

Problem-Oriented Courts

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DISCLAIMER

The purpose of this Research Paper is to provide additional information on issues relevant to the Project. The views expressed in this Research Paper are those of the individual author and do not necessarily coincide with the views of the Commission.

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Introduction

This paper addresses a number of issues linked to the emergence of problem-oriented courts. Problem-oriented courts form part of an emerging judicial sphere where the traditional focus on legal process is balanced with concern for therapeutic outcomes. Expressed simply, problem-oriented courts seek to use the authority and structure of the courts to further therapeutic goals and enhance the performance of agencies involved in delivering court mandated services. Problem-oriented courts attempt to facilitate a team approach and encourage close collaboration between agencies involved in the justice process. The problem-oriented court acts as the 'hub' connecting various 'spokes', such as drug and alcohol treatment agencies, community based corrections, probation services and domestic violence agencies, forming a holistic and integrated approach. This approach encourages magistrates and judges to take a pro-active and overtly leading role in the creation of better, well coordinated services for clients.

Supporters of problem-oriented courts maintain that such courts sit outside the traditional punishment paradigm, being more concerned with treatment and rehabilitation outcomes.¹ The orientation of the court is neatly encapsulated in the notion of 'forward looking' as opposed to 'backward looking' forms of justice – that is, sentencing practices should be geared towards encouraging positive future behaviour rather than simply punishing past actions. The future impact of problem-oriented courts on the ways the criminal justice as a whole deals with offending linked to issues such as drug and alcohol use, mental health, homelessness and social exclusion could prove to be far reaching. Moreover the problem-oriented approach – and the philosophies of therapeutic jurisprudence and, to a lesser extent, restorative justice that inform the approach – may influence the orientation of mainstream courts.

The approach is largely in its infancy in Australia. There is no settled theory (although a number of theories vie for relevance) and no unified template describing how a problem-oriented court should operate. Working practices vary according to the nature of the problem the court has been developed to deal with. The long-term benefits of the problem-oriented approach and its implications for the criminal justice system remain the subject of debate, both within the judiciary and within the network of agencies a problem-oriented approach binds together to work collectively on a particular problem.

Problem-oriented courts can include community or neighbourhood courts, family and domestic violence courts, mental health courts, drug courts and alcohol courts. However, the problem-oriented approach is also being used by some magistrates in general courts when dealing with particular groups of offenders. This is particularly the case where a magistrate's court has become the site for specialist treatment and diversionary services, such as Western Australia's court-based drug diversion initiatives.² This paper excludes discussion of Aboriginal Courts which have been extensively considered by the Law Reform Commission as part of its Aboriginal Customary Law Project.³

Problem-oriented courts have not emerged in a vacuum, but in response to the challenges posed by a number of seemingly intractable urban social problems (drug use, alcohol, family and domestic violence, mental illness, anti-social behaviour, fear of crime, and problems associated with 'hyper-marginalised' groups) apparently impervious to traditional remedies and solutions. They also reflect frustration with the often fragmented and ad hoc response of traditional justice structures, cultures and processes. Some courts, such as community or neighbourhood courts, have

1. Moore D, 'Translating Justice and Therapy: The drug treatment court networks' (2007) 47 *British Journal of Criminology* 42.
2. For a review, see UWA Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP): Final Report for the Drug and Alcohol Office* (Perth, 2007).
3. Aboriginal courts require a separate treatment. Freiberg lists them as a form of problem-oriented court. However, this view overlooks the fact that, from an Indigenous perspective, the 'problem' lies in the traditional incapacity of the white-fella system to recognise Indigenous law and values. Aboriginal courts are concerned with political realignment between two opposing legal paradigms. See Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005); Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Final Report No. 94 (September 2006). Marchetti and Daly also distinguish between problem-oriented and Aboriginal Courts for reasons similar to those put forward by the Law Reform Commission of Western Australia: see Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) *Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice*, No. 277. However, Harris sees consistency between the aims of the Victorian Koori Courts and therapeutic jurisprudence, claiming that they 'respond to the needs of Indigenous communities in a way that is consistent with the objects of therapeutic jurisprudence': see Harris M 'The Koori Court and the Promise of Therapeutic Jurisprudence' (2006) 1 *E Law – Murdoch University Electronic Journal of Law (Special Series)* 129 <https://elaw.murdoch.edu.au/issues/special/the_koori_court.pdf>.

emerged in response to claims that the courts are out of touch with the concerns of local communities and have been mandated to directly involve local people in the delivery of justice.

Problem-oriented courts have been influenced by the philosophies of restorative justice and therapeutic jurisprudence. While, as will be demonstrated later, the two philosophies cannot simply be collapsed together, they do share a common commitment to 'humanising' the justice process, closely integrating concerns for individual and social change into the legal process, and providing 'forward looking' rather than 'backward looking' justice outcomes. This latter concern in particular represents a paradigm shift in the way justice is conceived: less concerned with simply judging past actions than with affecting change in individuals and social contexts to ensure crime and victimisation is prevented in the future. Besides the various philosophies vying for influence in the courts, the problem-oriented court has become the site for new hybrid techniques for engaging with the needs and problems

of offenders. Since the focus of problem-oriented courts extends beyond applying the law, there is a need for behavioural techniques and treatments suited to the new environment. Intervention techniques such as motivational interviewing and brief interventions, discussed later, borrowed from addiction counselling, are emerging as intervention tools within problem-oriented courts because they claim positive results within a short timeframe.

Problem-oriented courts are not simply a new type of specialist court. As Freiberg points out, specialist courts, such as children's courts, have been in existence for a considerable amount of time.⁴ Specialist courts tend to be geared towards handling complex areas of law, whereas problem-oriented courts are more concerned with complex social problems that law alone is unable to resolve. The aim of the problem-oriented court is not to resolve complex legal issues, but rather to bring the authority and machinery of the court to bear on a particular social problem or suite of problems.

4. Freiberg A, 'Innovations in the Court System' (Paper presented at the Australian Institute of Criminology Conference on Crime in Australia: International Connections, Melbourne, 29–30 November 2004).

5. Zedner L, 'Policing Before and After the Police' (2006) 46 *British Journal of Criminology* 78, 78.
6. The term is generally believed to have emerged in the United Kingdom: see UK Government, *The Modernising Government White Paper* (March 1999). The *White Paper* made joining up government and frontline agencies to produce more integrated services a top priority. It implies creating new points of connection between the different arms of government, from policy-making through operations to service provision, creating 'seamless' policy.
7. Gate-keeping refers to decisions made by front-line personnel regarding whether to open the gates to the system or close them and keep people away from further contact. The police, for example, are the acknowledged 'gate-keepers' of, and point of first contact with, the criminal justice system and enjoy a degree of discretion about whether to take proceedings further or deal with matters informally. This is particularly the case in relation to minor offending by juveniles, where the police have been encouraged to use gate-keeping powers to divert young people away from contact with the criminal justice system and, in therapeutic jurisprudence terms, its 'anti-therapeutic' tendencies: see Blagg H & Wilkie M, *Young People and Police Powers* (Sydney: Australian Youth Foundation, 1995).
8. The 'silo' mentality implies that agencies are unable to see beyond the confines of their own agencies narrow horizons and view work with other agencies in conflict terms with each agency in competition with other agencies. It came in for sharp criticism in Western Australia during the 'Gordon' Inquiry into sexual abuse in a family violence in the Indigenous community: see Gordon S, Hallam K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (Perth: Department of Premier and Cabinet, 2002).
9. For a recent review, see Taylor C, *Court Licensed Abuse: Patriarchal lore and the legal response to intrafamilial sexual abuse of children* (New York: Peter Lang Pub Inc., 2004).
10. Walklate S, *Victimology: The victim and the criminal justice process* (London: Unwin Hyman, 1989).
11. Tilley N, 'Community Policing, Problem-Oriented Policing and Intelligence-Led Policing' in Newburn T (ed), *Handbook of Policing* (London: Willan Publishing, 2003).

In recent years a number of judicial scholars and criminologists have identified evolutionary shifts taking place in the structures and functions of the justice system. Zedner suggests that, at all levels, the system of justice as we have come to know over the last hundred or so years may simply be an historical 'blip' and will inevitably be superseded by new systems in an age where the traditional boundaries between systems are becoming more fluid.⁵

It has become an accepted tenet of contemporary justice policy that no agency acting in isolation can hope to make an impact on complex crime related issues. Complex problems require a joint approach that harnesses the skills and resources of agencies (welfare, policing, judicial, treatment) on a collaborative basis. There have been a range of pressures for all agencies working within the justice and justice related areas to set aside cultural differences and work in a more collegiate, 'joined up'⁶ and coordinated way, recognising that decisions made at one stage of the justice system have implications further down the track. Sound 'gate-keeping' practices⁷ at one stage of the system, such as the first point of contact with the police, can save resources at a later stage of the system to be used for cases requiring more intensive intervention.

Courts may wish to be participants in good joined up work, but courts are often the place where the inadequacies, flaws and weakness of inter-agency work are exposed. 'Whole of government' approaches sound fine in theory but are difficult to achieve in practice: good integrated agency work is the holy grail of contemporary justice policy – deeply desired, diligently pursued, often tantalisingly close, but always likely to vanish into the ether. One stimulus for the problem-oriented court may lie in the frustration many magistrates and judges

feel with the lack of adequate coordination and information sharing within and between relevant agencies. Magistrates may see the problem-oriented approach as offering some leverage over the system – a means by which they can influence local cultural practices and the 'silo' mentality⁸ of local agencies.

Victims

Courts have come under significant pressure to be responsive to the needs of victims and other vulnerable groups, and there is abundant literature detailing the capacities of the system itself to be a site of secondary victimisation.⁹ This has prompted courts, prosecutorial agencies, defence and the police to review the ways they deal with victims of crime. It has raised the issue of whether successful adjudication should be the fundamental goal of justice, trumping all other concerns, and whether it is good practice for positive learning experiences for offenders and therapeutic healing for victims to be deferred until after trials take place. New initiatives concerned with aiding vulnerable groups involved in the justice process, such as Western Australia's Child Witness Support Service, sharpen awareness that the justice process can have positive or negative therapeutic outcomes for participants, depending on how well they are supported through the process. The criminal justice system can itself become the site of 'secondary' or 'system' victimisation if victims are not treated with dignity and respect and kept informed about the status of the prosecution.¹⁰

Before looking in detail at problem-oriented courts it is useful to briefly identify the origins of the idea. Commentators agree that the problem-oriented court owes a debt to the problem-oriented approach developed in the context of policing.¹¹

The problem-oriented approach in policing

The problem-oriented approach can be traced back to the innovative work of Herman Goldstein who employed the idea to focus police practices on strategically defined priorities.¹² Goldstein encouraged police organisations to move away from a narrow preoccupation with crime fighting towards problem solving. Goldstein was critical of the tendency for policing to be incident-driven: a practice which ensured that the structural conditions underpinning individual crime events were left unresolved. The police in modern urban societies, Goldstein observed, struggle with an overwhelming array of problems – generally associated in some way with the sale and consumption of drugs, and the violence and social disorder this market creates.¹³ Meaningful reductions in the scale and intensity of crime required long-term strategies rather than the short-term goal of arresting offenders and temporarily taking the problem off the street or shifting the problem somewhere else.

