocial networks, entrenching patterns of problematic behaviour. Participants are denied the opportunity to form new peer networks that could motivate further recovery, away from substance-abusing friends and partners.¹³⁷

But these shortcomings must be understood in line with the limited objectives and resources of FDAC. The process is not ultimately designed to rehabilitate — that is only an objective insofar as it is in the best interests of the child subject to care proceedings. The truncated treatment schedule recognises the repercussions of uncertainty for the child, striking a balance between continued parental involvement and promptly securing a lasting arrangement. A

¹³³ Kemshall and others (n 35) 98.

¹³⁴ Winick (n 45) 1067.

¹³⁵ Hayes (n 49) 218.

¹³⁶ Webster and others (n 33) 35.

¹³⁷ Boppre, Salisbury and Parker (n 47) 16.

rehabilitative justice system would not sit at such cross-purposes. Plainly, those that are not reunited with their children do not receive additional support, but ‘successful’ mothers would benefit from longer-term assistance. The first two years after reunification are the riskiest in terms of direct relapse or other indicators of dysfunction.¹³⁸ Failed recoveries compromise the overriding objective of FDAC and the broader family court — the welfare of the relevant child.¹³⁹

4 Could a Problem-Solving Court Create Obstacles to Pathways Out of Crime?

‘The Family Court should be rebalanced as a problem-solving court, engaging therapeutic and other support systems that so many children and parents need.’¹⁴⁰

It would be generous to suggest that Sir James made an actionable proposal for the amalgamation of the Youth Court into a revamped family court. Rather, almost thinking aloud, he intimated that a family court, reoriented towards problem-solving and therapeutic practice, would be a better vehicle for grappling with complex and interrelated needs of adolescent offenders and their families.¹⁴¹ The Family Court already hosts a successful problem-solving court. Besides, Carlile, Taylor and their disciples in the NYOS assert that problem-solving justice holds real promise for young offenders. This section therefore seeks to evaluate the likely efficacy of a problem-solving family criminal court, bringing together analyses of extant problem-solving practice, while drawing on criminological literature to illuminate potential pitfalls. This examination will produce a fleshed-out model for problem-solving youth justice, maximising its potential for

¹³⁸ Harwin and others, *After FDAC* (n 110) 24.

¹³⁹ Children Act 1989 s 1(1).

¹⁴⁰ Munby (n 118) 8.

¹⁴¹ *ibid.*

promoting pathways out of crime while compensating for its shortcomings.

If we understand antisocial behaviour as a consequence of failed prosocial transitions, then problem-solving family courts' interventions need to address the causes of offending behaviour — tightly-bonded, locality-centred association, school exclusion — and facilitate prosocial pathway construction going forward. The former may involve counselling or training, to acquire missing social skills, or directing situational-personal change like moving schools or prohibiting contact with certain peers; to allow a child to break away from social networks fortifying a pathway into crime. It follows that once an antisocial scaffolding is removed, the disposed needs the tools to construct a prosocial one. Interventions need to be capable of facilitating prosocial network development and institutional engagement necessary for successful navigation of a conventional, lawful pathway. The latter could take the form of placement in further education colleges and apprenticeships. While we have seen that apprenticeships are successfully organised through existing YOS schemes, the state of education in the custodial estate is more precarious.¹⁴² Charlie Taylor found that education services 'play a peripheral role in efforts to rehabilitate children' due to their presumption that children who offend are incapable of succeeding in education.¹⁴³ Taylor, a former headteacher, deemed education in custody inadequate, with children receiving half of the targeted thirty hours of schooling a week.¹⁴⁴ Likewise, young people that want to enter the workforce are subject to the opportunities in their local area — a particular problem for provision in deprived areas, where offending is concentrated.¹⁴⁵ In the Teesside Study, interviewees' participation in training and employability schemes had little positive impact, resulting in the same poorly paid, insecure work they

¹⁴² Ward and Warkel (n 92) 13.

¹⁴³ Taylor (n 59) 11.

¹⁴⁴ *ibid* 40.

¹⁴⁵ Webster and others (n 33) 42.

otherwise had access to.¹⁴⁶ A critical limitation emerges from this analysis: without wider socioeconomic change, there is little guarantee that employment assistance schema will do much good. There is only so much that individual interventions can do to mitigate broader socio-structural factors that drive social exclusion and antisocial pathway construction. Much of transition disengagement is rooted in believing that prosocial pathway success is not within reach. In much of Britain today, that is true. Criminality is often an economically rational choice in deprived communities. Successful efforts to reduce ingrained criminality must change this.

