

## **Beyond supervision: Judicial involvement in offender management**

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*'Anyone new to drug court would be astonished by its informality, where the center stage is fully accorded to the judge...Drug court offers a different approach, with the judge becoming more than a stylistic figure. He or she will frequently engage in a dialogue with the offender...These inclusive personal contacts can produce affection and loyalty from some offenders; they will often say, with admiration, that no other judge has ever bothered to discuss with them the details of their personal lives' (Bean, 2002, p. 236).*

### **Introduction**

The task of supervising and managing offenders subject to court orders in the community has traditionally fallen to probation officers or social workers, with sentencers having a limited role once an order has been made. Since the introduction of the first drug courts in the USA more than 20 years ago, there has been a growing interest internationally in the capacity of 'problem-solving courts' to help bring about and support changes in offenders' circumstances and behaviour. A distinctive feature of problem-solving courts is the active involvement of the sentencing judge in reviewing the progress of offenders subject to community supervision and adapting the content of supervision accordingly. Empirical studies of drug courts suggest that the role of the sentencing judge may have a positive impact upon offenders' compliance and behaviour, with this being attributed to enhanced perceptions of procedural justice and, as a consequence, heightened judicial legitimacy (Mclvor, 2009). However, despite recent legislative and policy developments in the UK that allow for a greater role for sentencers in offender management, judicial involvement of this type has also attracted criticism on both legal and professional/therapeutic grounds. This chapter therefore considers the advantages and disadvantages of an enhanced role for sentencers in the management of offenders subject to community sanctions and the implications for their contribution to effective offender supervision.

### **The emergence of specialist courts and therapeutic jurisprudence**

The concept and practice of sentencer involvement in offender management has its roots in drug courts and other problem-solving courts which were first introduced in the United States and are now established across a number of jurisdictions (including the UK, Canada, Australia, Norway, Ireland and New Zealand: see Nolan (2009) for a comparative analysis) . Drug courts were established initially in the United States in the late 1980s, initiated by sentencers who were frustrated at the limited range and effectiveness of existing criminal justice measures for dealing with drug-related crime. The impetus for the establishment of drug courts in North America came from a growing acknowledgement of the link between drug misuse and crime along with increasing evidence of the efficacy of drug treatment, including treatment that is compelled rather than undertaken on a voluntary basis (e.g Hough, 1996; Gebelein, 2000; and, more recently, McSweeney et al., 2007). Operationally, drug courts vary across jurisdictions, but all are designed to reduce drug use and related offending by combining drug treatment with ongoing supervision and court-based review.

An important impact of the drug court 'movement' was the impetus that these courts provided to the development of other forms of specialist, problem-solving courts. These include domestic abuse courts, mental health courts, disability courts (for offenders with learning difficulties or 'cognitive disabilities'), community courts (which adopt a community-focused problem-solving approach to local crime) and re-entry courts (which aim to support

the resettlement of prisoners in the community after a prison sentence). In problem solving courts judges adopt a different role through the active reviewing of offenders' progress and court-based dialogue where 'the empathic connection between the judge and client is a central focus of the courtroom drama' (Nolan, 2001, p.99). According to Bakht (2004, p. 32) in problem-solving courts 'the judicial role has been transformed from a detached, neutral arbiter to the central figure in a team', reflecting what Nolan (2001. p. 93) refers to as the emergence of the 'romantic judge' (see also Boldt and Singer, 2006) who is characterised by 'judicial boldness, energy and compassion'. While Maruna and LeBel (2003, p.100) observe that 'rewarding positive achievements rather than punishing violations is an unusual role for the courts' (Maruna and LeBel, 2003, p. 100), Saum and Gray (2008) point out that offenders also take on a new role through the requirement that they become active participants in the problem-solving process.

Drug courts – and other problem-solving courts – represent an approach to criminal justice processing that has been termed 'therapeutic jurisprudence' (Wexler and Winick, 1992) and which refers to the capacity of legal processes and procedures (including the actions and approaches of criminal justice professionals) to have therapeutic or anti-therapeutic outcomes. Therapeutic jurisprudence emerged in the USA in relation to mental health law in the 1980s with mental health courts founded specifically on therapeutic jurisprudence principles. It was subsequently 'adopted' as a justifying principle by drug courts (Casey and Rottman, 2000) which represented its first systematic and widespread use in the USA (Hora and Schma, 1998). Under traditional court models, rehabilitation may be an aim of criminal justice processing but within a model of therapeutic jurisprudence it is intrinsic to the process. A key question for therapeutic jurisprudence is 'whether the law's antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values' (Wexler and Winick, 1996, p. xvii).