Problem-Oriented Policing (POP) is concerned with gathering intelligence on crime incidents in a particular locality, identifying characteristics and then tackling the underlying issues in the communal environment. The approach is concerned with prevention rather than simple enforcement. POP also challenged the traditional police culture which tended to define the task of policing in narrow law

enforcement terms. Instead POP seeks the active involvement of communities and relevant government agencies and non-government organisations in the development of strategies. In this respect POP formed part of an evolving sphere of policies in the criminal justice area premised on the belief that in complex contemporary societies the task of *policing* requires input from agencies other than *the police*.¹⁴

POP required a greater willingness to work in partnership with communities; to develop an evidence base by gathering relevant statistics, trawling through relevant literature and finding out what has worked elsewhere; and to work in a pro-active rather than reactive fashion. Goldstein argued that the dominant view of policing as essentially concerned with enforcing the law distorts our understanding of the actual role played by the police, which consists of 'developing the most effective means for dealing with a multitude of troublesome situations ... these means will often, but not always, include appropriate use of the criminal law'.¹⁵ POP has become synonymous with multi-agency crime prevention initiatives around issues as diverse as juvenile crime, vandalism, drugs, burglary and car theft. In the United Kingdom it has become firmly associated with strategies such as community-based policing and multi-agency strategies to reduce repeat burglaries on large housing estates.¹⁶

12. Goldstein H, 'Toward Community-Oriented Policing: Potential, basic requirements, and threshold questions' (1987) 33 *Crime and Delinquency* 6.
13. Goldstein H, *Problem-Oriented Policing* (New York: McGraw Hill, 1990) xi.
14. Shearing CD, 'Reinventing Policing: Policing as governance' (Paper presented at the Conference on Privatisation: Retreat or proliferation of state control, Bielefeld, Germany, 24–26 March 1994).
15. Goldstein H, *Problem-Oriented Policing* (New York: McGraw Hill, 1990) 2.
16. Leigh A, Read T & Tilley N, 'Problem-Oriented Policing, Brit POP', *Home Office Police Research Group: Crime Detection and Prevention Series*, Paper No. 75 (1996).

What's the Problem?

Problem-oriented courts were first established in the United States in the late 1980s. Berman and Feinblatt define a problem-oriented court as a court seeking to use the authority of the courts 'to address the underlying problems of individual litigants, the social problems of communities, and the structural and operational problems of a fractured justice system'.¹⁷ They emerged, according to Rottman and Casey, in response to the enormous pressure being placed on courts to solve a number of endemic social problems.

The main push for this change came from the societal changes that placed courts in the frontline of responses to substance abuse, family breakdown, and mental illness. Courts cannot restrict the flow of such problems into the courtroom, and often such problems stand in the way of effective adjudication of cases. Consequently, courts are struggling to create appropriate dispositional outcomes, including securing treatment and social services.¹⁸

The problem-solving approach emerged as a mechanism for courts to manage these pressures and for finding ways to reduce high levels of repeat incarceration by ensuring services are available. Freiberg sees the emergence of problem-oriented courts as a response to a changing social environment, exerting a range of new pressures on traditional courts. There is an increasing expectation that courts will run efficiently, work collaboratively with justice agencies, assess the quality of the services they provide to victims and witnesses, and be open and transparent.¹⁹ The problem-oriented court represents a species of law reform promising to meet these expectations. Observers agree that the process is evolutionary and a 'work in progress'.²⁰

What sets the problem-oriented approach apart from other approaches is the explicit commitment to social change. Berman and Feinblatt emphasise that problem-oriented

courts were designed to deal with 'broken systems'—not just broken laws—and were to focus on 'chronic social, human, and legal problems'²¹ of the kind that had proven resistant to most criminal justice solutions.

They seek to broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behaviour of litigants and ensuring the future well-being of communities. And they attempt to fix broken systems, making courts (and their partners) more accountable and responsive to their primary customers – the citizens who use courts every day, either as victims, jurors, witnesses, litigants, or defendants.²²

The fact that the courts are 'problem'-oriented strongly implies that they will inevitably be concerned with the social problems underlying offending rather than the narrow legal implications. Butts suggests that, while problem-oriented courts maintain traditional beliefs that offenders should be made accountable, the system should do more than punish; it should prevent future harm.²³ He situates their emergence within a broader trend towards 'community justice', linking them with community policing and neighbourhood-based justice programs, all of which are underpinned by the belief that the justice system is too remote from the lives of ordinary citizens and needed to be devolved to the local level.²⁴ Berman and Feinblatt maintain that these courts have emerged because of the breakdown in 'social and community institutions (including families and churches) that have traditionally addressed problems like addiction, mental illness, quality-of-life crime, and domestic violence',²⁵ suggesting that agencies such as probation and parole have struggled to meet the demands placed upon them to resolve these problems. They suggest that policy makers are now seeking an alternative to over-crowded prisons to handle crime problems and that '[a]dvances in the quality and availability of therapeutic

17. Berman G & Feinblatt J, 'Problem-Solving Courts: A brief primer' (2001) 23 *Law and Policy* 125, 130–31; see also Berman G & Feinblatt J, 'Problem-Solving Courts: A brief primer' as cited in Winick BJ & Wexler DB (ed), *Judging in a Therapeutic Key: Therapeutic jurisprudence and the courts* (Durham: Carolina Academic Press, 2003).
18. Rottman D & Casey P, 'Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts' (1999) 240 *National Institute of Justice Journal* 12, 13.
19. See Freiberg A 'Problem-Oriented Courts: Innovative solutions to intractable problems?' (2001) 11 *Journal of Judicial Administration* 8. Freiberg summarises the work of Berman & Feinblatt on the distinction between traditional and problem focussed courts: Berman G & Feinblatt J 'Problem-Solving Courts: A brief primer' (2001) 23 *Law and Policy* 125.
20. Rottman D & Casey P, 'Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts' (1999) 240 *National Institute of Justice Journal* 12.
21. Berman G & Feinblatt J, 'Problem-Solving Courts: A brief primer' (2001) 23 *Law and Policy* 125, 126.
22. *Ibid.*
23. Butts JA, 'Introduction: Problem-solving courts' (2001) 23 *Law and Policy* 121.
24. *Ibid.* 122.
25. Berman G & Feinblatt J, 'Problem-Solving Courts: A brief primer' (2001) 23 *Law and Policy* 125, 128.

interventions²⁶ have increased confidence in treatment options – particularly drug treatment programs. There has also been a shift in public attitudes towards ‘low-level’ crime and domestic violence (in favour of more vigorous forms of intervention).²⁷

Freiberg argues that problem-oriented courts are a reaction against many of the negative tendencies in contemporary justice policy which has led to ‘assembly-line justice produced by case management, plea-bargaining and heavy case loads or, what one judge has termed, “McJustice”.’²⁸ In contrast to this impersonalised and bureaucratised assembly line approach to justice, the problem-oriented court focusses on therapeutic rather than legal outcomes, promotes a collaborative rather than an adversarial approach within the court system, is people rather than case oriented, and is informal rather than formal, with the judge becoming a ‘coach’ rather than an ‘arbiter’.²⁹ Judges and magistrates become agents of social change, both within the court with individual offenders and offences, and outside the court, as they attempt to restructure the way government systems deal with intractable problems.

Clearly, problem-oriented courts have emerged in response to pressures on courts to do more to tackle thorny social problems, but they also reflect frustrations by the judiciary about its lack of input into the working practices of agencies (probation officers, social workers, correctional staff, juvenile justice workers, drug and alcohol counsellors, etc) whom they delegate to provide treatment,

supervision and support. One key difference between problem solving and other courts is the expanded role for the judicial officer to monitor cases: instead of simply passing on cases to other agencies, some courts take an active part in the change process and closely monitor both offenders and the agencies who supervise them. In American drug courts, judges closely monitor and supervise offender performance, and require ongoing returns to court and progress reports.³⁰ The court becomes a hub for intervention rather than a simple delegator of tasks. Indeed, in the American drug court model the court aims to become ‘a curative realm’ where addicts are cured, ‘quite literally, within the walls of the courtroom’.³¹

It is generally accepted in the relevant literature that problem-oriented courts have been influenced by restorative justice and therapeutic jurisprudence.³² Some practitioners view therapeutic jurisprudence as particularly influential.³³ It is useful therefore to briefly discuss these theories and what they have offered to the emerging field of ideas. Restorative justice has a more established place in the justice system than therapeutic jurisprudence and has been subjected to broader theoretical and empirical scrutiny than therapeutic jurisprudence; therefore, it will be discussed first. Restorative justice emerged in the late 1980s and quickly provided a philosophical base for a raft of innovations stretching from diversionary conferencing for juvenile offenders through to processes of national healing in the form of ‘truth and reconciliation’ commissions.³⁴

26. Ibid.
27. Ibid.
28. Freiberg A ‘Problem-Oriented Courts: Innovative solutions to intractable problems?’ (2001) 11 *Journal of Judicial Administration* 8, 9.
29. Ibid 10.
30. Berman G & Feinblatt J, ‘Problem-Solving Courts: A brief primer’ (2001) 23 *Law and Policy* 125, 131.
31. Moore D, ‘Translating Justice and Therapy: The drug treatment court networks’ (2007) 47 *British Journal of Criminology* 42, 42.
32. Freiberg A, ‘Problem-Oriented Courts: Innovative solutions to intractable problems?’ (2001) 11 *Journal of Judicial Administration* 8; Winick BJ & Wexler DB (eds), *Law in a Therapeutic Key: Developments in therapeutic jurisprudence* (Durham: Carolina Academic Press, 1996).
33. Ibid.
34. Braithwaite J, ‘Restorative Justice: Assessing optimistic and pessimistic accounts’ (1999) 25 *Crime and Justice: A Review of Research* 1, 7.

Restorative Justice

While problem-oriented courts have become particularly associated with the philosophies and techniques of therapeutic jurisprudence they have also been influenced by restorative justice. There are areas of common ground between therapeutic jurisprudence and restorative justice. Both are concerned with improving outcomes for victims, offenders and the broader society by attempting to resolve and heal the effects of crime rather than simply imposing the law. This is not to suggest that therapeutic jurisprudence and restorative justice are identical twins. It is important to acknowledge the subtle – and the not so subtle – variations in the two approaches. The overlap in values around being victim/client centred and the focus on repairing harm rather than imposing law mask a number of core differences, the most fundamental of which relates to the role of the courts and judicial officers as agents of social change.

What is restorative justice?

The definition established by Tony Marshall describes the aims of restorative justice.

Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.³⁵

In its pure form, restorative justice philosophy has tended to present the courts as a primary barrier to restorative solutions and has placed its faith in informal processes, such as conferences, that lie outside the formal judicial sphere. Restorative justice advocates have tended to portray courts as lacking the necessary flexibility to deal with complex social issues. Not surprisingly, therefore, restorative justice has been particularly influential in the development of *diversionary* options which deliberately seek to *minimise*—

where they cannot bypass altogether— court involvement. Diversion is the term given to options that re-route cases away from contact with the criminal justice system. Diversion can take place at any point of contact – pre-arrest or pre-trial. The purpose of diversion is to ensure the least intrusive option while opening up potential for alternative forms of dispute resolution.

Bazemore and Walgrave³⁶ suggest that, at its most fundamental, restorative justice refers to actions which repair the harms caused by crime, as opposed to simply imposing the law. In a seminal article produced in the late 1990s, Zehr and Mika outline the key philosophy of restorative justice. They argue that crime is fundamentally a violation of people and personal relationships before it is a violation of laws: laws should be subordinate to the human and social context of the offence. Restorative programs must focus on repairing the harm caused by crime rather than responding to breaches of the law.³⁷

Restorative justice emerged at a time when the inadequacies of the criminal justice system were being publicly aired and policies were being pulled in often contradictory directions.³⁸ Restorative justice offered a new way of resolving many of the widely perceived shortcomings of the system – offering to harmonise apparently incommensurable goals such as delivering better forms of justice to offenders and communities, while giving a voice to victims. Restorative justice had deep roots in what has been called the ‘informal justice’ lobby, which included activists seeking to de-institutionalise and devolve justice to the local level and return power to grass-roots communities.³⁹ It was strongly influenced by Nils Christie’s assertion that the state habitually ‘steals’ our conflicts and the goal of justice reform should be to return control to those most directly affected by conflict.⁴⁰ Declan Roche suggests that restorative justice ‘became a unifying

35. Marshall T, ‘The Evolution of Restorative Justice In Britain’ (1996) 4(4) *European Journal on Criminal Policy and Research* 21, 37.
36. Bazemore G & Walgrave L (eds), *Restorative Juvenile Justice: Repairing the harm of youth crime* (Monsey: Criminal Justice Press, 1999).
37. Zehr H & Mika H, ‘Fundamental Concepts of Restorative Justice’ (1998) 1 *Contemporary Justice Review* 47, 51–52.
38. Garland D, *The Culture of Control: Crime and social order in contemporary society* (Oxford: Oxford University Press, 2001).
39. Matthews R (ed), *Informal Justice* (London: SAGE, 1988). Proponents of Informal Justice supported processes such as alternative dispute resolution run by neighbourhood justice centres as an alternative to the formal court system.
40. Christie N, ‘Conflicts as Property’ (1977) 17 *British Journal of Criminology* 1.

banner “sweeping up” a number of informal traditions of justice and capturing the imagination of many of those interested in reforming the criminal justice system’.⁴¹ Some prominent restorative justice advocates maintain that restorative justice is not simply a new brand of justice reform but represents an emerging global social movement capable of radically transforming our most fundamental beliefs about the role of justice in society.⁴²

Fundamentally, therefore, restorative justice is concerned with a shift in authority and responsibility for the delivery of justice away from traditional sites, such as courts, and into the community. Roche summarises this position in a recent study:

Judges do not have a monopoly on the administration of justice; it can also be administered by ordinary citizens in everyday locations such as homes, neighbourhoods, and workplaces. Outside the formal rules and procedures of a courtroom justice can be done quickly and cheaply, and can provide an opportunity for people to display valuable qualities such as compassion and understanding.⁴³

In New Zealand, interest in restorative justice was boosted by the emergence of conferencing as a vehicle for restorative solutions. Conferencing lay at the centre of a raft of radical reforms to both justice and welfare services under the *Children, Young Persons and Their Families Act 1989* (NZ).⁴⁴ The Act sets out a series of principles guiding the conduct of youth justice proceedings which are consistent with restorative justice. These include involving all those affected by an offence, holding offenders accountable and taking victim’s wishes into account.⁴⁵ Under the Act a conference (known as a Family Group Conference) is held in the vast majority of cases involving young people.

