

THE SOCIAL, POLITICAL AND THEORETICAL CONTEXT OF DRUG COURTS

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This paper situates the drug court phenomenon within the social, political and theoretical framework in which it operates. It addresses the philosophical underpinnings of drug courts within the context of criminal punishment, drawing on influences from recent criminological theory. The importance of understanding the background and rationale for drug courts cannot be underestimated if they are indeed, as the author suggests, a possible template for the criminal justice system of the future.

I INTRODUCTION

There are currently seven drug courts operating across Australia – five in Queensland and one each in New South Wales and Victoria. They form part of the lowest hierarchy of courts,¹ and are designed to deal with individuals who have committed an offence because of, or directly related to, their drug addiction. These individuals, who would ordinarily face a prison sentence, are presented with an option for long-term treatment and rehabilitation programs within the community, under the supervision of the court. For many, the philosophy underpinning the drug court model represents a much needed transformation of the criminal justice system.

The drug court process begins before adjudication, once participants are identified as eligible. The eligibility guidelines include no prior violent offence, a willingness to participate in the program, and drug dependency. Election to participate in the drug court program means that the offender agrees to plead guilty to the charge. The participant then undertakes an extended treatment program which is coupled with a monitoring regime consisting of frequent drug testing and appearances before the drug court magistrate. The participant's progress and general well-being are reviewed at each court appearance, with the possibility of rewards or sanctions for non-compliance being awarded.

Instead of the traditional trial in which the state takes an adversarial role by prosecuting defendants, the drug court represents a situation in which the state's function is a therapeutic intervention and the focus is on the individual and his or her needs. A key distinguishing factor of drug courts, compared with more traditional criminal courts, is the planned collaboration between the various agencies which deal with the drug-affected offender – Legal Aid, the police, corrections, and the alcohol and drug dependency arm of the health authorities.

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¹ With the exception of New South Wales, where they form part of the District Court hierarchy.

For its most ardent proponents, the drug court model represents a fundamental paradigm shift in justice, away from a predominantly punitive orientation towards an approach that looks at drug-related crime in a holistic way. The drug court process deals with the causes of the crime which has been committed, instead of accepting the traditional compartmentalisation of justice which renders the underlying causes of crime somebody else's responsibility. Alternatively, there is criticism by those who see drug courts as an ill-informed reaction to a social crisis and an inappropriate compromise of the impartial judicial adjudication function.

In order to better inform this debate, it is necessary to situate drug courts within their social, political and theoretical contexts. The first two of these frameworks impose external pressures on the operation of drug courts, and the latter brings pressure from within; but an understanding of all three collectively is necessary to properly comprehend the drug court phenomenon and to anticipate the role that drug courts may have in reform of the criminal justice system.

II SOCIETY'S DEMAND FOR CRIME TO BE PUNISHED

The social context within which drug courts operate acknowledges society's demand for crime to be punished, combined with the recognition that drug-induced crime raises a series of complex questions which undermine a simple belief in pure retribution. Throughout history, the vexed question of dealing with criminal offenders in a manner which is not only just, but appears to be just, has occupied the hearts and minds of theorists, both within and outside the legal academy. An historical examination of the concept of justice in relation to the social and cultural understandings of drug-related crime has shown that classical theories of crime and punishment have evolved through post-welfare penological thought into, finally, the harm-minimisation philosophy that has culminated in the concepts of diversionary justice and problem orientated courts, encapsulated by the drug court movement. Within the drug court paradigm, the concept of punishment is inextricably linked with the question of whether it is fair, right, or just to punish drug-related offences differently from offences committed by those who have no chemical addiction, and, further, whether it is the role of the criminal justice system to determine the rights and duties of drug-affected offenders in recognition of their disadvantages.

Thus, the question is whether it is appropriate that a society, which recognises the incidence and reality of drug addiction, and spends millions of public dollars on combating its effects, should treat drug-afflicted offenders differently in terms of punishment. The answer to this question is revealed by a thorough examination of the relationship between drugs and crime, and the social and cultural imperatives for combining the punishment and therapeutic paradigms.

A The Drug Crime Nexus

There continues to be debate about whether illicit drug use ‘leads’ to crime, or crime leads to or exacerbates illicit drug use;² any discussion of the rights or wrongs of punishment of drug-affected offenders needs to take place in light of an awareness of conflicting approaches to the connection between drugs and crime. Illicit drug users can be grouped into two broad categories.³ The first category contains individuals who rarely, if ever, come into contact with the criminal justice system, who live relatively stable lives, and whose drug use remains undetected. The second category contains those individuals who are involved in a variety of criminal activities and who come to the attention of criminal justice authorities. The reasons for the connection between illicit drug use and offending include the obvious one of the very fact that the possession, distribution and use of these substances is illegal; and also more indirect experiences such as victimisation, mental health problems, drug and alcohol abuse among family members, use of prescription drugs, and drug dependency of a magnitude which cannot be sustained by legal means.⁴

In Australia, an on-going project conducted by the Australian Institute of Criminology and funded by the Australian Attorney-General’s Department called Drug Use Monitoring in Australia (‘DUMA’)⁵ seeks to measure illicit drug use among those people who have recently been apprehended by police. The DUMA program uses voluntary urine samples and questionnaires, administered to arrestees, to gather information on illicit drug use and crime from those detained by police around Australia.⁶ Data from DUMA is used to examine issues such as the relationship between illicit drugs and property and violent crime; to monitor patterns of drug use across time; and to help assess the need for drug treatment among the offender population. Although DUMA participants are only tested for illicit drug use, the self-reporting aspect of the process also reveals the alcohol component of the participants’ drug-taking. Of those detainees who had used an illicit drug or alcohol in the past 12 months of the study, over half were dependent on alcohol and other drugs. Twenty-seven per cent were classified as dependent on alcohol and 52 per cent on illicit drugs. Alcohol dependency was more common among males and those aged over 30 years.⁷

² Australian Institute of Criminology, *Gender Differences in the Sequence of Drug Use and Crime*, Crime Facts Info No 90 (2005) 1. This study identified slight gender-based differences that illicit drugs may play in the development of a criminal career, but identified illicit drug use as an important factor in criminal offending for both men and women.

³ Tony Makkai, ‘Drug Courts: Issues and Prospects’ (Trends and Issues in Crime and Criminal Justice No 95, Australian Institute of Criminology, 1998) 1.

⁴ Holly Johnson, ‘Drugs and Crime: A Study of Incarcerated Female Offenders’ (Research and Public Policy Series No 63, Australian Institute of Criminology, 2004) xv.

⁵ See generally Australian Institute of Criminology, Drug Use Monitoring in Australia Project <<http://www.aic.gov.au/research/duma/>> at 8 July 2006.

⁶ The data which DUMA collects includes: urinalysis information on offender use of opiates, marijuana, cocaine, methadone, amphetamines and benzodiazepines; self-reported data on patterns of illicit drug use; and self-reported data on current and prior arrest and prison experiences.

⁷ Carmen Schulte, Jenny Mouzos and Tony Makkai, ‘Drug Use Monitoring in Australia: 2004 Annual Report on Drug Use Among Police Detainees’ (Research and Public Policy Series No 65, Australian Institute of Criminology, 2005) 3.

Although the precise link between drug and alcohol abuse and criminal offending is not known, it has been shown that drug use exacerbates criminal offending.⁸ This is revealed by the findings of the Drug Use Careers of Offenders ('DUCO')⁹ project, which seeks to measure drug use, including illicit drug use, among sentenced offenders. Data from DUCO may be used to examine the intersection of drug use patterns and criminal careers and to explore issues concerning links between drug use and crime. As noted by Makkai and Payne:

The study found that the majority of offenders reported using illegal drugs, and poly-drug use was common. More than 80 per cent had used any of the four main drug types – cannabis, heroin, amphetamines and cocaine. Current regular use in the six months prior to arrest was reported by 62 per cent of offenders. In terms of the types of drugs, regular use was reported as: 53 per cent for cannabis; 31 per cent for amphetamines; 21 per cent for heroin; 7 per cent for cocaine; and 35 per cent for two or more illegal drugs. Analysis by offender category reveals significant differences in the type and frequency of drug use over the lifetime criminal career. Regular property offenders and regular fraud offenders consistently reported a greater lifetime prevalence of illegal drug use than did homicide offenders, violent offenders and non-regular offenders.¹⁰

The DUCO study uses a conservative measure of causation, which includes a combination of addiction or intoxication at the time of the current offence, for offenders who stated that the reason they committed the offence was related to drugs or alcohol. However, it should be acknowledged, as it was by Johnson in her further study of female offenders, that the figures available rely on arrest statistics, and that

[a]rrest statistics reflect only those crimes that come to the attention of police and for which an offender is identified and arrested. Arrests for drug offences are therefore more an indication of police action around the enforcement and detection of drug-related activity than a measure of drug use in the community. Police action can be affected by the availability of resources and setting of priorities, including targeted operations, which may shift over time. Nevertheless, the number of arrests is a good indicator of the number who are at risk of being criminalised and imprisoned for their drug use.¹¹

⁸ Johnson, above n 4, xiv.

⁹ See generally Australian Institute of Criminology, Drug Use Careers of Offenders Project <<http://www.aic.gov.au/research/projects/0019-intro.html>> at 8 July 2006.

¹⁰ Toni Makkai and Jason Payne, 'Key Findings from the Drug Use Careers of Offenders (DUCO) Study' (Trends and Issues in Crime and Criminal Justice No 267, Australian Institute of Criminology, 2003) 1.

¹¹ Johnson, above n 4, 7.

1 Implications of the Drug Crime Nexus

Articulation of the connection between drug addiction and crime highlights the problem of deciding how this information is used. One approach is that drug use is wrong in and of itself, and for this reason alone is deserving of punishment. Therefore, when it is related to criminal activity that comes to the attention of the authorities, it is doubly deserving of punishment and a prison sentence is indicated. A second, contrasting, view is that drug addiction is an illness; a manifestation of social and personal problems which needs to be understood and treated. The drug addiction and the criminal activity should be separated, and treated without recourse to the law. A third hybrid view has recently emerged. This revolves around the concept that drug users are a danger both to themselves and to the community, and it is therefore in the interests of all that the addiction be treated. Although it is recognised that the various causes of addiction are complex, the addiction is not detached from the crime, and the offender is treated for both the problems.