The concept of therapeutic jurisprudence has been embraced to varying degrees by legal professionals in different jurisdictions. As Nolan (2009) notes, support for the approach is particularly strong among problem-solving courts in North America and in Australia where, for example, magistrates in Western Australia unanimously resolved to apply the principles of therapeutic jurisprudence in their courts (King and Wager, 2005). In the UK, by contrast, judges in problem-solving courts would not necessarily describe their practice as being influenced directly by principles of therapeutic jurisprudence (Nolan, 2009), though it is clear that the concept has underpinned judicial involvement in offender management at least implicitly. As one Scottish drug court sheriff commented, review hearings represented the point where the 'the legal side of things melds with the non-legal, sort of therapeutic side of things'. As 'the process which joins the two together', reviews could be conceptualised as 'the nexus between the two aspects of the approach'. (McIvor, 2009, p. 38).

Writing from an Australian perspective, King and Wager (2005, p. 32) describe the role of the judge in a therapeutic jurisprudential approach as 'motivating rather than intimidating. It is emphasising the standing and authority of the judge or magistrate rather than the judge or magistrate's power to impose sanctions'. However, in the context of problem-solving courts, the judge will also sanction offenders which may ultimately result in a short period of time in prison. According to Burns and Peyrot (2003), the interactions that take place in drug courts, can be construed as a form of 'tough love' in which the threat of incarceration is held over the offender by the 'therapist-judge' (p. 418). In a similar vein, the 'carrot and stick' approach that characterises judicial supervision was described by a Scottish drug court sheriff as a 'Sword of Damocles' (Eley et al., 2002, p. 54). Maruna and LeBel (2003), in their discussion of re-entry courts in the USA, question whether punitive and therapeutic approaches can be easily reconciled. As they observe 'the history of crime control in the 20th Century suggests that when both tools (the therapeutic and the punitive) are available, the latter will almost always win out or at least undermine the former' (p. 96).

Casey and Rottman (2000) have argued that the rights perspective has dominated the administration and provision of justice in North America and that this may have contributed to a growing schism between the courts and the public. They suggest that therapeutic jurisprudence may help to bridge the gap between the 'rights' perspective (which focuses on justice, equality and legal decision-making and which represents a masculine ideal of masculinity) and the 'care' perspective (which reflects a feminine model of compassion and responsiveness to needs).

Therapeutic jurisprudence has, however, been acknowledged even by its proponents to lack precise definition and to be 'time-consuming, interdisciplinary, and inexact' (Casey and Rottman, 2000, p. 454). This 'vagueness' or lack of theoretical coherence of which therapeutic jurisprudence has been accused (Mackenzie, 2008) has been said to result in difficulties in measuring its operation in practice with the result that relatively little is known about how particular practices affect individuals and how the characteristics of individuals themselves modify or shape the problem-solving process (Casey and Rottman, 2000). Therapeutic jurisprudence can therefore be more appropriately conceived of as a set of organising principles (McIvor, 2009) or an 'interpretive lens' (Nolan, 2001, p. 186).

### **Developments in the UK**

In the UK, sentencers have traditionally had limited involvement with community orders once they have been imposed unless the order is breached and the offender is brought back to court. Provision for sentencers to periodically review community orders was first introduced by the 1998 Crime and Disorder Act in the context of Drug Treatment and Testing Orders (DTTOs). DTTOs, which drew upon the US Drug Court model, included provision for sentencers to take an active role in reviewing the progress of offenders on orders by bringing them back to court on a regular basis (or, alternatively, scrutinising progress through paper-based reviews).

DTTO schemes were introduced in England in 1998 in three pilot sites (Turnbull et al., 2000), and in 1999 and 2000 respectively in two Scottish pilot sites (Eley et al., 2002). The English pilots varied in terms of how successfully they had been implemented. With respect to judicial review, practice was variable across the pilot sites in terms of both frequency and the degree of judicial continuity across successive reviews (Turnbull et al., 2000). In the Scottish pilots, despite some differences across the two sites in terms of how reviews were conducted (in Fife the provision for in-chamber reviews was interpreted literally by sheriffs who usually conducted face-to-face reviews with offenders in chambers), the review process was believed on the whole to work well, with continuity of sentencer being achieved in most cases and offenders reporting that reviews helped to keep them 'on their toes' (Eley et al., 2002).