The attraction of the conferencing model lay in its capacity to involve all parties concerned in and affected by a particular offence – not just those with a narrow legal interest. These include not just the

primary victims and offenders but also secondary victims (such as family and friends) as well as supporters of the offender. Moreover, these stakeholders were not simply there to air grievances or express their views about the offender’s behaviour. The conference had decision-making power and those involved in the conference may have an important role to play in deciding what steps needed to be taken to resolve a particular problem and in ensuring that any conference plan entered into by the offender was implemented.

The attraction of the conference for policy makers, police and justice workers was that it had the potential to make diversion look less like a soft option. Diversion becomes not just a mechanism for re-routing individual cases away from contact with the existing criminal justice system but a vehicle for directing cases into an alternative process of community-based justice. Diversionary conferencing seemed to suit the interests of a number of key players. The police might have increased confidence in referring juveniles to a conference when they know the young offender may have to face up to the victim, offer compensation and/or undertake some community task; while youth justice workers could feel they were removing the potentially stigmatising effects of involvement (or what therapeutic jurisprudence would call the ‘anti-therapeutic’ consequences of involvement) with the courts, while providing a meaningful experience to young people and an opportunity for genuine community involvement.

Wide interest in John Braithwaite’s thesis of ‘reintegrative shaming’⁴⁶ confirmed the appeal of conferencing and reinforced the belief that conferencing was a better method than existing models of justice.⁴⁷ Reintegrative shaming describes a form of shaming ceremony in which offenders are reintegrated into the fold through strategies of community—rather than

41. Roche D, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2003) 6.
42. Braithwaite J, ‘Restorative Justice: Assessing optimistic and pessimistic accounts’ (1999) 25 *Crime and Justice: A review of research* 1.
43. Roche D, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2003) ix.
44. Van Ness D, Morris A & Maxwell G, ‘Introducing Restorative Justice’ in Maxwell G & Morris A (eds), *Restoring Justice for Juveniles: Conferencing, mediation and circles* (Oxford: Hart Publishing, 2001).
45. Maxwell G & Morris A, ‘Family Group Conferences and Reoffending’ in Maxwell & Morris, *ibid.*
46. Braithwaite J, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).
47. Braithwaite J & Mugford S, ‘Conditions of Successful Reintegration Ceremonies: Dealing with juvenile offenders’ (1994) 34 *British Journal of Criminology* 139.

official—disapproval, in a way that condemns the offence but does not denigrate the offender.⁴⁸ There has been considerable critical debate about the notion of reintegrative shaming and a full examination of the issue lies outside the scope of this paper. Critics have pointed to the difficulties inherent in developing informal mechanisms of condemnation that do not denigrate in some way. Badly handled ‘shaming’ ceremonies can become destructive, especially in relation to marginalised groups who have no pre-existing stake in the mainstream community.⁴⁹

Roche suggests that informal justice processes can lack accountability and subside into name calling, bullying and intimidation.⁵⁰ There have been instances where restorative justice forums have lacked the kind of accountability written into the judicial process: the now infamous ‘I am a thief’ episode in the mid 1990s in Canberra where a young person was made to wear a T-shirt with ‘I am a thief’ emblazoned on it.⁵¹ Some criminologists have feared that—whatever the explicit aims of restorative justice—the unintended outcome of support for public shaming could be that it paves the way for a return to the days of punishment as a form of public spectacle (in the form of ‘chain gangs’ for example) intended to humiliate⁵² rather than re-integrate offenders. Others have questioned the emphasis on forums such as conferences as the main arena for restorative solutions. White, for example, calls for a form of restorative justice for marginalised young people based on social justice and community capacity building, arguing that restorative justice should encompass social inclusion strategies rather than being concerned solely with individual offenders.⁵³

The common threads in restorative justice philosophy include:

- victim involvement and participation in the process (including primary and secondary victims of crime, as well as victim advocates);
- the use of alternative forums and formats for restorative processes, such as the ‘conference’ format (instead of institutions such as courts);
- a focus on the personal harms caused by criminal events rather than the criminal laws broken;
- a less elevated role for legal professionals and major institutions and their systems of knowledge, in favour of lay people, whose skills and knowledge (of people, situations, communities) may be of equal, if not greater, value;
- a high premium placed on voluntariness – people should not be coerced into taking part in restorative processes;
- a focus on symbolic or token forms of restitution, rather than attempting to squeeze equivalent amounts of money or goods from people who do not have them;
- reconciliation and forgiveness as positive and desirable, though not always feasible, outcomes for victims, offenders and communities; and
- a focus on the reintegration of offenders back into communities and families.

Roche usefully summarises the four values underpinning restorative justice as ‘personalism, participation, reparation, and reintegration’.⁵⁴ Personalism because crime is fundamentally a violation of people not laws; reparation because repairing the harm should be the goal of justice; participation because those most affected by a crime should be involved in its resolution; and reintegration because restorative solutions require that the offender’s ties with the community should be repaired not destroyed.⁵⁵

48. Ibid 142.

49. Blagg H, ‘A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia’ (1997) 37 *British Journal of Criminology* 481; Blagg H, ‘Restorative Visions and Restorative Justice Practices: Conferencing, ceremony and reconciliation in Australia’ (1998) 10 *Current Issues in Criminal Justice* 5.

50. Roche D, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2003) 89.

51. For a discussion, see Roche, *ibid*; Braithwaite J, ‘Restorative Justice: Assessing optimistic and pessimistic accounts’ (1999) 25 *Crime and Justice: A review of research* 1, 97.

52. Pratt J, ‘The Return of the Wheelbarrow Men; or, the Arrival of Post- Modern Penalty?’ (2000) 40 *British Journal of Criminology* 127.

53. White R, ‘Communities, Conferences and Restorative Social Justice’ (2003) 3 *Criminal Justice* 139.

54. Roche D, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2003) 25.

55. *Ibid* 32.

While supporters of restorative justice would generally adhere to these broad values there are significant differences in emphasis – particularly in relation to the question of what constitutes successful outcome. Is it only restorative justice when all who have been affected by a crime are involved in its resolution? Some supporters of restorative justice argue that restorative processes require achieving a balance between the interests of key stakeholders, principally communities, victims and offenders,⁵⁶ and equal participation by these stakeholders is required for genuine success. This is best achieved through participatory processes such as community conferencing, family conferencing and peace circles. Other commentators, however, believe that restorative processes are possible, even where all parties are not involved. Walgrave, for example, makes the case that work with victims can be restorative even when the offender is not apprehended, providing victims are allowed to tell their stories and have someone acknowledge the impact the criminal event has had on their lives.⁵⁷

Based on research with victims and offenders in South Australia, Daly questions one of the most cherished restorative justice commandments, that restorative justice lies at the opposite end of the spectrum to retributive justice, pointing out that advocates ‘display a remarkable uniformity in defining restorative justice by reference to what it is *not*, and this is called *retributive justice*’.⁵⁸ She is critical of the good/bad dichotomy in restorative justice, which attributes ‘goodness’ to

negotiation and mediation, and ‘badness’ to any form of adversarialism and retribution. In reality, Daly maintains, victims and other participants in restorative conferencing were interested in ‘multiple’ outcomes combining elements found on both sides of the binary divide: including elements of retributive, rehabilitative and restorative forms of justice. They wanted to see the offender reprimanded for bad behaviour, encouraged to be law abiding and persuaded to make amends to the victim.⁵⁹

While traditional restorative justice principles privilege community-based alternatives to the mainstream system of justice, in practice there has been a tendency to balance innovatory processes such as conferencing and more traditional systems. This process can deliver checks and balances, where restorative forums and judicial processes act to check each other’s power, rather than the whole system being transformed into one in which informal justice forums trump judicial processes. McElrea sees the success of the New Zealand Youth Court lying in its capacity to act as a ‘back-stop’ to conferencing processes.⁶⁰ Western Australia’s system of juvenile justice teams allows for close partnership between courts and diversionary conferencing, and the Children’s Court, itself, actively refers cases for conferencing in Western Australia. Moreover, some models of restorative conferencing have been criticised as being highly formalised and scripted events closely controlled by conference convenors.⁶¹

56. Bazemore G & Umbreit M, *Guide for Implementing the Balanced and Restorative Justice Model: Report* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 1998).
57. Walgrave L, ‘Community Service as a Cornerstone of a Systemic Restorative Response to (Juvenile) Crime’ in Bazemore G & Walgrave L (eds), *Restorative Juvenile Justice: Repairing the harm of youth crime* (Monsey: Criminal Justice Press, 1999).
58. Daly K, ‘Restorative Justice: The real story’ in McLaughlin E, Fergusson R, Hughes G & Westmorland L (eds), *Restorative Justice: Critical issues* (London: SAGE, 2003) 197.
59. Daly is also critical of the claim that restorative justice is synonymous with Indigenous justice practices.
60. McElrea FWM, ‘Restorative Justice: The New Zealand Youth Court, a model for development in other courts’ (1994) 17(3) *Public Sector* 15.
61. Young R, ‘Just Cops Doing “Shameful” Business? Police-Led Restorative Justice and the Lessons of Research’ in Maxwell G & Morris A (eds), *Restoring Justice for Juveniles: Conferencing, mediation and circles* (Oxford: Hart Publishing, 2001).

