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**PROBLEM-ORIENTED COURTS: INNOVATIVE
SOLUTIONS TO INTRACTABLE PROBLEMS?**

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INTRODUCTION

No institution can survive if it does not adapt to its changing environment. Though the judicial system has neither been immune to change nor unresponsive to it, it faces particular problems in the modernising process.¹ Caught between the weight of tradition and the doctrines of constitutional separateness on the one hand, and the need to maintain their relevance and the confidence of the public on the other, courts have often struggled to adapt to the forces of change. Magistrates' Courts have probably been quicker than the higher courts to adapt to economic, political and social change. Benches have been professionalised, courts rationalised and computerised, work flows standardised and proceduralised while the flow of business becomes larger, more complex and more serious.² But at all levels of the court hierarchy, modernisation has produced significant changes in court processes: managerialism requires efficiency, speed, cost-effectiveness and collaboration between different agencies within the criminal justice system. Accountability requires courts to consider the quality of their services, their facilities and responsiveness to all those who pass through their doors, including victims and witnesses. It also requires them to be open, transparent and accessible to the public. Governments increasingly monitor judicial performance at an individual and aggregate level.³

¹ J.W. Raine, 'Modernizing Courts or Courting Modernization?' (2001) 1 *Criminal Justice* 105, 106.

² See e.g. R. Douglas and K. Laster, *Reforming the People's Court: Victorian Magistrates' Reaction to Change*, Melbourne, 1992.

³ Raine, *op. cit.* p. 108.

Judicial experimentation and innovation is constant,⁴ catalysed in the modern age by the speed of communication, extensive travel and continuing and extensive professional discourses which take place in professional journals, conferences, seminars and cultural exchanges. Ideas travel rapidly and possibly none more so in the sphere of court administration than those relating to the development of ‘problem-oriented’ or ‘problem-solving’ courts. This article traces the development of problem-solving courts in the United States and their introduction in Australia, examines their philosophy and structures and explores some of the jurisprudential, ethical and practical issues arising from their operation.

PROBLEM-ORIENTED COURTS

The concept of the ‘problem-oriented’ court is still emerging. There is, as yet, no generally accepted terminology. In the United States, the phrase ‘problem-solving’ seems to be preferred over the terms ‘problem-oriented’ or ‘specialised’ courts, though little seems to turn on the distinctions at this stage.⁵ Nor is there an agreed definition of the nature of such a court or its underlying philosophy. Berman and Feinblatt define a problem-solving court as one which seeks ‘to use the authority of the courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities.’⁶ Examples of these forms of specialised courts include drug courts, mental health courts, domestic violence courts, community courts, teen courts and others.⁷ They represent a move away from a focus on individuals and their criminal conduct to offenders’ problems and their solutions. Their attempt to deal with the problems which may have contributed to an offender’s criminal behaviour reflects a realisation by courts and legislators that social problems may require social, rather than legal solutions. Their emergence also reflects a reaction against the modernising process, which, in some cases, has impersonalised the courts by emphasising outcomes over processes. They are, in part, are response to assembly-line justice

⁴ This is not new. Experiments with Children’s Courts date back to the nineteenth century, and the twentieth century saw numerous experiments with tribunals, boards and specialised courts; see T. Carney, ‘New Configurations of Justice and Services for the Vulnerable: Panacea or Panegyric?’ (2000) 33 *ANZJ Crim* 318.

⁵ G. Berman, and J. Feinblatt, ‘Problem-Solving Courts: A Brief Primer’ (2001) 23 *Law and Policy* 125. My own preference, as the title suggests, is for the term ‘problem-oriented’, which is slightly less hubristic than ‘problem-solving’. It signifies the effort rather than the result, which is possibly more pessimistic than the American promoters of this concept.

⁶ Ibid.

⁷ See generally United States, Department of Justice, Office of Justice Programs, www.ojp.usdoj.gov/courts/problem_solving.htm.

produced by case management, plea-bargaining and heavy case loads or, what one judge has termed, 'McJustice'.⁸ They are also 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.⁹

There are a number of common factors which have led to the development of problem-oriented courts. These include: increasing frustration among the courts and the public with traditional approaches to case processing; rising court case loads; burgeoning prison populations; a breakdown in traditional social and community institutions which have supported individuals in the past; the difficulties faced by courts and correctional authorities in providing offenders with adequate or effective services and improved therapeutic interventions. Most importantly, it has been the realisation that recidivism, where caused by underlying physical, psychological, social or economic circumstances, is better, and probably more economically, dealt with by effective social intervention than by harsher sentences.¹⁰ A 'problem-solving' approach to criminal justice problems is not new, having been pioneered by Herman Goldstein in relation to police work.¹¹ The emerging problem-oriented courts share a number of common elements. Berman and Feinblatt summarise these as follows:¹²

- *Case Outcomes*

Problem-solving courts seek to achieve tangible outcomes for victims, for offenders and for society. These include reductions in recidivism, reduced stays in foster care for children, increased sobriety for addicts, and healthier communities...

- *System Change*

⁸ Justice S. Kaye, Chief Judge, New York State Court of Appeals, cited in Greg Berman, "What is a Traditional Judge Anyway?": Problem Solving in the State Courts' (2000) 84(2) *Judicature* 78, 82; see also D.E. Olson, A.J. Lurigio, and S. Alberstson, 'Implementing the Key Components of Specialized Drug Treatment Courts: Practice and Policy Considerations' (2001) 23 *Law and Policy* (in press).

⁹ J. Feinblatt, G. Berman and D. Denckla, D. 'Judicial Innovation at the Crossroads: A Look at Problem-Solving Courts' (2001) *Court Management* (in press).

¹⁰ G. Berman, "What is a Traditional Judge Anyway?": Problem Solving in the State Courts' (2000) 84(2) *Judicature* 78.

H Goldstein, "Improving Policing: A Problem Oriented Approach" (1979) 25 *Crime and Delinquency* 244.

¹² Berman and Feinblatt 2001, p.131; see also Carney, op. cit. p. 320.

In addition to re-examining individual case outcomes, problem-solving courts also seek to re-engineer how government systems respond to problems like addiction, mental illness and child neglect. They promote reform outside of the court house as well as within...

- *Judicial Monitoring*

Problem-solving courts rely upon the active use of judicial authority to solve problems and to change the behaviour of litigants. Instead of passing off cases – to other judges, to probation departments, to community-based treatment programs – judges at problem-solving courts stay involved with each case throughout the post-adjudication process....

- *Collaboration*

Problem-solving courts employ a collaborative approach, relying on both government and non-profit partners (i.e., criminal justice agencies, social service providers, community groups, and others) to help achieve their goals...