It is in response to this third view that the drug court phenomenon has come to the fore, and to a certain extent, this renders obsolete the discussion about whether drug use leads to crime or whether the reverse is true. Research has found that criminal activity precedes drug use, but that offending, in particular property crime, increases once drug use escalates. This suggests that any attempt to answer the 'chicken or the egg' question is largely misguided.¹² However, it does lead to a different perspective about what kind of punishment is appropriate for a crime which is often committed without the necessary criminal intent, and raises the question of whether there is any difference between crimes committed whilst under the influence of drugs, and crimes committed to obtain money for drugs. In order to understand the recent thinking which has culminated in the establishment of drug courts, it is necessary to look at the evolution of theories about crime and punishment.

B The Nature of Punishment

What then is punishment? In its legal context, punishment has a direct correlation with the aims of the criminal justice system, and as such it has changed over time in accord with society's views of the role of the criminal justice system. One definition of legal punishment is that it comprises of 'penalties authorised by the state, and inflicted by state officials, in response to crime'.¹³ However, Hudson acknowledges that there are many different labels for different types of

¹² Ibid xiv. However, somewhat different results were found for women in the Johnson study (ibid): One-third of all drug-using women interviewed for this study began offending prior to any drug use, and two-thirds had used illegal drugs prior to or within the same year as their first offence. This suggests that, for a substantial portion of female offenders, drug use plays a role in shaping onset into a criminal career. Women involved in the sex trade, for example, tended to begin sex work after becoming regular users of amphetamines and heroin.

¹³ Barbara Hudson, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory, Crime and Justice* (2nd ed, 2003) 1.

punishment depending on the perceived assessment of its objectives.¹⁴ Acknowledged objectives of legal punishment include:

- (a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or
- (b) to deter the offender or other persons from committing offences of the same or a similar character; or
- (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
- (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
- (e) to protect the community from the offender; or
- (f) a combination of two or more of those purposes.¹⁵

This statement reflects a modern underlying philosophy, which has, however, changed over time, and not always in a continuum, different societies at different times have placed different emphases on the primary function of punishment. As David Garland says, 'the specific nature of punishment in any society will always have its roots in the broader context of prevailing (or recently prevailing) social attitudes and traditions'.¹⁶

In addition, there are two mutually exclusive emphases: prospective, concerned with preventing future crimes; and retrospective, concerned with punishing already committed crimes. Ideas such as retribution, prevention, deterrence, education and rehabilitation have had their advocates throughout history – what changes is the relative influence they exert in relation to other prevailing social and political forces.

Drug courts represent both an explicit and implicit melding of traditional views on punishment (retribution and deterrence) with efforts to address drug addiction from the standpoint of community needs (rehabilitation). Therefore, in order to properly understand the current philosophy informing the way in which drug courts deal with those who come before them, it is necessary to position the phenomenon of drug courts within the development of the concept of punishment as it has evolved through social history. What does the underlying rationale which informs the drug court movement owe to the various perspectives of the traditional philosophic and moral views of punishment and justice?

¹⁴ Ibid 2.

¹⁵ *Sentencing Act 1991* (Vic) s 5.

¹⁶ David Garland, *Punishment and Modern Society: A Study in Social Theory* (1990) 210.

1 Utilitarian Theories of Punishment

In the early period of most systems of law, the rough sense of justice demanded the infliction of the same loss and pain on the aggressor as he or she had inflicted on his or her victim. The idea which was encapsulated by the idiom ‘an eye for an eye’¹⁷ which mandated that punishment or restitution be proportional to the actual, demonstrable harm done, and not be determined by the rage of the party offended against.

As society developed and became more complex, the classical criminological tradition, largely developed through the work of Beccaria¹⁸ and based on the utilitarian concept of the ‘greatest happiness for the greatest number’, was held to be the proper basis for all social action. Classical utilitarian theory, born of Kantian philosophy which emerged in a European context of economic prosperity and colonialism, is the doctrine that actions, institutions, etc are to be evaluated (as right, wrong, good, evil) by considering their likely contribution to the happiness of the human race; in this calculation the happiness of any one person is to count for no more or less than the happiness of any other. The utilitarian theory of justice is committed to the maximisation of the common good. Acts, practices, and rules are to be judged better or worse, or right or wrong, according to how effectively they promote this goal. Utilitarian theorists such as John Stuart Mill¹⁹ and Jeremy Bentham²⁰ supported government intervention, arguing that it was necessary to promote the good of society as a whole. When this concept is translated into the criminal justice sphere, it is interpreted as crime being an injury to society as a whole, and not explained in terms of sin or dealt with on the basis of privilege.²¹ Therefore, the purpose of punishment is not simply social revenge or retribution, but should be orientated towards deterring individuals and others from committing crime. As Beccaria wrote:

The end of punishment, therefore, is no other, than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make the strongest and most lasting impression on the minds of others, with the least torment to the body of the criminal.²²

¹⁷ The term “an eye for an eye” is a pronouncement of equality of ancient standing. King Hammurabi used that concept to describe enforcement of equality wherein evils done by one individual to another were punishable by returning the same evil to the guilty party. Moses imposed such a law in Israel also as “an eye for an eye and a tooth for a tooth”. It is repeated three times in the Torah, and is found in three passages in the Old Testament (Exodus 21:23, 24; Leviticus 24:19, 20; and Deuteronomy 19:21), most explicitly in the Book of Exodus as ‘[t]hou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot’: *King James Bible* (first published 1611, 1987 ed), Exodus 21:24.

¹⁸ See generally Cesare Beccaria, *On Crimes and Punishments* (1963).

¹⁹ See especially John Stuart Mill, *Utilitarianism* (first published 1863, 2001 ed).

²⁰ See especially Herbert Lionel Adolphus Hart, ‘Bentham’s Principle of Utility and Theory of Penal Law’ in Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (first published 1789, 1996 ed) lxxix, cxii.

²¹ Rob White and Fiona Haines, *Crime and Criminology: an Introduction* (3rd ed, 2004) 28.

²² Cesare Beccaria, *An Essay on Crimes and Punishments* (1767) 43 as quoted in Rob White and Fiona Haines, *Crime and Criminology: an Introduction* (3rd ed, 2004) 29.

The classical tradition of punishment was based on the idea that crime was rational behaviour, and Durkheim in particular believed that crime is normal in society because there is actually no extra social or natural dividing line between criminal activity and other, morally reprehensible, but more acceptable activities.²³ The effectiveness of the concept of crime actually comes from the process of punishment and social emotions which are engendered within society. Durkheim believed that a society in which there is no crime would be a rigidly over-policed, oppressive society. He postulated that '[p]unishment constitutes essentially a reaction of passionate feeling, graduated in intensity, which society exerts through the mediation of an organized body over those of its members who have violated certain rules of conduct'.²⁴

Deterrence theory does not specify a particular mode of punishment, but requires that the type of punishment chosen must increase overall happiness. The moral justification for any action should depend on whether or not that action increases total human happiness more than it subtracts from that happiness. There is a strong influence of utilitarian theory underpinning the drug court movement. Not only do drug courts uphold the concept of government intervention in the affairs of an individual who has offended against society, but they correspond to the utilitarian objectives of deterrence and rehabilitation.

2 Retribution

Retributive justice posits that the criminal law's function is retribution and that retributive punishment demands that those who deserve punishment receive it. According to Moore, '[t]o deserve punishment, two things are necessary: one must have done a wrongful action, and one must have done so culpably'.²⁵

Within retributive theory, punishments are justified on the grounds that the criminal has created an imbalance in the social order that must be addressed by action against that criminal. Central to retributive justice are the notions of merits and deserts, in other words, people should receive what they deserve. This means that people who work hard deserve the fruits of their labour, while those who break the rules deserve to be punished. Retributive justice requires that the punishment fit the crime and that like cases be treated alike. Wrongdoers deserve blame and punishment in direct proportion to the harm inflicted. Immanuel Kant uses a debt metaphor to explain the notion of just deserts.²⁶ Citizens in a society enjoy the benefits of a rule of law. According to the principle of fair play, the loyal citizen must do his or her part, by way of reciprocal restraint, to maintain the balance in the system. An individual who seeks the benefits of living under the rule of law, without being willing to make the necessary sacrifices of self-restraint, is seen as giving him or herself an unfair advantage. Punishment

²³ George Vold, Thomas Bernard and Jeffrey Snipes, *Theoretical Criminology* (5th ed, 2002) 105.

²⁴ Emile Durkheim, *The Division of Labor in Society* (1984), 52.

²⁵ Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (1997) 33.

²⁶ See Immanuel Kant, *The Metaphysical Elements of Justice* (first published 1780, 1965 ed).

removes the undeserved benefits by imposing a penalty that balances the harm inflicted by the offence, which is suffered as a debt that the wrongdoer owes his fellow citizens. Retributive justice in this way aims to restore both victim and offender to their appropriate positions relative to each other. The unfair advantage that the wrongdoer has gained through his or her behaviour will be offset by the punishment imposed.

The theory of retributive justice is often associated with harsh punishment, based on the belief that harsh punishment is expected to act as a deterrent. However, proponents of the theory point out that the retribution should be proportional to the crime, and that minor crimes should attract mild punishments while major crimes should attract harsh punishments. There is a tendency to slip from retributive justice to an emphasis on revenge. Vengeance is a matter of retaliation – of getting even with those who have hurt us – and can also serve to teach the wrongdoer how it feels to be treated in a certain way. Like retribution, revenge is an understandable response to wrongs committed against innocent victims, but punishments dictated by revenge do not satisfy principles of proportionality or consistency. The belief that punishment will act as a deterrent is also flawed. A deterrence strategy assumes that offenders are rational thinkers who calculate the costs and benefits of their behaviour. As such, it in turn assumes that a person faced with the choice between criminal and lawful behaviour would choose lawful behaviour, with its high benefits and relatively low costs, over an illegal lifestyle, with its high costs and relatively low benefits.²⁷ In practice, punishment has only an indirect deterrent effect, as revealed by the many studies which have shown that the death penalty does not deter murder.²⁸ Nor is it likely that longer sentences deter crime or reduce recidivism, other than for the simple reason that those who are imprisoned are unable to re-offend during that time.