DTTOs were not, however, without their critics. For example, although DTTOs were informed by the drug court model that had evolved in the USA, Bean (2002) described them as 'watered down' versions of Drug Courts because they did not allow for the development of the co-ordinated multi-professional team approach – with the judge as 'team leader' - that characterised drug courts in other jurisdictions. In a similar vein Turnbull et al. (2000, p. 5) observed in that 'the role of US sentencers in drug courts approximates far more to that of 'case manager'. This, coupled with a sentencing ideology that emphasises reward as well as punishment, distinguishes drug courts from the DTTO pilot sites.'

Two years into the DTTO pilot, the Scottish Executive rolled out DTTOs nationally and established pilot drug courts at the DTTO pilot sites in Glasgow and Fife. The Scottish drug courts shared many features in common with those in other jurisdictions including integration of substance misuse treatment with criminal justice processing; the use of a non-adversarial

approach; early identification of eligible participants with rapid access to treatment; a coordinated approach by sentencers, prosecution, defence and treatment providers to secure compliance by participants; ongoing judicial review of participants' progress; and partnerships with other relevant agencies to provide ongoing support for participants (Mclvor et al., 2006a). They targeted repeat offenders whose offending was directly related to their dependence on or propensity to use drugs and who were at immediate risk of a custodial sentence. They were located within the sheriff summary courts, presided over by two sheriffs in Glasgow and one in Fife whose role in review hearings was to motivate, encourage and sanction the offender depending upon progress made. As Mclvor (2009) notes, the dialogues that took place in the context of drug court reviews were viewed as a key feature of the drug court process by professionals and offenders alike.

A significant element of the Scottish drug courts which has not been replicated in other specialist /problem-solving courts in Scotland – the youth courts (Mclvor et. al., 2006b) and domestic abuse court (Reid-Howie Associates, 2007) - or in the dedicated drug courts subsequently introduced in England and Wales (Matrix Knowledge Group, 2008) was the provision for relatively informal pre-review meetings which enabled multi-professional discussion of offenders' progress. These meetings were valued by sheriffs for providing a rounded picture of each participant and their progress, furnishing them with up-to-date information about offenders from the professionals involved in their supervision. The information gleaned at the pre-review meetings was important in helping sheriffs to decide 'which buttons to push' in their subsequent dialogue with participants: whether there were particular achievements to acknowledge or, conversely, whether there were setbacks that should be commented upon in court (Mclvor, 2009).

In England and Wales, DTTOs were rolled out nationally then subsequently replaced, in 2005, by community orders and suspended sentence orders with drug treatment requirements. Pilot Dedicated Drug Courts (DDCs) were introduced in 2005 in London and Leeds (though latter had a drug court model in operation since 2001), with further pilot sites announced by the Secretary of State for Justice in March 2008. In 2003 the government announced its intention to pilot a community justice centre in North Liverpool and a second in Salford. The community justice centres were based on the Red Hook Community Court in Brooklyn, New York, which was established in June 2000 to offer a co-ordinated, problem-solving response to local problems of crime and disorder. The North Liverpool Community Justice Centre was presided over by a single judge while the Salford Community Justice Initiative operated with a rotating bench of magistrates. In addition to dealing with offenders appearing for sentence and subject to community orders, the North Liverpool Community Justice Centre also aimed to support the resettlement of prisoners in the community after their sentences, in a manner akin to re-entry courts in the USA (Maruna and LeBel, 2003). Proposals for the development of a community justice centre and community court in Scotland (with the role of the judge being purportedly 'central' to the operation of the proposed court) were announced by the Justice Minister in March 2007 but subsequently withdrawn in May 2009 in light of the anticipated capital costs.