- *Non-Traditional Roles*

Some problem-solving courts have altered the dynamics of the courtroom, including, at times, certain features of the adversarial process.... Problem-solving courts often engage judges in unfamiliar roles as well, asking them to convene meetings or broker relationships with community groups or social service providers.'

The differences between traditional courts and problem-oriented court are succinctly summarised in the following table:¹³

¹³ R.K. Warren, *Reengineering the Court Process*, 1998 cited in D. Rottman, and P. Casey, (1999) 'Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts' 240 *National Institute of Justice Journal* 12, 14.

Traditional Process	Transformed Process
Dispute resolution	Problem solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Claim or case oriented	People oriented
Rights based	Interest or needs based
Emphasis based on adjudication	Emphasis placed on non-adjudication and alternative dispute resolution
Judge as arbiter	Judge as coach
Backward looking	Forward looking
Precedent based	Planning based
Few participants and stakeholders	Wide range of participants and stakeholders
Individualistic	Interdependent
Legalistic	Common-sensical
Formal	Informal
Efficient	Effective

Though still in their early stages, it has been argued that problem-oriented court have moved beyond the experimental mode and into the mainstream of justice. Some have gone as far as to suggest that a major paradigm shift has occurred.¹⁴ Though one may be sceptical about such a sweeping claim, it is clear that this phenomenon requires serious consideration.

PHILOSOPHICAL BASIS

The development of the first drug courts in the United States was essentially a pragmatic response to a range of major administrative problems in the criminal justice system such

¹⁴ Feinblatt, Berman and Denckla, op. cit.

as overcrowded dockets, increasing prison populations and court management issues. The original drug courts were as much concerned with streamlining cases as they were with treatment regimes. However, the overlay of a philosophical basis on the problem-oriented court model came with the development of the concept of ‘therapeutic jurisprudence’, first articulated in the late 1980s by Wexler and Winick in the context of mental health law.¹⁵ Winick describes therapeutic jurisprudence as a study of the law’s healing potential. In his view, therapeutic jurisprudence¹⁶

seeks to assess the therapeutic and counter-therapeutic consequences of law and how it is applied and to effect legal change designed to increase the former and diminish the latter. It is a mental health approach to law that uses the tools of the behavioural sciences to assess the law’s therapeutic impact, and when consistent with other important values, to reshape law and legal processes in ways that can improve the psychological functioning and emotional well-being of those affected.

Its main contribution has been to broaden the courts’ focus beyond the dispute before it towards the needs and circumstances of the parties.¹⁷ The therapeutic jurisprudence movement is burgeoning, with an expanding literature covering corrections, domestic violence, health care, torts, contract, criminal courts, homelessness, preventive law, family law, disability law, probate law, elder law and drug treatment.¹⁸ Its development of the theory and practice of courts, decision-making, service provision and the like has spurred the creation of new courts and refined the ethical, legal and social problems which arise from this new approach to the curial function.¹⁹

PROBLEM-ORIENTED VERSUS SPECIALISED COURTS

Specialisation in the court system is not new. Historically, civil and criminal courts have always been distinguished, as were courts of equity and common law, courts of first instance and courts of appeal. Specialised jurisdictions such as Children’s Courts,

¹⁵ D.B. Wexler and B.J. Winick, ‘The Potential of Therapeutic Jurisprudence: A New Approach to Psychology and the Law’ in J.R.P. Ogloff, (ed), *The Law and Psychology: The Broadening of the Discipline*, Durham, N.C., Carolina Academic Press, 1992.

¹⁶ B.J. Winick, ‘Applying the Law Therapeutically in Domestic Violence Cases’ (2000) 69(1) *UMKC Law Review* (in press), p. 1.

¹⁷ Rottman and Casey, op. cit. p.14.

¹⁸ P.F. Hora, and W.G. Schma, ‘Therapeutic Jurisprudence’ (1998) 82(1) *Judicature* 9; P. Hora, W.G. Schma, and J.T.A. Rosenthal, ‘Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America’, (1999) 74 *Notre Dame Law Review* 439.

Coroner's Courts, family, environmental, industrial courts and the like are constantly emerging. More recently, for case management purposes, specialised lists such as building cases, intellectual property, causes have been created within existing courts.

A specialised court can be regarded as a court with limited or exclusive jurisdiction in a field of law presided over by a judge with expertise in that field.²⁰ The advantages of specialisation include improved judicial decision-making through the use of judicial expertise, more efficient court processes because of judges' and counsels' familiarity with the subject matter and interlocutory processes and reduced backlogs in the generalist courts.²¹ On the other hand, specialised courts may be problematic if they are seen as too narrow or become too isolated from the mainstream, if they are regarded less prestigious than the generalist courts or if the judicial officers sitting in them become stale or bored with their work because of the lack of variety.

However, problem-oriented courts are not merely a form of specialised courts. While a problem-oriented court can be conceived of as a specialised court, not every specialised court is a problem-oriented court. The distinction is significant. Though specialised courts may be distinguished by their procedures or the expertise of the presiding officers, unless they adopt the features outlined above (judicial supervision or control, inter-sectoral collaboration and the like), they cannot be regarded as problem-oriented courts.

VARIETIES OF PROBLEM-ORIENTED COURTS

Drug Courts

The genesis of modern problem-oriented courts can be found in the first drug court experiment in Dade County Florida in 1989. A drug court, as it is generally understood in the relevant literature,²² is a court which is 'specifically designated to administer cases referred for judicially supervised drug treatment and rehabilitation within a jurisdiction'.²³ Drug courts were developed in the belief that courts could become involved in 'treatment' and not be confined to shunting offenders off to prisons where there was

¹⁹ M.D. Zimmerman, 'A New Approach to Court Reform' (1998) 82(3) *Judicature* 108.

²⁰ American Bar Association, (1996) *Concept Paper on Specialized Courts*, Washington, D.C., www.abanet.org/ceeli/conceptpapers/speccourts/spc1.html

²¹ J.W. Stempel 'Two Cheers for Specialization' (1995) 61 *Brooklyn Law Review* 67; C. Walsh, 'The Trend Towards Specialisation: West Yorkshire Innovations in Drugs and Domestic Violence Courts' (2001) 40 *The Howard Journal* 26.

²² See generally A. Freiberg, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213 from where some of the subsequent material is drawn.