Additionally, the court will require legislation to specifically direct public authorities, unless agencies willingly subject themselves to the jurisdiction of the court, per the constitutional principle outlined in *A v Liverpool City Council*.¹⁴⁷ FDACs circumvent the rule through voluntary arrangements, but these will be harder to achieve at a national scale. It is thus likely that the court will require primary legislation.¹⁴⁸ The desirability of statutory powers over judicial initiative is only substantiated by the testimony of FDAC judges, who reported under-resourcing specialist teams and courts, and anxiety generated by fragile funding arrangements.¹⁴⁹ Considering that a problem-solving family court would operate at an order of magnitude greater than the then-nascent FDACs, questions arise as to whether — without statutory support — the Family Court will have the personnel to carry out fortnightly reviews of young offenders' progression. International experience shows that specialised courts are vulnerable to austerity and changes in policy agendas, as they can easily be dismantled; an Act of Parliament would go some distance to attenuate that peril and allocate the resources necessary for its full realisation.¹⁵⁰ Clearly, the fate of problem-solving youth practice is fundamentally a

¹⁴⁶ *ibid* 35.

¹⁴⁷ Munby (n 118) 4.

¹⁴⁸ *ibid* 9.

¹⁴⁹ Tunnard, Ryan and Harwin (n 109) 30.

¹⁵⁰ Bakht (n 71) 249.

question of political will. As much as problem-solving courts efficiently use existing funds and generate savings, a fundamental expansion of the family court's jurisdiction could be a step too far for an organisation strained by austerity.¹⁵¹ Should the executive return to the cause, allocating the necessary money and powers, problem-solving judges will provide children opportunities to construct turning points out of crime. Yet, as individual pathways are inherently unpredictable, interventions through problem-solving justice must be appropriate to the individual and their circumstances. What effects prosocial behaviour in one, might not in another.¹⁵² What is certain, is that a government that is serious about tackling crime must take steps to ameliorate intergenerational disadvantage, that both gives rise to offending and frustrates efforts to build pathways out of crime.

The risk of net-widening and up-tariffing inherent to novel rehabilitative tools renders an independent referral mechanism a necessity.¹⁵³ In American Mental Health Courts defendants who agree to participate have their charges — having been screened and referred by jail psychiatrists at bail hearings — dismissed entirely or prosecuted in abeyance. Suspended sentences are dismissed or heavily reduced upon completion of treatment.¹⁵⁴ Similarly, FDAC operates as a parallel system, available to those subject to ordinary care proceedings. It has no influence over the decision of a local authority to refer the matter. Its position as an alternative maintains the crucial element of choice, while still incentivising treatment. However, this is not simply a matter of compliance. System contact has almost universally negative consequences for children's pathways to desistance. The success in driving down the number of first-time entrants into the YJS, is grounded in a diversionary approach that understands the criminogenic effect of formal disposal. Pathways to desistance are, more than anything, about identity. They require a

¹⁵¹ Whitehead (n 111).

¹⁵² MacDonald (n 44) 123.

¹⁵³ Bowen and Whitehead (n 12) 29.¹⁵⁴ Bakht (n 71) 248.

¹⁵⁴ Bakht (n 71) 248.

young person to accept that they can change. Antisocial labels, like offender or drug abuser — that diminish self-efficacy and create social exclusion — are imposed from without.¹⁵⁵ They are subsequently internalised and reinforced by the person in question.

This is why court contact is so problematic. As much as interventions have the potential to prompt positive turning points, they can spawn ones that negatively impact the trajectory of a young life. An offender label shifts what behaviour is acceptable and ‘not for me’ in the wrong direction.¹⁵⁶ Judges are social authority figures, in whom defendants vest wider feelings about whether they should trust or feel included by society.¹⁵⁷ Young people, whose transitory offending behaviour was tangential to their perception of self, take this rejection to heart. Their participation in school — a key obstacle to antisocial pathway progression — is disrupted.¹⁵⁸ In its place they are exposed to the criminogenic influence of other offenders, in the custodial estate or community supervision; in addition to the reality that certain access routes are closed to them due to the legal consequences and stigma associated with criminal conviction.¹⁵⁹ Where a young person would have grown out of offending behaviour, an interaction with the court begets relational trauma and a critical moment inducing commitment to an antisocial pathway. This is what academics mean by labelling. It has real consequences: the Edinburgh Longitudinal Study, which used annualised surveys of 4300 participants to examine the self-reported offending careers of disadvantaged children, found that 96 per cent of those who became chronic offenders in adulthood had experienced police contact by the age of fifteen. This was compared to less than half for those who engaged in the same antisocial behaviour as adolescent, but desisted from offending.¹⁶⁰ Consequently, its authors

¹⁵⁵ France and Homel, ‘Societal Access Routes and Developmental Pathways’ (n 3) 16.

¹⁵⁶ Goodnow (n 28) 56.

¹⁵⁷ Kaiser and Holtfreter (n 8) 50.

¹⁵⁸ McAra and McVie (n 10) 200.

¹⁵⁹ Bowen and Whitehead (n 12) 30.¹⁶⁰ McAra and McVie (n 10) 194.

¹⁶⁰ McAra and McVie (n 10) 194.

found that doing nothing is often better in reducing serious offending.¹⁶¹ Pertinently for a model focused on intervention, most of the hard-won success achieved in Youth Justice since 2007 has been through prioritising diversion away from system contact.