Although the underlying rationale for retribution theory is that the crime has been committed, and therefore punishment is warranted, it is mitigated by the belief that punishment is justified only when the person is rational when he or she chooses to act in contravention of the law. In the on-going debate about the exact categorisation of a crime committed by a drug-affected person, retributive justice lends both the solidity of the inevitability of punishment and the moderation of the acknowledgment that the punishment must fit the crime. In line with the statement by Finnis that ‘in any state of affairs capable of being improved by it, punishment’s justifying point is to make an improvement’,²⁹ the proportionality aspect of retributive theory is germane to the objective of drug courts.

²⁷ Mark Fleisher, ‘Lost Youth and the Futility of Deterrence’ in Sean McConville (ed), *The Use of Punishment* (2003) 89, 101.

²⁸ See, eg, William Bailey and Ruth Peterson, ‘Murder, Capital Punishment and Deterrence: A Review of the Literature’ in Hugo Bedau (ed), *The Death Penalty In America: Current Controversies* (1997) 135, 143.

²⁹ John Finnis, *Aquinas: Moral, Political, and Legal Theory* (1998) 212.

3 Rehabilitation/Reform

Rehabilitation, which is particularly pertinent to drug-related crime, lost favour as an ideal in the mid to late 1970s, largely due to the 'nothing works' conclusion reached by a meta-analysis of correctional treatment programmes.³⁰ The subsequent years saw a return to deterrence and 'just deserts' based punishment. This shift in punishment focus, coupled with the so-called 'War on Drugs', led to vast changes at all stages of the criminal justice system. Increases in drug arrest conviction and incarceration rates led to a court system that was congested by drug-involved offenders and a skyrocketing prison population.³¹ Penalties such as mandatory minimums, intensive supervision and court imposed special conditions were all designed to complement the 'get tough on crime' stance.³² However, they did not address the underlying addiction problem.

As Garland has emphasised, it is necessary to have an understanding of the cultural context within which particular types of punishment are practiced.³³ In relation to drug courts, Nolan concurs that the 'moral codes and symbols pervading a particular culture at a particular time greatly influence which behaviours will be regarded as deviant and what types of punishment will be used to sanction them'.³⁴ In building on this concept he suggests that the burgeoning drug court movement, although it 'first developed in response to the growing number of drug cases overcrowding America's criminal court calendars'³⁵ came to fulfilment in the light of

the advancement of the therapeutic culture [in the general community] – typified by an elevated concern with the self, by a conspicuously emotivist form of discourse and self-understanding, by a proclivity to invoke the language of victimhood and to view behaviors in pathological rather than moral/religious terms, and by the elevated social status of psychologists and other therapeutic practitioners.³⁶

Nolan concludes that it is therefore not surprising that the justice system drew upon this system of therapeutic understanding to give meaning and direction to the drug court movement.³⁷

The therapeutic culture is also closely aligned with the emergence of a form of communitarianism, which reflects a belief that rights are due to all individuals;

³⁰ James R P Ogloff, 'Offender Rehabilitation: From "Nothing Works" to What Next?' (2002) 37 *Australian Psychologist* 245, 245.

³¹ Michael Tonry and James Q Wilson, 'Drugs and Crime' in Michael Tonry and Norval Morris (eds), *Crime and Justice: A Review of Research* (1990) vol 12, ix.

³² David Garland, 'The Culture of High Crime Societies: Some Preconditions of Recent 'Law and Order' Policies' (2000) 40 *British Journal of Criminology* 347, 349-50.

³³ Garland, above n 16, 249.

³⁴ James L Nolan Jnr, *Reinventing Justice: The American Drug Court Movement* (2001) 4.

³⁵ *Ibid* 5.

³⁶ *Ibid* 47.

³⁷ *Ibid* 48.

that punishment which is not facilitative of some future good is unjustified; and that the 'good' to be promoted and protected by the criminal justice system must be consistent with the general obligation of social policies and institutions to promote participation in society.³⁸ In the realms of criminal justice policy, the concept of 'community' is often expressed as the opposite to prison. As Braithwaite comments, '[p]rison was an invention that sought to remove offenders from the community, from its observation and from its participation in punishment'.³⁹ Therefore, the communitarian approach to punishment encapsulates a focus on the critical advantages of civil libertarian approaches that emphasise the claims of individuals, understood in terms of their social relationships,⁴⁰ and which focuses on the concepts of harm-minimisation.

III POLITICAL EXPEDIENCY

The advent of drug courts cannot properly be understood without an examination of the political context in which they have come into being. Although many would argue that a drug addict is only nominally a criminal, the political reality is that the cost of drug-related crime is of major concern and therefore policy makers are eager to be seen to be responding to that concern. As McConville says,

[t]he exact relationship between public opinion and party political contest always occasions debate, but that criminal policy is now central to party politics throughout the liberal democracies is beyond doubt, and that it becomes supercharged at times is a matter simply of observation.⁴¹

It is difficult to deduce whether public opinion and political policy are congruent, or whether policy is made on the basis of what it suits politicians' interests to claim the public wants.⁴² It is equally difficult to separate political expediency from a ground-swell social movement, particularly in a society where mainstream media ownership is often aligned with government interests. Nevertheless, it is incontrovertible that society's absorption with the problem of drugs and crime over the past decade has challenged the traditional approach to criminal justice. Given the scarcity of resources on the one hand, and the increase in the cost of justice on the other, there are few alternatives possible.

³⁸ Hudson, above n 13, 73.

³⁹ John Braithwaite, *Crime, Shame and Reintegration* (1989) 179.

⁴⁰ Nicola Lacey, 'Penal Theory and Penal Practice: A Communitarian Approach' in Sean McConville (ed), *The Use of Punishment* (2003) 175, 195.

⁴¹ Sean McConville, 'The necessity of chance' in Sean McConville (ed), *The Use of Punishment* (2003) 235, 248.

⁴² See, eg, Julian V Roberts, 'Public Opinion and Sentencing Policy' in Sue Rex and Michael Tonry (eds), *Reform and Punishment: The Future of Sentencing* (2002).

One of these paths is to seek alternative or complementary forms of justice, which are more responsive than the traditional mechanisms, and which minimise the social and political pressures on state budgets. Alternative forms of administration of justice, with their simplified procedures, are becoming more common. Alternative dispute resolution (in all its forms such as mediation, negotiation and arbitration); sentencing circles, which encourage community involvement in the punishment of offenders; and restorative justice conferencing, which aims to use therapeutic strategies to restore both the offender and the victim to the community, are now well known within criminal justice circles. Problem-oriented courts, which have been described as moving away from a focus on an individual's criminal conduct to focus on examination of offenders' problems and proposing solutions for them,⁴³ are an obvious example of such alternative forms of justice. There are many parallels between problem-oriented courts and the drug court movement.

Another possible course is to reconsider the allocation of public resources to the justice sector, at the expense of other areas or sectors that are considered less pressing, such as the therapeutic community. In this case it is important to consider the political repercussions of such reallocations, that is, the issue of crime as a political subject. This draws attention to the emphasis placed by the government on such things as the 'War on Crime' as opposed to a 'War on Homelessness', even though the two may be inextricably linked. Political expediency plays a large part in such choices.

Neither of the strategies – alternative forms of justice and better funding for treatment – should be considered mutually exclusive solutions. The drug court represents an amalgamation of both alternative forms of justice and political expediency. As with so many innovations in the social and justice policy arena, the drug court movement represents a belief that something innovative, co-operative and constructive needs to be done to combat the complex and costly problem of drug-related crime. The symbolism of this message may be as important as the message itself. Drug-related crime is seen as an area in which past punitive policy has failed. As Fischer writes:

Especially over the past two decades, prohibition-based addiction policy has consumed billions of dollars, witnessed more widely available and cheaper drugs, rising mortality and morbidity levels among addicts and a huge societal cost burden, and subsequently has come under considerable criticism from many ...⁴⁴

Therefore, the drug court experiment is a timely attempt at addressing a particular social problem in a way which is seen to encompass modern ways of thinking

⁴³ Arie Freiberg, 'Problem-oriented courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 9.

⁴⁴ Benedikt Fischer, 'Doing Good with a Vengeance: A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America' (2003) 3(3) *Criminal Justice* 227, 242.

about crime control while meeting the political needs of those charged with implementing justice in a more therapeutic way. They are an example of dealing with specific types of social disorder in a holistic way, in contrast to the classical common law paradigm of judicial administration that separates the judicial function from the correction and prevention functions.

The theoretical underpinning of the new problem-oriented courts also contrasts with the classical rule of law ideal. As argued in the previous section, conventional justice no longer imposes sanctions for the sole purpose of reducing individual offending, whatever political rhetoric and the strategic plans of official agencies might argue to the contrary. Rather, sanctions are imposed by the state for the benefit of the wider community. These benefits are, among other things, to reassert particular values, support the cultural meanings and symbols underpinning the criminal law and the punishment system, to assert the authority of the state, and to educate the public and to deter individual offenders and others.⁴⁵ A particular benefit to the community is the reduction of the costs of crime, a factor which has a great deal of importance in the political arena.

A Economic Rationalism – the Costs of Crime

It is a modern political reality that the state has to balance many conflicting priorities while resolving the important question of the cost of justice. Many of the socio-political imperatives that modern society takes for granted, and even promotes, force the state to allocate increasingly large proportions of its resources to the task of organising a justice system. Increasingly, the judicial system must withstand the criticism that it is inefficient and overly costly. Therefore, although available studies indicate that there may be more benefits to be gained from drug courts than the fact that they are fiscally efficient, claims about their cost-effectiveness enhance their political accountability.

