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Citation: 50 Crim. L.Q. 224 2005



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Problem Solving Courts as Agents of Change

*Natasha Bakht**

1. Introduction

Problem solving courts have expanded rapidly across the United States in an attempt to find new solutions to difficult socio-legal problems. The dispute resolution model of problem-solving courts is founded upon the principles of therapeutic jurisprudence, an approach to the law that regards legal phenomena as having therapeutic and anti-therapeutic consequences.¹ Beginning in the area of mental health, this approach has expanded to consider matters within criminal law such as drug abuse and domestic violence and has spread from the United States to many jurisdictions. Canada has not yet embraced problem solving courts to the same extent as has the

* Assistant Professor of Law, University of Ottawa, M.A. in Political Studies (Queen's), LL.B. (Ottawa), completing an LL.M. at New York University School of Law (2005) as a Global Hauser scholar. This paper was prepared for Justice Paul Bentley of the Ontario Court of Justice on behalf of the National Judicial Institute with funding provided by the National Crime Prevention Centre and the Department of Justice.

1. Professor David Wexler first developed the term "therapeutic jurisprudence" in 1987. See D. Wexler, "Therapeutic Jurisprudence Forum: The Development of Therapeutic Jurisprudence: From Theory to Practice" (1999), 68 Rev. Jur. U.P.R. 691 at p. 693. Bruce J. Winnick has noted that the law is inherently either therapeutic or anti-therapeutic from the point of view of the participants in the court process including accused individuals, victims of crime and the community itself. See Winnick in Amy D. Ronner, "Therapeutic Jurisprudence on Appeal" (2000), 37 Court Review (The Journal of the American Judges Association) 64 at p. 64. See generally also The International Network on Therapeutic Jurisprudence, online at <<http://www.therapeuticjurisprudence.org>>.

United States, although there are signs that both federal and provincial governments in Canada are keen to do so. There are currently Drug Treatment Courts (DTCs) in Toronto, Vancouver and St. John. In December 2004, the Canadian Department of Justice announced its plan to create three new DTCs. Problem solving court processes have also arisen in Canada in cases concerning mental health, aboriginal justice and domestic violence.

Problem solving courts have developed in response to the realization that a "one size fits all" approach to criminal justice does not work in some contexts.² The adversarial nature of the traditional criminal justice model cannot effectively handle the complexity of certain human and social problems, where failing to deal with fundamental causes almost guarantees re-offending.³ As a result, initiatives have emerged that are designed to enable courts to respond more effectively to cases in which complex, often overlapping, and sometimes intractable social and personal issues are involved.⁴ Specifically, courts attempt to deal holistically with cases involving these difficult socio-legal problems by implementing the principles of therapeutic jurisprudence wherein judicial case processing is partnered with treatment providers and community groups to provide follow-up and support for victims and offenders alike in order to reduce recidivism.

This paper will compare and contrast the rise and development of problem solving courts as agents of change in Canada and the United States with reference to specific specialized courts. Some reference will also be made to initiatives in Australia and the United Kingdom that employ therapeutic jurisprudence. The many ways in which the problem solving model is provoking change within legal communities and the application of therapeutic jurisprudence in traditional courtrooms will also be explored. While many of the rationales and workings of the

2. This description is taken from a research proposal prepared by Megan Stephens, LL.M Candidate and Associate at Columbia Law School.

3. *Ibid.*

4. Sherry L. Van de Veen, "Some Canadian Problem Solving Court Processes" (paper presented at the Canadian Association of Provincial Court Judges Pre-Institute Conference, September 2003, St. John's, Newfoundland: National Judicial Institute, 2003) at p. 1.

various specialized courts in both the United States and Canada share similarities, there are certain distinctions that have resulted in unique approaches to therapeutic jurisprudence.

2. The Origins of Problem Solving Courts

In many respects the roots of this new judicial approach can be traced back to indigenous and tribal justice systems of what today constitutes the United States, Canada, Australia and New Zealand. "A serious effort is now underway to learn from those systems and to introduce some of their perspectives and techniques into western judicial structures."⁵ As for western judicial machinery, the origins of problem solving courts can be traced to 1989 when, at the peak of the crack cocaine epidemic, the first drug court opened in Dade County, Florida.⁶

There are numerous social and historical factors that have been documented as having given rise to problem-solving innovation in the United States. These include:

- changes among the kinds of social and community institutions (including families and churches) that have traditionally addressed problems such as addiction and mental illness;
- the struggles of government efforts, whether legislative or executive, to address these problems, including the difficulties that probation and parole departments have faced in linking offenders to services and effectively monitoring compliance;
- a surge in the nation's incarcerated population and the resulting prison overcrowding, which has forced many policymakers to rethink their approach to crime;
- trends emphasizing the accountability of public institutions, along with technological innovations that have facilitated the documentation and analysis of court outcomes;

5. Bruce J. Winick and David B. Wexler, eds., *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Durham: Carolina Academic Press, 2003), p. 3.

6. G. Berman and J. Feinblatt, "Problem-Solving Courts: A Brief Primer" (2001), 23 *Law and Policy* 4. Some people suggest that the problem solving courts have their roots in the late nineteenth century juvenile courts in the United States. See, for example, B.J. Winnick, "Problem Solving Courts and Therapeutic Jurisprudence: Therapeutic Jurisprudence and Problem Solving Courts" (1998), 30 *Fordham Urb. L.J.* 1055 at p. 1056.

- advances in the quality and availability of therapeutic interventions, which have given many within the criminal justice system greater confidence in using certain forms of treatment (particularly drug treatment) in an effort to solve defendants' underlying problems;
- shifts in public policies and priorities — for example, the influence of the feminist movement has increased awareness about domestic violence; and, perhaps most importantly,
- rising caseloads and increased frustration of the public and system players with the standard approach to case processing and outcomes.⁷

As a result of these factors, in August 2000 the United States Conference of Chief Justices and the United States Conference of State Court Administrators endorsed the concept of problem solving courts and calendars that utilize the principles of therapeutic jurisprudence as the future policy direction for trial courts in the United States.⁸

In addition, the United States Bureau of Justice Assistance published *The Trial Court Performance Standards* in 1997, encouraging courts to look at more than the legal outcome of cases before them. These standards direct trial courts to recognize the social outcome of court cases and to consider whether social problems are truly addressed by the outcomes of judicial proceedings. Hence, in the United States there is considerable administrative policy justification for the problem solving approach to justice.⁹

In Canada, the new problem solving mechanisms have developed as a result of judicial initiative and as a result of increased community expectations of the court system.¹⁰ Importantly, in September 1996 the Parliament of Canada enacted comprehensive changes to the sentencing provisions of the *Criminal Code*.¹¹ The sentencing revisions as interpreted by the Supreme Court of Canada have incorporated certain aspects of restorative justice

7. Berman and Feinblatt, *ibid.*, at p. 1 and Winnick, *ibid.*, at p. 1056.

8. Resolution No. 22 passed by the United States Conference of Chief Justices and the United States Conference of State Court Administrators, August 2000.

9. Van de Veen, *supra*, footnote 4, at p. 3.

10. *Ibid.*, at p. 2.