²³ National Association of Drug Court Professionals, US.

little likelihood of improvement in the offender's underlying problems. Their major philosophical breakthrough was the direct involvement of judges in the management of the case and it was this innovation which opened the way for other special courts to be developed to deal with special criminal populations.²⁴

There are now over 570 drug courts across the United States and their numbers are increasing rapidly. Drug courts have been established on a pilot basis in New South Wales, Queensland, South Australia and Western Australia. They are also being trialled in Canada, Ireland, Scotland and England.²⁵

As developed in the United States, Canada and Australia, drug courts have a number of criminal justice and therapeutic aims.²⁶ In relation to the criminal justice system, they aim to reduce the level of drug-related criminal activity, to reduce the level of breaches of conditional orders such as bail or conditional sentences and to reduce imprisonment rates and the cost of the system through reducing the burden on the police, the courts and the correctional system. The means by which these aims are intended to be achieved are through judicial and therapeutic interventions which aim to eliminate, decrease or manage drug usage, to decrease the number and rate of relapses and the provision of a range of life skills.

The United States National Association of Drug Court Professionals, Drug Court Standards Committee has identified ten key components of drug courts which have come to be internationally accepted as the essential features of such courts:²⁷

- drug courts integrate alcohol and other drug treatment services with justice system case processing;
- using a non-adversarial approach, prosecution and defence counsel promote public safety while protecting participants' due process rights;

²⁴ J.S. Goldkamp, and C. Irons-Guynn, *Emerging Judicial Strategies for the Mentally Ill in the Criminal Caseload: Mental Health Courts in Fort Lauderdale, Seattle, San Bernadino and Anchorage*, U.S Department of Justice, Bureau of Justice Assistance, Washington, 2000, p. 5.

²⁵ In England, trial drug courts commenced in 1998 in West Yorkshire. These courts sit weekly and are staffed by specially trained magistrates. The courts' legal power is based on the use of a probation order with a condition of treatment as well as drug testing and treatment orders; Walsh, op. cit. 28.

²⁶ M Swain, *The Illicit Drug Problem: Drug Courts and Other Alternative Approaches* (NSW Parliamentary Library Research Service, Sydney, 1999), p 26; S. Belenko, "Research on Drug Courts: A Critical Review" (1998) 1 *National Drug Court Institute Review* 1, 6.

²⁷ NADCP Drug Court Standards Committee, 1997.

- eligible participants are identified early and promptly placed in the drug court program;
- drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services;
- abstinence is monitored by frequent alcohol and other drug testing;
- a coordinated strategy governs drug court responses to participants' compliance;
- ongoing judicial interaction with each drug court participant is essential;
- monitoring and evaluation measure the achievement of program goals and gauge effectiveness;
- continuing interdisciplinary education promotes effective drug court planning, implementation, and operations;
- forging partnerships among drug courts, public agencies, and community-based organisations generates local support and enhances drug court effectiveness.

There is no single model of a drug court. The two basic options are pre-adjudicative (deferred prosecution) or post-adjudicative (deferred or suspended sentencing following a plea or finding of guilt). The various Australian schemes have been described in detail elsewhere²⁸ The New South Wales Drug Court, established under the *Drug Court Act 1998* (NSW), is presided over by a District Court Judge with the power of both a District Court and Local Court judicial officer. The scheme is post-adjudicative, requiring either a plea of guilty or an intention so to plead and an 'initial' sentence to be imposed. It requires the offender to complete a treatment program which lasts about 12 months or more following which a 'final' sentence is imposed. It also provides for a regime of rewards and punishments during the period of the order. The scheme commenced operation in February 1999 as a two year trial program and processed over 875 offenders. It is being subjected to a rigorous evaluation.²⁹

²⁸ A. Freiberg, op. cit.

²⁹ K. Freeman, R. Lawrence Karski, and P. Doak, *New South Wales Drug Court Evaluation: Program and Participation Profiles*, New South Wales Bureau of Crime Statistics and Research, Crime and Justice Bulletin No.50, Sydney; 2000; K. Freeman, *New South Wales Drug Court Evaluation: Interim Report on Health and Well-being of Participants*, New South Wales, Bureau of Crime Statistics and Research, Crime and Justice Bulletin No. 53, Sydney; 2001; S. Briscoe, and C. Coumarelos, *New South Wales Drug Court: Monitoring Report*, New South Wales Bureau of Crime Statistics and Research, Crime and Justice Bulletin No.52, Sydney, 2000.

A trial Youth Drug Court commenced operation in two Western Sydney Children's Courts in August 2000 based on the adult model, but with modifications.³⁰ The court, presided over by a number of specially trained magistrates, is conducted within the framework of the existing Children's Court but with similar powers to that of a drug court. It targets alcohol as well as drug abuse and employs treatment services tailored to young people and has had significant resources invested in it, including rehabilitation beds, extra full time youth and family workers and extra Department of Juvenile Justice Intensive Program units.³¹

The Queensland scheme, which commenced on a pilot basis in three Magistrates' Courts in south-eastern Queensland, is similar in structure to the New South Wales scheme. Established under the *Drug Rehabilitation (Court Diversion) Act 2000* (Qld), it is less a drug court system than a sentencing option which may eventually be available to all courts. Jurisdiction is divided between the Supreme Court, which deals with all indictable offences, and the Magistrates' Court which deals with summary offences and certain indictable offences triable summarily. The core element of the scheme is the Intensive Drug Rehabilitation Order which requires the court to record a conviction and sentence the offender to a term of imprisonment which is suspended subject to a range of treatment and other conditions. The Queensland drug courts began operation in June 2000 at Beenleigh, Southport and Ipswich with two extra court being mooted for Townsville and Cairns. \$1.4 million was allocated to the project with additional funding of \$400,000 supplied soon after to cover the requirements of residential care, inpatient and outpatient services, health, housing and family support and Legal Aid. As at 31 January 2001, there had been 249 referrals to the courts.³²

The Western Australian scheme adopts a multifaceted approach which 'involves a number of sentencing options combined with a number of treatment interventions'. The scheme contains three types of intervention: a *Brief Intervention Regime*, which is designed as a pre-sentence option for offenders on a second or subsequent cannabis possession charge, a *Supervised Treatment Intervention Regime* (STIR) is designed primarily as a pre-

³⁰ On the United States juvenile drug courts, see M. Roberts, J. Brophy, and C. Cooper, *The Juvenile Drug Court Movement*, U.S Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Fact Sheet No. 59, Washington, D.C., 1997. Juvenile drug courts have a number of problems peculiar to them including dealing with peer group pressure, family dysfunction, confidentiality issues and special services to deal with the educational and training needs of young people.

³¹ S. Scarlett, 'Youth Drug Court' *Rights Now*, (2000) (September), p. 12; see also *Youth Drug Court Program*, www.lawlink.nsw.gov.au/lac.nsf/pages/ydcbrochure.

sentence option for offenders with substance abuse problems charged with minor offences, and a *Drug Court Regime* (DCR) is aimed at offenders whose offending and/or substance abuse behaviours require an intensive level of intervention and supervision and who might otherwise be likely to face a term of imprisonment.