The potential for wider judicial involvement in offender management in England and Wales was heralded by the Halliday Report (Home Office, 2001) which proposed that sentencers should have the option of undertaking periodic reviews of offenders subject to community supervision. Section 178 of the Criminal Justice Act 2003 subsequently introduced the option for courts to review offenders' progress on community orders. This power was made available in the first instance to the community justice centres in North Liverpool and Salford before being extended to a second tranche of 11 community justice centres that were introduced in England and Wales in 2007. Not all orders made in North Liverpool Community Justice Centre had Section 178 conditions attached to them, though the majority of those made by magistrates in the Salford Community Justice Initiative did (Brown and Payne,

2007). Mair et al. (2008) found that sentencers had mixed attitudes towards the review power for community orders. Some magistrates expressed concern about the significant resource implications for the courts and probation service and some thought the practice would overlap with the probation service's responsibility for dealing with compliance. Others, however, believed that the power to review community orders would facilitate and strengthen enforcement and engender greater public confidence in orders.

The Green Paper 'Engaging Communities in Criminal Justice' published in April 2009 contained proposals to roll out problem-solving principles to all Magistrates Courts in England and Wales and to encourage courts to make greater uses of the Section 178 powers to review community orders 'in order to enable the judiciary to build relationships with offenders, acting as a source of encouragement, praise and reprimand as appropriate' (Criminal Justice System, 2009, para 51, p. 32), and with a particular emphasis on how they might be used intensively in specific locations to address persistent local crime problems and anti-social behaviour. The consultation paper also sought views on whether the power to review community orders should be extended to those under 18 years of age (Criminal Justice System, 2009).

Proposals also exist in Scotland to make judicial review a more regular and central feature of community-based offender management. The 2007 review of community penalties by the Scottish Government contained proposals to extend the power of judicial review from DTTOs and probation to all community penalties, with these powers thought to be particularly useful 'in ensuring compliance during the early stages of an community penalty, when the offender is most likely to reoffend and may be struggling to establish a routine' (Scottish Government, 2007, p.27). Broadly similar proposals were put forward by the Scottish Prisons Commission (2008) which recommended the establishment of 'progress courts' presided over by particular judges with responsibility for this specialised task (Scottish Prisons Commission, 2008). The Scottish Government, in response, rejected the need for separate progress courts (Scottish Government, 2008) but instead introduced legislation, in the Criminal Justice and Licensing (Scotland) Bill, to enable sentencers to set review hearings – taking the form of 'informal discussions between the judge and the offender' (Scottish Government, 2008, p. 14) - in the context of a proposed new community sentence (the Community Payback Order) which would replace the existing community service, probation and supervised attendance orders (Scottish Government, 2008). Formal responses by both the judiciary and social work professionals to the proposals for legislated periodic review have been generally positive, while stressing the importance of effective targeting to ensure the best use of staff and court time and highlighting the need for further detailed guidance to maximise consistency in the operation of reviews across the country (Scottish Parliament, 2009).

In different jurisdictions, therefore, provisions are being introduced to give sentencers a greater say in the active management of community orders. Advocates for increased judicial involvement in offender management have pointed to its potential to provide 'better' justice by improving judicial decision-making, promoting procedural justice, enhancing compliance and achieving improved outcomes. However, this enhanced role for sentencers has also attracted criticisms, including the risk that it may lead to an erosion of due process and concern that it both widens the net of social control in an invidious way and enables judges to engage in 'therapeutic' practices for which they have not been professionally trained. These purported benefits and disadvantages are now considered in turn.

## **Benefits of judicial involvement**

### ***Improving court processes***

Ongoing judicial involvement in problem-solving courts is aimed at improving both compliance and client outcomes through the use of legal practices and processes that are

more likely to achieve therapeutic or rehabilitative aims (Nolan, 2009). King and Wager (2005) argue that problem-solving approaches can promote rehabilitation through addressing the underlying problems that contribute to offending. However, Makkai (2002) has suggested that the most significant change brought about by drug courts has been the linking of treatment directly with the judge whereby 'the notion of an impartial arbitrator is replaced with a caring, but authoritarian, guardian' (Payne, 2005, p.74). Similarly, the increased courtroom interaction with defendants was viewed by professionals associated with the Salford Community Justice Initiative as one of the most innovative changes to have taken place (Brown and Payne, 2007) while a professional associated with the pilot drug courts in Scotland described sentencer involvement in dialogue with offenders as 'a major step forward in legal history' (McIvor, 2009, p. 40).