This cost-effectiveness claim can be made on two bases: firstly, that the costs of crime to the community are so large that any inroads made in reducing crime are beneficial; and secondly, that it costs less per person to divert offenders into treatment than to incarcerate them. In relation to the first claim, Mayhew and Adkins in a 2003 Australian Institute of Criminology paper⁴⁶ assessed some of the major costs of crime for a range of offences and showed that the overall cost of crime in Australia amounts to nearly A\$32 thousand million per year, which is nearly A\$1600 per person and five per cent of gross domestic product. Those crimes commonly associated with drug affected offenders, such as burglary, are more costly than would be suggested by the proportion of offences they comprise. The total cost is A\$241 thousand million, or A\$2400 per burglary. The cost of robbery in Australia is A\$600 million, with an average of A\$3600 per incident.

⁴⁵ Allison Morris and Warren Young, 'Reforming Criminal Justice: The Potential of Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice: Philosophy to Practice* (2000) 11, 16.

⁴⁶ Pat Mayhew and Glenda Adkins, 'Counting the Costs of Crime in Australia' (Trends and Issues in Crime and Criminal Justice No 247, Australian Institute of Criminology, 2003) 8.

Theft of vehicles costs A\$880 million overall, with an average of A\$6000 for each vehicle stolen (the second highest incident cost after homicide).⁴⁷

The second claim made for drug courts is that they are efficient. A program is economically efficient if its monetary benefits outweigh its monetary costs.⁴⁸ Discussions of the economic efficiency of criminal justice initiatives can be very persuasive and have gained wide appeal in political, policy, and academic settings. Although there are currently only limited cost-benefit analyses of Australian drug courts available,⁴⁹ much work has been undertaken on the human cost-benefit effects. In the area of costs of incarceration versus costs of rehabilitation, the argument has to encompass more than simply dollar value. Relative expenditure on prison places and rehabilitation places cannot take into account the inestimable benefits which arise from a successful rehabilitation program, in contrast to a successful (insofar as the term successful can be applied in this circumstance) prison term. As John Costanzo says, when speaking about the cost-benefit analysis of the South East Queensland Drug Court program:

Has it been cost-effective? ... [Although] the formula took into account that for each person terminated from the program the cost was higher than the cost of simply imprisoning each person in the comparison group ... [I]t did not attempt to put a dollar figure on the broad range of benefits.⁵⁰

Obviously, for those involved in the drug court experiment, as well as for the community in general, effectiveness in terms of the dollar component is only one of the many considerations which need to be taken into account when assessing the success of the drug court phenomenon. Cost avoidance measurements, such as the avoidance of the costs of providing prison places and repeated court appearances, although important considerations when assessing the benefits of the drug court process, may turn out to be less important to the long term success of drug courts than a sound theoretical basis.

⁴⁷ Frank Furedi, 'Drug Control and the Ascendancy of Britain's Therapeutic Culture' in James Nolan Jnr (ed), *Drug Courts in Theory and in Practice* (2002) 215, 224.

⁴⁸ Brandon Welsh and David Farrington, 'Correctional Intervention Programs and Cost-Benefit Analysis' (2000) 27 *Criminal Justice and Behavior* 115, 115.

⁴⁹ See, eg, Bronwyn Lind et al, 'New South Wales Drug Court Evaluation: Cost-Effectiveness' (NSW Bureau of Crime Statistics and Research, 2002); Department of Justice and Acumen Alliance, 'Benefit and Cost Analysis of the Drug Court Program: Final Report' (Victorian Department of Justice, 2005).

⁵⁰ John Costanzo, 'Proportionality and the Effectiveness of the Queensland Drug Courts' (Paper presented at the 22nd Australian Institute of Judicial Administration Annual Conference: Proportionality – Cost-Effective Justice?, Sydney, 17-19 September 2004) 3, <<http://www.aija.org.au/ac04/papers/Costanzo.pdf>> at 25 July 2006.

IV THEORETICAL PERSPECTIVES ON DRUG COURTS

It is important to undertake an analysis of the theoretical context which underpins the drug court movement. The theoretical concepts dealt with are diversionary strategies, which are often reflected in the practices of problem-oriented courts, restorative justice as opposed to retributive justice, and the burgeoning area of therapeutic jurisprudence.

As Arie Freiberg said, 'what distinguishes the abstract theoretical approach from pragmatic incrementalism is that only the former can provide the framework for the study of the relevant phenomenon and act as a guide or blueprint for the future'.⁵¹ Theories have three major components: articulated propositions, empirical validity and tacit implications.⁵² In order to fully understand the relevance of a theory to an existing institution, it is necessary to consider all three of these aspects – not just what the theorists say the theory is about, but also whether the theory has been tested and what it is that we assume, or ignore, when looking at the theory. It is suggested that drug courts are an extension of some relatively new theories of justice, but that they do not exactly fall within a single theory.

A *Diversionary Justice*

Diversionary justice, as the name suggests, advocates a brand of justice that aims to divert offenders from the criminal justice system. Essentially, it is derived from an idea that the mainstream criminal justice system is potentially destructive and that those who can be diverted from it, should be. It has been said that the objectives of diversion are an ambiguous composite of education, rehabilitation, retribution, punishment and deterrent discourses and objectives, and that this ambiguity reflects the pluralism of current criminal justice practice.⁵³ As such, drug courts are leading examples of a maturation of the diversionary justice process. Diversionary justice relies on certain principles, such as the principle of harm reduction and the holistic treatment of the person as well as the problem:

Diversion should be seen as initiating the process of social change, rather than simply treating 'drug problems'. Good diversion practice will recognise the interplay of various social issues, eg, employment, finance, health, legal etc, and will engage, where appropriate, a whole range of support services to address them.⁵⁴

⁵¹ Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2002) 20(2) *Law in Context* 6, 11.

⁵² Raymond Paternoster and Ronet Bachman (eds), *Explaining Criminals and Crime: Essays in Contemporary Criminological Theory* (2000) 2.

⁵³ Benedikt Fischer et al, 'The Socio-legal Dynamics and Implications of 'Diversion': The Case Study of the Toronto 'John School' Diversion Programme for Prostitution Offenders' (2002) 2(4) *Criminal Justice* 385, 395.

⁵⁴ Alcohol and Other Drugs Council of Australia, 'Alcohol and Other Drug Council of Australia Guidelines (1996)' in Melissa Bull, *Just Treatment: A Review of International Programs for the Diversion of Drug-related Offenders from the Criminal Justice System* (2003) 132 (Appendix E), 132.

One of the main proponents of diversionary strategies is Sarre who advocates a number of diversionary reform initiatives.⁵⁵ He posits that diversion can occur at a number of stages in the criminal justice process, as well as at the 'front-end'.⁵⁶ The principles underlying diversion have many parallels with the aims of the drug court movement, which also purports to take a holistic approach to the treatment of the drug addicted criminal. Another similarity is that diversionary theory places as much emphasis on what the offender is being diverted to, as on from what they are being diverted away.

Diversion has always been a part of the criminal justice process, most often manifesting itself in informal 'on-the-street' police cautions in cases of minor offences.⁵⁷ More formal diversionary programmes, such as community-based corrections, were originally aimed at avoiding the unnecessary costs and negative consequences of involvement with the legal system.⁵⁸ This resonates with aspects of labelling theory and the avoidance of prison terms for drug affected offenders which are lynch-pins of the drug court phenomenon. Pinpointing further connection between drug courts and diversionary theory is the fact that drug courts also attract criticism for potential net-widening and the difficulty of evaluation, which are common criticisms of diversionary practice.

1 Labelling Theory

Such programmes, especially in the juvenile justice arena, became widespread during the 1980s and 1990s; a development that can be traced at least in part to the persuasive writings of labelling theorists such as Howard S Becker.⁵⁹ Such theorists, and other proponents of diversion, pointed to the self-fulfilling effect on offenders caught up in the criminal justice system being labelled as deviant. Labelling theory focuses on the reaction of other people to offenders which results in the segregation of the offender from society. Becker noted that this process of segregation creates 'outsiders', who are outcast from society, and who then begin to associate with other individuals who have also been cast out. This is particularly pertinent to the modern drug culture. When more and more people begin to think of these individuals as deviants, they respond as such; thus the deviant reacts to the label 'deviant' by continuing to engage in deviant behaviour. Becker wrote that

[d]eviance is *not* a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender'. The deviant is one to whom that label has successfully been applied; deviant behaviour is behaviour that people so label.⁶⁰

⁵⁵ See generally Rick Sarre, 'Deconstructing and Criminal Justice Reforms: Rescuing Diversionary Ideas from the Waste-paper Basket' (1999) 10 *Current Issues in Criminal Justice* 259.

⁵⁶ *Ibid* 259.

⁵⁷ Increasingly, diversionary practices are being given an official sanction, as in the case of the Queensland Illicit Drug Diversion Initiative whereby individuals apprehended with small amounts of cannabis may be offered the opportunity to undertake a drug assessment and education session through local health services as an alternative to attending court.

⁵⁸ Catherine Spooner, Wayne Hall and Richard Mattick, 'An Overview of Diversion Strategies for Australian Drug-related Offenders' (2001) 20 *Drug and Alcohol Review* 281, 290.

⁵⁹ See generally Howard Saul Becker, *Outsiders: Studies in the Sociology of Deviance* (1966).

⁶⁰ *Ibid* 9 (emphasis in original).

An obvious solution to the stigma of labelling is to divert offenders from the formal processes of the criminal justice system, so that the labels are never attached, or if they are, they are attached in a less public arena. In relation to drug courts, it is an important aspect of the operation that offenders are never labelled as such, but are referred to as 'participants' once they have embarked on the program. This has the effect of separating the person from the crime, which is one of the central tenets of labelling theory and in combination with cancelling the conviction record, reduces the stigmatisation of criminal or deviant.