The pilot scheme commenced operation in December 2000. The court will operate in the Perth Children's Court (for one day per week), Perth Petty Sessions and District Court for two years and is expected to deal with approximately 3000 offences per year. The magistrate heads a team which is made up of a full-time Legal Aid lawyer and police prosecutor, a part-time representative of the Director of Public Prosecutions, a project manager and an assessment group.³³

The South Australian drug court trial represents an extension to existing 'problem-solving courts' such as the domestic violence 'court', the mental impairment 'court' and the Aboriginal Court Day which have been introduced over the past three years.³⁴ These are less separate courts than special sittings of the Magistrates' Court. The trial, which is scheduled to last two years and involve approximately 100 participants per year at a cost of \$1.56 million per year, builds on existing legislation and is based in the Magistrates' Court with one or more magistrates dedicated to that program. It is essentially a pre-sentence model.

Though claims for the success of drug courts have been many, few rigorous, methodologically sound evaluations have been published. In the United States, the Drug Court Clearinghouse and Technical Assistance Project at the American University has published a review of the first decade of operation of drug courts.³⁵ The Review utilises a wide range of outcome measures against which to compare the traditional adjudication process including reductions in drug use and recidivism, It also looks at the amount and quality of supervision, capacity to address relapse and its consequences, the integration of drug treatment with other rehabilitation services; retention rates in programs, cost effectiveness; use of criminal justice resources, benefits to prosecutors and police, the physical and the economic well-being of participants and effects on families. The Review reports these results from drug court programs:

³² Queensland, Attorney-General and Minister for the Arts, *Press Release*, 13 February 2001.

³³ J. Moss, ('The West Goes to Court' (2000) *Connexions*, (Nov 2000 – January 2001), p. 32.

³⁴ A Burgess, and S. O'Connor, *South Australian Drug Court* Paper presented at the Australian Drug Courts Workshop, Department of Criminology, the University of Melbourne, February, 2000.

- *Reduction in drug use:* drug court participants are tested for drug use on a regular basis so that information about drug use is readily available. Drug use for participants is substantially reduced and significantly lower than for non-drug court defendants and for graduates, is eliminated altogether.
- *Recidivism:* depending upon the characteristics of the population targeted and the degree of social dysfunction and other problems they present, recidivism among all drug court participants has ranged between 5 and 28 and less than 4 percent for graduates.
- *Retention rates:* the average retention rate in the 200 oldest programs has been around 70% (the total of graduates plus active participants).
- *Cost-effectiveness:* the average cost per treatment component ranges between \$US 1,200 and \$US 3,500 per participant. It is estimated that savings in jail bed days amount to \$5,000 per defendant. It is also reported that drug court programs have reduced police costs, welfare costs and unemployment benefit costs.
- *Families and children:* drug court programs have decreased the rate at which defendants lost custody of their children. 750 drug-free babies have been born to female defendants, thus obviating the medical and social service costs of supporting a drug addicted infant.
- *Police and prosecutors:* in jurisdictions in which drug courts operate, police and prosecutors report that the court has enhanced the credibility of law enforcement, provides them with a more effective response and provides a better alternative to the traditional 'revolving door' process.

Another meta-analysis of drug court has been undertaken by the National Center on Addiction and Substance Abuse (CASA) at Columbia University which examined 59 evaluations covering 48 drug courts. The findings of this study by Steven Belenko³⁶ have been summarised by Berman and Feinblatt:³⁷

³⁵ *Looking at a Decade of Drug Courts* 1999, www.american.edu/justice/publications/decade1.htm (accessed 22 March 2001).

³⁶ S. Belenko (1998) 'Research on Drug Courts: A Critical Review' 2(2) *National Drug Court Institute Review* 1 – 58.

³⁷ Berman and Feinblatt, op. cit. 132 – 133.

[T]his study revealed that drug court participants are far more likely to successfully complete mandated substance abuse treatment than comparable participants who seek help on a voluntary basis. One-year treatment retention rates are 60 percent for drug courts compared to 10 to 30 percent among voluntary programs (Belenko 1998:29-30). In addition, the CASA analysis found that defendant drug use and recidivism are substantially reduced during the period of drug court participation (ibid.:36). While less conclusive, there is also evidence to suggest that the benefits of drug court participation do not end when a defendant graduates from the program. According to the CASA study, drug court participants have lower *post-program* re-arrest rates as well. Of nine drug court evaluations that used a comparison group, eight found positive recidivism rates (ibid.:39-41).

In addition to these impacts on participants, the CASA meta-analysis found that drug courts generated significant cost savings. In general, incarceration is far more costly than treatment. As a result, drug courts save money even after accounting for administrative costs. A study of the Multnomah County, Oregon drug court found that over a two-year period, the court had achieved \$2.5 million in criminal justice cost savings, based on 440 participants (ibid.:34). Additional savings outside the criminal justice system – reductions in victimization, theft, public assistance, and medical claims – were estimated to be an additional \$10 million.

Mental Health Courts

In the United States, the first mental health court was established in Broward County, Florida in July 1997.³⁸ Similar courts have now been established in twelve jurisdictions including Seattle, San Bernadino and Anchorage in the United States and in Toronto, Canada. In the United States, federal funding has authorised the creation of 125 more pilot mental health courts.³⁹ These courts developed in response to a crisis in mental health care in the community, over-crowded gaols and the failure of traditional criminal justice and treatment agencies to deal adequately with the mentally ill.

³⁸ Goldkamp and Irons-Guynn, op. cit.; J. Petrila, N.G Poythress, A. McGaha, and R. Boothroyd, *Preliminary Observations from an Evaluation of the Broward County Florida Mental Health Court*, Paper delivered at the 15th ANZ Society of Criminology Conference, Melbourne, 2001.

³⁹ Petrila et al, op. cit.

Though differing in a number of ways,⁴⁰ the United States mental health courts share a number of common attributes.⁴¹ They attempt to identify mentally disordered defendants early in the criminal justice process, and, through a process of screening and referral to mental health agencies, attempt to prevent them being sent to gaol if they do not represent a threat to the community. The courts deal primarily with low level offending where the defendant consents to participation in the programs and where it is clear that the mental illness contributed to the commission of the offence. The distinctive features of these courts are that they attempt to intervene early in the process. The courts have developed multi-disciplinary teams which provide for intensive treatment and supervision under the control of the judge to whom the teams are accountable. Their major challenges are timeliness, accuracy and confidentiality.

Mental health courts function as problem-oriented courts in that they attempt to remedy some of the failures of existing community and social services to deal with difficult populations by providing them with access to treatment and other services in a co-ordinated and disciplined fashion. The courtroom process itself is informal and adopts a therapeutic approach to the defendant. Its personnel are specialised and remain with that jurisdiction for long periods. Though similar in some ways to drug courts, they do not adopt the same methods of treatment, sanctions and rewards as are used in the drug courts because of the different nature of the underlying problems and the different outcomes expected.