In the Salford Community Justice Initiative, although some stakeholders expressed reservation about magistrates engaging in dialogue with offenders, the process was recognised as furnishing the magistrate with more information about the defendant, thereby improving sentencing decisions (Brown and Payne, 2007). Magistrates themselves were very positive about the review process, which enabled them to respond quickly to a lack of progress or compliance or, if appropriate, to encourage and praise offenders when their progress was good (Brown and Payne, 2007). Saum et al. (2002) found that most drug court participants in their US study believed that the judge was influential in facilitating their progress through the appropriate use of warnings and praise. In the Red Hook Community Court, perceived helpfulness and objectivity of the judge, being treated with respect and the quality of courtroom communication were the most important predictors of defendants' perceptions of the fairness (Frazer, 2006).

In attempting to enhance offenders' compliance, judges operating within a therapeutic jurisprudence framework may also utilise the 'theatre' of the court (Nolan, 2001) to reinforce their influence and persuasion over clients by arranging the court calendar so as to maximise the impact of communication from the bench on those awaiting their reviews. This practice (involving, for example, reviews being undertaken first with those appearing from custody to serve as a warning to others of the consequences of non-compliance) was reported to be widespread in US drug courts (Nolan, 2001). In Scotland, too, drug court sheriffs recounted how they would 'choreograph' the review hearings to amplify the message conveyed to the court (McIvor, 2009), a practice that was facilitated by the multi-disciplinary pre-review meetings that were convened to discuss the progress of participants who were due to appear in court.

### ***Achieving improved compliance and outcomes***

A review of specialist courts commissioned by the then Department of Constitutional Affairs for England and Wales concluded that judicial monitoring of offenders was related to their success (Plotnikoff and Woolfson, 2005). Evidence that sentencers may have a key role to play in determining court outcomes derives principally from drug court research. For example a long-term study of a drug court in Oregon found that recidivism rates differed widely among judges, with reductions of recidivism varying from 4 per cent to 42 per cent (Finigan et al., 2007). Although Sanford and Arrigo (2005) found no consistent evidence that the *frequency* of judicial reviews was associated with improved drug court outcomes, Marlowe et al. (2004; 2005) found that more frequent reviews resulted in improved outcomes for *higher risk* offenders.

Belenko (2001) found that judicial interaction and monitoring were believed by participants to be an important element of drug court programmes while Cooper et al. (1997) reported that offenders regarded judicial supervision and encouragement to be critical in achieving success. Senjo and Lepi (2000) found that supportive comments offered by sentencers

during review hearings had a significant effect on drug court programme completion and that offenders were particularly responsive to the use of positive reinforcement as opposed to the more traditional use of punishment. This is consistent with Maruna and LeBel's (2003) assertion that strengths-based approaches are more effective than coerced obedience in engaging offenders and promoting intrinsic motivation to change.

As Brown and Payne (2007, p.29) note in their evaluation of the Salford Community Justice Initiative, a key assumption is that 'the continuity of magistrates should create a greater sense of personal accountability on the part of the offender, leading to improved compliance with sentence requirements'. Prior to the introduction of the Salford pilot, offenders sometimes reported a sense of injustice at being dealt with by different magistrates on successive court appearances (Brown and Payne, 2007). There is, indeed, emerging evidence that consistency or continuity of sentencers is linked to drug court success. For example, Goldkamp (2004) found that higher levels of contact with the same judge resulted in lower levels of recidivism, while the process evaluation of the Dedicated Drug Courts in England found that continuity of sentencer across court appearances was associated with enhanced compliance with court hearings, lower levels of positive drug tests for heroin, an increased rate of completion and a reduced frequency of reconviction (Matrix Knowledge Group, 2008). In the North Liverpool Community Justice Centre offenders reacted positively to reviews and 'increased engagement with the proceedings and the continuity provided by the single judge model ... served to increase offenders' accountability to the court' (McKenna, 2007, p. 32). Offenders who were subject to review requirements reported fewer issues in completing their sentence and there was some evidence that their completion rates were higher than those of comparison cases dealt with in another court (McKenna, 2007).