T herapeutic Jurisprudence

Therapeutic jurisprudence is a more recent innovation than restorative justice. The term 'therapeutic jurisprudence' was coined by Wexler and Winick and is concerned with the potential role of law and legal process as a therapeutic agent: it aims to 'maximize therapeutic effects of the law and minimize anti-therapeutic consequences of the law'.⁶² It acknowledges that the law can have a serious impact on the emotional and psychological wellbeing of those involved in legal processes – that it can have both therapeutic and anti-therapeutic outcomes. The notion of 'therapeutic' in therapeutic jurisprudence is a fairly simple one. A therapeutic experience is positive and encourages meaningful change, while an anti-therapeutic experience is negative and has adverse consequences for the actors involved. Therapeutic jurisprudence explores ways of maximising potential benefits. Proponents claim that encounters with the legal system, like encounters with the health system, should leave them better off, not worse off, than before.⁶³

Therapeutic jurisprudence sets out from the realisation that '[e]ncounters with the law can be personally devastating for the individuals concerned and result in profound psychological distress and social dislocation'.⁶⁴ In this respect the perspective echoes the sentiments of the father of the problem-oriented approach, Herman Goldstein, in relation to contact between citizens and the police as often being devastating in its impact.⁶⁵

Winick writes:

Therapeutic jurisprudence proposes the exploration of ways in which, consistent with principles of justice and other constitutional values, the knowledge, theories, and insights of the mental health and related disciplines can help shape the development of the law. Therapeutic jurisprudence builds on the insight that the law itself can be seen to function as a kind of therapist or therapeutic agent.⁶⁶

Courts employing a therapeutic jurisprudence approach would remain conscious of the positive and negative tendencies in the justice system and seek to minimise the negative tendencies. The approach encourages courts to adopt an analytical stance in relation to the cases coming before them. Scott sees parallels between therapeutic jurisprudence and developments in public health:

There is a striking similarity as well between many of TJ's core principles and the lessons coming out of the patient safety movement in health care. Both perspectives urge taking a systemic approach to problems in their respective arenas, be they medical errors or criminal behavior. Just as health care providers do a root cause analysis after a medical mishap ... in order to prevent similar accidents ... in the future, so do judges in problem-solving courts applying TJ principles seek to understand the root causes of an offender's behavior, to resolve the underlying psychological conditions or social circumstances that led to that behavior, and thereby to prevent future criminal behavior.⁶⁷

Supporters of therapeutic jurisprudence see the approach having a significant impact on the way the justice system operates irrespective of the specific legal issue or variety of court. However, De Rosiers demonstrates how the 'therapeutic' approach adopted by the Supreme Court of Canada to the question of Quebec secession defused potential conflict and paved the way for ongoing dialogue by recognising the complexity of the issues and the legitimacy of both arguments.⁶⁸ Two key dimensions of the therapeutic jurisprudence approach have relevance, according to De Rosiers: firstly, the shift in emphasis in courts from 'finality to a process'; and, secondly, the recognition that many relationships, such as those involving family members or, as in De Rosier's example, neighbouring ethnic communities have continuity and should be repaired and maintained rather than damaged during adversarial court

62. Birgden A, 'Therapeutic Jurisprudence and Sex Offenders: A psycho-legal approach to protection' (2004) 16 *Sexual Abuse: A Journal of Research and Treatment* 351, 351.
63. Winick BJ & Wexler DB (eds), *Law in a Therapeutic Key: Developments in therapeutic jurisprudence* (Durham: Carolina Academic Press, 1996); Stolle DP, Wexler DB & Winick BJ (eds) *Practicing Therapeutic Jurisprudence: Law as a helping profession* (Durham: Carolina Academic Press, 2000).
64. Birgden A & Ward T, 'Pragmatic Psychology Through a Therapeutic Jurisprudence Lens' (2003) 9 *Psychology, Public Policy and Law* 334, 334.
65. Goldstein H, *Problem-Oriented Policing* (New York: McGraw-Hill, 1990).
66. Winick BJ 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy and Law* 184, 185.
67. Scott C, 'Book Review – Judging in a Therapeutic Key: Therapeutic jurisprudence and the courts' (2004) 25 *Journal of Legal Medicine* 377, 387–88.
68. Des Rosiers N, 'From Telling to Listening: A therapeutic analysis of the role of courts in minority-majority courts' (2000) 37 *Court Review* 54.

processes. De Rosiers argues that ‘courts should move from being magical “tellers of the truth” to becoming more process-oriented listeners, translators, educators and, if possible, facilitators.’⁶⁹

This shift in emphasis regarding the role of the court, from all knowing expert to listener and facilitator, finds parallels in other contemporary debates. What has become known in recent years as the ‘strengths-based’ approach in social work, psychology and counselling explicitly challenges the view that only professionals have the answers and clients should remain passive consumers of expert knowledge: substituting this with the belief that individuals, families and communities have many of the answers, given the right kind of support. The strengths-based approach operates on the assumption that clients have core strengths and resources as well as deficiencies: strengths-based approaches attempt to understand the client’s world view, and involves ‘systematically examining survival skills, abilities, knowledge, resources and desires that can be used in some way to help meet client goals’.⁷⁰ The aim of intervention should be to empower individuals and groups to control the process of change.⁷¹ Corcoran and Pillai describe a strengths orientation thus:

Attention, rather than being focused on the history of the problem, orients to a future without the problem. Assessment is focused on helping people visualize how they would like their lives to be, identifying times at which the solution (or part of it) has already happened, and figuring out what is needed to make the solution happen and keep it happening.⁷²

This focus on ‘strengths and solutions rather than problems and dysfunction’ has become influential in approaches to social work with juvenile offenders.⁷³ Therapeutic jurisprudence shares many of the ideals of strengths based intervention, being highly focussed on future possibilities rather than past mistakes.

While therapeutic jurisprudence has radical aims in terms of reforming the ways the criminal justice system responds to problems in the community, it takes a fairly conservative or traditional stance in relation to the structure of the criminal justice system. Unlike restorative justice, which, as we have seen has – at least in theory – a subversive relationship with court authority, therapeutic jurisprudence does not challenge the traditional authority of the court. Indeed, it seeks to extend and modify rather than reduce the role of judges and magistrates, giving them a greater, rather than diminished, stake in work of other court users. Judicial officers become more aware of the therapeutic and social needs of offenders; courts acknowledge that communities are significant stakeholders but ultimate power still resides in the authority of court. Therapeutic jurisprudence aims to create a ‘collegiate’ system in the courts. The traditional goals of the sentencing take second place to processes designed to dig deep into the causes of offending behaviour and produce positive change. Therapeutic jurisprudence is, therefore, firmly in the business of law reform and it has implications for the way a diversity of courts operate.⁷⁴ In the therapeutic jurisprudence model sentencing emerges as a result of a ‘conversation’ between interested parties rather than the product of a single, omnipotent, all knowing expert. However, notwithstanding this more discursive and conversational approach to the process of sentencing, in the last instance the court retains the monopoly on decision making, unlike the restorative justice model where the responsibility is, in theory at least, shared out amongst all conferencing participants.

Fundamentally, therapeutic jurisprudence is geared towards making the existing system work better rather than replacing it with something else. It does not share restorative justice’s belief that enhancing the quality of justice inevitably requires reducing the role of professionals in the

69. Ibid 54.
70. Rangan A & Sekar K, ‘Strengths Perspective in Mental Health: Evidence based case study’ (Paper presented at the Conference on Strength-Based Strategies, Hyderabad, India, 9–14 November 2006); see also Blundo R, ‘Learning Strengths-Based Practice: Challenging our personal and professional frames’ (2001) 82 *Families in Society* 296.
71. McKeown K, *A Guide to What Works in Family Support Services for Vulnerable Families* (Dublin: Minister of State with Responsibility for Children, 2000).
72. Corcoran J & Pillai V, ‘A Review of the Research on Solution-Focused Therapy’, *British Journal of Social Work Advanced Access* (September 2007)
73. Corcoran J, ‘A Solution-Oriented Approach to Working with Juvenile Offenders’ (1997) 13 *Child and Adolescent Social Work Journal* 277, 277.
74. See discussions of the relevance of TJ to Aboriginal Courts, International Courts, Domestic and Family Violence Courts, etc, in Reinhardt G & Cannon A (eds), *Transforming Legal Process in Court and Beyond: A collection of refereed papers from the 3rd International Conference on therapeutic jurisprudence, presented by the Australian Institute of Judicial Administration in Perth, Western Australia on 7–9 June 2006* (Melbourne: Australasian Institute of Judicial Administration Inc., 2007).

justice system; rather it seeks to make professionals work in a more integrated and less adversarial fashion.

Therapeutic jurisprudence may also place less emphasis on voluntary involvement in processes than restorative justice. Indeed, a degree of coercion is not inconsistent with therapeutic jurisprudence where this involves the court employing its arsenal of coercive powers to lever offenders into treatment options and ensure compliance with mandated programs.

A holistic approach

Therapeutic jurisprudence, has significant implications for the working practices of all agencies involved in the criminal justice system. A number of researchers/practitioners have welcomed the new approach. Birgden sees therapeutic jurisprudence as offering an alternative to the heavy preoccupation with risk assessment and risk management in the correctional field because of its 'humanistic' approach. She focuses in her work on the importance of integrating court and correctional strategies into holistic approaches to offender rehabilitation. The shift in the role of the judge/magistrate

towards one of enabling is complemented by the role of the corrections officer as a facilitator of behaviour change.⁷⁵ In this way, a therapeutic continuum connects court and non-court processes with each part engaged in a holistic process. Glaser sees therapeutic jurisprudence resolving an ethical dilemma for workers in sex offender treatment programs.⁷⁶ Increasingly, sex offender treatment programs require therapeutic staff to adopt coercive values and practices which 'cannot be reconciled with traditional mental health ethics in any way.'⁷⁷ Therapeutic jurisprudence, because its commitment to the law as a therapeutic agent, promises a 'law of healing' and offers a way of balancing the competing demands of offender rehabilitation and community safety.⁷⁸

Cannon, however, sees the relationship between courts employing therapeutic jurisprudence and community-based corrections and parole as a potentially problematic one with potential 'patch wars' over resources.⁷⁹ There will need to be collaborative arrangements made between 'services delivered under court programs and those by correctional departments and community organisations'.⁸⁰

75. Birgden A, 'Therapeutic Jurisprudence and Sex Offenders: A psycho-legal approach to protection' (2004) 16 *Sexual Abuse: A Journal of Research and Treatment* 351.

76. Glaser B, 'Therapeutic Jurisprudence: An ethical paradigm for therapists in sex offender treatment programs' (2003) 4 *Western Criminology Review* 143.

77. *Ibid* 144.

78. *Ibid*.

79. Cannon A, 'Therapeutic Jurisprudence in the Magistrates Court: Some issues of practice and principle' in Reinhardt G & Cannon A (eds), *Transforming Legal Process in Court and Beyond: A collection of refereed papers from the 3rd International Conference on therapeutic jurisprudence, presented by the Australian Institute of Judicial Administration in Perth, Western Australia on 7-9 June 2006* (Melbourne: Australasian Institute of Judicial Administration Inc., 2007) 136.

80. *Ibid*.

Restorative Justice and Therapeutic Jurisprudence: Areas of convergence

Braithwaite suggests that, despite some differences, restorative justice and therapeutic jurisprudence share a number of common traits.⁸¹ These include: a concern with overcoming the tendency for offenders to deny the pain they have inflicted on the victim; commitment to evidence-based practice; and a belief that innovative change can genuinely improve outcomes for people (which Braithwaite – following David Wexler – calls ‘playing the believing game’ rather than remaining wedded to negative critiques of innovations).⁸² He suggests that both are committed to a philosophy of ‘holism’,⁸³ which he defines as a capacity to see each individual case as ‘many things at once, with respect for the dignity of all actors involved’.⁸⁴ Both restorative justice and therapeutic jurisprudence require an engagement with the particulars of each case, placing problem solving ahead of simple punishment and he claims that both restorative justice and therapeutic jurisprudence represent a ‘return to problem-oriented adjudication’.⁸⁵

Braithwaite acknowledges differences between restorative justice and therapeutic jurisprudence on questions of empowerment. Restorative justice privileges stakeholder empowerment over other elements of the process and is wary of paternalism in any form. The ideal conference scenario is one where professionals contribute to the process but are exempted from decision making. This vision is at odds with the therapeutic jurisprudence vision of the judge as a ‘coach’. Braithwaite suggests that a key difference lies in the degree of adherence to existing judicial values. Therapeutic jurisprudence, he states, is concerned with developing options that strengthen and are consistent with extant legal values, whereas restorative justice aims to be deliberately *transformative*, in the sense of replacing existing legal principles and practices with new ones.

A revolution is needed in our legal system that substantially replaces adversarial legalism with Restorative Justice institutions, where the role of the court is substantially relegated to oversight of the injustices of restorative processes, which do the real work of access to justice.⁸⁶

Notwithstanding these reservations, Braithwaite sees complementarity between restorative justice and therapeutic jurisprudence to the extent that both reject retributivist solutions and promote ‘active’ rather than ‘passive’ forms of accountability where offenders take responsibility for correcting past mistakes and restoring relationships.