A preliminary evaluation of the Broward County mental health court indicates that nearly 900 people were referred to it in its first two years. Preliminary observations show that there is general satisfaction with the court, that people are treated in a respectful manner and that there is success in obtaining treatment. It is also clear that a key factor in the success of the court is the presiding judge.⁴² Support for the court amongst lawyers is high and communication between agencies is good. Most importantly, it has achieved its objective of preventing persons with mental illness charged with non-violent misdemeanours spending long periods in gaol.⁴³

⁴⁰ In terms of the stages of intervention in the criminal justice system, in their methods of resolving the criminal charges and in their handling of non-compliant participants.

⁴¹ See Goldkamp and Irons-Guynn, *op. cit.*

⁴² Petrilá et al, *op. cit.*

⁴³ ABC Radio National, *The Law Report* (2001), *Mental Health and the Law*, Broadcast 14 March 2001, www.abc.net.au/rn/talks/8.30/lawrpt/stories/s259679/htm

In South Australia, a similar scheme was established in June 1999 under the title of the 'Magistrates' Court Diversion Program'.⁴⁴ This scheme was the initiative of the Chief Magistrate who was concerned that the courts needed to deal better with people with a mental impairment⁴⁵ who have been charged with minor offences. This Division of the Court, presided over by one magistrate, sits in open court for one day per fortnight. The court aims to assess offenders at the earliest possible time on a voluntary basis. It is supported by a Manager of the Diversion Program who co-ordinates the provision of health and housing services. It is resource intensive, employing three court-based personnel: a principal coordinator with background in health administration, project management and mental health nursing, a senior clinical advisor who is a psychologist with training in clinical and forensic psychology and a mental health justice liaison officer. There is also a clinical nurse consultant who is employed by the South Australian Mental Health Service.

Under the South Australian scheme, once the offender accepts the court's jurisdiction,⁴⁶ the charges are adjourned for periods of up to 6 months. The court prepares an intervention plan, acting in essence as a referral agency dealing not only with the mental health problems of offenders, but also with other problems such as homelessness or drug addiction. The aim of the program is to 'assist and ensure that all programs are in place and that person remains compliant with the services. It places people in violence intervention program or alcohol programs, assists and ensures that all programs are in place and ensures that the person remains compliant with the services.'⁴⁷ The person's progress in the program is regularly reviewed by the court which. The proceedings may conclude with a withdrawal of the charges or the imposition of a sentence which reflects the offender's success on the program. Failure on the program with withdrawal from it results in the person returning to the normal court process.⁴⁸

A variation of the mental health court concept was established in Sydney in early 2000 in the form of a psychiatric assessment service provided by the New South Wales

⁴⁴ N. Hunter, and H. McCrostie, *The South Australian Magistrates' Court Diversion Program: Background, Objectives and Operation*, Paper delivered at the 15th ANZ Society of Criminology Conference, Melbourne, 2001; see also

www.courts.sa.gov.au/courts/magistrates/court_interv_officers.html

⁴⁵ Including mental illness, intellectual disability, personality disorder, dementia, neurological disorder or acquired brain injury.

⁴⁶ Though there is no formal requirement to plead guilty, the court is not designed to deal with contested cases.

⁴⁷ See ABC Radio, op.cit, remarks by Sue Dusmohamed, Program co-ordinator.

Corrections Health Service at Central and Parramatta Local Courts, the purpose of which was to make available to the courts expedited psychiatric assessments of defendants.⁴⁹ This pilot project arose out of similar concerns to those which led to the establishment of mental health courts in the United States, namely high levels of mental illness among remand and sentenced prisoners, lengthy periods of detention pending the obtaining of medical reports and a lack of adequate mechanism for obtaining such reports.

The New South Wales scheme provides psychiatric assessments of defendants who are charged with summary offences with a view to providing therapeutic alternatives to custody. In the period between March and December 2000, 163 assessments were made, of whom 41% had no psychiatric diagnosis, 7% were admitted to a psychiatric hospital, 24% released on bail, 33% remanded in custody and 6% were sentenced to imprisonment.⁵⁰ A feature of the program is the development of an on-going relationship between the service and the courts. Jonathan Carne, the consultant psychiatrist to the scheme, has commented that⁵¹

... one has the feeling that all the players in the court are working together to try and obtain an outcome that in no way prejudices the general public, but at the same time attempts to lead the defendant into reorganising their life in a more therapeutic manner.

There is a weekly liaison meeting between the service and Magistrates and lawyers at the court, in-service training sessions with psychiatric hospitals and community mental health services, liaison with services and Corrections Health Services and training of psychiatry registrars. Carne has argued that this scheme has been successful because it is timely, responsive to the courts, professional, impartial and provides a better quality service which saves both time and money in terms of hospital and custodial care.

Domestic Violence Courts

Domestic violence courts differ from drug courts or mental health courts in that their focus is upon the nature of the offence rather than the offender. The jurisdiction is not 'affliction' based (e.g. addiction or mental illness), but is designed to deal with both the offender and the victim. In the United States, more than 200 domestic violence courts

⁴⁸ See ABC Radio, op.cit, remarks by Ted Iuliano, Presiding Magistrate.

⁴⁹ See ABC Radio, op.cit, remarks by Dr Jonathan Carne, Forensic Psychiatrist.

⁵⁰ Carney, op cit.

⁵¹ ABC Radio, op. cit.

have been established whose aim is to provide an ‘integrated system that can handle both civil protection orders and criminal domestic violence cases.’⁵² These courts aim to address the problem of domestic violence by integrating a range of counselling, substance abuse and other programs into a court-based system.⁵³ The courts differ from the traditional criminal courts in that the specialist judges develop an expertise in the subject area, provide close monitoring and supervision of the orders and develop a range of creative sentencing options. Because the process of supervision is on-going, it can develop responsive treatment plans which change over time and which can reflect the changed relationship between the parties.

This innovation has spread to the United Kingdom, where a specialist domestic violence court was set up in Leeds in June 1999.⁵⁴ This courts sits for one afternoon per week and is presided over by specialist magistrates. Its aim is to rehabilitate offenders who, in exchange for a non-custodial sentence, are required to attend courses or centres which are intended to address their violent behaviour. The court makes use of a variety of agencies: probation services, victim support groups, police and social services.

In October 1999 the South Australian Magistrates’ Court established a form of ‘domestic violence’ court in which two courts set aside half or one day a week for hearing domestic violence cases. These cases are heard in closed court in order to provide privacy to the participant and are staffed by a small number of magistrates. The court exercises its sentencing powers over defendants by requiring them to participate in education courses as a condition of release on a bond. To that extent, it is a voluntary program. It works together with a Violence Intervention Program which aims to break the cycle of violence. This pilot program was granted \$200,000 by the Department of Human Services to employ a women’s worker, a men’s worker and a children’s worker as well as a part time probation officer.