The piloted Scottish Youth Court is one-such cautionary tale. Attempting to implement youth-focused problem-solving, it ‘encouraged prosecution in cases that might previously have attracted an alternative resolution’. The pilots were terminated on the grounds of their excessive cost and the criminogenic effect of up-tariffing young offenders.¹⁶² This risk almost certainly fed into Charlie Taylor’s specific formulation of his problem-solving Children’s Panels.¹⁶³ Leaving the decision to prosecute to existing systems that prioritise diversion retains a check against inappropriate interventions, administered by well-intentioned but overzealous youth justice practitioners.¹⁶⁴ A court that foregrounded whether intervention was therapeutic for the young person at issue, would be less likely to ‘overdose’ and propagate offending pathways through unneeded system contact. However, this attitude would need to pervade beyond the court to decision-makers who determine if a child should be referred to trial. Alternatively, employing a problem-solving court solely as a sentencing body would keep intact existing structures that prioritise diverting children away from court.

The problem-solving court is fundamentally a rehabilitative body. Utilising therapeutic jurisprudence, it eschews the traditional adversarial form in pursuit of an environment that improves compliance with treatment, through building supportive relationships of trust.¹⁶⁵ That capacity to build empathy is a key strength of the problem-solving approach, realising the law’s potential to act as an

¹⁶¹ *ibid* 200.

¹⁶² Bowen and Whitehead (n 12) 29.¹⁶³ Taylor (n 59) 32.

¹⁶³ Taylor (n 59) 32.

¹⁶⁴ Bowen and Whitehead (n 12) 30.¹⁶⁵ Kaiser and Holtfreter (n 8) 46.

¹⁶⁵ Kaiser and Holtfreter (n 8) 46.

instrument of healing.¹⁶⁶ However, it puts aside much of what make traditional courts objective arbiters of fact. Ward and Warkel highlighted the risk that YRO review magistrates would lack the necessary impartiality, should that young person return to court. Given the desirability of judicial continuity in the problem-solving process, this is something that a family court should attempt to accommodate. If the relationship between sentencing and supervision is a closed-loop, then there is no reason why further offending — which is to be expected along non-linear paths to desistance — cannot inform the structure of a treatment plan, which will include agreed penalties for backward steps. The problem arises where problem-solving courts are tasked both with finding guilt and administering treatment. Taylor's designation of his panels as a sentencing-only body was a concession to that complication. Indeed, the FDAC model regards the reversion to ordinary care proceedings as an important motivator for mothers to comply with the treatment plan.¹⁶⁷ The issue of whether a problem-solving YJS should strive for continuity between trial and sentencing is not one that this author seeks to resolve.

Instead, this paper adds a caveat to Sir James' proposal of a problem-solving family court. The author agrees that the inherent limitations of the problem-solving model render it ill-suited to assuming the full jurisdiction of the Youth Court. The FDAC and American Mental Health Courts illustrate the utility of a parallel carrot and stick method. Retaining the existing structure of the YJS at large alleviates the risk of a problem-solving court inadvertently undoing decades of progress. Subsequently, this paper recommends that a problem-solving court should only take over the sentencing function of the Youth Court, which would still offer punitive disposals, with the view that this would improve uptake and engagement with rehabilitation programmes.¹⁶⁸

¹⁶⁶ Winick (n 45) 1090.

¹⁶⁷ Harwin and others, *Child and Parent Outcomes* (n 113) 150.

¹⁶⁸ Therapeutic jurisprudence holds that those who feel that they have been treated fairly are less likely to reoffend; successful reintegration starts at disposal.

5 Conclusion

This paper has made the case for a problem-solving, family criminal court, targeted at young people embedded in antisocial pathways. Though the clamour for reform is to some extent a political construction, it is the author's view that a therapeutic court would facilitate more turning points out of crime for chronic offenders, whose complex underlying needs are ill-served by traditional disposal. Assuming a sentencing function parallel to the Youth Court, a problem-solving family court could operate in line with best practice, without undermining the broad success of the diversionary youth justice model. While it is no silver bullet, a well-designed court could support young people in building lives free of crime.

Additional research in this area should further explore the problem-solving approach and pathways evaluative framework. If practitioners wish to take this configuration forward, the author recommends a pilot scheme across multiple sites around the country, to evaluate how it works in geographically and socioeconomically diverse communities. A longitudinal study, such as that conducted by Professor Judith Harwin for FDACs, should be carried out contemporaneously to evaluate long-term outcomes and identify possibilities for improvement in practice. This could be conceived and funded at the local level, but there would be clear advantages to Westminster involvement. A pathways frame would aid the study of desistance in the youth and adult custodial population. Constructivist pathways could provide valuable insights into how to best use offenders' time in custody, in aid of reintegration. Turning points can take place across the life-course, not just in adolescence.

Improvements to traditional justice disposals are beyond the scope of this article, but the author would point to the spread of problem-solving principles in general practice (see Ryder) as a path forward.