2 Prison Over-Crowding

The popularity of diversion is also a reaction to increasing rates of incarceration. High prison numbers, high recidivism rates, increased costs, and the negative impact of conventional methods of punishment on the rehabilitation and reintegration of offenders into wider society have brought about a real sense that there is a penal crisis looming, and that only by some drastic measures can it be averted.⁶¹ A reduction in prison numbers, by diverting those thought to be heading in that direction into other non-custodial options, seems viable for prison reformers, and is no less attractive to current political planners. This also resonates with the aims of the drug court movement.⁶² In line with the social purpose of the diversionary justice movement, as epitomised by drug courts, other aims are to reduce the level of drug dependency within the community (especially the level of criminal activity associated with drug dependency), ameliorate the health risks to the community associated with drug use, and relieve pressure on resources in the court and prison systems. The latter is realised by reducing the number of people who are sent to prison, although it may in fact increase the number of people who are dealt with by the court system. This leads to criticism that achieving this has the adverse effect of 'widening the net'.

3 Net-widening

Net-widening is the aspect of diversionary justice which is most often used to counter arguments about its effectiveness. In his *Visions of Social Control*, Cohen posits that there has been an expansion of social control under the guise of diversion and that this is simply another example of the inevitable expansion of the power base of the justice system, designed to bring more persons under formalised social control.⁶³ (This is supported by Lilly, Cullen and Ball when they state that '[d]iversion has "widened the net" of state control by creating a "system with an even greater reach"'.⁶⁴) Cohen was referring to the danger that persons who would not otherwise be caught up in the criminal justice system now come under its 'net' because diversionary strategies, by their very nature, operate

⁶¹ Rob White and Santina Perrone, *Crime and Social Control: An Introduction* (1997) 177.

⁶² *Drug Rehabilitation (Court Diversion) Act 2000* (Qld) s 3(1)(d).

⁶³ Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification* (1985) 42.

⁶⁴ J Robert Lilly, Francis Cullen and Richard Ball, *Criminological Theory: Context and Consequences* (3rd ed, 2002) 119, quoting Malcom W Klein, 'Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediments' in Michael Tonry and Norval Norris (eds) *Crime and Justice: An Annual Review of Research* (1979) 145, 184.

more widely. First time offenders, who would ordinarily evade a prison sentence, may instead find that they are referred to a drug court by well meaning magistrates. In Australian drug courts, where the projected sentence which is being suspended must be a certainty rather than a possibility, there is less chance of a person receiving a drug-court order when they may have received no prison term at all, but there is a chance that some participants, who may have been given only a short sentence, could actually expend more time and energy finishing the drug court program than would be necessary to do the prison time. In these cases, the net has not so much widened as deepened.

4 Coercion

In relation to drug courts, this issue concerns the voluntary nature of diversion opportunities offered by the drug court program, and the implications for the possibility of duress being placed on the prospective participant. The fact is that in order to take part in the drug court program, participants are required to plead guilty and thereby sacrifice their rights to the due process of the formal criminal justice system. The use of legal coercion, in an effort to ensure that individuals with substance abuse problems receive treatment, has long been an issue in the field of addiction studies.⁶⁵ All diversion programs employ coercive strategies in that offenders are confronted with the decision to do something about their drug problem (for example, undergo therapy) or face legal consequences, such as imprisonment. However, it is clear that diversion is more effective if those involved are motivated to make the change rather than coerced into doing so. This is supported by evidence which suggests that when people perceive themselves as having choice, control and self-determination over their behaviour, they perform better, are more persistent and feel more motivated and interested to engage in the activity than people who feel controlled by their environment.⁶⁶ Therefore, drug-addicted offenders who are forced into treatment by the legal system might experience a diminished sense of autonomy that could increase perceptions of coercion.⁶⁷ This in turn might result in reduced motivation for treatment or compliance to demands by the legal system, leading to increased drop-out rates and less positive treatment outcomes. As one commentator has cautioned, if being given an option of diversion is backed by a threat of referral to court, then the allegedly non-punitive option in reality becomes an extension of the justice system and the diversion is a legal fiction.⁶⁸

⁶⁵ See, eg, Frances O'Callaghan, Noleen Sonderegger and Stefanie Klag, 'Drug and Crime Cycle: Evaluating Traditional Methods Versus Diversion Strategies for Drug-related Offences' (2004) 39 *Australian Psychologist* 188.

⁶⁶ Thomas Cameron Wild, Brenda Newton-Taylor and Rosalia Alletto, 'Perceived Coercion among Clients Entering Substance Abuse Treatment: Structural and Psychological Determinants' (1998) 23 *Addictive Behaviors: An International Journal* 81, 83.

⁶⁷ *Ibid.*

⁶⁸ Kenneth Polk, 'Juvenile Diversion: A Look at the Record' (1984) 30 *Crime & Delinquency* 648, 653.

5 Effectiveness of Diversion

From a recent review of international programs for the diversion of drug-related offenders, it appears that Australian drug courts largely emulate the patterns observed in other diversionary strategies.⁶⁹ Evaluation of drug diversionary programs – not only drug courts, but also deferred sentencing regimes, arrest referral schemes and probation-based programs – formed part of the review. Bull writes that ‘the complexity of causal links between drug use and crime make any assessment of possible cost-benefits difficult to calculate’.⁷⁰ She points out that this difficulty is compounded by inefficient multi-agency communication, lack of knowledge and/or support of programs among referrers, inefficient screening and assessment, lack of clarity of objectives, differing expectations regarding abstinence, inconsistency of delivery of services, lack of monitoring and the limited range of treatment services available for programs to draw upon.⁷¹ However, analysis of ‘successful’ graduations shows a gender, racial and age bias in that white men, particularly those around 30 years old, fared the best in programs that diverted drug offenders from the mainstream system, while women, youth, indigenous people, immigrants who spoke foreign languages, and drug users with mental illnesses were disadvantaged.⁷² Although, as Bull writes, this is not surprising, as these groups have traditionally not been well managed in traditional criminal justice systems, it appears a particular condemnation of a movement that aims to rectify the traditional problems of the mainstream criminal justice system. It also supports the particular criticism of net-widening whereby the very existence of drug courts has increased the number of cases being dealt with by the criminal justice system.⁷³

6 Problem-oriented courts

In its modern manifestation, diversionary theory places as much emphasis on what offenders are being diverted to, as on from what they are being diverted away. Accordingly, modern diversionary practice can be said to have expanded to include problem-oriented⁷⁴ courts. Problem-oriented courts have been described as ‘moving away from a focus on individuals and their criminal conduct to focus on examination of offenders’ problems and solutions to them’.⁷⁵ As Freiberg states, such courts are ‘part of a wider movement that has seen the growth of restorative justice, community justice, family group conferences, sentencing circles and other inclusive, participative, procedural justice-oriented forms of dispute resolution’.⁷⁶

⁶⁹ See, eg, Melissa Bull, *Just Treatment: A Review of International Programs for the Diversion of Drug-related Offenders from the Criminal Justice System* (2003).

⁷⁰ *Ibid* 32.

⁷¹ *Ibid* 11.

⁷² *Ibid* 15.

⁷³ Nolan, above n 34, 70.

⁷⁴ This is the term which will be used, in preference to ‘problem-solving courts’, which is the phrase preferred in the United States.

⁷⁵ Freiberg, above n 43, 9.

⁷⁶ *Ibid*.

The modern problem-oriented court encompasses not only types of offences but also types of solutions. They are designed to deal with offenders in a holistic way, taking into consideration those aspects which make the offender different from the usual offender, and ensuring that considerations of his or her community are taken into account. A drug court is a prime example, the offender's addiction makes him or her different from the offender attending a traditional criminal court, and the community considerations lead to the acknowledgement that if a person is subject to powerful influences which contribute to his or her criminal behaviour, 'we cannot expect them to stabilise without assistance'.⁷⁷ As opposed to mainstream courts, the magistrates and judges in problem-oriented courts are able to establish a continuing connection with the people who appear before them.⁷⁸

One criticism of problem-oriented courts is that they 'compartmentalise ... and deal with the most difficult end of the spectrum, when what is required is a range of flexible responses across the system'.⁷⁹ By concentrating resources away from early intervention strategies, which are commonly held to be more successful, there is a constant danger that people who are diverted from formal agencies of social control are directed into a less formal – but no less bureaucratic – apparatus rather than away from the system entirely.⁸⁰ Sarre, for example, casts a critical eye on various manifestations of diversionary practice, and concludes that reductions in the number of people coming into contact with the formal criminal justice system is not falling with the speed anticipated, or hoped by reformers.⁸¹ Critics of diversionary programs are in danger of being caught up in a 'quantity versus quality' debate wherein they try to differentiate between the numbers of people who come before any aspect of the criminal justice system and the quality of their experience while there. However, success is a very hard quality to quantify, even when it is reduced to a measurement of recidivism as compared to court appearances.⁸²

B Restorative Justice

Restorative justice offers an empowerment model of criminal justice, which is based on the belief that traditional processes of the criminal justice system disempower both the victim and the offender. In restorative justice initiatives, the balance is restored when the victim and the offender are given the potential to

⁷⁷ Julie Wager, 'The Drug Court: Can a Relationship Between Health and Justice Really Work?' (Paper presented at the Inaugural WA Alcohol and Other Drug Symposium, 'Alcohol and Other Drugs: Collaborating for Better Care', Fremantle, 20-21 August 2002) 2.

⁷⁸ Diane Fingleton, 'Commentary on Paper Presented by Professor Arie Freiberg, Professor of Criminology at The University of Melbourne at the Australian Institute of Judicial Administration Magistrates' Conference, 2001' (Paper presented at the Australian Institute of Judicial Administration Magistrates' Conference, Melbourne, 20-21 July 2001) 1.

⁷⁹ Arie Freiberg, 'Drug Courts: Sentencing Responses to Drug Use and Drug-related Crime' (2002) 27(6) *Alternative Law Journal* 282, 282.

⁸⁰ Cohen, above n 63, 13.

⁸¹ Sarre, above n 55, 267.