Domestic violence courts are politically controversial in that some feminist organisations have long argued that domestic violence should be treated in the same manner as, or even more harshly than, other forms of violence, being attended by mandatory arrest, prosecution and condign punishment. The development of domestic violence courts,

⁵² The United States’ legal structure in this context is not strictly analogous to that which applies in Australia in that courts can deal with a range of issues which in this country would probably be dealt with in the Family Court.

⁵³ B.J. Winick, ‘Applying the Law Therapeutically in Domestic Violence Cases’ (2000) 69(1) *UMKC Law Review* (in press).

⁵⁴ Walsh, op.cit.

with their rehabilitative focus, may, in this context, be seen as condoning the behaviour of perpetrators and as sending the wrong signal to the victims.⁵⁵ Proponents of the courts, on the other hand, argue that in the long term, court processes which recognise that many victims want to maintain the family unit may be more successful than punitive responses which do little to deal with the offender's problems or the relationship itself. A supportive court process may, indeed, encourage more victims to report their crimes by reducing their fear of retaliation.

Community Courts

In 1993 the Midtown Community Court was established in New York City to deal with low level offenders convicted of offences such as prostitution, shoplifting, illegal vending and the like, in recognition of the fact that these highly recidivist offenders often suffer from substance abuse, physical and mental health problems and homelessness.⁵⁶ These courts differ from traditional misdemeanour courts in that they attempt to bring together community organisations, local residents, merchants and other groups concerned with the amenity of their area, both in the organisation of the court (such as advisory boards, community mediation, and victim-offender mediation panels) and the provision of services.

Community courts primarily use sanctions such as community service but provide housing and other social services, health care, drug treatment and job placement or training services in or near the court complex. The court acts not just as a welfare broker, but uses the criminal process to emphasise the seriousness of the sanctioning process in an attempt to engender a sense of accountability or responsibility in offenders. The problem-oriented features which community courts contain include an enhanced and on-going judicial role in relation to the defendant, the use by the court of extensive personal background information relating to the offender, the employment by the court of resource co-ordinators who bring together and manage the legal and other services

⁵⁵ R.B. Fritzler, and L.M.J. Simon, *Principles of an Effective Domestic Violence Court*, Unpublished Paper, 1999.

⁵⁶ E. Lee, *Community Courts: An Evolving Model*, U.S Department of Justice, Bureau of Justice Assistance, Washington, 2000; S.K. Knipps, and G. Berman, 'New York's Problem-Solving Courts Provide Meaningful Alternatives to Traditional Remedies' (2000) 72 *New York Bar Association Journal* 8; Berman and Feinblatt, *op.cit.*; P. Casey, and D. Rottman, *Therapeutic Jurisprudence in the Courts*, National Center for State Courts, Institute for Court Management, www.ncsc.dni.us/ICM/distance/therapeutic/2000_08 (posted August 2000; accessed 3 March 2001).

required to implement the sentence and the location of treatment and other providers in the court precinct to provide immediate assistance.

Between 1993 and 1998, the New York court was the only one of its kind in the United States. One evaluation of the court indicated that it had reduced low level crime in the area, had gained the support of the public and had contributed to the local community through the provision of community work.⁵⁷ By the end of 2000, 17 similar courts had been established in other parts of the country.⁵⁸

Other Specialised Courts

As noted above, not all specialised courts are necessarily problem-oriented courts, though the ideas are often conflated. In South Australia, which has developed these ideas further than any other Australian jurisdiction, an Aboriginal Court day has been established in the Port Adelaide Magistrates' Court. Under this scheme, which has been operating since June 1999, the Court, sitting one day per week as a 'Nunga Court'⁵⁹ deals only with Aboriginal people who have pleaded guilty to an offence. It differs from other court days in that the magistrate sits off the bench in order to be at the same level as the defendant and is assisted by an Aboriginal justice officer or senior Aboriginal person who advises on cultural and community matters. Aboriginal officers are available to the court to assist the offender, their family and others in relation to the processes of the court. The court is more inclusive than a traditional court in that all participants, including the victim and other members of the community have a chance to speak. In that respect, it more closely resembles family group conferences and similar forms of restorative justice.

In the United States, a form of justice known as 'Teen Courts' has been developing since the early 1980s. Like Aboriginal Courts, they are not strictly problem-oriented courts, but specialised courts dealing with defined client groups for whom it is believed that particular, focused forms of process and sanctions will be more beneficial to the offender. There are now over 650 of such courts operating in the United States and a National Youth Court Center to monitor and foster their growth has been established.⁶⁰

⁵⁷ Berman and Feinblatt, *op.cit.*

⁵⁸ Lee, *op.cit.* p.1.

⁵⁹ 'Nunga' is the local Aboriginal word to describe Aboriginal people.

⁶⁰ J.A. Butts, and J. Buck, *Teen Courts: A Focus on Research*, U.S Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, Washington, D.C, 2000; A.R. Shiff, and D.B. Wexler, 'Teen Court: A Therapeutic Jurisprudence Perspective' (1996) 32 *Criminal Law Bulletin* 342.

Though there are many different models of youth or teen court, they are usually used for young offenders (10 – 15 year olds), with no or minimal prior records, who have been charged with minor offences. Their distinguishing feature is that the prosecution, defence and adjudication of the cases are undertaken by young people, not adults. Jurisdiction is voluntarily assumed (as an alternative to a formal court process) and sanctions are generally limited to restitution or reparation, community work, apology or education or counselling courses. Failure to comply with the order results in the case being referred back to the traditional court system.

These courts are seen to be preferable to traditional adult courts, including Children's Courts, because they attempt to harness the powers of peer pressure, improve the quality of procedural justice, enhance the empathy of both the offender and the court participants and increase community participation of young people. No teen court has yet been introduced in Australia, but the Liberal Party government in Western Australia, prior to its recent electoral defeat, was actively considering experimenting with such a program.