Other professionals working within the therapeutic jurisprudence area see parallels between restorative justice and therapeutic jurisprudence to the extent that both are concerned with the ‘law’s impact on emotional life and on psychological and social wellbeing’.⁸⁷ Both perspectives also share a concern with balancing the needs of victims, offenders and society.⁸⁸ Some magistrates, however, question whether therapeutic jurisprudence, as practised in Australian problem-oriented courts is sufficiently victim-centred. Based on his experience in South Australia, Deputy Chief Magistrate Cannon argues that therapeutic jurisprudence tends to be offender focussed and inadequately deals with the harms caused to victims.⁸⁹ Restorative justice is better suited to address the needs of victims because it places victim empathy at the centre of intervention.

Cannon suggests that the two philosophies can work together and he recounts running a process of victim offender mediation as part of the Drug Court sentencing process.⁹⁰ Victim-centredness may be the blind spot in the therapeutic jurisprudence process. Victim-focussed restorative justice, where offenders deal directly with the victims of crime, may enhance the overall effectiveness of problem-oriented courts, creating a more holistic process.

81. Braithwaite J, ‘Restorative Justice and Therapeutic Jurisprudence’ (2002) 38 *Criminal Law Bulletin* 244.
82. *Ibid.*
83. *Ibid.* 245.
84. *Ibid.* 245–46.
85. *Ibid.* 246.
86. *Ibid.* 254.
87. Sinclair I & Du Plessis A, ‘Domestic Violence Adjudication in South Africa: A view on therapeutic jurisprudence and human rights protection of the female victim’ in Reinhardt G & Cannon A (eds), *Transforming Legal Process in Court and Beyond: A collection of refereed papers from the 3rd International Conference on therapeutic jurisprudence, presented by the Australian Institute of Judicial Administration in Perth, Western Australia on 7–9 June 2006* (Melbourne: Australasian Institute of Judicial Administration Inc., 2007) 11.
88. *Ibid.*
89. Cannon A, ‘Therapeutic Jurisprudence in the Magistrates Court: Some issues of practice and principle’ in Reinhardt & Cannon, *ibid.* 129.
90. Cannon A, ‘Therapeutic Jurisprudence in the Magistrates Court: Some issues of practice and principle’ in Reinhardt & Cannon, *ibid.* 135. Cannon recalls that the experience of one offender who was so shocked when confronted with the human consequences of his offending that he relapsed on his drug program.

Brief Encounters: Treatment and the Courts

One key difference between restorative justice and therapeutic jurisprudence is that, while restorative justice attempts to minimise the role of treatment professionals (social workers, psychologists, probation officers, drug and alcohol workers, etc) in the resolution of crime related issues in favour of lay-people, the therapeutic jurisprudence oriented court continues to place a high premium on professionally delivered treatment options. Indeed, supporters of therapeutic jurisprudence maintain that it is the adoption of a multi-disciplinary approach and the capacity to holistically integrate court processes and treatment practices that give therapeutic jurisprudence its unique flavour,⁹¹ with courts becoming less focussed on legal language than on problem fixing and a consequent blurring of the boundaries between the languages of therapy and law. One outcome is the increasing use in courts of new therapeutic languages—or meta-languages, as they tend to combine elements from a number of different disciplines—as courts become more familiar with the treatment techniques in play within the agencies aligned with the court, and as these agencies become more conversant with the needs of the court. In relation to the drug courts in the United States and Canada, for example, Moore observed a significant degree of ‘knowledge crossover’⁹² between actors from different professional backgrounds as each began to ‘define their own work as markedly different from the work done in traditional criminal courts.’⁹³ One consequence of this identified by Moore was that ‘expert knowledge’ became ‘freed from expert actors’ so that, for example, judicial officers increasingly began to employ the language of psychology when dealing with addicts in the court.⁹⁴

The emergence of therapeutic jurisprudence and the problem-oriented court has favoured short-term therapies that fit in with the time-frames of the

court and promise speedy results. Two techniques that have been influential in the context of therapeutic jurisprudence are motivational interviewing and brief interventions.

The concept of ‘brief intervention’ describes a range of treatments rather than one unified approach, all premised in the belief that even very short-term interventions—provided they occur at the optimum moment—can have beneficial outcomes. Brief intervention regimes can cash in on an offender’s motivation to change as a result of being brought before a court. Research suggests they work better than no intervention at all and sometimes work as well as more intensive treatment.⁹⁵ Moreover, they have emerged to deal with clients who are not directly seeking help for an addictive disorder (hence the attraction for courts) and can be delivered by non-specialist health professionals.

The common characteristic is that intervention is restricted to a few sessions at most. Brief interventions can take place in a number of settings and are not restricted to the clinical setting. Some forms of intervention are heavily ‘opportunistic’, meaning that the client has not requested help but is intercepted (in court, for example, when court staff/drug workers approach an offender facing non-drug related charges).⁹⁶ Brief interventions are open to the criticism that they are paternalistic and based on the principle that the professionals know best and that clients will be grateful later. It is not a client-centred approach.

Motivational interviewing emerged in the drug and alcohol field and has been defined as a way of establishing dialogue with clients about the need for behaviour change.⁹⁷ Marsh and Dale describe motivational interviewing as a tool for increasing client commitment to change their behaviour.⁹⁸ Unlike classical approaches to dealing with clients which

91. Birgden A, ‘Therapeutic Jurisprudence and Sex Offenders: A psycho-legal approach to protection’ (2004) 16 *Sexual Abuse: A Journal of Research and Treatment* 351.
92. Moore D, ‘Translating Justice and Therapy: The drug treatment court networks’ (2007) 47 *British Journal of Criminology* 42, 44.
93. Ibid.
94. Ibid.
95. Dunn C, Deroo L & Rivara FP, ‘The Use of Brief Interventions Adapted From Motivational Interviewing Across Behavioural Domains: A systematic review’ (2001) 96 *Addiction* 1725.
96. Heather N, ‘Using Brief Opportunities for Change in Medical Settings’ in Miller W & Heather N, *Treating Addictive Behaviours* (New York: Plenum Press, 2nd ed., 1998) 133.
97. Miller W & Rollnick S, *Motivational Interviewing: Preparing people for change* (New York: Guilford Press, 2nd ed., 2002).
98. Marsh A & Dale A, *Addiction Counselling: Content and process* (Melbourne: IP Communications, 2006).

tend to 'seek to confront the client with reality', motivational interviewing is patient-centered and collaborative: a 'conversation' designed to enhance motivation to change.⁹⁹ Motivational interviewing may be delivered as a brief, stand-alone intervention or as a prelude to another treatment.¹⁰⁰ The literature indicated that motivational interviewing seemed to be better than no treatment and comparable with alternative treatments for sub-groups in the short-medium term. Further, motivational interviewing appeared to deliver effects comparable to alternatives in considerably less time, either as a stand-alone intervention (for those with milder addictive problems) or as a prelude to other treatments (for the more problematic addictions). One of the attractions of motivational interviewing is that it can be delivered by non-clinicians. Professionals from a diversity of backgrounds (including legal professionals) can be trained in motivational interviewing techniques to enhance client understanding and increase their motivation to change. Fundamentally, motivational interviewing is based on the premise that it is the client's own motivation and desire to turn his or her life around that is the crucial determinate in treatment. In this respect there is considerable overlap between motivational interviewing and strengths-based approaches to work with clients, as mentioned earlier. Both believe that clients have core strengths as well as deficiencies and the goal of intervention should be to unlock and harness inherent strengths as a prerequisite for change.¹⁰¹

David Wexler suggests that motivational interviewing is being adopted in problem-oriented courts in the United States by lawyers as a way of moving away from purely legal ways of relating to offenders

and clients, and positively engaging with their problems.¹⁰² Similarly, Birgden has developed a strategy for defence lawyers to apply motivational interviewing techniques with offenders matched with change readiness.¹⁰³

In these examples the role of defence lawyers shifts from being primarily concerned with achieving the most favourable legal outcome for their clients to becoming involved in changing the root causes of offending. The pay-off for clients is that they receive genuine assistance to deal with problems such as addiction, homelessness and/or mental illness and may do so in a community setting rather than a correctional institution. Brief interventions and motivational interviewing are embedded in 'stages of change'¹⁰⁴ models of intervention. Offenders who come before courts for non-addiction related offences and are not seeking help for their addiction will be considered as being at the earliest stages of change.

Therapeutic jurisprudence has also opened up space within the court for other potentially beneficial forms of treatment. Magistrate King (as he then was) in the Geraldton Magistrate's Court took the lead in introducing transcendental meditation as a stress reduction and self-development technique for offenders with substance abuse problems.¹⁰⁵

Having reviewed a number of the issues connected with the background to problem-oriented courts, some of the issues connected with a number of problem-oriented courts are briefly discussed below. This is not intended to provide a definitive account of any one form of problem-oriented court, rather to establish the diversity of contexts in which courts operate.

99. Rollnick S & Miller W, 'What Is Motivational Interviewing?' (1995) 23 *Behavioural and Cognitive Psychotherapy* 325.
100. *Ibid.*
101. Turnell A & Edwards S, *Signs of Safety: A solution and safety oriented approach to child protection casework* (New York: Norton Press, 1999).
102. Wexler D, 'Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer' (2005) 17 *St Thomas Law Review* 743.
103. Birgden A, 'Therapeutic Jurisprudence and Sex Offenders: A psycho-legal approach to protection' (2004) 16 *Sexual Abuse: A Journal of Research and Treatment* 351.
104. Heather N, 'Using Brief Opportunities for Change in Medical Settings' in Miller W & Heather N, *Treating Addictive Behaviours* (New York: Plenum Press, 2nd ed., 1998) 133.
105. King MS, 'Geraldton Alternative Sentencing Regime: Applying therapeutic and holistic jurisprudence in the bush' (2002) 26 *Criminal Law Journal* 260. (The program ceased when Dr King left Geraldton in 2005.)

The Development of Problem-Oriented Courts

Fixing Broken Windows: Community courts and community building

American criminologists Wilson and Kelling produced a highly influential article in the mid 1980s arguing that urban social decay begins when low level disorder is left unchecked.¹⁰⁶ Expressed simply, the 'broken windows' thesis maintained that repeated minor 'incivilities', such as petty vandalism (hence 'broken windows'), antisocial conduct, graffiti, drug dealing, begging, prostitution, littering and fare-evasion, can initiate a spiral of neighbourhood decline. Gradually, people lose confidence in their neighbourhood. Those who can move out of the area do so, less desirable groups take their place, drug dealers move in, abandoned and vandalised buildings become commonplace, local people feel powerless, and fear of crime becomes endemic. To prevent the spiral of urban neighbourhood decline, authorities must step in when the first window is broken rather than wait until the process of decline is impossible to check.

The broken windows thesis has become firmly associated with the zero tolerance model of policing, particularly as practised by the New York Police Department, which explicitly sets out to clear the streets of petty criminality in the belief that this would forestall more serious forms of offending.¹⁰⁷ However, while much attention was focussed on the policing implications of the broken windows thesis, it also stimulated debate on the best ways of building community coherence through forms of social crime prevention. A string of new research and critical writing challenged Wilson and Kelling's overriding emphasis on law enforcement as the antidote to neighbourhood decline and identified the importance of investing in 'social capital' and undertaking processes of 'community capacity building' to establish resilient communities and social networks.¹⁰⁸

Community courts have emerged as a result of this kind of thinking. Unlike the zero tolerance model, premised on the belief that all we need to do to prevent crime is to rigorously impose the law and punish offenders, the approach acknowledges the need to change the social context¹⁰⁹ in which offending takes place and offer something—beside censure and condemnation—to those placed before the courts.

The community court is, in a number of crucial respects, the most challenging court system to establish, in that it requires synergy with community structures rather than just collaboration between agencies. Community Courts require 'bottom up' rather than 'top down' processes, where priorities bubble up from below rather than imposed from above. They are usually linked to some kind of community justice centre rather than stand alone courts. Community courts draw on the energies of local people and are often concerned with quality of life issues in the neighbourhood; they place emphasis on the input of lay people rather than judicial expertise.