11. *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 718.2(a) to (e).

into the criminal justice system. While these provisions do not equate to the same administrative policy direction for Canadian trial courts as exists in the United States, these factors have created a favourable legal environment within which problem solving courts and the therapeutic principles upon which they are based can evolve.¹²

3. The Sentencing Principles in the *Criminal Code of Canada*

The new Canadian sentencing legislation contains a conditional sentence option that diverts cases from the justice system where in the opinion of the investigating officers and other authorities it is appropriate.¹³ Two other provisions that embrace the concept of restorative justice, or community-based sentencing, also form part of the new sentencing legislation. The first incorporates the notion that no person ought to be deprived of his liberty if less restrictive sanctions may be appropriate (s. 718.2(d)) and the second specifically states that all alternatives to incarceration ought to be considered by the court in every case, especially in the case of Aboriginal offenders (s. 718.2(e)). The concept that prison ought to be a last resort in sentencing is embraced by the new legislation. While the context of these provisions also contains clear references to other purposes of sentencing such as denunciation, deterrence and the need to separate offenders from society, for the purposes of the new problem solving court processes, it is the emphasis on alternative sanctions to incarceration (ss. 718.2 (d) and (e)) that are of significance.¹⁴

The high rate of incarceration in Canada as compared to other industrialized countries¹⁵ and the scarcity of resources available

12. Van de Veen, *supra*, footnote 4, at p. 3.

13. *Criminal Code*, s. 742.1. A conditional sentence is a sentence of less than two years that is served in the community subject to the conditions prescribed in the order. A conditional sentence is not available where the offence provides for a mandatory minimum term of imprisonment such as murder. A conditional sentence may be ordered where the court is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing in ss. 718 to 718.2 of the *Criminal Code*.

14. Van de Veen, *supra*, footnote 4, at p. 13.

15. *Ibid.*, at p. 12.

for the purposes of incarceration has also contributed to the new approach to sentencing in the *Criminal Code*. The new sentencing scheme indicates that jails should be reserved for serious offenders needing to be separated from the community, while less serious offenders should remain among society while adhering to appropriate conditions. These changes invite a closer relationship between the justice system, its correctional agencies and community agencies dealing with the rehabilitation of offenders.¹⁶

In *R. v. Proulx*,¹⁷ the Supreme Court considered the new sentencing legislation generally and the conditional sentence provision in particular. They held that a conditional sentence is available in principle for all offences in which the statutory prerequisites are satisfied, and that failure to consider this option may well constitute reversible error.¹⁸ The court went further to say that whenever both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration.

With respect to the concept of deterrence, the Supreme Court recognized once again that incarceration may ordinarily provide more deterrence than a conditional sentence, but cautioned judges to be “wary of placing too much weight on deterrence given the uncertain deterrent effect of incarceration”.¹⁹ In the context of problem solving courts these remarks are an encouragement for the justice system to craft effective community alternatives in sentencing whenever appropriate.²⁰ The collaborative, integrated, multi-disciplinary approach utilized in problem solving court processes likely achieves these objectives more effectively than the traditional system, which largely leaves these in the hands of either defence counsel or probation authorities, neither of which have the co-ordinated and directed resources that are available to the problem solving court.²¹

16. *Ibid.*

17. *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 at para. 90, [2000] 1 S.C.R. 61, 30 C.R. (5th) 1.

18. *Ibid.*

19. *Ibid.*, at p. 452.

20. Van de Veen, *supra*, footnote 4, at p. 16.

21. *Ibid.*

The Supreme Court of Canada also interpreted certain provisions of the sentencing legislation in *R. v. Gladue*.²² This case will be discussed later in this article in connection with specialized courts for Aboriginal peoples. I turn now to examining the way in which the problem solving model has instigated change through specialized courts in both the U.S. and Canada.

4. Drug Courts: An Early Example of Problem Solving Courts

Since 1989 drug courts have expanded rapidly across the United States. According to the National Association of Drug Court Professionals, there are currently 1,200 drug courts in existence or being planned in the United States. These courts have enrolled more than 300,000 people in their drug treatment programs.²³ What began as an experiment in Dade County became a national movement during the decade that followed.²⁴ It has been suggested, however, that drug courts in the United States developed for administrative rather than ideological reasons. "The marriage between therapeutic jurisprudence and drug courts came *after* the birth of the latter."²⁵

By the mid 1990s a number of players in the criminal justice community in Toronto realized that the traditional methods of dealing with drug-dependent criminality in Canada were a failure. In recognition that incarceration alone does little to break the cycle of drugs and crime and that prison is a scarce resource best used for individuals who are genuine threats to safety, a committee of representatives from the Federal Department of Justice, the defence bar, duty counsel, Public Health, the Centre for Addiction and Mental Health, Community Corrections, Court Services and the judiciary commenced meeting on a monthly basis. After many months of discussions with representatives of the community the federal government agreed to fund a four-year

22. *R. v. Gladue*, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385, 23 C.R. (5th) 197.

23. National Association of Drug Court Professionals, online at <<http://www.nadcp.org/whatis>> (accessed February 4, 2004).

24. Drug Court Clearinghouse and Technical Assistance Project, "Looking at a Decade of Drug Courts" (Drug Courts Program Office, Justice Programs, U.S. Dept. of Justice, 1998) at p. 3, online at <<http://www.ncjrs.org/html/bja/decade98.htm>>.

25. Arie Freiberg, "Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism" (2003), 20 *Law in Context* 6 at p. 9.

pilot project. On December 1, 1998, the country's first Drug Treatment Court, and the first drug treatment court outside the United States, commenced operation in Toronto.²⁶ The funding for the court has recently been extended for a further five years, and in its 2004 Speech from the Throne the Federal Government has committed to expanding the number of Drug Treatment Courts in Canada.

Most drug courts utilize a team-based approach to treatment — that is, a coordinated strategy among judge, prosecution, defence and treatment providers to govern offender compliance. This approach draws its strength from each representative providing input from their unique institutional perspective. This team-based approach has resulted in the creation of new roles for the traditional judicial players. Judges are no longer “dispassionate, disinterested magistrates”, but instead are “emphatic counselors”²⁷ who play an active role in the treatment process, monitoring compliance, rewarding progress and sanctioning infractions. “The prosecution and defence are not sparring champions, they are members of a team with a common goal: getting the defendant off drugs.”²⁸

(1) The Use of Sanctions and Treatment in Drug Courts

American drug courts emerged in part as a reaction to the “zero tolerance” policy of many U.S. jurisdictions in which possession of even a relatively small quantity of cocaine resulted in mandatory minimum sentences.²⁹ In New York State, for example, possession of half a gram of cocaine or 16 ounces of marijuana requires a minimum sentence of one to three years. The “Drug War”, as it has come to be known, resulted in a 56% increase in drug arrests between 1985 and 1991.³⁰ Many in the U.S. justice system believe that the increased penalties, coupled with a crack-down by police forces, have proven to be ineffective

26. Paul Bentley, “Canada’s First Drug Treatment Court” (2000), 31 C.R. (5th) 257 at p. 260.

27. Michael D. Zimmerman in David B. Rottman, “Does Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?” (2000), 37 Court Review 22 at p. 25.