ISSUES AND PROBLEMS

The foregoing account of a number of recent innovations in court processes in the United States, England and Australia is not intended as a paean to mindless or reckless experimentation, a panegyric to problem-oriented courts or an uncritical endorsement of all that emerges from the criminal justice system of the United States.⁶¹ However, it is intended to encourage consideration of innovative and possibly better ways of dealing with some of the more intractable problems confronted by the judicial system. That the system has been less than perfect in its treatment of drug-related crime, mentally disordered offenders, chronic minor recidivists and indigenous offenders is hardly debatable. What is contentious is what can replace, supplement or enhance our current processes. In a sense, the issue is not so much *what*, but *to what extent*, for the schemes outlined above are already in operation in various jurisdictions. The challenge now is not so much invention as application or adaptation. In the space of two decades, restorative justice, in the form of victim-offender conciliation programs, diversion schemes, sentencing circles, family group conferences and others, is becoming widespread, if not

⁶¹ I have argued strongly elsewhere that Australians should be extremely wary of following every American sentencing trend and fashion: see A. Freiberg, "Three Strikes and You're Out - It's Not Cricket: Colonisation and Resistance in Australian Sentencing" in M. Tonry, and R. Frase, (eds), *Punishment and Penal Systems in Western Countries*, New York, Oxford University Press, 2001.

quite turning into a mainstream program. Therapeutic jurisprudence appears to be the next major paradigm shift. Seen in a positive light, these experiments should not be seen as derogating from an idealised, traditional criminal justice system where every defendant has his or her day in court and justice and reason prevail. Instead, they should be regarded as incremental improvements to a complex and varied system which must respond to new and difficult problems in a manner which does not necessarily put at risk hard won procedural rights, but which can enhance community safety and retain public confidence in the courts.

Both restorative and therapeutic jurisprudence concepts have one common element which I believe goes a considerable way to explaining their attractiveness and success and that is their emphasis on procedural justice. Procedural justice, or natural justice, or due process, is that aspect of the criminal justice system which focuses upon process rather than outcome. Traditionally, it encompasses such matters as the right to notice, to an unbiased decision-maker, to be heard, to understand and be understood, to be represented, to appeal and so on. In this context procedural justice refers in particular to the process by which all parties to criminal proceedings, including offenders, victims and related parties, can be involved in resolving disputes and the problems they manifest or symbolise by giving both a voice, and especially the time, to express their feelings and concerns. The research evidence increasingly shows that when:⁶²

litigants are treated in ways that accord them a sense of participation and dignity, and are given the feeling that court actors have good intentions, they respond with higher satisfaction to judicial proceedings and the results of such proceedings, even if unfavourable. Victims need to be accorded a sense of ‘voice’, the ability to tell their side of the story, and ‘validation,’ the sense that what they have to say is taken seriously. They should be treated with dignity and respect by court officials who convey to them a sense that what is being done is in their best interest and done with good rather than bad intentions. Treating people in this way also diminishes the extent to which they feel coerced and gives them a sense of voluntary choice even in inherently coercive contexts. People given choice rather than being made to feel coerced, respond better, with greater satisfaction and with more motivation and effective performance. Indeed, experiencing

⁶² Winick, op. cit. p. 32. (footnotes omitted); but see particularly E.A. Lind, and T.R. Tyler, *The Social Psychology of Procedural Justice*, 1988; T.R. Tyler, *Why People Obey the Law*, 1990.

choice and a sense of self-determination is often vital to an individual's sense of her own locus control and may be essential to emotional well-being.

Another common element is that these processes are resource intensive. Conferences take time and personnel to organise and run and the sanctions must be supervised and enforced. Drug courts, mental health and other courts require services, case managers, co-ordinators and administrative resources to function. The theoretical and empirical question is whether these up-front investments ultimately save money in terms of reduced crime and imprisonment rates. On these matters, the jury is still out.

The development of problem-oriented courts has not been without criticism. They raise a host of practical, conceptual and ethical issues which I attempt to summarise briefly in the following paragraphs.⁶³

Identifying the 'Problem'

A problem-solving court presupposes a 'problem' to be solved. If the 'problem' is not the crime (which is only regarded as the symptom of some underlying trouble or pathology), then the solution must depend upon an accurate diagnosis of the precipitating cause, or causes, of the problem. Herman Goldstein, in his work on problem-oriented policing, defined a problem to include a 'wide range of behavioural and social problems that arise in a community'.⁶⁴ Rarely is there a single 'cause' of crime. Drug addiction is usually symptomatic of a range of other personal, medical or psychological problems which are often compounded by other difficulties such as housing and income support. Mental disorder is often complex and multi-faceted though, unlike intellectual disability, it can be a transient state. Ward and Stewart have argued that rehabilitation models which identify one or more criminogenic 'needs' as the basis of intervention rest upon assumptions about crime and offenders which need to be made manifest.⁶⁵ However, there is little agreement about the nature of these 'needs' and how they can best be addressed within the criminal justice framework. There is also considerable criminological debate over whether individualistic theories of criminal behaviour, such as those proposed by psychologists, psychiatrists social workers, biologists and others can adequately explain criminal behaviour. Though not denying

⁶³ For a more detailed discussion of the issues arising out of the development of drug courts in particular, see Freiberg, op.cit.

⁶⁴ Goldstein, op. cit.

⁶⁵ T. Ward, and C. Stewart, C. *Human Needs and Offender Rehabilitation*, Unpublished Paper, Department of Criminology, The University of Melbourne, 2001.

individualistic-oriented solutions, critics of problem-oriented court stress the need to accurately identify the ‘problem’ before crafting a solution.

Related to this issue is that of relating the ‘problem’ to the jurisdiction of the court. A drug-addicted person may also perpetrate domestic violence. A mentally-ill person may also have a substance abuse problem. If a court’s jurisdiction is defined too narrowly, it may not generate enough business to warrant developing an infrastructure; if it is too broad, it may lose its special focus and be unclear about its mission and expertise.⁶⁶

Concentration versus Dispersal

It is often argued that in fact, every court is a drug court and therefore services should be provided in every court dealing with drug-related offences. To the extent that this is true, it probably unrealistic to expect that all courts can be provided with the resources necessary to implement a true problem-oriented system. In an ideal world, it would be pleasing to have, in every court, specialised services staffed by an adequate number of trained staff with the financial resources to meet the full range of offenders’ needs. Pending this ideal world, the pragmatic response appears to be to focus these resources in a smaller number of courts which can deal with the more difficult and expensive cases. These courts can act as points of referral from general courts, centres of expertise and training for staff and foci of research and evaluation.⁶⁷

This cautious, pragmatic response can, however, be contrasted with recent development in New York State, which has announced a plan to restructure its court system by adopting drug court principles in every jurisdiction: every court dealing with drug offences will become a drug court by offering judicially-monitored treatment to up to 10,000 offenders each year.⁶⁸ The experimental, it seems, has become the mainstream; the paradigm has shifted. Whether this new experiment will succeed remains to be seen. One can be sceptical about whether sufficient resources can possibly be made available on this scale, whether every judge is suitable for this approach, whether too many babies will be placed in the one bath. Whatever the outcome of this initiative, it indicates that in New York State, at least, traditional curial approaches have been judged to be inadequate and requiring a major overhaul.

⁶⁶ Petrilá et al, op. cit; Rottman and Casey, op. cit, p. 16.