The first community court was the Midtown Community Court opened as a three-year demonstration project in New York in 1993. The court covered Times Square and adjacent residential neighbourhoods. The aim was to provide effective and accessible justice for 'quality of life'¹¹⁰ offences such as prostitution, shoplifting, minor drug possession, turnstile jumping and disorderly conduct. The court intended to forge closer links with the community and develop a collaborative problem-solving approach to incivilities and 'quality-of-life' offences. There are 27 community courts in operation across the United States.¹¹¹ Community courts tend to use sanctions such as community service but also focus on welfare needs such as housing, health care, drug treatment and job placement.¹¹² The courts, according to Freiberg have a strong problem-solving role.

106. Wilson JQ & Kelling GL, 'Broken Windows: The police and neighbourhood safety' (March 1982) 243 *Atlantic Monthly* 29.
107. For a critique of the zero tolerance approach, see Dixon D & Maher L, 'Policing, Crime and Public Health: Lessons for Australia from the 'New York miracle'' (2005) 5 *Criminal Justice* 115.
108. Bayley D, *Police for the Future* (New York: Oxford University Press, 1994); Putnam RD, *Bowling Alone: The collapse and revival of American community* (New York: Simon & Schuster, 2000); Johnston L & Shearing C, *Governing Security: Explorations in policing and justice* (London: Routledge, 2003); Shearing CD, 'Reinventing Policing: Policing as governance' (Paper presented at the Conference on Privatisation: Retreat or proliferation of state control, Bielefeld, Germany, 24–26 March 1994).
109. Currie E, 'Social Crime Prevention Strategies in a Market Society' in NACRO, *International Developments in Crime and Social Policy* (London: NACRO, 1996).
110. Sviridoff M, Rottman D, Ostrom B & Curtis R, *Dispensing Justice Locally: The implementation and effects of the Midtown Community Court* (New York: Harwood Academic Publishers, 2000).
111. Kralstein D, *Community Court Research: A literature review* (Centre for Court Innovation, 2005) <http://www.courtinnovation.org/_uploads/documents/ccresearch.pdf>.
112. Freiberg A, 'Innovations in the Court System' (Paper presented at the Australian Institute of Criminology Conference on Crime in Australia: International Connections, Melbourne, 29–30 November 2004).

The problem-oriented features which community courts contain include an enhanced and ongoing judicial role in relation to the defendant, the use by the court of extensive personal background information relating to the offender, the employment by the court of resource coordinators who bring together and manage the legal and other services required to implement the sentence and the location of treatment and other providers in the court precinct to provide immediate assistance.¹¹³

Community courts are developing slowly in Australia. There is a community court in Darwin, however, despite its title, the Darwin court fits more comfortably into the Indigenous court model – being mainly concerned with Indigenous offenders and enjoying a particularly close relationship with the local Indigenous community. This is also the case in relation to the Kalgoorlie-Boulder Community Court which is fundamentally an Aboriginal Court in practice.

A community court has been established within a new Neighbourhood Justice Centre at Collingwood City in the city of Yarra (Victoria).¹¹⁴ Described as a ‘work in progress’, it is intended to evolve over time on the basis of collaboration with local agencies and residents, in relation to the changing priorities of the dynamic local environment. The implementation model has not been arrived at in advance of strategies designed to embed the process locally.

The aim of the Neighbourhood Justice Centre is to

enhance community involvement in, and ownership of, the justice system. It will respond to, and engage with, the community in addressing its issues and concerns, thereby creating a justice system which, over time, is more integrated, responsive, accessible and more effective in reducing crime, addressing the underlying causes of criminal behaviour and increasing access to justice.¹¹⁵

The Neighbourhood Justice Centre intends to increase offender accountability; decrease the rate at which orders are breached; improve community outcomes by increasing the amount of unpaid community work undertaken locally; increase the confidence of victims and other participants; modernise the courts by innovative local practice; and increase community safety and offender accountability.¹¹⁶

A 20-member Community Liaison Committee was established involving local residents, as well as traders and agency representatives. The role of the committee was to liaise with the community; identify community perceptions and expectations of the process; identify local crime, safety issues and solutions; contribute to the Neighbourhood Justice Centre governance process; have input into service delivery and evaluation models; assess possible risks in the process; and contribute to restorative justice objectives.¹¹⁷ The process places a strong emphasis on crime prevention and on community education. The court is part of a holistic process. The Neighbourhood Justice Centre provides a Screening, Assessment and Referral Team (SART) to gate-keep cases, focussing on the needs and risks of offenders,¹¹⁸ and on pre-hearing problem solving and identification of issues influencing offender behaviour. The SART assists courts in finding solutions based on mediation, volunteering and employment, and offers support to those at risk of enmeshment in the system due to some form of complex need. To be eligible for the court, offenders must reside in the Yarra area. The court does not hear committal cases, lengthy contested matters or serious sex offences but does hear Children’s Court matters.¹¹⁹ Interestingly, the court also deals with civil as well as criminal matters.

113. Freiberg A ‘Problem-Oriented Courts: Innovative solutions to intractable problems?’ (2001) 11 *Journal of Judicial Administration* 8, 19.

114. The court was established under specific legislation: *Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)*.

115. Department of Justice, *The Neighbourhood Justice Centre: Community justice in action in Victoria* (Melbourne, 2007) 3.

116. *Ibid* 4.

117. *Ibid* 5.

118. The SART will take advantage of some well established Victorian assessment tools including the Good Lives Model and the CISP Victorian Intervention Screening Assessment Tool.

119. *Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)*.

Community justice courts – United Kingdom

Community Justice Courts are also being developed in the United Kingdom. Currently, eight schemes, based in magistrates courts, are in operation across England and Wales modelled on the New York Red Hook scheme in the Bronx. They aim to reduce fear of crime and repeat offending, speed up the court process, give communities a say in how offenders are dealt with, and enable magistrates to order offenders back to court to keep tabs on progress. The schemes particularly hope to have an impact on antisocial behaviour.¹²⁰ A District Court judge involved in establishing the scheme expressed confidence that courts of this nature could have an impact on rates of antisocial behaviour and improve the morale of local communities in a relatively short period of time.¹²¹ The courts are undergoing a process of evaluation.¹²² Schemes in North Liverpool and Salford have been subject to a qualitative inquiry gauging the views of staff, community members and offenders, which have tended to be positive. A more rigorous quantitative inquiry is also planned. Anecdotal evidence suggests that while some urban courts, such as in Liverpool and Manchester, are showing promise, others are struggling to find cases. This is believed to be because some courts have been poorly targeted, having been established in relatively stable, low crime areas, where most cases brought before the courts are for fixed penalty offences, or too serious to be eligible.¹²³

Drug courts

Drug courts seek to intervene in the cycle of drug use, crime and prison by providing strong incentives for offenders to undertake treatment. The first drug court was established in Dade County Florida in 1989. There are currently over one thousand drug courts in the United States. Australian Drug Courts have been

described as providing an 'extensive treatment and rehabilitation program, undertaken with the supervision and ongoing management of the court'.¹²⁴ Drug courts in Australia have emerged as part of a raft of strategies designed to minimise the harm caused by illicit drugs. The Council of Australian Governments introduced the National Illicit Drug Strategy in 1999 which boosted resources for drug treatment services and expanded its role in the criminal justice area. A key plank in the illicit drug strategy was that of 'diversion', targeting drug users at an early stage of involvement. 'Diversionary' initiatives have been established at all stages of contact with the system – pre-arrest, pre-trial, pre-sentence, post-sentence and post-release. Drug courts currently operate in five Australian jurisdictions. The first drug court commenced in 1999 in New South Wales followed by South Australia (2000), Queensland (2000), Western Australia (2001) and Victoria (2002).¹²⁵

Diversion in the context of drug related offending differed from the variety generally in operation within the criminal justice system, which was philosophically geared towards minimum intervention. Diversion in the context of drug use, however, *was to be diversion into treatment programs, not simply out of the system*. Roberts and Indermaur suggest that this difference underscored a philosophical shift, influenced by health professionals more concerned with getting drug users into treatment than simply reducing the pressure on the criminal justice system.¹²⁶ It is open to debate whether this approach is truly diversionary; that is, if diversion is defined in terms of reduced contact with the criminal justice system.

The practice in Australian drug courts is to have a collegiate approach and ensure that cases do not simply arrive in court without preliminary discussion. Files and reports are placed in front of magistrates

120. According to the official government website, community justice in the UK is aimed at tackling 'anti-social behaviour and the crime associated with it, making life better for everyone. Community justice brings the justice system and communities together, solving problems, reducing crime and building confidence': see <www.communityjustice.gov.uk>.

121. Fiona, 'Judge backs East Middlesbrough Community Court', *Gazette Live*, 26 June 2007, <http://ts3.gazettelive.co.uk/2007/06/judge_backs_east_middlesbrough.html>.

122. See <www.communityjustice.gov.uk>.

123. Alan Milligan, Chair of the Magistrates Court, Durham Region, consultation (11 July 2007).

124. Loxley W, Toumbourou J, Stockwell T, Haines B, Scott K, Godfrey C, Waters E, Patton G, Fordham R, Gray D, Marshall J, Ryder D, Sagggers S, Sanci L & Williams J. *The Prevention of Substance Use, Risk and Harm in Australia: A review of the evidence* (Canberra: The National Drug Research Centre and the Centre for Adolescent Health, 2004) 216.

125. Freiberg A, 'Innovations in the Court System' (Paper presented at the Australian Institute of Criminology Conference on Crime in Australia: International Connections, Melbourne, 29–30 November 2004).

126. Roberts L & Indermaur D, 'Timely Intervention or Trapping Minnows? The potential for a range of net-widening effects in Australian drug diversion initiatives' (2006) 13 *Psychiatry, Psychology and Law* 220.

before court sits. There are conferences with prosecution, defence counsel and drug staff in the absence of the defendant to arrive at a position before court begins. Indermaur and Roberts suggest that the introduction of drug courts in Australia during the 1990s was not based upon any firm evidence of effectiveness, 'but because they represented an idea whose time has come'.¹²⁷ Much of the research on drug courts has been American and typically focussed on serious offenders facing imprisonment and may have limited applicability to the Australian context.¹²⁸ Overviewing the current state of drug courts in Australia, Indermaur and Roberts identify a number of issues. Where to locate 'drug court on the diversion continuum and which group of offenders to target' is the major difference between jurisdictions; there is some confusion as to whether the courts are 'a form of "early" intervention or a "last chance" for an offender before imprisonment'.¹²⁹ Indermaur and Roberts also argue that, while much of the rhetorical support for drug courts focuses on reducing contact with costly imprisonment, the reality is that they are situated in magistrates courts which tend to generally produce non-custodial outcomes.¹³⁰ While there is justification in capturing individuals whose offending behaviour is not sufficiently serious to merit incarceration, it does also raise serious risks of net-widening: 'The temptation will be to reach into the vast supply of "needy" cases to provide help rather than [sic] use the drug court as an alternative to custody'.¹³¹ This is particularly problematic because the drug court is a highly intrusive option. They agree that drug courts show promise; however, they argue that more work needs to be undertaken to identify 'which groups of offenders are best served by this approach'.¹³² They express concern about the net-widening risks with the Brief Intervention Regime in the Perth Drug Court which 'deals with cannabis offenders, some facing only their second charge for simple possession'.¹³³ On the other hand,

supporters of the Perth Drug Court can point to a degree of variegation and flexibility in the system which allows for the management of less serious cases (through the Drug Court Regime) and the Pre-sentence Order for offenders facing a custodial sentence.