⁸² See generally Lawrence Sherman, Heather Strang and Daniel Woods, 'Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)' (Centre for Restorative Justice, Research School of Social Sciences, Australian National University, 2000).

repair the harm caused to individuals and the community through family and community conferencing. Transposing that idea onto the drug court, the restorative analogy is reflected in the drug court participant being restored as a functional member of society by being given an opportunity to repair the harm they have done to themselves, and to their victim. The concept of 'victim' in relation to a drug-related offence is more than just the individual whose property has been interfered with – it is also the fabric of society itself, the community order which has been broken by the offence.

Restorative justice is a term which resists an 'easy and agreed-upon definition',⁸³ but which broadly promises to hold offenders accountable in ways which are constructive rather than punitive, to include dialogue and participation, and to pay less attention to the voices of legal actors.⁸⁴ As such it involves a multi-faceted approach to criminal justice, which emphasises communication between offenders, victims and their supporters. Because restorative justice processes repair the harm of the offence done on three levels – that of the victim, the offender and the community – the offender is restored to a position whereby he or she is able to take on a role as a viable member of society. The goal of having the offender restored to his or her community accounts for the 'success' of a justice system based upon restorative notions which is not measured by the final outcome or legal result,

but rather by the degree to which people feel they have an impact, that they have been treated fairly, that they have understood each other, that they have better mechanisms for making decisions and handling their differences, and that their key issues have been addressed ... If successful, the participants feel that they are a valued part of their community.⁸⁵

Like diversionary strategies, restorative justice is a response to the perception that the traditional criminal justice system is failing.⁸⁶ It displaces the emphasis on the adversarial court process and instead focuses on the needs of the victims of crime, as well as the needs of the offenders and the community. This process is designed to provide the context for ensuring that social rather than legal goals are met. The expected end result is that communities and individuals are empowered in dealing with their problems and in influencing the direction of the criminal justice process, so formal punishment and incarceration become less relied upon sanctions.⁸⁷

⁸³ Kathleen Daly, 'Pile It On: More Texts on RJ' (2004) 8 *Theoretical Criminology: An International Journal* 499, 500.

⁸⁴ Ibid.

⁸⁵ John Paul Lederach and R Kraybill 'The Paradox of Popular Justice: A Practitioner's View' in Susan Merry and Neal Milner (eds), *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States* (1995) 357, 368.

⁸⁶ Greg Berman and John Feinblatt, *Judges and Problem-Solving Courts* (2002) Centre for Court Innovation 1

<<http://www.courtinnovation.org/uploads/documents/JudgesProblemSolvingCourts1.pdf>> at 8 July 2006.

⁸⁷ Carol La Prairie, 'Altering Course: New Directions in Criminal Justice – Sentencing Circles and Family Group Conferences' (1995) 28 *Australian and New Zealand Journal of Criminology* 78, 78.

Because of the emphasis placed by drug courts on rehabilitation (as opposed to other court functions, including case processing and punishment), there are many parallels between restorative justice philosophies and the drug court phenomenon. The positive aspects of reintegrative shaming, the disavowal of the retributive aspects of punishment and the establishment of substantive justice being offered through the drug court experience all justify the alignment of drug courts with restorative justice principles. However, the presence of the state, and the absence of the victim, in the drug court process prevents a direct parallel being drawn between the two models.

1 Reintegrative Shaming

An important aspect of the academic debate about the effect of punishment on criminal behaviour is consideration of not only what type and intensity of sanctions are applied, but analysis of the quality of the sanctions being applied.⁸⁸ An attempt to develop a theory of how the quality of sanctioning affects re-offending is found in the theory of shame and reintegration as espoused by Braithwaite in *Crime, Shame and Reintegration*.⁸⁹ Drawing on research about how societal reaction affects the crime rate, and the labelling theory made famous by Becker,⁹⁰ Braithwaite posits that an important aspect of the informal social control is what he calls 'shaming', which he defines as 'all processes of expressing disapproval, which have the intention or effect of invoking remorse in the person being shamed and/or condemnation by others who become aware of the shaming'.⁹¹ Shaming comes in two varieties, reintegrative and disintegrative, and each type has a different impact on recidivism. Reintegrative shaming, broadly, is aimed at bringing offenders back into society by making them recognise and make amends for the damage they have caused. Disintegrative shaming stigmatises and excludes, thereby creating a class of outcasts.⁹² Reintegrative shaming, which attempts to reintegrate the offender back into the community of law-abiding or respectable citizens,⁹³ seeks to shame the crime, but not the criminal.

There is a tension between state-centred punishment and restorative justice as a ground-swell social movement. This movement represents a move towards recognition that 'top-down accountability of some form is needed with top-down standards that are contestable bottom-up'.⁹⁴ Part of the reason for the popularity of restorative justice programs in recent years has been the belief held by legal reformers that it represents a blow against the oppressiveness and unfairness of state-centred criminal justice, with its 'inhumane reliance on prisons'.⁹⁵

⁸⁸ Lawrence Sherman, 'Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction' (1993) 30 *Journal of Research in Crime and Delinquency* 445, 449.

⁸⁹ See, eg, Braithwaite, above n 39.

⁹⁰ See, eg, Becker, above n 59.

⁹¹ See, eg, Braithwaite, above n 39, 9.

⁹² *Ibid* 55.

⁹³ *Ibid* 100-1.

⁹⁴ John Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42 *British Journal of Criminology* 563, 563.

⁹⁵ *Ibid* 564.

However, some restorative justice practices can offend against principles of due process and for this reason efforts have been made to set standards for these programs, for example by the United Nations.⁹⁶ The apparent contradiction between restorative justice freeing offenders from the shackles of the traditional criminal justice system, and the setting of equally restrictive parameters for its operation prompts the question ‘if restorative justice is about shifting power to the people, surely reimposing the state to set standards for restorative justice shifts the power back to the state’?⁹⁷

The literature on stigmatising shaming has resounding implications for the drug court movement. The work done by Braithwaite on the interaction between the offender and the criminal justice system indicates that criminal sanctions can backfire, and lead to more rather than less crime. Offenders are more likely to be defiant when they perceive the sanctions as stigmatising not their actions, but rather themselves, and when they are affected by drugs they are most likely to deny the stigmatising shame that has been imposed on them. The lessons learned from the work on reintegrative shaming, whereby the individual offender is encouraged to acknowledge his or her mistakes and seek, or at least accept, the support and encouragement of others not to re-offend, resonates within drug court practices. An integral part of the drug court procedure is the requirement that the participant reflect on his or her role in the process. It is a threshold requirement, for both restorative justice and drug court acceptance, that the participant admits culpability for the offence in question. The restoration of the individual as a viable member of the community is predicated upon that individual taking responsibility for his or her actions and graduating beyond that position.

2 Restorative Justice as Retributive Justice

One of the greatest attractions for proponents of restorative justice is that it represents a shift away from the reliance on punishment as retribution. Advocates argue that our responses to crime should seek restoration, which necessarily excludes retribution and punishment. However, Kathleen Daly, who is a prolific writer in the area of restorative justice,⁹⁸ suggests that perpetuation of certain myths about restorative justice is detrimental to its future and its legitimacy.⁹⁹ These myths include: that restorative justice is the opposite of retributive justice (in the way that good is the opposite of bad);¹⁰⁰ that restorative justice is based on centuries-old practices and was the dominant form of pre-modern justice; that restorative justice forms part of the feminist ethic of care as opposed to the formal justice model; and that restorative justice produces major changes in the behaviour of victims and offenders. The ‘real story’, according to her, is that there *are* strong connections between retribution and restoration; that

⁹⁶ See, eg, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, UN ESC Res 2002/12, UN Doc E/CN.15/2000/L.2/Rev.1, (2002).

⁹⁷ See, eg, Braithwaite, above n 39, 564.

⁹⁸ See generally Daly, above n 83.

⁹⁹ See generally Kathleen Daly, ‘Restorative Justice: The Real Story’ (2001) 4 *Punishment & Society* 55.

¹⁰⁰ Daly, above n 83, 500.

oppositional metaphors such as caring justice and formal justice are unhelpful;¹⁰¹ that strong stories of repair and goodwill are uncommon; and that restorative justice is a nominal concept and is not just about restoring.¹⁰²

Myths of success and of general effectiveness are also common to the drug court phenomenon, especially as reflected in the American literature on the subject. Restoring the drug-affected offender to the community by way of treatment rather than exacting retribution is seen as a major advantage of the operation. However, Anthony Duff argues that the two are not mutually exclusive and that restoration is not only 'compatible with retribution, it *requires* retribution, in that the kind of restoration that crime makes necessary can be brought about only through retributive punishment'.¹⁰³ In formulating this argument, Duff asserts that restorative practices under the guise of criminal mediation and reparation are punitive, and serve the appropriate aims of criminal punishment in four different ways. Firstly, mediation is a communicative process just as criminal punishment is a communicative enterprise between a state or political community and its members. Secondly, criminal mediation is retributive in that it induces suffering (censure), and is justified in those terms. Thirdly, the reparation that the offender undertakes is a type of penalty; it is intentionally burdensome and makes demands on time, money or energy. Lastly, although criminal mediation is retributive and looks backwards, it is also future-directed in that it aims to dissuade the offender from future crimes by his or her recognition of the wrong committed. The restorative justice process aims to secure repentance and apologetic reparation from the offender, and thus to achieve reconciliation between the offender and the victim; '[i]t aims ... to achieve restoration, but to achieve it precisely through an appropriate retribution. That is, I would argue, the proper aim of criminal punishment more generally'.¹⁰⁴

3 Restorative Justice as Substantive Justice

Two themes will continue to dominate the area of restorative justice. One is how restorative justice, as a representative of new justice norms and practices, can relate to formal legality. The other is whether the rhetoric of the promise of constructive accountability, increased dialogue, and a change of focus away from legal relevancies, can be sustained.¹⁰⁵ Within this paradigm, restorative justice has also been likened to a form of substantive justice rather than procedural justice.¹⁰⁶ It is suggested that restorative justice offers a better prospect of

¹⁰¹ Daly acknowledges that such dichotomies remain popular because they simplify a new justice field and help to sell a new justice area: *ibid.*

¹⁰² Kathleen Daly, 'Making Variation a Virtue: Evaluating the Potential and Limits of Restorative Justice' in Elmar G M Weitekamp and Kerner Hans-Jürgen (eds), *Restorative Justice in Context: International Practice and Directions* (2003) 23, 48-9.