⁶⁷ Carne, op. cit.

⁶⁸ J. Feinblatt, G. Berman, and A. Fox, ‘Institutionalizing Innovation: The New York Drug Court Story’ (2000) 28 *Fordham Urban Law Journal* 277, 279.

Problems in Court

The problem-oriented paradigm raises some profound questions about the nature and operation of the court process itself. Proactive judging, which requires the presiding officer to act as judge, mentor, supervisor and service broker threatens some of the core judicial values such as impartiality, fairness, certainty and the separation of powers between the judiciary and the executive.⁶⁹ In what role do judges act when they seek or arrange the provision of services? Is due process met when judges both hand down sentences and supervise and deal with breaches of their orders? As they become more expert or specialised in their field, are they in danger of acting less on information which is brought before the open court and more on their own knowledge, experience or research? Are offenders being disadvantaged by decisions made in case conferences involving judges, clinicians, prosecution and defence counsel to which they are not direct parties? In these courts disparity of sentencing outcome is the norm and judges may be under greater pressure than when they sit in courts where sentencing decisions may be more predictable or more precedent-based. Judicial power based on wide discretion rather than the interpretation of law may expose the judges to personal responses by disgruntled offenders.⁷⁰

These issues of specialisation, expertise and training raise further problems about the operation of specialised courts generally. What kinds of training are required and who is to provide it? Should judges be selected on the basis of interest, personality, qualifications or even gender? Though specialisation has its advantages, it also has considerable drawbacks. Problem-oriented courts can be highly rewarding,⁷¹ but they can also be stressful and judges are in danger of 'burning out'.⁷² Suitable replacements can be difficult to find, which may result in the failure of such courts in smaller jurisdictions, particularly if they are seen as less prestigious dead-end or 'backwater' courts.

Problem-oriented courts also pose significant challenges for prosecution and defence counsel. The 'team' approach, which requires cooperation and collaboration, sits uneasily

⁶⁹ Berman and Feinblatt, *op. cit.*; Raine, *op. cit.* p. 110

⁷⁰ Berman, *op. cit.* 82.

⁷¹ Many judges report that they have greater satisfaction in these courts than in the traditional courts where the 'revolving door' form of justice is more common.

⁷² R.S. Gebelein, *The Rebirth of Rehabilitation: The Promise and Perils of Drug Courts*, U.S. Department of Justice, National Institute of Justice, Sentencing and Corrections: Issues for the 21st Century, No. 6, Washington, D.C., 2000.

with the traditional notions of the adversary system.⁷³ As most of these courts are post-adjudicatory, the issues of guilt or innocence are not of primary importance, though these issues can be resolved elsewhere in the system. However, counsel's role in the dispositional issue is contentious. Should defence counsel seek the least restrictive alternative open to the court in the light of the gravity of the offence and the background of the offender, or should they seek a disposition, or process, which is in their client's 'best interests', a phrase which conjures issues of paternalism, coercion and role conflict. In practice, it appears that the dilemmas are less stark and the conflicts resolvable. Speaking of the role of defence counsel in the South Australia mental health court, Bronwyn Waldron of the Australian Legal Services Commission said:⁷⁴

... your role becomes less that of an advocate, less pursuing a verdict of not guilty, shall we say, and more a person who's providing information to the court about your client's progress with treatment, with monitoring, with attending appointments, accepting medication, providing feedback about any sort of unpleasant side effects they may be getting on whatever medication they're prescribed, perhaps even liaising to get medication changed. You find yourself going away from the advocacy role and getting much more involved in day-to-day aspects of the client's treatment.

In essence, counsel's role is to ensure that the client can make a well-informed choice about the options available to him or her by testing assertions about the nature and extent of treatment and the services provided and the time they will take.⁷⁵

Those involved with problem-oriented courts are cognisant of the dangers of paternalism inherent in the concept of therapeutic jurisprudence, but those who have theorised this concept have argued that paternalistic intervention is anti-therapeutic because it deprives people of the right to make decisions and therefore, by depriving them of individual autonomy, is therapeutically disadvantageous.⁷⁶

⁷³ Strong advocates for a problem-oriented justice system argue that the adversary system does not serve offenders or the public well in the long term and requires reconsideration.

⁷⁴ ABC Radio National 2001.

⁷⁵ Berman, *op. cit.* p. 83; Winick, *op. cit.* p. 36; Berman and Feinblatt, *op. cit.* p. 134; Petrila et al, *op.cit.* p. 12.

⁷⁶ Winick, *op. cit.*, p. 43.

CONCLUSION

It is not difficult to be critical of the reforms or experiments outlined above. Some may be flawed, some may fail and some may be positively dangerous. Some may fail because of problems in their execution and some because of some fatal conceptual flaw. Yet, as Berman and Feinblatt in their review of the development of problem-solving courts note, these courts should not be compared to some idealised form of justice, but to the real world of the criminal courts: the plea-bargaining mills, the brief plea-hearings, the high recidivism rates of the difficult offenders and the frustrated judges who feel that they can do little for the most difficult cases other than propel them up higher in the sentencing hierarchy.⁷⁷ But more importantly, these experiments raise the broader issue of whether the traditional court model has failed, not because it lacks resources, but because it is based on a faulty paradigm of how justice is delivered. That paradigm, which is based more on outcome than process, may be seen to be inadequate because it has failed to sufficiently consider the importance of participation in justice. The astonishing expansion of restorative justice programs around the world, even in the absence of solid evidence about their effect on recidivism, indicates that their true appeal is not necessarily utilitarian but symbolic: process is paramount. When this insight is joined with a problem-oriented approach which devotes court and service resources to deal with underlying criminogenic causes, it can provide a powerful alternative to the sterile, costly and ultimately counter-productive punitive approaches which have resulted dispirited court and correctional officers and bursting goals.

While it may be a little early to be calling for a complete overhaul of the Australian criminal justice system, it is not premature to press for the continuation of local experiments with drug courts, mental health courts, domestic violence courts and other innovations yet to be introduced. Evaluations of these initiatives is imperative: not only recidivism rates but retention rates, cost, satisfaction, public confidence, health and social outcomes.⁷⁸ Though Australia lacks centres such as the Center for Court Innovation in New York,⁷⁹ through such bodies as the Australian Institute of Judicial Administration, it

⁷⁷ Op. cit. p. 135.

⁷⁸ Carney, op. cit. p. 326.

⁷⁹ The Centre is an independent research and development arm of the New York Unified Court System which assists in the development of new forms of courts, create demonstration projects and convenes forums and conferences on court developments: Berman and Feinblatt, op. cit. p. 126.

should foster experiment, debate and evaluation of a wide range of initiatives which have the potential to improve the quality of justice in Australia.