Indermaur and Roberts are not alone, however, in expressing concerns about the net-widening potential of drug courts. Scholars in the United States and Canada have questioned whether innovations such as drug courts have improved the quality of life of drug addicts or simply intensified and tightened social control over them.¹³⁴ Moore argues that the 'therapeutic enterprise has decidedly punitive effects, amplifying control and erasing protections in the name of curing the offender'.¹³⁵

While acknowledging that drug courts are a clear improvement on the rhetoric of the 'war on drugs' and over-reliance on imprisonment that characterised American policy in the 1990s, Moore maintains that despite their appeal and the fact that they offer some genuinely positive measures for addicts (such as access to health care and other social services) they

maintain the same old practices of justice and punishment, only now they are known by different names. Detention translates into therapy, a warrant is now an incentive and appearance in a criminal court a chance to process a drug-use relapse. Translating these practices into a network with a broader curative goal does not erase their punitive, disciplinary intentions or effects.¹³⁶

Domestic violence courts

Family and Domestic Violence Courts emerged as a means of streamlining justice processes, ensuring that perpetrators are held to account, increasing victim safety and reducing the tendency of the justice process to be the cause of further victimisation. As in other areas of problem-

127. Indermaur D & Roberts L, 'Drug Courts in Australia: The first generation' (2003) 15 *Current Issues in Criminal Justice* 136, 137.
128. Hall W, 'The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems' (1997) 30 *Australian and New Zealand Journal of Criminology* 103.
129. Indermaur D & Roberts L, 'Drug Courts in Australia: The first generation' (2003) 15 *Current Issues in Criminal Justice* 136, 144.
130. The picture however may not be so simple. The Perth Drug Court does also accept referrals from the District Court and Supreme Court.
131. Indermaur D & Roberts L, 'Drug Courts in Australia: The first generation' (2003) 15 *Current Issues in Criminal Justice* 136, 144.
132. *Ibid* 147.
133. *Ibid* 144.
134. Nolan J, *Reinventing Justice: The American drug court movement* (Princeton: Princeton University Press, 2001); Fischer B, Roberts J & Kirst M, 'Compulsory Drug Treatment in Canada: Historical origins and recent developments' (2002) 8 *European Addiction Research* 61.
135. Moore D, 'Translating Justice and Therapy: The drug treatment court networks' (2007) 47 *British Journal of Criminology* 42, 42.
136. *Ibid* 57.

oriented intervention, family and domestic violence courts emerge on the back of criticism that traditional courts often mishandled cases of family violence. There is considerable literature critical of the criminal justice system's response to domestic violence. Critics have pointed to a tendency not to take family and domestic violence issues seriously, a high attrition rate in prosecutions, a lack of coordination between agencies, and a shortage of appropriate victim services.¹³⁷

Courts, according to Ursel, have needed to reconsider how they measured 'success' in family and domestic violence cases.¹³⁸ She suggests that while the criminal justice system in general responds robustly and swiftly in the area of crisis intervention in discrete cases of violence—which may be critical in preventing domestic homicide—it is less successful at checking the cycle of abuse. This is because violence is often systemic rather than episodic. Traditional models of crisis intervention and adjudication mistakenly assumes that victims share the same goals (ie, prosecution and punishment) as the criminal justice system. The criminal justice process, she maintains, is blind to many painful aspects of the victim's situation, which can encompass divorce, child custody and property issues, long delays in hearing matters, and ineffective treatment options.¹³⁹

Ursel calls for a different approach:

A single police response, court appearance or stay in a women's shelter does not miraculously change the complex web of love, fear, dependency and intimidation woven into the fabric of an abused woman's life ... If we change the goals of intervention from conviction (a one-dimensional outcome) to redress dangerous power imbalances (a complex process of empowerment), then possibly the criminal justice system could offer women at risk meaningful intervention.¹⁴⁰

Family violence courts in Australia are courts specifically designed to improve

victims' experiences of the justice system and use the authority of the court to direct offenders into treatment. Domestic and family violence courts acknowledge that the problems underpinning domestic violence are multiple and complex, and often require multi-level and multi-agency forms of intervention and support.¹⁴¹

Family and domestic violence courts differ from other problem-oriented courts according to Stewart in that they privilege victim safety and victim centredness over other considerations,¹⁴² while other problem-oriented courts tend to favour offender wellbeing. While there is no unified model of a family and domestic violence court, they tend to have a number of common characteristics: they have—or should have—a suite of treatment and referral options available for both victims and offenders, and be based on a high level of inter-agency coordination to ensure timely and appropriate intervention.

Some working within the domestic violence area in courts see a positive role for therapeutic jurisprudence in creating a court environment concerned with an integrated approach, balancing accountability, reintegration and the safety needs of victims.¹⁴³ Commentators acknowledge that therapeutic jurisprudence can have relevance to the work of family and domestic violence courts because of its commitment to positive change and rehabilitation as legitimate goals of justice intervention.¹⁴⁴ Therapeutic jurisprudence has been recommended as an approach to the needs of women experiencing domestic violence in the United States.¹⁴⁵ The approach, according to Erez and Copps Hartley, may increase cultural sensitivity to women from minority and immigrant backgrounds and minimise some of the anti-therapeutic tendencies of courts: the current system is not sufficiently sensitive to the distinct cultural needs of victims from immigrant backgrounds.

137. For a review, see Holder R, 'Domestic and Family Violence: Criminal justice interventions' (2001) *Australian Domestic and Family Violence Clearinghouse*, Issues Paper No. 3.
138. Ursel J, 'Can Specialised Courts Meet Victim Needs For Justice? The case for family violence courts' (Paper presented at a seminar of the Queensland Centre for Domestic and Family Violence Research, Mackay, 13 April 2004), <<http://www.noviolence.com.au/janeursel.html>>.
139. Holder R, 'Domestic and Family Violence: Criminal justice interventions' (2001) *Australian Domestic and Family Violence Clearinghouse*, Issues Paper No. 3.
140. Ursel J, 'Can Specialised Courts Meet Victim Needs For Justice? The case for family violence courts' (Paper presented at a seminar of the Queensland Centre for Domestic and Family Violence Research, Mackay, 13 April 2004), <<http://www.noviolence.com.au/janeursel.html>>.
141. Stewart J, 'Specialist Domestic/Family Violence Courts within the Australian Context', *Australian Domestic and Family Violence Clearinghouse*, Issues Paper No. 10 (2005).
142. *Ibid* 4.
143. Sinclair I & Du Plessis A, 'Domestic Violence Adjudication in South Africa: A view on therapeutic jurisprudence and human rights protection of the female victim' in Reinhardt G & Cannon A (eds), *Transforming Legal Process in Court and Beyond: A collection of refereed papers from the 3rd International Conference on therapeutic jurisprudence, presented by the Australian Institute of Judicial Administration in Perth, Western Australia on 7–9 June 2006* (Melbourne: Australasian Institute of Judicial Administration Inc., 2007) 12.
144. Goldberg S, *Judging for the 21st Century: A problem-solving approach* (Ottawa: National Judicial Institute, 2005).
145. Erez E & Copps Hartley C, 'Battered Immigrant Women and the Legal System: A therapeutic jurisprudence perspective' (2003) 4 *Western Criminological Review* 155.

[T]he current structures of investigation, lack of translators, criminal justice actors' misunderstanding of cultural issues, and concerns about immigration status require battered immigrant women to engage in culturally incongruent activities in order to obtain relief. Such culturally conflicting interactions can create anti-therapeutic effects for these women, thereby reducing their current and future use of the system.¹⁴⁶

On the other hand, there has been considerable debate about the relevance of restorative justice to gendered violence related cases, particularly where the stress on informality may allow offenders to re-victimise in informal justice meetings.¹⁴⁷

The Joondalup Family Violence Court in Western Australia was launched in 1999 and it deals with civil matters for restraining orders (both violence and misconduct restraining orders) and all criminal matters related to domestic violence. There are now family violence courts in Rockingham and Fremantle and there are plans to extend them to Midland, Armadale and Perth in 2008. A specialist magistrate, prosecutor and defence counsel are attached to the court. The accused receives legal advice prior to agreeing to participate in the perpetrator program. A multi-agency Case Management Team comprised of various stakeholders such as the Police, Department of Community Development, Community Justice Service, Relationships Australia, Pat Giles Women's Centre and Victim Support Services lies at the core of the service.¹⁴⁸ The team maintains an assessment process on offenders diverted into domestic violence user groups and prepares a pre-sentence report. Interestingly, the magistrate does not participate in the group, unlike in the drug court model. The magistrate does not have an up-front 'case management' role: programs for offenders tend to last six months and the offender reappears before the magistrate after being on the program for three months to assess progress.¹⁴⁹ This is in sharp contrast with

the Perth Drug Court where the magistrate chairs the Case Management Team and the offender appears on a weekly basis and is directly answerable to the magistrate. Perhaps this illustrates the core differences between the two types of problem-oriented court. The drug court is directly, almost exclusively, focussed on intervention with offenders to change behaviour, while the family and domestic violence court has a more diffuse focus on victim safety and offender rehabilitation.

Mental health courts

Mental health courts were first established in the United States: in Florida in 1997 and in Washington, Alaska and California in 1999. They are designed to be therapeutic problem-solving courts attempting to alleviate some of the problems posed for mentally ill defendants charged with criminal offences.¹⁵⁰ These courts recognise the vulnerability of the mentally ill to enmeshment in the criminal justice system and the fact that the system, particularly gaol, rarely has a positive effect and tends to exacerbate mental illness. The majority of these courts deal with misdemeanours only and attempt to provide speedy intervention once someone is charged. The court provides intensive supervision, relying on a team approach between prosecution, defence and treatment staff, with the judge occupying a central role. There is currently no mental health court in Western Australia.

In the South Australian Magistrates Court Diversion Program, the term 'mental health' has been avoided to circumvent stigmatising users. Established as a pilot in 1999, the scheme is to be given a legislative footing. The program began in response to the realisation that many individuals arrested by the police and being detained in prison suffer from a mental illness, and become caught up in a revolving door. A situation exacerbated by

146. Ibid 166.
147. Stubbs J, 'Restorative Justice, Domestic Violence and Family Violence' (2004) *Australian Domestic and Family Violence Clearinghouse*, Issues Paper No. 9.
148. Urbis Keys Young, *Research into Good Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence*, Final Report (Canberra: Office of the Status of Women, 2002).
149. Department of Justice, *Joondalup Family Violence Court*, Final Report (February 2002). I am also grateful to Suzie Ward for observations of the Joondalup Court in operation.
150. University of Alaska Anchorage, 'The Court Coordinated Resources Project – Mental Health Court in Alaska' (2002) 18(4) *Alaska Justice Forum* 1.

the shift away from institutions to community care which has led to increased homelessness and reduced access to treatment.¹⁵¹

As with other problem-oriented courts, concerns have been expressed about the lack of a credible evidence base in the mental health court area supporting this kind of intervention in the United States.¹⁵² There have been concerns that such courts have suffered from a lack of resources – there has not been the level of investment in mental health courts as there has been in drug courts.¹⁵³ Other research in the United States, however, indicates that mental health courts are less likely than drug courts to use the sanction of gaol as leverage for getting offenders into treatment, or as a sanction when conditions are breached.¹⁵⁴ Existing research suggests that a multi-disciplinary approach involving all key players is essential to successful work in this field. Courts researched in the United States were considered to be working along the lines of therapeutic jurisprudence because they were genuinely focussed on the needs of individual offenders and were aware of due process issues.¹⁵⁵ There have been consistent concerns that mental health courts have the potential to criminalise mentally ill people committing minor offences in the name of treatment.¹⁵⁶

151. Hunter N & McRostie H, *Magistrates Court Diversion Program: Overview of key data findings* (South Australia: Office of Crime Statistics, 2001).

152. Steadman HJ, Davidson S & Brown C, 'Law and Psychiatry: Mental health courts: Their promise and unanswered questions' (2001) 52 *Psychiatric Services* 457.

153. *Ibid* 458.

154. Griffin PA, Steadman HJ & Pettila J, 'The Use of Criminal Charges and Sanctions in Mental Health Courts' (2002) 53 *Psychiatric Services* 1285.

155. Watson A, Hanrahan P, Luchins D & Lurigio A, 'Mental Health Courts and the Complex Issue of Mentally Ill Offenders' (2001) 52 *Psychiatric Services* 477.

156. Lamb HR, Weinberger LE & Reston-Parham C, 'Court Intervention to Address the Mental Health Needs of Mentally Ill Offenders' (1996) 47 *Psychiatric Services* 275.