¹⁰³ Antony Duff, 'Restoration and Retribution' in Andrew Von Hirsch, Julian V Roberts and Anthony Bottoms (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003) 43, 43 (emphasis in original).

¹⁰⁴ *Ibid.* 58.

¹⁰⁵ Daly, above n 83, 500.

¹⁰⁶ Barbara Hudson, 'Victims and Offenders' in Andrew Von Hirsch, Julian Roberts and Anthony Bottoms (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003) 177, 178.

substantive justice by allowing consideration of individuals according to their own needs. This is in opposition to formal, distributive justice, which reduces cases to general categories, and which characterises justice as fairness, or equality. Exploration of the issues for which restorative justice is appropriate, and the extent to which it must incorporate due process safeguards and standards such as proportionality,¹⁰⁷ is also an issue which has great resonance in the drug court paradigm. Recent analyses of programs with a restorative justice orientation suggest that such interventions have, at best, a modest impact on recidivism.¹⁰⁸ The implications are that additional factors (such as anti-social peers, substance abuse and criminogenic communities) which are linked to criminal behaviour, are not adequately addressed in the restorative process.¹⁰⁹ An associated issue when looking at the relationship between recidivism and restorative justice is to take into account the ‘selection effect’; that is, the possibility that restorative justice participants have a different likelihood of offending, regardless of type of treatment. Those eligible for such programs may be less likely to offend because of factors completely extraneous to the restorative justice process, such as age, criminal history, familial support and personal attitude.¹¹⁰

4 Victims and Stake-holders

Restorative justice has been criticised for placing too much responsibility for crime reduction on victims and offenders, not only in their role as stakeholders but as representatives of the larger collectivity (the community).¹¹¹ The ‘anti-state appeal within restorative justice’¹¹² may tempt many restorative justice advocates to place such emphasis on the role of the community in regulating conflict as to support the shedding of this responsibility by the state. As Hudson asks:

is restorative justice a welcome returning of conflicts to those to whom they rightfully belong, or is it another example of the state divesting itself of onerous and expensive burdens, washing its hands of things for which it ought to continue to take responsibility?¹¹³

Essentially, restorative justice aims to move away from the ‘zero-sum’ approach to the relationship between victims and offenders in which the rights of one must

¹⁰⁷ Barbara Hudson, ‘Restorative Justice and Gendered Violence: Diversion or Effective Justice?’ (2002) 42 *British Journal of Criminology* 616, 626-9.

¹⁰⁸ See, eg, Jeff Latimer, Craig Dowden and Danielle Muise, ‘The Effectiveness of Restorative Justice Practices: a Meta-Analysis’ (Department of Justice Canada, 2001); Hennessey Hayes and Kathleen Daly, ‘Conferencing and Re-offending in Queensland’ (2004) 37 *Australian and New Zealand Journal of Criminology* 167; Garth Luke and Bronwyn Lind, ‘Reducing Juvenile Crime: Conferencing Versus Court’ (Contemporary Issues in Crime and Justice No 69, New South Wales Bureau of Crime Statistics and Research, 2002).

¹⁰⁹ Latimer, Dowden and Muise, above n 108, 18.

¹¹⁰ Luke and Lind, above n 108, 3.

¹¹¹ Daly, above n 99, 58.

¹¹² Adam Crawford, ‘The State, Community and Restorative Justice: Heresy, Nostalgia and Butterfly Collecting’ in Lode Walgrave (ed), *Restorative Justice and the Law* (2002) 101, 113.

¹¹³ Hudson, above n 106, 179.

be at the expense of the rights of the other, and instead illustrates that concern for the offender does not have to be at the cost of concern for the victim. This type of justice represents an interaction between the state and the community, which recognises that the processing of conflict is an important social act that has been monopolised by the state to the detriment of the community. Restorative justice 'highlights the social importance of deliberative and inclusionary responses to crime and other harms',¹¹⁴ and this impact is reflected in the role of drug courts in returning the task of resolving the conflict caused by the drug-related crime to the people affected. Drug court participation requires a high level of commitment and embracing of common goals by both the offender and the drug court team. Similarly, another defining characteristic of restorative justice is that outcomes are measured 'by the satisfaction of the stakeholders in each case and not by comparison with the outcome of like cases'.¹¹⁵ The drug court philosophy emphasises the capacity of the individual to complete the rehabilitation requirements from the very inception where individuals are assessed as suitable, or otherwise, on an individual basis. Although the drug court program is based upon a generally accepted framework, individual needs and abilities are taken into account at the defendant's first appearance before the drug court. The personalisation of the drug court participant's interaction with the judicial authority is one of the hallmarks of the drug court experience.

However, there are other aspects of drug court operation which distance them from an exact facsimile of a restorative justice interaction. As explained above, one of the features which most distinguishes restorative from mainstream justice is the side-lining of the state's role. One of the ways in which this manifests itself is in the idea that professionals should not be dominant, but instead, 'the voices of the stakeholders should be the loudest'.¹¹⁶ However, in a drug court, all of the stakeholders, except the offender, are professionals. Further, they are professionals employed by the state. There is another issue which indicates further discordance between the drug court model and restorative justice – the victim. The marked absence of the victim (except as represented by the state) during the drug court proceedings weakens any parallels between this aspect of restorative justice practice and drug court practice, even if the community of stakeholders could be said to be ably represented by the 'drug court team'. Restorative justice relies upon the notion of the communal by 'reconfiguring the idea of the "public interest" through appeals to a different set of "stakeholders"'.¹¹⁷ It is difficult to conceive how the community is represented in a drug court other than as the secondary victim of crime, or what David Garland calls the 'collective, all-purpose victim'.¹¹⁸

Because the aim of restorative justice is to replace the dominance of state justice and shift the focus from the implication that it is a matter concerning only the

¹¹⁴ Crawford, above n 112, 104.

¹¹⁵ Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 *British Journal of Criminology* 578, 578.

¹¹⁶ Crawford, above n 112, 115-18.

¹¹⁷ *Ibid* 115.

¹¹⁸ David Garland, *Culture of Control: Crime and Social Order in Contemporary Society* (2001) 181.

state and the offender towards an understanding that crime affects the victim and the community, the drug court experience fails to completely resonate with restorative justice ideals. However, there may be a stronger parallel between the drug court movement and another recently emergent theory: therapeutic jurisprudence.

C Therapeutic Jurisprudence

Justice which has as its primary aim the treatment, rather than just the punishment, of offenders is known as therapeutic justice, and is commonly referred to as therapeutic jurisprudence. There is a strong affinity between therapeutic jurisprudence and the rationale and objectives of the drug court movement to the extent that some commentators see them as co-existent: 'the underlying theory of drug courts is the theory of therapeutic jurisprudence'.¹¹⁹ Therapeutic jurisprudence was first discussed in 1987 by David Wexler in a paper delivered to the National Institute of Mental Health,¹²⁰ where the author noted the extent to which substantive rules and legal procedures diminish the therapeutic returns for mentally ill persons who are involved in legal processes. Instead, Wexler in subsequent publications with his co-author Winick advanced the idea that the law could be used as a 'therapeutic agent' to promote the psychological or physical well-being of the people it affects.¹²¹ This concern that beneficial outcomes be a primary motivation of the criminal justice process suggests therapeutic jurisprudence as a suitable theory to underpin the treatment of drug affected offenders.

1 An Approach Rather Than a Theory?

However, it has been suggested that therapeutic jurisprudence is an approach rather than a theory, and that it thereby produces an array of studies that are illustrative of the approach rather than confirming a pre-existing hypothesis.¹²² In itself this is neither a good nor a bad thing, but it does preclude being able to assess the drug court phenomenon against a background of unifying principle. Much of the lack of rigour which characterises drug court surveys and studies in the United States is a direct result of the lack of a cohesive set of theoretical principles which could be said to underpin their operation. Therapeutic jurisprudence, instead of providing a theoretical background for points of comparison, invites us to think instrumentally and empirically about its applications – it should not be viewed as a dominant perspective, but as a tool for

¹¹⁹ Scott Senjo and Leslie Leip, 'Testing and Developing Theory in Drug Court: A Four-Part Logit Model to Predict Program Completion' (2001) 12 *Criminal Justice Policy Review* 66, 67.

¹²⁰ See generally David Wexler, 'Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence' in David Wexler and Bruce Winick (eds), *Essays in Therapeutic Jurisprudence* (1991) 3.

¹²¹ See, eg, David Wexler and Bruce Winick, 'Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research' (1991) 45 *University of Miami Law Review* 979; David Wexler and Bruce Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996); Dennis P Stolle, David Wexler and Bruce Winick, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000).

¹²² Mark Hall, 'Law, Medicine and Trust' (2002) 55(4) *Stanford Law Review* 463, 464-70.