The significance of continuity and consistency has also been highlighted by Holt (2000) in relation to effective case management in probation, providing a basis for the development of positive working relationships between client and worker and making the experience of supervision integrated and coherent. However, achieving consistency and continuity across review hearings has presented practical difficulties in Magistrates Courts in England and Wales which operate with a rotating three-magistrate bench. This problem was noted by Turnbull et al. (2000) in the evaluation of the pilot DTTOs and in the process evaluation of the Dedicated Drug Courts (Matrix Knowledge Group, 2008). And although professionals associated with the Salford Community Justice Initiative reported a good level of continuity across hearings, this could not be quantified (Brown and Payne, 2007). As a possible solution the 2009 Green paper 'Engaging Communities in Criminal Justice' proposes that continuity, which can 'have a powerful effect', might be achieved by having at least one magistrate continuously involved throughout the case review process (Criminal Justice System, 2009, para 47, p. 30).

Wexler (2001) has suggested that judicial involvement in specialist courts can promote rehabilitation by contributing to the 'desistance narratives' (Maruna, 2001) that help to facilitate and sustain desistance from crime. McIvor (2009) has argued that the exchanges that take place between sentencers and offenders in drug court can enhance procedural justice (Tyler, 1990) which confers greater legitimacy upon judges, promotes normative as opposed to constraint-based or instrumental compliance (Bottoms, 2001) and increases the responsiveness of participants to exhortations that they should change. Support for such an argument can be found in Gottfredson et al.'s (2007) finding that judicial review directly reduced drug use and indirectly reduced criminal behaviour by increasing participants' perceptions of procedural fairness. By contrast, King and Wager (2005) have suggested that court processes that are insensitive to the needs and circumstances of defendants can result in disrespect for and lack of compliance with court orders.

Further evidence that perceptions of procedural fairness are more important than outcomes comes from the evaluation of the Red Hook Community Court. Red Hook defendants' perceptions of fairness did not vary according to the outcome of their case, whereas in the traditional comparison court defendants expressed more favourable views of the judge if their case was dismissed (Frazer, 2006), lending some support to Winick and Wexler's (2003, p.17) suggestion that 'relationships and processes are more important than the substance of the therapies and sanctions'

### ***Accommodating diversity***

It has also been suggested that practices characterised as therapeutic jurisprudence - including the regular judicial review of offenders' progress - may render court processes less discriminatory and more capable of responding appropriately to diverse groups of offenders. For instance, experience in Western Australia suggests that aboriginal people tend to respond positively to the opportunity for dialogue in court (King and Wager, 2005) while the Red Hook evaluation suggested that defendant satisfaction with court processes varied less according to race and socioeconomic status than it did in a traditional court (Frazer, 2006).

There is also some evidence that women may be particularly responsive to judicial interaction in a problem-solving court setting. For example, Johnson et al. (2000) found that women were more likely than men to state that regular court hearings helped them to remain drug-free while Saum and Gray (2008) found that women were more likely than men to be satisfied with their interactions with the judge. In comparison with men, women were more likely to value praise from judges and to believe that judges had given them an opportunity to relate their side of the story, had been fair to them, had treated them fairly and had treated them with respect. Saum and Gray suggest that women may be better able than men to utilise judicial interaction to their advantage because they are able to develop meaningful connections with judges, to communicate their needs and to respond to the judges' requests. Being better able to express themselves in court may be both personally fulfilling for women and may facilitate aspects of the drug court process. Saum and Gray argue that a 'care perspective' operates in drug court and that 'this more feminine model of justice appears particularly beneficial to the women who encompass it' (2008, p. 115). This chimes with the broader suggestion that through advocating different criminal justice responses to different types of offences, therapeutic jurisprudence and the problem-solving approach it underpins represent a more effective response to offending (Casey and Rottman, 2000).

### ***Enhancing sentencers' job satisfaction***

A final argument that has been advanced in favour of greater judicial involvement in offender management is that it enhances judges' job satisfaction by enabling them see successes as well as failures and to 'believe that they are for the first time really making a difference in people's lives' (Nolan, 2001, p. 109). This enhanced sense of satisfaction - which has been highlighted by prominent judicial proponents of therapeutic jurisprudence (e.g. Hora and Schma, 1988; Hora et al., 1989) - may help to explain judges' enthusiasm for problem-solving approaches, especially where their discretion has been increasingly constrained by developments such as sentencing guidelines and they are increasingly perceived by the public as 'out of touch' (Nolan, 2001).