28. Judith S. Kaye, “Lawyering for a New Age” (1998), Fordham L. Rev. 3.

29. Bentley, *supra*, footnote 26, at p. 271.

30. *Ibid.*

and a waste of financial and human resources because they ignore the fact that addiction cannot be eliminated without effective treatment.³¹

The Toronto Drug Treatment Court by contrast has developed in the absence of mandatory minimum sentences for drug offences. In addition, unlike many U.S. drug courts, which are based on abstinence from all drugs,³² the Toronto DTC requires that participants work *towards* abstinence from illegal drugs. The program demands that participants be free of crack/cocaine and/or heroin before completion. In the United States almost all drug courts either prohibit or strongly discourage the use of both illegal drugs and alcohol by drug court participants.³³ By way of contrast, in Toronto, where participants have achieved a positive lifestyle change, have stopped using crack/cocaine, heroin and other non-medically prescribed drugs and have at least one marijuana-free urine sample, they may be permitted to complete Phase I of the program at the discretion of the DTC team.³⁴

There is a wide variance among U.S. drug courts in the imposition of sanctions. Some courts employ a zero tolerance towards any drug use. Other courts utilize a harm reduction approach involving sanctions, which increase in their severity for repeated instances of drug use.³⁵ It is very rare for sanctions to be used in Canadian drug treatment courts. When they are used, it is typically only after an offender has been in the drug treatment program for a lengthy period of time and upon the advice of treatment providers. In Toronto, relapse is an anticipated part of the recovery process and continued drug use will not lead to expulsion from the drug program. If participants admit to use and the DTC team believes that they are committed to work towards abstinence, then such use will not be an impediment to continued involvement in the program.³⁶

31. *Ibid.*

32. Peter Anderson, "Treatment with Teeth", in *American Prospect Special Report. Criminal Justice Reform* (2003), at p. 2.

33. "Looking at a Decade of Drug Courts", *supra*, footnote 24, at p. 14.

34. Bentley, *supra*, footnote 26, at p. 271.

35. *Ibid.*, at p. 259.

36. *Ibid.*, at p. 265.

It is also noteworthy that unlike most U.S. drug courts,³⁷ the Toronto DTC incorporates methadone maintenance as part of its treatment arsenal for heroin addicts. The abstinence model of most U.S. courts does not permit the use of methadone. In Toronto, it is felt that methadone is an effective treatment option that should not be excluded simply because it does not fit the model of complete abstinence.³⁸

One critique of U.S. drug courts is that they “widen the net” by including drug offenders who would otherwise have been diverted out of the criminal justice system and received minimal sanctions. Unlike many U.S. drug courts, the Toronto DTC accepts traffickers and other offenders for whom jail would be the likely outcome of a guilty plea.³⁹ Traffickers whose primary reason for possessing or trafficking in drugs is to satisfy their own addiction rather than to profit from the transaction can be accepted into the Toronto DTC program, offering those offenders an opportunity to deal with their substance addiction within the criminal justice system.⁴⁰

Abstinence from substance abuse is only one of a number of preconditions that must be fulfilled before the offender will be allowed to end his or her participation in Toronto’s DTC. Participants are also required to demonstrate a fundamental lifestyle change including improved interpersonal skill development, stable and appropriate housing, and education and vocational skills. It is the belief of the Toronto DTC that these requirements are necessary to improve the likelihood that offenders will remain drug and crime free.⁴¹ A comparable program and rationale exists in the United States where almost all drug courts require participants after they have become clean and sober to obtain a high school diploma or General Education

37. According to the National Drug Court Institute’s “Drug Court Practitioner Fact Sheet, Methadone Maintenance and Other Pharmacotherapeutic Interventions in the Treatment of Opioid Dependence” by Karen Freeman, April 2002, Vol. III, No. 1, Rikers Island in New York City is the only correctional system in the United States that treats heroin-dependent inmates with methadone, referring them to treatment programs upon release.

38. Bentley, *supra*, footnote 26, at p. 272.

39. *Ibid.*, at p. 269.

40. Van de Veen, *supra*, footnote 4, at p. 30.

41. Bentley, *supra*, footnote 26, at p. 265.

Development certificate, maintain employment, be current in all financial obligations, including drug court fees and child support payments and have a sponsor in the community.⁴²

(2) The Australian Drug Court Experience

Unlike the Canadian and American experience, in Australia drug courts have been largely created by statute or established by government using existing statutory provisions and significant budgets.⁴³ The first drug court in Australia was established in 1998 in New South Wales. Since then, drug courts have been established mainly in metropolitan areas such as Queensland, South Australia, Victoria and Western Australia, with the promise of expansion to regional areas upon successful completion of trials.⁴⁴ Early research on the drug court in New South Wales indicates that improvements have been found in measures of health, social functioning and drug use of participants and that the court is a more cost-effective means of reducing the rate of offending.⁴⁵

The success⁴⁶ of drug courts globally⁴⁷ has spread the problem solving model beyond the confines of drug offences. Both Canada and the United States have developed other specialized courts that deal with such issues as mental health, domestic violence and community justice, among others.⁴⁸

5. Domestic Violence Courts

Just as the need to re-examine the criminal justice system as it deals with drug cases is obvious to many stakeholders within the

42. "Looking at a Decade of Drug Courts", *supra*, footnote 24, at p. 4.

43. Freiberg in Michael S. King, "Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush" (2002), 26 *Criminal L.J.* 260 at p. 267.

44. King, *ibid.*, at p. 260.

45. Freeman in King, *ibid.*, at p. 264.

46. The success of drug courts in reducing rates of recidivism has been documented in the United States. See for example "Looking at a Decade of Drug Courts", *supra*, footnote 24. See also Steven Belenko, "Research on Drug Courts" (1998), National Drug Court Institute Review (The National Center on Addiction and Substance Abuse at Columbia University) 35. In Canada, drug treatment courts are still relatively new. Evaluation of the Toronto DTC will not be complete until June 30, 2004, but the preliminary research results for the first three years are encouraging. See Van de Veen, *supra*, footnote 4, at p. 33.

47. Drug treatment courts have also emerged in Glasgow and Kirkcaldy, Scotland.

48. Berman and Feinblatt, *supra*, footnote 6.

justice system, so too is the need to improve the handling of domestic violence cases. Absent from the traditional court process was an understanding of the complexities of domestic violence, especially the social and economic ties that bond victims to their abusers.⁴⁹ The problem solving response is to consider explicitly the special characteristics that domestic violence cases present, including these factors: (1) domestic violence does not involve violence between strangers; (2) victims under the influence of their abusers are isolated, particularly vulnerable and reluctant to prosecute; and (3) domestic violence is often repetitive.

In the United States there are now more than 300 courts that have special processing mechanisms for domestic violence cases.⁵⁰ In various locations within Canada more effective models for dealing with domestic violence cases are also being explored. One such model is the Domestic Violence Court in Calgary, which deals not only with spousal violence, but also assaults by parents against children and adult children against parents, including elder abuse.

Both American and Canadian domestic violence courts emphasize the development of a new attitude in dealing with the first reported incidence of domestic violence. Considerable emphasis is placed on early and prompt intervention in domestic violence cases because it enhances victim safety, sends a message to the defendant that the case is being taken seriously, and signals to the victims that their suffering will not be ignored.⁵¹ From a treatment perspective, it is also known that at the time of the first violent event, offenders are often remorseful. With the passage of time, excuses and the psychological state of denial set in.⁵²

(1) Victim Support

Domestic violence courts are designed to enhance victim safety and defendant accountability. Judges use their authority to make

49. Robyn Mazura and Liberty Aldrich, "What Makes a Domestic Violence Court Work?: Lessons from New York" (2003), 42 A.B.A.J. 5 at p. 5.