'gaining a new and distinct perspective on questions regarding the law and its applications'.¹²³ As David Wexler wrote, 'therapeutic jurisprudence does not resolve conflicts among competing values. Rather it seeks information needed to promote certain goals and to inform the normative dispute regarding the legitimacy or priority of competing values'.¹²⁴

2 Therapeutic Jurisprudence or Jurisprudential Therapy?

Not only does therapeutic jurisprudence lack a comprehensive theoretical framework, it may also have insufficient legal credibility to underpin a significant change of direction in the criminal justice system. However, reflections on the role of therapeutic jurisprudence in a historical context illustrate that, although it is derivative of the legal realism movement and other movements in legal scholarship (specifically social science and law), it does make a unique contribution.¹²⁵ Its antecedents are in the influences of the legal realism movement – as famously encapsulated by Oliver Wendell Holmes ('[T]he life of the law has not been logic: it has been experience'¹²⁶) – and also of Roscoe Pound's exposition of sociological jurisprudence, whereby he argued that the law must study the actual social effects of legal institutions and legal doctrines.¹²⁷ Slobogin takes up this theme and gives the definition of therapeutic jurisprudence as 'the use of social science to study the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects'.¹²⁸ In looking at the impact of the law on certain participants, legal rules, legal procedures, and the roles of legal actors are seen to be so antipathetic as to produce anti-therapeutic consequences. Instead, therapeutic jurisprudence, according to Freckelton, 'explores ways in which, consistent with principles of justice, the knowledge, theories and insights of mental health and associated disciplines can improve the process and outcome of the law.'¹²⁹ Formalistic application of the law is de-emphasised; instead, greater attention is paid to the social consequences of legal decisions and procedures. Accordingly, therapeutic jurisprudence requires legislators, judges and legal practitioners to make policy decisions based on empirical evidence gleaned from examining the 'potential effects of proposed legal arrangements on therapeutic outcomes'.¹³⁰

¹²³ Peggy Hora, William Schma and John Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439, 445.

¹²⁴ David Wexler and Robert Schopp, 'Therapeutic Jurisprudence: A New Approach to Mental Health Law' in Dorothy Kagehiro and William Laufer (eds), *Handbook of Psychology & Law* (1992) 361, 373.

¹²⁵ See, eg, David Finkleman and Thomas Grisso, 'Therapeutic Jurisprudence: From Idea to Application' in David Wexler and Bruce Winick (eds), *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996) 587.

¹²⁶ Oliver Wendell Holmes, *The Common Law* (1881) 1.

¹²⁷ See, eg, Roscoe Pound, *Outlines of Lectures on Jurisprudence* (5th ed, 1943).

¹²⁸ Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy and Law* 193, 196.

¹²⁹ Ian Freckelton, 'Therapeutic Jurisprudence and Tribunals' (Paper presented at the 5th Annual Australian Institute of Judicial Administration Tribunals Conference: Developing a Best Practice, Melbourne, 6-7 June 2002) 1.

¹³⁰ Hora, Schma and Rosenthal, above n 123, 445.

Because of its emphasis on psychological and physical health rather than legal principles, therapeutic jurisprudence has experienced a slow acceptance in legal circles. There is some argument that therapeutic jurisprudence is limited to a descriptive and normative theory of mental health law without any application to areas of law outside that domain. Small acknowledges that it is theoretically possible for therapeutic jurisprudence to move beyond the domain of mental health law. He nevertheless questions the likelihood of this happening:

The strength of therapeutic jurisprudence is that the promoted value of therapy is consistent with a therapeutic value long prized and implicit in mental health law. When one moves to other areas of the law, the value of therapy takes on considerably less significance, and at times becomes irrelevant.¹³¹

In addition, Slobogin has identified some challenges confronting therapeutic jurisprudence which may preclude it from becoming accepted as an established element in the criminal justice system.¹³² First of all, is therapeutic jurisprudence distinguishable from other jurisprudences that share its goal of using the law to improve the well-being of others? Secondly, can the term therapeutic be defined in a meaningful way? Thirdly, will the vagaries of empirical research, on which therapeutic jurisprudence heavily relies, plague its proposals? Fourthly, is there tension between the rule of law and therapeutic jurisprudence, based on the emphasis of the former on equality and of the latter on discretionary decision making, so that therapeutic jurisprudence benefits only a subgroup of those it affects? Lastly, there is the question of balance: when and how should a therapeutic jurisprudence proposal be balanced against countervailing legal and social policies?

Nevertheless, if therapeutic jurisprudence is the 'study of law as a therapeutic agent',¹³³ any consequence of law that is at least in some sense related to psychological functioning would seem to be within the broad contours of therapeutic jurisprudence.¹³⁴ It is in this context that drug courts, which are concerned with both the psychological as well as physical well being of their participants, show a strong pragmatic connection with therapeutic jurisprudence. This is reflected in the way that court processes, the role of the judge and the other drug team members, and the treatment of the participant in a drug court are geared toward the objective of treatment rather than punishment in the drug court scenario.

However, this does raise the issue of whether standard legal principles and practice are given sufficient recognition in the face of the therapeutic emphasis. Should therapeutic considerations should play a dominant, or for that matter any,

¹³¹ Mark A Small, 'Legal Psychology and Therapeutic Jurisprudence' (1993) 37 *St Louis University Law Journal* 675, 698-9.

¹³² Slobogin, above n 128, 195.

¹³³ David Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1 *Psychology, Public Policy and Law* 220, 220.

¹³⁴ Bruce Winick and David Wexler, 'Introduction' in Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key* (2003) 3, 4.

role in judicial decision-making? Are judges being encouraged to go beyond the realistic limits of their expertise by applying research in psychology, therapy, and other behavioural sciences in their courtrooms? Do judges sacrifice impartiality as they become more closely involved in the defendants' progress in therapy and in life generally? Do problem solving courts cross the line into the executive branch of government when they determine policy by actively managing the behaviour of defendants who come before them?¹³⁵ For some critics, the active intervention by judges in the day-to-day lives of litigants 'is dangerous ... indeed'.¹³⁶ Nolan's important work on this topic, *Reinventing Justice: The American Drug Court Movement*, characterises the 'profundity of the change' in the drug court judge's role as representing 'an important departure from the [United States] common law tradition, a change that is ... commensurate with broader changes taking place'.¹³⁷

3 The Drug Court Objective

One of the synergies between the principles of therapeutic jurisprudence and the drug court experience is the idea that, because the experience of coming before the court is creating a therapeutic consequence for defendants, the court should capitalise on the moment when a person is brought before it, and use that as a starting point for improving the defendant's overall lifestyle. Drug court proponents identify the potential for a stronger relationship between the concepts of drug courts and therapeutic jurisprudence, and suggest that 'each can deeply enrich and support the other'.¹³⁸ The main supporters of therapeutic jurisprudence, Winick and Wexler, explain that specialised treatment courts are related to therapeutic jurisprudence but are not identical to the concept. 'Rather, they are merely "vectors" moving in a common direction',¹³⁹ with such courts serving as a kind of laboratory for the application of therapeutic jurisprudence principles. The position of drug-motivated offenders highlights the tension that exists between the law and health sectors, and between punishment and rehabilitation. Programs that manage this tension, satisfying both the requirements of the law and the requirements of appropriate drug interventions, need to encompass flexible philosophical notions. One view of therapeutic jurisprudence is that it is the inevitable resultant nexus between the two systems of criminal justice and mental health. This makes it particularly applicable to the treatment of drug users because of the uncertainty as to whether drug addiction is a crime or a mental illness, or rather, whether the criminal effects of drug addiction should be treated as a result of criminal intention or mental illness.

However, some critics deny that the connection is workable. Hoffman writes that

¹³⁵ See, eg, Berman and Feinblatt, above n 86.

¹³⁶ Morris Hoffman, 'Commentary: The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1479.

¹³⁷ Nolan, above n 34, 90.

¹³⁸ Hora, Schma and Rosenthal, above n 123, 441.

¹³⁹ Bruce Winick and David Wexler, 'Drug Treatment Court: Therapeutic Jurisprudence Applied' in Bruce Winick and David Wexler (eds), *Judging in a Therapeutic Key* (2003) 106, 106.

[b]y existing, simply to appease two so diametric and irreconcilable sets of principles, drug courts are fundamentally unprincipled. By simultaneously treating drug use as a crime and as a disease, without coming to grips with the inherent contradictions of those two approaches, drug courts are not satisfying either the legitimate and compassionate interests of the treatment community or the legitimate and rational interests of the law enforcement community. They are, instead, simply enabling our continued national schizophrenia about drugs.¹⁴⁰

Freiberg, when characterising the development of drug courts in Australia as pragmatic incrementalism rather than a paradigm shift, points out that at no time was implementing therapeutic jurisprudence a consideration during their implementation.¹⁴¹ Thus, therapeutic jurisprudence may be a convenient label to apply to the drug court movement after the event, in an attempt to deliver credibility through a theoretical (or quasi theoretical) basis.

V CONCLUSION

In order to fully understand the drug court phenomenon, it is necessary to situate it within three dominant frameworks: social, political and theoretical. The role of drug courts in shaping the uneasy relationship between social and political views of appropriate (just) punishment for drug affected offenders in a 'neo-liberal' climate, which recognises the changing role of state and governmentality, makes them a subject of great interest. Drug courts do not operate in a vacuum, and it is therefore critical that those responsible for making the policy which affects their operation also consider the various contexts in which they operate. Social and political demands are addressed because drug courts represent an amalgamation of alternative forms of justice and political expediency, while also catering for the need to reduce the costs of crime to the community.

Analysis of the theoretical framework within which drug courts operate suggests that they draw on, but are not equivalent to, the relatively new theories of diversionary justice, restorative justice and therapeutic jurisprudence. They represent the intersection of the most palatable aspects of recent criminological theory, mixed with political expediency to create a solution which sits comfortably with society's current need to deal with the drug-affected criminal in a manner which reflects contemporary ideals of justice.

Drug courts symbolise a paradigm shift in criminal justice. Through an exploration of their social, political and theoretical underpinnings we may be closer to understanding not only the reasons for the emergence of drug courts, but also the challenges they face. Recognition of substance abuse and dependence as chronic relapsing health disorders, rather than moral or behavioral issues, and the

¹⁴⁰ Hoffman, above n 136, 1477.

¹⁴¹ Freiberg, above n 51, 7-10.

increased acceptance of substance abuse treatment alternatives for offenders as the most effective way of minimising the harm to society, underlie this new direction in criminal justice. The new focus on problem solving courts, and therapeutic jurisprudence as a counterbalance to retributive justice punishment models, represents a much needed change of direction for the criminal justice system. Understanding the background of the drug court movement, and the extent to which they offer a challenge to 'business as usual', will have an important role in forming the criminal justice system of the future and may provide a template for the new ways of 'doing' criminal justice.