### **Arguments against judicial involvement**

#### ***Revival of the rehabilitative ideal and new forms of surveillance***

Critics of therapeutic jurisprudence have expressed concern that it reflects a return to the 'rehabilitative ideal' in which the offender is pathologised and punishment is justified as a



means of 'curing' or 'reforming' the offender (Rosenthal, 2002) to produce, in the drug court context, 'self-governing citizens, free of the burden of drugs and crime' (Took, 2005, p. 35). The rehabilitative justification for punishment has been criticised on the grounds that it variously promotes indeterminacy, results in loss of civil liberties by criminalising antisocial behaviour, is potentially 'soft' on crime and may result in differential sentencing that is unjustified and arbitrary (Rosenthal, 2002). With respect to judicial engagement with offenders, Boldt (1998, 1262-3) expresses particular concern reading the potential for excessive and unwarranted judicial expression arguing that 'In gross terms the informality, and immediacy of the judge's relationship with the defendant confers a potentially ungovernable discretion similar to that which so riled critics of the rehabilitative ideal nearly thirty years ago.'

Bean (2002) has also pointed out that, despite the apparent informality that characterises dialogues between judges and offenders in drug courts, the judge ultimately sets the parameters, decides when they have been exceeded and determines the sanction that is imposed. In many respects, he suggests, drug courts (and problem solving courts more generally) are at risk of reproducing earlier rehabilitative practices that were subject to much criticism and debate. In particular, drug courts – and the revised judicial role they support - may represent a return to an era of discretionary justice characterised by the central importance and powerfulness of the judge. In this respect, he argues, enhanced judicial involvement may be perceived as 'sometimes getting dangerously close to a system that offers scope for accusations of bias and favoritism' (p. 249). Mackenzie (2008, p. 516) goes further in suggesting that drug courts represent 'state-imposed therapeutic coercion driven by officials who fear their traditional sources of legitimation have lost their effect'.

Nolan (2001) has argued that problem solving courts encapsulate a *new* form of rehabilitation in which private issues are open to judicial exploration and oversight and which makes possible the expansion of judicial authority. Judicial involvement in offender supervision and management has been criticised as representing a new, and deeper, form of *surveillance* as a consequence of the information about offenders gained by judges and the discretion that they are able to exercise when sentencing them, responding to lack of compliance and deciding what is in their best interests (Burns and Peyrot, 2003). 'The net result' according to Burns and Peyrot (2003) 'is the expansion of the state's supervision, monitoring and control over offenders' lives because they are being 'rehabilitated'" (p. 434).

The transparency that is often claimed to arise from the court-based reviews of offenders' progress raises a further concern with respect to the airing of sensitive issues in open court. In the Scottish DTTO pilots, this issue was dealt with in Glasgow through the clearing of the court if sensitive topics were discussed, though this was not always welcomed by offenders who were concerned about how this would be publicly interpreted (Eley et al., 2002). In the pilot drug courts, by contrast, the discussion of participants' circumstances at pre-review meetings provided an opportunity for sensitive issues relevant to the offender's progress to be brought to the sheriff's attention confidentially and in private, thereby preventing the need to make reference to them in open court (McIvor et al., 2006).

### ***Blurring of professional boundaries and competences***

Judges in problem-solving court settings have been variously referred to as assuming the role of social worker (Saum and Gray, 2008), probation officer (Hoffman, 2000), case manager (Turnbull et al., 2000) and therapist (Bean, 2002). The apparent blurring of professional boundaries that may occur when judges step beyond their traditional role has attracted criticism on the grounds that it may result in judges 'overstepping the mark' and making decisions that they are not professionally trained or competent to make. Hoffman (2000, p. 1530), for example, suggests that in drug courts the 'crowned chief probation officer is by definition an amateur' while Bean (2000) questions the therapeutic value of the

dialogue between judges and offenders because the nature and extent of contacts with the offender fall far short of what would be considered necessary in most therapeutic relationships.

Saum and Gray (2008) have suggested that judges in problem-solving courts operate from what might be better described as a 'social worker' perspective, developing close relationships with their clients over time as they meet to discuss and monitor progress. However, the Law Reform Commission for Western Australia (2009) suggests that taking a problem-solving approach does not mean that sentencers are acting as 'social workers': 'Although therapeutic aims are encouraged, judicial officers in court intervention programs continue to perform judicial functions – they remain bound to apply the law and ensure that the legal rights of participants are protected' (p. 31).