50. *Ibid.*, at p. 2.

51. *Ibid.*, at p. 4. See also Van der Veen, *supra*, footnote 4, at pp. 64-66.

52. Van de Veen, *ibid.*, at pp. 64-65.

victims feel welcome in the court, to express empathy for their injuries, and to mobilize resources on their behalf.⁵³ Because therapeutic jurisprudence proposes that judges be sensitive to the beneficial or harmful consequences that their actions and decisions have for the parties that come before them, it has been suggested that in sentencing domestic violence offenders excessive fines should be avoided.⁵⁴ Excessive fines can rarely be collected and typically money is simply taken away from much-needed family resources, which effectively penalizes the victim(s).

At the Brooklyn Felony Domestic Violence Court, complainants are given the choice of an advocate from either the attorney general's office or Safe Horizon, an independent victim advocacy organization. Both advocates provide identical services; however, advocates from the district attorney's office may be compelled to give the prosecutor information about the complainant even if she⁵⁵ does not want such information shared. The independent victim advocates have a greater flexibility to keep information confidential.⁵⁶ This arrangement is seen as taking advantage of the strengths of both systems without sacrificing the confidentiality of complainants.⁵⁷

By contrast, in Calgary's Domestic Violence Court, victims are provided with a caseworker from a non-profit society called The HomeFront Society for the Prevention of Domestic Violence. The independence of case workers is thought to be important to avoid the possibility of the perception of conflict of interest allegations, since Crown counsel and duty defence counsel are both employed by agencies within the Justice Department of the Government of Alberta.⁵⁸

53. Randal B. Fritzler and Leonore M.J. Simon, "Principles of an Effective Domestic Violence Court" (2000), 37 Court Review 28 at p. 31.

54. *Ibid.*

55. Domestic violence is certainly not limited to male-female relationships and is not always perpetrated by men. I have used "she" in order to refer to the complainant/victim and "he" to refer to the defendant for simplicity and in order to reflect the results of studies that show approximately 95% of domestic violence victims are female. See Mazura and Aldrich, *supra*, footnote 49, at p. 7.

56. *Ibid.*, at p. 3.

57. *Ibid.*

58. Van de Veen, *supra*, footnote 4, at p. 64.

Case workers are individuals with a social work background who ensure that complainants of domestic violence and their family members receive consistent support and resource information throughout the judicial process. The case worker forms an integral part of the domestic violence court team, which includes the Crown, probation, police and defence counsel. An important function of the case worker is the participation in pre-trial conferences, providing information pertaining to the complainant's circumstances and concerns.

In the Brooklyn Felony Domestic Violence Court, a complainant who chooses an independent advocate will presumably have her confidentiality guaranteed by solicitor-client privilege. In Canada, the confidentiality of complainants' records held by third parties, such as case workers, is governed by provisions in the *Criminal Code*⁵⁹ that allow for the disclosure of these records in certain situations. Thus, the case worker takes care not to gather evidence about the circumstances of the offence and not to bias the court to the complainant's perspective. The objective of the case worker is to enhance the information-sharing process by providing pertinent information regarding the complainant, the accused and other family members as part of the multi-disciplinary team-based approach to decision-making.⁶⁰

(2) Defendant Accountability

Authors have argued that despite the goal of defendant accountability, domestic violence courts in the United States are not targeted at rehabilitating offenders.⁶¹ Services are offered primarily to help victims achieve independence and include housing, job training and safety planning. The primary "service" offered to defendants is batterers' programs. In New York, these programs are used primarily as monitoring tools rather than as a therapeutic device and it is unclear whether these programs have the impact of deterring further violence.⁶²

59. See *Criminal Code*, ss. 278.1 to 278.91. See also Lise Gottell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the *Charter for Sexual Assault Law*" (2002), 49 *Osgoode Hall L.J.* 251. Gottell concludes that women's access to privacy rights in this context are frail.

60. Van de Veen, *supra*, footnote 4, at p. 75.

61. Mazura and Aldrych, *supra*, footnote 49, at p. 6.

62. *Ibid.*

An articulated objective of the Domestic Violence Court in Calgary is to hold the offender accountable for his behaviour through the imposition of legal sanctions and the provision of opportunities for treatment and rehabilitation.⁶³ A specialized Domestic Violence Probation Unit has been established to this end, which allows for closer monitoring of offenders who will typically be required to attend for assessment and to take such counselling or treatment as directed, including domestic violence counselling, addiction counselling and psychological counselling. Prior to the creation of the Domestic Violence Court, anger management was often the only type of counselling ordered. Treatment agencies, however, advised that while domestic violence counselling includes anger management, domestic violence is not only an anger management issue.⁶⁴ Whether these forms of treatment are successful in their rehabilitative potential for defendants remains to be seen upon further study.⁶⁵

Judges can however, use their authority to insist respectfully that offenders take responsibility for their violence and acknowledge the court's authority over their behaviour. Judges play a critical role in confronting "the perpetrator's cognitive distortions".⁶⁶ Distorted thinking on the part of the perpetrator includes minimizing or denying the violence and blaming the victim. Judges should be wary of accepting plea bargains or other compromises that allow offenders to escape responsibility for present and future acts.⁶⁷ "No contest" pleas in the American context⁶⁸ and peace bonds in the Canadian context reinforce distorted thinking by allowing the offender to avoid full responsibility for his behaviour. Involving the offender in contracting with the court to establish terms of orders can increase compliance and stress that domestic violence is chosen behaviour that "contrary

63. Van de Veen, *supra*, footnote 4, at p. 60.

64. *Ibid.*, at p. 77.

65. Because the court began in May 2000, extensive evaluations are not as yet available. For independent preliminary evaluations see Van de Veen, *supra*, footnote 4, at pp. 84-87.

66. Fritzler and Simon, *supra*, footnote 53, at p. 31.

67. *Ibid.*

68. William Schma, "Judging for a New Millennium" (2000), 37 Court Review 4.

to what the perpetrator has believed in the past . . . will not get him what he wants”.⁶⁹

6. Aboriginal Courts

(1) The Gladue Court

Another manifestation of problem solving courts are the specialized courts geared toward Aboriginal peoples. As noted earlier, the *Criminal Code of Canada* makes specific reference to curbing incarceration as a sanction for all offenders, but particularly Aboriginal peoples by requiring sentencing judges to consider all available sanctions other than imprisonment. Many reports have found that Aboriginal people are disproportionately represented in Canada’s prison population.⁷⁰ As the Supreme Court noted, “[t]he drastic over-representation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem”.⁷¹

In *R. v. Gladue*, a case involving an Aboriginal woman who entered a guilty plea to manslaughter after killing her common-law husband, the Supreme Court of Canada carefully considered the provisions of s. 718.2(e) of the *Criminal Code* and directed trial judges to take a restorative approach to justice in cases involving Aboriginal offenders.⁷² The court held there is a “judicial duty to give the provision’s remedial purpose real force”.⁷³

69. Fritzler and Simon, *supra*, footnote 53, at p. 31.

70. See generally *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queens Printer, 1991); *Royal Commission on the Donald Marshall, Jr. Prosecution* (Halifax: Queens Printer, 1989) and *Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996).

71. *Gladue*, *supra*, footnote 22, at p. 722.