Issues for Judges and Magistrates

There is no doubt that the problem-oriented approach has far reaching implications for the role of the judicial officer and other court users. These courts extend the sphere of judicial responsibility and potentially bring magistrates into closer contact with victims, offenders and other court-related agencies. Magistrates have to acquire new skills, including an understanding of the treatment languages that go along with the particular problem the court has been established to address; a capacity to manage inter-agency dialogue, and an ability to remain engaged with cases. They also require understanding of the rudiments of therapeutic jurisprudence and restorative justice, as these philosophies underpin the shift in the court role. Problem-oriented courts require sophisticated arrangements to manage these new demands. They have prompted the creation of new court liaison staff to interface between magistrates/judges, other agencies and communities. The quality of this interface work may hold the key to successful problem-oriented work.

The shift in role for magistrates requires considerable commitment. The local magistrate may become not simply a 'coach' but the commanding officer of a small inter-agency steering committee comprising the magistrate, court staff, lawyers, community corrections officers, treatment agencies and police working collaboratively on a specific issue. Innovations in Western Australia, such as the Geraldton Alternative Sentencing Regime (GASR) in the Geraldton Magistrates Court—a variety of drug court that operated in Geraldton in the early 20002, under Magistrate King—illustrate that these initiatives are labour intensive. Establishing GASR required the magistrate becoming involved in 'consciousness raising', establishing a number of steering groups, empowering agencies to own the project, struggling for resources, and maintaining local commitment.¹⁵⁷ Indeed, King and Piggott liken the process of working with the agencies to the processes involved in therapeutic

jurisprudence itself – in both instances the court has to take the lead in promoting change by involving parties in decision making and resolving problems.¹⁵⁸ Many court professionals may have reservations about King and Piggott's notion of the magistrate as therapist, but they illustrate that managing a problem-oriented court requires that the magistrate takes a proactive stance in terms of mobilising local resources and drawing together a local support system. It involves consensus building, negotiation and consultation. It transforms the role of the magistrate and court staff¹⁵⁹ – magistrates step over traditional boundaries between themselves and other agencies.

Drug court magistrates appear to be amongst the most proactive and interventionist. However, even in these courts some magistrates have struggled to gain control over the system. An evaluation in Queensland found:

Our consultations with the Magistrates ... revealed that they had limited, if any, knowledge of the overall compliance of offenders with the requirements of the program, or of the impact of the program on participants' drug taking and related behaviour. The large majority of Magistrates indicated that they would like to receive such information on a regular basis, and considered that this would inform their knowledge of and support for the program.¹⁶⁰

Magistrates adopting a case management approach may also find they need to be involved as change managers in relation to local practices which inhibit the development of a problem-oriented approach. That is, they may need to take the lead in convening inter-agency meetings and ensuring that policies are consistent with the aims of the problem-oriented court. For example, a review of a court-based drug diversion project in Western Australia found that the magistrate's adoption of a hands-on management role with offenders alienated some correctional staff who felt that traditional offender management was being compromised in the name of treatment.¹⁶¹

157. King MS & Piggott L, 'Mirroring the Stages of Change in the Establishment of Problem Solving Courts' in Reinhardt G & Cannon A (eds), *Transforming Legal Process in Court and Beyond: A collection of refereed papers from the 3rd International Conference on therapeutic jurisprudence, presented by the Australian Institute of Judicial Administration in Perth, Western Australia on 7–9 June 2006* (Melbourne: Australasian Institute of Judicial Administration Inc., 2007) 161.
158. *Ibid* 169.
159. Cannon A, 'Therapeutic Jurisprudence in the Magistrates Court: Some issues of practice and principle' in Reinhardt & Cannon, *ibid* 135.
160. Queensland Health, *Evaluation of Queensland Illicit Drugs Court Diversion Program, Final Report* (July 2005) [6.1.4].
161. See UWA Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP): Final Report for the Drug and Alcohol Office* (Perth, 2007) 63–64 & 76.

What's in it for Other Court Users?

A problem-oriented approach requires willingness on the part of participants in court processes to break with some traditional beliefs about their role and embrace a more collegiate style of working. Wexler,¹⁶² and Winnick and Wexler,¹⁶³ suggest that as interest mounts in therapeutic jurisprudence a range of court users are recognising the benefits of the approach and are willing to adopt a more holistic stance. Defence lawyers, for example, increasingly attend to their client's long term interests rather than simply see their role in terms of reducing any possible penalty. Winnick and Wexler describe a 'new model' of work for lawyers which

contemplates lawyers practicing with an ethic of care and heightened interpersonal skill, who seek to prevent legal difficulties ... for their clients through sensitive counseling [sic], advance planning, creative problem solving, careful drafting, and the use of alternative dispute resolution techniques. In recent years, this emerging model has begun to penetrate legal education.¹⁶⁴

Wexler notes that some defence lawyers in the United States are refusing to represent clients, such as those repeatedly caught driving under the influence, unless they agree to a therapeutic jurisprudence approach, accept responsibility for their actions and undertake treatment for addiction, although there is no evidence to suggest that this practice is not being replicated in Australian courts at this stage.¹⁶⁵ The role of the defence lawyer shifts towards a search for an outcome that would improve the likelihood of clients not returning to court due to the fact

the problems underlying offending have not been dealt with. Increasingly in American problem-oriented courts, defence lawyers assemble a rehabilitation package to present either to the prosecution in the process of plea bargaining or to the judge at sentencing. Wexler argues that defence lawyers, along with judges and probation officers, should become 'change agents' and adopt techniques that will create positive changes in behaviour.¹⁶⁶ These kinds of changes require that the language of the court is modified to accommodate a narrative style of communication, allowing clients to tell their story 'unconstrained by rigid notions of legal relevance'.¹⁶⁷ There are a number of barriers to the creation of a this kind of therapeutic environment, not least of which is the adversarial nature of the criminal justice system. Carson¹⁶⁸ and Slobogin,¹⁶⁹ for example, point to inherent tensions between therapeutic values and the rough and tumble of the trial process which, in some instances, has decidedly anti-therapeutic effects.

In the problem-oriented court judges and magistrates are given greater leverage and involvement in the change process. The judge becomes the conduit and channel for information and decision-making processes that might previously have remained the secret domain of agencies and their clients; hence, the concern expressed in relation to drug courts in the United States that they have compromised patient/health provider confidentiality and that the court system is now the real client not the person receiving treatment.¹⁷⁰

162. Wexler D, 'Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer' (2005) 17 *St Thomas Law Review* 743.
163. Winnick BJ & Wexler DB (ed), *Judging in a Therapeutic Key: Therapeutic jurisprudence and the courts* (Durham: Carolina Academic Press, 2003).
164. Winnick BJ & Wexler DB (ed), 'The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the criminal law clinic' (2007) 13 *Clinical Law Review* 605, 605–606.
165. Wexler D, 'Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer' (2005) 17 *St Thomas Law Review* 743, 744. This may reflect the current legal culture of the USA and may be not be applicable to the Australian situation. On the other hand some legal scholars in Australia see an emerging interest in the adoption of an 'ethics of care' by Australian lawyers: see Evans A & Parker C, *Inside Lawyers' Ethics* (Cambridge: Cambridge University Press, 2007).
166. Wexler, *ibid* 747–49; see also Clark M, 'A Change-Focused Approach for Judges' in Winnick BJ & Wexler DB (ed), *Judging in a Therapeutic Key: Therapeutic jurisprudence and the courts* (Durham: Carolina Academic Press, 2003) 137.
167. Wexler, *ibid* 748.
168. Carson D, 'Therapeutic Jurisprudence and Adversarial Injustice: Questioning limits' (2003) 4 *Western Criminology Review* 124.
169. Slobogin C, 'Therapeutic Jurisprudence: Five dilemmas to ponder' in Winnick BJ & Wexler DB (eds) *Law in a Therapeutic Key: Developments in therapeutic jurisprudence* (Durham: Carolina Academic Press, 1996).
170. See eg 'What Makes Drug Courts Succeed or Fail?', *Drug Policy Research Centre Newsletter* (June 2000), <www.reconsider.org/issues/drug_court/interesting_facts.htm>.

Problem-Oriented Approach in Other Courts

Discussion in the United States has also shifted towards the integration of the problem-solving approach into mainstream courts. Research by the Centre for Court Innovation with groups of professionals working within problem-oriented courts found guarded optimism about integrating the problem-solving approach into mainstream courts.¹⁷¹ The professionals believed that the judges in all types of courts could adopt a more proactive stance – ask more questions, link with service providers, and delve deeper into underlying issues. They would then be in a better position to tailor more relevant court orders. Judges could also communicate and engage directly with defendants (rather than through counsel) as they do in problem-oriented courts, encourage greater integration of social services into the court system, require defendants on mandated orders to report back to the court, and, more problematically given the potential to compromise defendant's rights, adopt a more team-based and non-adversarial approach.¹⁷² Participants also noted two key barriers to the dissemination of problem-oriented techniques into mainstream courts: firstly, judges work within time constraints that would inhibit a problem-centred approach; and secondly, most courts lack the technology, resources and staff required to operate in a problem-oriented style.¹⁷³

171. Farole DJ, Puffett N, Rempel M & Byrne F, 'Applying the Problem-Solving Model Outside of Problem-Solving Courts' (2005) 89 *Judicature* 40, 41.

172. *Ibid.*

173. *Ibid.*

C onclusion

Problem-oriented courts are becoming an accepted feature of the criminal justice system in Australia and their influence is steadily growing. Nevertheless, the evidence base remains shallow and there is a need for more intensive longitudinal studies focussed on both processes and outcomes. Longer term studies around recidivism, re-offence frequency, desistance from crime and/or harmful behaviours and community reintegration are required. In the case of community courts there would also need to be research focussed on community harmony and the extent to which neighbourhoods feel like safer, better places to live in because of the community court and the justice centre. Long term process evaluations are required to gauge the impact of the court on the broader justice system: Has it stimulated better inter-agency collaboration? Are courts easier places to access? Do victims, witnesses and communities of care feel more accepted than in other courts? Has the quality of local services for victims and offenders improved because of court interventions? Has the creation of a homelessness court, for example, stimulated greater awareness of the problems facing homeless and itinerant people and has government stepped in to improve services locally? An important issue—and one experienced particularly in relation to drug courts—relates to the balance between treatment and due process. There are serious problems related to the net-widening impact of intrusive treatment programs targeted at minor offenders, where the likelihood is that ‘failure’ in treatment will result in increased criminalisation. This places pressure on courts to ensure that net-widening is minimised.

There are a number of cultural differences between the United States of America and Australia. While courts have been under pressure in Australia to respond to societal problems, it is doubtful that they were ever expected to be the ‘frontline’

response to crime and fix intractable social problems as were their American counterparts. Australia has always had a more social democratic approach in terms of the provision of social services, enjoys a wider network of government welfare organisations and has been less influenced by ‘neo-liberal’ justice policies based on reduced state intervention and individualism.¹⁷⁴ In the drug area there has been more of a harm minimalisation approach. There is a strong chance that problem-oriented courts may enjoy more success in Australia due to the wider array of support and treatment options already open to Australian courts, although they may struggle in rural and remote areas where infrastructure is lacking and services thin on the ground – a problem already identified in relation to court-based drug diversion projects in Western Australia.¹⁷⁵

The philosophies of restorative justice and therapeutic jurisprudence provide a rationale for the problem-oriented courts’ less adversarial and more forward looking approach. However, there will remain areas of tension between the two approaches: restorative justice views itself as a social movement, not a brand of justice reform, and restorative justice purists may have concerns about a tendency towards paternalism within therapeutic jurisprudence. On the other hand, supporters of therapeutic jurisprudence may be alarmed by the excessive focus on communal empowerment in restorative process and the potential for denial of due process and outright ‘mob rule’. The literature, however, suggests that professionals working in and around problem-oriented courts cheerfully borrow and mix ideas from both camps to construct a new meta-language. This language picks up on restorative justice’s commitment to resolving the human—rather than just the legal—consequences of offending while remaining positive about the capacity of the courts and existing structures to play a leading role in the resolution of complex social issues.

174. O’Malley P, ‘Globalizing Risk?: Distinguishing styles of ‘neo-liberal’ criminal justice in Australia and the USA’ (2002) 2 *Criminal Justice* 205. Neo-liberal social and economic policies generally support limited state intervention, reduced access to state provided welfare and free markets.

175. UWA Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP): Final Report for the Drug and Alcohol Office* (Perth: Drug and Alcohol Office, 2007).