72. In *R. v. Hamilton* (2003), 172 C.C.C. (3d) 114, 8 C.R. (6th) 215 (Ont. S.C.), it was held, seemingly appropriately, that s. 718.2(e) could be used to order conditional sentences of two black women charged with cocaine-related offences. The Court of Appeal for Ontario recently overturned this decision, noting that there is no evidence “to suggest that poor black women share a cultural perspective with respect to punishment that is akin to the aboriginal perspective”: *R. v. Hamilton*, [2004] O.J. No. 3252 (QL) at para. 99, 186 C.C.C. (3d) 129, 22 C.R. (6th) 1 (C.A.). The Court of Appeal for Ontario appears to construe s. 718.2(e) to require that the individual circumstances of an offender must be sufficiently similar to those of Aboriginal offenders and must point to a particular tradition of restorative justice in the accused’s ethnic, cultural or religious life in order to justify a similar sentencing approach.

73. *Gladue*, *supra*, footnote 22, at para. 93, subparagraph 3.

The need for the court to become aware of other sentencing alternatives in the case of Aboriginals caused Toronto judges to establish a special court called The Gladue (Aboriginal Persons) Court. Judges consulted with the Aboriginal community in Toronto to create this specially structured court, which deals specifically with Aboriginal offenders and provides judges with the information they require to carry out the directives from the Supreme Court decision in *Gladue*.⁷⁴

The objective of the court is to facilitate the trial court's ability to consider the unique circumstances of Aboriginal accused and Aboriginal offenders. The court treats all Aboriginal people, including status and non-status Indians, Métis and Inuit peoples. To assist the court, Aboriginal Legal Services of Toronto has designated court workers to deal with the initial problem of identifying Aboriginal people should they wish to be identified. Participation of an accused in the court is voluntary.⁷⁵

The Gladue Court hears bail hearings, bail variations (with Crown consent), remands and sentencing. Trials are not held in the Gladue Court. A distinguishing feature of the Gladue Court is that all persons working in the court, including prosecutors, duty counsel, case workers, defence counsel, probation and judges have the expertise and a particular understanding of the range of programs and services available to Aboriginal people in Toronto, and these services are linked to the court through the presence of Aboriginal Legal Services' court workers.⁷⁶

Both the Aboriginal court worker and the Gladue "Aboriginal person court case worker" play critical roles in the operation of the court by proactively securing residence beds for defendants when needed, and arranging any treatment resources. The Gladue Court worker provides critical information about the offender that aids the judge in crafting the appropriate sentence or helps to secure the offender's release on bail where appropriate. The sentencing report is designed to give the judge an understanding of the particular needs and circumstances of the Aboriginal defendant. It is an essential part of examining the underlying causes of the criminal behaviour, and forms part of

74. Van de Veen, *supra*, footnote 4, at p. 17.

75. *Ibid.*, at p. 47.

76. *Ibid.*, at pp. 49-50.

the special effort made at the Gladue Court to implement sanctions that are appropriate given the broader systemic context in which Aboriginal peoples have come into contact with the criminal justice system. The court is designed to take the necessary time to deal with Aboriginal cases and the pace of the court recognizes that it may require a more detailed and time-consuming examination of the causes of the criminal behaviour in order to satisfy the court's mandate of inquiring into alternatives to imprisonment.⁷⁷

(2) The Tsuu T'ina Court and the Peacemaking Initiative

In addition to the Gladue Court, which is a large urban response to the directive of the Supreme Court of Canada, smaller peacemaking initiatives are also found in Canada. The Tsuu T'ina Peacemaking Initiative and Court is one example of a problem solving process that is physically on reserve property and that incorporates Aboriginal culture and resources within a specific, relatively small Aboriginal community.⁷⁸

In October 2000, a Provincial Court with jurisdiction over criminal and youth matters was established on the Tsuu T'ina Reserve adjacent to Calgary, Alberta. The judge, prosecutor, court clerks, court workers and probation officers of the court are all Aboriginal people. Some defence counsel are also Aboriginal. The protocols of the court reflect Tsuu T'ina traditions. Among other things, the court opens with a smudge ceremony and includes burning of sage or sweet grass signifying a prayer for help from what the Aboriginal people understand to be the Great Spirit. Outward appearances are important, as they help the people of the community recognize the court as their own system of justice designed to bring about peace and order.⁷⁹

At the first appearance on criminal charges the case is adjourned to assess whether the case will be accepted into the Peacemaking Program, a determination that is made by the peacemaking co-ordinator and is dependent on the accused's willingness to participate in the peacemaking.⁸⁰

77. *Ibid.*, at p. 50.

78. *Ibid.*, at p. 51.

79. *Ibid.*, at p. 41.

80. *Ibid.*

A powerful tool utilized by the court in accordance with Aboriginal tradition is a peacemaking circle used for the rehabilitation of offenders, the restoration of relationships, and healing. At the peacemaking circle, each person is given an opportunity to speak uninterrupted while all other participants listen. Each person is given this opportunity more than once. The first time each person speaks, they address the events that occurred. The second time around the circle, each person speaks about how they were personally affected by what occurred. The third time around the circle, each person speaks about what should be done. The process may be time-consuming but it continues until it is clear what should be done. The fourth time each person speaks they speak about what is agreed. The entire circle procedure may take from two hours to two days, but the majority are concluded within an afternoon. Typically the judge is not present during these peacemaking proceedings. Upon the conclusion of the circle, the offender signs an agreement to carry out whatever has been decided by the peacemaking circle.⁸¹

After the final peacemaking circle has been held the matter is returned to court. The Peacemaking co-ordinator reports on what has been completed by the offender. The Crown prosecutor then assesses whether the charge can be withdrawn, depending upon the seriousness of the charge and whether the peacemaking circle outcome is an appropriate consequence. If the charge is not withdrawn, the prosecutor agrees to have the peacemaking report as part of the information the court ought to consider in the sentencing process. Hence the peacemaking process has a great deal of relevance to the final resolution of the case.⁸²

An important part of the process is the final peacemaking circle, which is held after the offender has completed the tasks he or she has agreed to perform. At this circle there is a ceremony that celebrates the completion of the tasks. This is reminiscent of the graduation ceremonies held in Drug Treatment Courts, which also celebrate the success of the offender in a different context, but have a restorative aspect from community and offender perspectives.

81. *Ibid.*, at pp. 42-43.

82. *Ibid.*, at p. 42.

(3) The Peacemaking Principles of the Courts of the Navajo Nation

In the United States, the courts of the sovereign Navajo Nation came into existence on April 1, 1959. The Navajo trial courts have general civil jurisdiction and limited criminal jurisdiction. Navajo civil jurisdiction extends to all persons (Indian and non-Indian) who reside in Navajo Indian Country or have caused an action to occur in Navajo Indian Country. The Navajo courts' criminal jurisdiction applies to Indians only and extends to all crimes codified in the Navajo Nation Code along with its terms of punishment.⁸³

The Navajo Nation has developed a *Uniform Sentencing Policy* that also uses the concept of peacemaking, described by Chief Justice Robert Yazzie as "talking things out in a good way". Like the Tsuu T'ina peacemaking initiative, the process of peacemaking at the Navajo Nation is nothing short of rigorous. The Navajo Nation sentencing policy provides for peacemaking before a charge is filed, after one is filed, before sentencing and after sentencing.

Chief Justice Robert Yazzie has described the peacemaking process in this way:⁸⁴

The procedure is fairly simple. First, there is a traditional prayer to put people in the right frame of mind for the talking out. Often, a peacemaker will choose an elder to say it. Then, everyone has their say about what happened. They also have their say about how they *feel* about what happened. We like to say that the most important piece of paper in the procedure is the tissue, and emotions are on the table. Opinion evidence is freely allowed, within the bounds of saying things in a respectful way. After all that is done, there is "the lecture." That means that it is time for the peacemaker to do some teaching. The peacemaker will relate parts of the *Hajine Bahane*, our creation lore, and apply it to the problem. The old "stories" are actually a form of precedent which everyone respects . . . Finally, based upon the prayer, venting, discussion, and knowledge of the traditional way of doing things, the people themselves usually reach a consensus decision about what to do. Planning is actually a central Navajo justice concept, and the people plan a very practical resolution to the problem. Today, we put it in writing and the parties sign it.

83. The Navajo Nation, online at <<http://www.lapahie.com/Courts.cfm#Intro>>.

84. Chief Justice Robert Yazzie, "The Navajo Response to Crime" (Lecture presented to The American Judicature Society, November 1997) at pp. 2-3, online at <<http://www.american.edu/academic.depts/spa/justice/publications/navajo3.htm>>.

Both the Navajo Nation and Tsuu T'ina systems emphasize the important roles and responsibilities of the families of both the offender and the victim.⁸⁵ Family members for both the offender and victim may be involved in the peacemaking process. So may community and resource people such as addiction workers or other resource agency personnel. A peacemaking circle may have anywhere from 5 to 25 people participating.⁸⁶

The obvious strength of the Tsuu T'ina Court and the Navajo Nation courts is that these courts are established by the community to suit its culture. The courts take place within the physical boundaries of the community and employ Aboriginal people whom the community can relate to and trust. The courts and the peacemaking initiatives are designed to restore peace and order within the community through the restoration of relationships between members of the community affected by the criminal activity and the offender.⁸⁷

These courts exemplify the underlying principles of therapeutic jurisprudence and restorative healing in that they are intent upon dealing with the root causes of the criminal activity, offering treatment and counseling where needed in the case of both victims and accused persons.

(4) The Geraldton Alternative Sentencing Regime

An interesting application of therapeutic jurisprudence exists in regional Western Australia, an area with a significant Aboriginal population.⁸⁸ The Geraldton Alternative Sentencing Regime (GASR) provides an alternative sentencing option for the court in dealing with drug, alcohol and other offender-related problems. Accused persons in criminal proceedings may choose to participate in a holistic program that attempts to address all the factors that underlie and may contribute to the offending behaviour. The court process, which includes a team-based approach and judicial management of offenders, is utilized to promote the psychological and physical well being of participants.⁸⁹

85. *Ibid.*, at p. 2.

86. *Ibid.*

87. Van de Veen, *supra*, footnote 4, at pp. 44-45.

88. King, *supra*, footnote 43, at p. 261.

89. *Ibid.*, at pp. 260-64. See also Van de Veen, *supra*, footnote 4.

The GASR permits adjournment of a case for up to six months in order for the accused to participate in a treatment regime that can include stress reduction and transcendental meditation.⁹⁰ The program is available to both accused who have entered guilty pleas and those who have not, “the rationale being that often accused persons are at risk of re-offending if left without treatment”.⁹¹

“The concept of assessing accused for treatment of underlying problems which contribute to recidivism, without categorizing the case, may be worth considering in both large and small jurisdictions.”⁹² The growing number of “hybrid courts”⁹³ indicates that there are often overlapping problems between problem solving courts. For example, alcohol and drug abuse or mental health issues can be root contributing causes to the violence in domestic assault cases. The GASR’s attempt to address the sometimes multiple contributing causes of offending behaviour may well provide an increasingly effective alternative to traditional sentencing options.

7. Mental Health Courts

The emergence of specialized courts geared toward serving people with mental health issues stems from the view that the criminal behaviour of mentally ill people is a health issue rather than a criminal law matter. Because the criminal justice system has been established to protect society from persons whose *intentional* behaviour violates the criminal law,⁹⁴ the fact that the number of people with mental illness in the criminal justice system has increased steadily in both the United States and Canada is cause for concern.⁹⁵

Prisons are not typically institutionally equipped, trained or staffed to address the treatment needs of people with mental illness.⁹⁶ Detrimental to defendants with mental illness is that in

90. King, *supra*, footnote 43, at p. 261.

91. Van de Veen, *supra*, footnote 4, at p. 101.

92. *Ibid.*

93. Rottman, *supra*, footnote 27, at p. 25.

94. *Ibid.*, at p. 20.

95. Derek Denckla and Greg Berman, “Rethinking the Revolving Door: A Look at Mental Illness in the Courts” (Center for Court Innovation, 2001), at p. 2, and Van de Veen, *supra*, footnote 4, at p. 19.

96. *Ibid.*, at p. 3.

the traditional court system they are not treated in a manner that appropriately takes into account their illness — in fact, they are treated just like any other defendant.⁹⁷

The principles of therapeutic jurisprudence have infiltrated court processes that treat the mentally ill in several parts of the world. For example, in Australia's Magistrates' Court in Adelaide a mental impairment court was created in 1999. This is not a separate court but a division of the Magistrates' Court that specializes in particular problem areas or jurisdictions with designated sitting days, support staff and services.⁹⁸ In England and Wales, a therapeutic jurisprudence approach has been thought to be particularly relevant to the Mental Health Review Tribunals through which a patient has the right to question the legitimacy of his or her detention.⁹⁹

(1) Toronto's Mental Health Court

A mental health court was established in Toronto in 1998¹⁰⁰ to deal with mentally ill accused who were in custody and whose fitness to stand trial was to be determined prior to the criminal charge proceeding. In Toronto's Mental Health Court, great effort is made to improve the treatment of the mentally ill who encounter the criminal justice system through the availability of forensic psychiatrists, on-site duty counsel and mental health court workers. A main advantage of the court is its physical proximity to adjoining holding cells and office space, which allow psychiatrists, social workers, lawyers and families access to the prisoner, who can be isolated from the mainstream of offenders. Instead of the usual atmosphere of a large remand institution with a substantial population of prisoners charged with varying degrees of criminal activity, a health-oriented atmosphere is created.¹⁰¹

Forensic psychiatrists are available in the court five days a week. When there are reasonable grounds to believe that an

97. *Ibid.* and Van de Veen, *supra*, footnote 4, at p. 20.

98. Freiberg, *supra*, footnote 25, at p. 10.

99. Nicola Ferencz and James McGuire, "Mental Health Review Tribunals in the UK: Applying a Therapeutic Jurisprudence Perspective" (2000), 37 *Court Review* 48 at p. 51.

100. Van de Veen, *supra*, footnote 4, at p. 19.

101. *Ibid.*, at pp. 21-23.

accused may be unfit to stand trial the person is remanded into the court, where a psychiatrist can examine him or her the same day, thus eliminating the typical eight-day delay in remand. This is a marked departure from the traditional system where a shortage of hospital beds resulted in accused persons needlessly being held in custody rather than being assessed immediately.¹⁰² Similarly, the court has on-site duty counsel to provide immediate legal advice to mentally ill accused so that the matter can be more expeditiously handled, avoiding delays during which the accused may remain in custody.¹⁰³

One of the most important components of the court is the on-site presence of mental health court workers who provide extensive assistance to the accused. Health court workers are social workers with special knowledge of the mental health and social services available in the community and their role is to ensure the accused person is appropriately directed to these services. They assist the accused in contacting referral agencies and even assist the accused in getting to scheduled appointments. Their involvement increases the level of compliance with treatment and with court orders.¹⁰⁴

The court creates a non-adversarial atmosphere. Rules of evidence, procedure and court room etiquette are relaxed. People who are both competent and interested in dealing with mentally disordered people are utilized in all parts of the court process. The dialogue concerning each case includes family members as well as the accused in recognition of the fact that family members are often the only ones who have the pertinent information about the accused that will be required by the court.¹⁰⁵

(2) Mental Health Courts in the United States

The first mental health court in the United States opened in June 1997 in Broward County, Florida.¹⁰⁶ There are many points of entry into this court, but primarily candidates are identified during intake by jail staff within 24 hours of arrest.

102. *Ibid.*, at p. 22.

103. *Ibid.*, at p. 24.

104. *Ibid.*, at pp. 23-24.

105. *Ibid.*, at pp. 21-22.

106. Denckla and Berman, *supra*, footnote 95, at p. 7.

Accused are screened by jail psychiatrists, and then again by clinicians from the public defender's office, and if symptoms of mental illness are found, the defence attorney will inform a magistrate presiding over the bail hearing, who will then refer the case to the Mental Health Court. The judge of this court will recommend pre-adjudication diversion into treatment. The judge will monitor defendants in treatment for up to one year. The length of judicial supervision and level of treatment vary depending on the treatment needs of the individual defendant.¹⁰⁷

For defendants who agree to participate in treatment diversion, the state's attorney may either dismiss charges immediately or hold prosecution in abeyance, depending on the seriousness of the offence. Upon completion of the treatment, the charges held in abeyance will be dismissed or reduced. Certain defendants with serious criminal histories may be required to plead guilty and get credit for time served in treatment in lieu of incarceration.¹⁰⁸

Several other mental health courts now exist in the United States. Generally, mental health courts have been planned and overseen by interdisciplinary teams composed of a variety of criminal justice and behavioral health stakeholders. Participation in mental health courts is voluntary. Defendants must opt in to receive treatment. One challenge for the system is that many mentally ill accused may decide not to participate in the mental health court programs because treatment lasts a minimum of one year, a much longer time than would be spent in jail.¹⁰⁹

Mental health court practitioners in the United States struggle with the issue of whether it is ever appropriate to use jail as a sanction for defendants who fail to take their medications or participate in treatment: "In drug court, there's a certain logic to sending offenders to jail for dirty urine because they're violating the law. When a mentally ill defendant stops taking his medication, he may have violated the court's order, but no law has been broken."¹¹⁰ It is too early to tell if mental health courts are achieving the goal of reducing recidivism of participating defendants.¹¹¹ That mental health courts treat the mentally ill

107. *Ibid.*, at p. 8.

108. *Ibid.*

109. *Ibid.*, at p. 10.

110. *Ibid.*, at p. 13.

111. *Ibid.*, at p. 10.

more humanely, however, is without a doubt and one of its greatest strengths.

8. Applying Therapeutic Jurisprudence Outside the Realm of Specialized Courts

Though the problem solving model has seen a proliferation of specialized courts as a means of addressing the underlying socio-legal needs of participants in the justice system, there is certainly nothing preventing judges from using the principles of therapeutic jurisprudence in existing court systems to better meet the needs of accused persons. David Rottman has warned that it is crucial to recognize the potential application of therapeutic jurisprudence generally.¹¹² He notes that in the United States the new generation of specialized courts proliferated in an era of particularly generous funding for criminal justice and an extraordinarily robust economy. "One of the defining features of the new specialized courts is the ease with which they can be dismantled."¹¹³ An economic downturn could prove fatal to specialized courts.¹¹⁴

Perhaps the greatest contribution that specialized courts can make is as agents of change beyond a mere few courtrooms. There is great potential for a natural process of diffusion in which drug treatment court and other special court judges take the benefit of their experience with them when they return to civil and criminal dockets.¹¹⁵ Perhaps the most basic and informal level at which judges and courts communicate respect for defendants is by "treating them in the round"¹¹⁶ and interacting with them as individuals.

Some applications of therapeutic jurisprudence in traditional courtrooms are based on common sense. One example is speaking in simple terms. Offenders are more likely to comply with an order or sentence if they understand what they are being told. Small claims courts "probably work a therapeutic effect . . . when black-robed judges take the time to listen to plaintiffs and

112. Rottman, *supra*, footnote 27, at p. 26.

113. *Ibid.*, at p. 23.

114. *Ibid.*, at p. 24.

115. Chase and Hora in Rottman, *supra*, footnote 27, at p. 26.

116. Fritzler and Simon in Rottman, *ibid.*, at p. 27.

defendants explain their sides of a dispute".¹¹⁷ David Wexler, in his work in the area of health care compliance, has also suggested the use of "behavioral contracts", in which the offender enters into an agreement to follow certain protocols. For example, a judge deciding whether to grant probation could conceptualize the conditional release not simply as a judicial order but as a type of behavioral contract where the offender's involvement and participation are an integral part of the process. Where the hearing for such an offender serves as a forum of public commitment, that perhaps even family members may attend, compliance is likely to be enhanced.¹¹⁸

The therapeutic effectiveness of judicial praise as a technique to further defendant compliance has been documented and endorsed by many in the judicial community. The empowering effects of graduation ceremonies, applause and even judicial hugs have become commonplace in many drug courts.¹¹⁹ One judge has commented:¹²⁰

You may be thinking, as I did when a colleague of mine told me about this [type of] reward, this is too hokey! It is not. I have seen men who have done state prison and women who have been selling their bodies for years glow in response to positive recognition before their peers.

The lessons from drug treatment courts can and should be extended to ordinary criminal cases. At the successful completion of a period of probation, for example, judicial praise, family and friend attendance and/or a graduation ceremony can easily form part of a "routine" criminal proceeding.¹²¹ Judges should consider taking such action even when all is going well and they are not especially worried about an offender's compliance, for such a hearing could recognize and applaud an offender's efforts and itself contribute to the "maintenance of desistance".¹²²

Even in the realm of appellate court adjudication there is room for the general application of therapeutic jurisprudence. Because appellate courts are final decision-makers that not infrequently share their reasoning, they are in a position to be able to

117. Rottman, *ibid.*

118. David B. Wexler, "Robes and Rehabilitation: How Judges Can Help Offenders 'Make Good'" (2001), 37 *Court Review* 18 at p. 19.

119. *Ibid.*, at p. 21. See also Anderson, *supra*, footnote 32, at p. 3.

120. Anderson, *ibid.*, at p. 3.

121. Wexler, *supra*, footnote 118, at p. 21.

122. *Ibid.*, at p. 22.

“minimize damage” and engender therapeutic consequences.¹²³ Nathalie Des Rosiers, President of Canada’s Law Reform Commission, has written persuasively about the use of language in written decisions. Her study of two judgments rendered by the Supreme Court of Canada compares and evaluates the way in which language that reflects the parties’ positions better serves the concept of justice.¹²⁴

In her examination of the *Quebec Secession Reference Case*,¹²⁵ in which the Canadian federal government asked the Supreme Court to rule on the constitutionality of a unilateral Quebec secession, Des Rosiers argues that the court’s judgment can be viewed as therapeutic¹²⁶ for a variety of reasons. First, the court gave value to the continuity of the relationship between Quebec and the rest of Canada, emphasizing, as problem solving courts do, the future over the past. Secondly, in its reasoning, the court acknowledged the complexity of the issue. Despite the fact that the court held Quebec did not have the right under the Canadian constitution or at international law to unilaterally secede, the tone of the narration was sympathetic to Quebec’s interests. Quoting a famous Quebec proponent of confederation, George-Étienne Cartier, the court used Quebec’s own narrative and history to acknowledge and celebrate its existence. The decision framed the discourse in a way that squarely addressed the potential for change. It did not resolve the issue, but it allowed “for the debate without shutting up one participant”.¹²⁷ The result was that both sides, the Quebec separatists and the spokespersons for the federal government alike, cheered.¹²⁸

9. The Unique Role of Judges in Applying Therapeutic Jurisprudence

The rise of therapeutic jurisprudence in specialized courts and beyond raises interesting questions with respect to the role of

123. Ronner, *supra*, footnote 1, at p. 64.

124. Nathalie Des Rosiers, “From Telling to Listening: A Therapeutic Analysis of the Role of Court in Minority-Majority Conflicts: (2000), 37 Court Review 54.

125. *Reference re: Secession of Quebec*, [1988] 2 S.C.R. 217, 161 D.L.R. (4th) 385, 51 C.R.R. (2d) 1.

126. Des Rosiers, *supra*, footnote 124, at p. 54.

127. *Ibid.*, at p. 62.

128. Robert Young in Des Rosiers, *ibid.*, at p. 54.

judges. The judicial role has been transformed from detached, neutral arbiter to the central figure in a team, which in the drug court context focuses on the participants' sobriety and accountability. The judge has been described as "both a cheerleader and stern parent, encouraging and rewarding compliance, as well as attending to lapses".¹²⁹ Some critics have argued that problem solving judges are simply glorified social workers:¹³⁰ "Judges are a bizarre amalgam of untrained psychiatrists, parental figures, storytellers and confessors."¹³¹

For many judges this "new cultural reality"¹³² may seem counter-intuitive. For example, a team-based approach to decision-making requires a judge to abdicate sole responsibility in determining the outcome of a case. Similarly, a harm reduction approach to drug offences insists that judges not apply a strict interpretation of the law, but find innovative ways of treating an illness that has incidental criminal consequences. Though some suggest that "therapeutic jurisprudence is what good judges do anyway on a daily basis",¹³³ it may be that a traditional legal background alone is ineffective training for judges playing an active role in the problem solving process that requires in addition to analytical skills and legal knowledge, effective communication and creative thinking. That judges are being pushed to unprecedented extremes with new responsibilities raises the question of whether all judges are capable of fulfilling these new roles. "New forms of judging may require new forms of judges or changes in their training or qualifications."¹³⁴

10. The Independence of the Judiciary

Problem solving courts also raise concerns with respect to the independence of the judiciary. The constitutional principles that require judges to be independent and separate from other branches

129. Deborah J. Chase and Peggy Fulton Hora, "The Implications of Therapeutic Jurisprudence for Judicial Satisfaction" (2000), 37 Court Review 12.

130. See Greg Berman and John Feinblatt, "Beyond Process and Precedent: The Rise of Problem Solving Courts" (2002), 41 Judges' Journal 6.

131. Morris B. Hoffman, "Therapeutic Jurisprudence, Neo-Rehabilitism and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous" (2002), 29 Fordham Urb. L.J. 2063 at p. 2066.

132. Zimmerman in Schma, *supra*, footnote 68, at p. 6.

133. Fritzler and Simon, *supra*, footnote 53, at p. 31.

134. Freiberg, *supra*, footnote 25, at p. 20.

of the government are, some argue, being jettisoned for a new therapeutic approach that is inimical to the judicial function.¹³⁵

The therapeutic jurisprudence movement requires us to become the kind of involved, hands-on, right-thinking, sure-footed activists that the judicial branch was specifically designed to exclude. It requires us to accept, in a collective fashion entirely inconsistent with the fierce independence of the judiciary, a therapeutic paradigm that is not only a matter of public policy but about which reasonable public policy makers differ.¹³⁶

As judges become involved in initiating problem solving courts and activities that include organizing, convening meetings and lobbying, are they infringing upon the territory of the executive branch of government?¹³⁷ It has been argued that if governments want judges to deal more effectively with certain issues then legislation ought to be passed to direct this to be done. It is not for judges to make policy decisions and to use their positions in order to bring about such change. On the other hand, it has also been suggested that judges are simply utilizing the discretion they have traditionally been granted in order to craft more meaningful sentences.¹³⁸

As judges solicit the wisdom of social scientists, researchers and professional treatment providers, are they more likely to become engaged in *ex parte* communications? Judge Hoffman has noted that problem solving court processes force judges “to collaborate with prosecutors, defense lawyers and therapists in a fashion that is entirely inconsistent”¹³⁹ with the adjudicative role. By contrast, Judge Van de Veen has noted that knowledge about any specialty merely enhances the work of a judge, providing insights and the ability to ask questions and consider potential issues in a more educated way.¹⁴⁰ She also notes that the adjudicative process of problem solving courts tends to be traditional in its maintenance of a formal legal framework.¹⁴¹ It is the

135. Hoffman, *supra*, footnote 131, at p. 2084.

136. *Ibid.*, at p. 2088.

137. Sherry L. Van de Veen, “Re: Problem Solving Courts — Critiques, Tensions and Issues”, National Judicial Institute Internal Memorandum (November 20, 2002) at p. 5. See also Hoffman, *supra*, footnote 131, at p. 24.

138. *Ibid.*

139. Hoffman, *supra*, footnote 131, at p. 2088.

140. Van de Veen, *supra*, footnote 137, at p. 4.

141. *Ibid.*

post-adjudication process that is different, where judicial supervision of the accused in ongoing meetings with the judge and others may be held out of court.

11. Conclusion

There is little doubt that problem solving courts and the underlying theory of therapeutic jurisprudence have revolutionized the workings of the criminal justice system. These effects have been felt in the United States and increasingly in Canada and globally. The problem solving model seeks to deal more effectively with the underlying factors causing criminal behaviour. Certain socio-legal problems including the use of illegal drugs and domestic violence have been dealt with through the use of specialized courts. These courts have also serviced particular groups including Aboriginal people and the mentally ill.

The principles of therapeutic jurisprudence, however, can and should also be used beyond the borders of specialized courts in everyday trial processes and appellate courts. Though critics of problem solving courts have cautioned against the newly intrusive role of judges and its impact on the independence of the judiciary, the problem solving model has shown signs of being a valuable agent of change. It is perhaps too early to tell how successful problem solving courts have been in transforming the way we think about courts and the results we expect them to achieve, but there is little doubt that they offer a ray of hope to ending “revolving door justice”, where the same defendants are recycled through the court system again and again.¹⁴²

142. Berman and Feinblatt, *supra*, footnote 130, at p. 6.