This is an important observation and highlights the need for appropriate safeguards to protect offenders' rights, particularly given the centrality of the judge in the problem-solving court process (Bean, 2002). As Bean (2002, p. 248) observes, 'drug courts have been designed for judges with high levels of imagination, insight, and moral integrity; there are few controls and few formal constraints...What then of an overly enthusiastic judge, a sadistic judge or an incompetent judge?'. Judicial decision-making in a problem-solving context needs to be informed by the information and advice provided by other professionals who have day-to-day responsibility for the supervision of the offender, rather than the judge assuming and usurping these other professionals' roles. In other words, while the dialogue that takes place between judges and offenders may be aimed at achieving 'therapeutic' outcomes, the advice upon which it is based should be professionally grounded and for this reason the judge him/herself cannot be considered to be a 'therapist' in the technical sense of the term.

However, the observation that 'drug court judges spend much of their time doing things that could and should be done by probation officers' (Hoffman, 2000, p.1529) had led to accusations that judicial involvement in offender management represents a doubling-up of effort. In the Salford Community Justice Initiative, for example, some professionals thought that reviews were over-used by magistrates and often amounted to an unnecessary duplication of monitoring (Brown and Payne, 2007). This concern did not extend, though, to the North Liverpool Community Justice Centre where the judge tended to convene reviews only where there were concerns about an offender's ability to comply with an order (McKenna, 2007).

By contrast, the Law Reform Commission of Western Australia (2009) raises an interesting question of equality: if judicial monitoring is of benefit to offenders, should it not be available to *all* offenders and not just those who are dealt with in problem-solving courts? In the UK, legislated provision exists in England and Wales and is planned in Scotland for periodic judicial review to form a component of any community order where the sentencer believes that this would be of benefit in encouraging compliance with an order. The *option* of judicial review of any community orders appears to offer a workable compromise between the danger of duplication of effort and the need for equal access to justice, allowing for review hearings to be convened if it is considered in the best interests of the offender for this to happen. *Requiring* that all community orders are subject to judicial review has a number of attendant risks. For example, not all sentencers will possess the inclination or the skills to engage in a meaningful way with offenders so as to encourage and support them during their orders and it is unclear to what extent and how easily these skills can be acquired. In the Salford Community Justice Initiative, for example, although magistrates received training in how to engage with offenders, the part-time nature of their role meant that it took some time to gain adequate experience of adopting a problem-solving approach (Brown and Payne, 2007).

In Scotland, the approach to reviewing orders in the drug courts and youth courts was markedly different, illustrating how the nature and quality of judge-offender dialogues is context-specific. Drug court reviews were generally encouraging and motivating and participants regarded dialogue and building a rapport with the sheriff as a central feature of the review process (McIvor et al., 2006a). As one drug court sheriff commented, 'it is possible to a considerable degree to form an impression of the individual and it is even possible to build up a relationship with that individual which is meaningful in the context of the court' (O'Grady, 2003, p. 65). In the youth courts, by contrast, there tended in most cases to be limited exchange between the young person and the sheriff during reviews. Judicial dialogue was generally brief with an emphasis on the consequences of non-compliance or normative judgements about the kind of person the young person should strive to become (McIvor et al., 2004). Young people spoke rarely and appeared awkward when doing so, while sheriffs, though broadly supportive of reviews, stressed that the purpose was *not* to establish a relationship or build rapport (Popham et al., 2005; Barnsdale et al., 2006). These qualitative differences in review procedures are likely to reflect in part the age of the offenders concerned, but they are also likely to reflect the fact that sheriffs in the drug courts had volunteered to take on that role while *all* sheriffs in the courts hosting them were expected to preside over the youth courts on a rotational basis. The risk is that *requiring* sentencers to take on a role with which they do not feel comfortable may at best do more harm than good (for example by engaging with offenders in ways that reinforce the authority of the court in a negative way and promote instrumental as opposed to normative compliance) and at worst may result in resistance to the use of community orders (and an increased use of imprisonment instead).

### ***Erosion of due process***

Nolan (2001) observes how in drug courts judges may alter their courtroom practices to convey compassion and understanding of their clients – for example not wearing judicial robes, addressing clients by their first names and hugging clients – but questions whether under these circumstances a level of judicial impartiality and consistency in sentencing is valued and maintained. Particular concerns relate to the individualised nature of sanctions imposed in the event of non-compliance and the possibility that detailed information gleaned through open dialogue with offenders may be used against them in a future court case or in when resentencing an offender in the event of an order being breached (Nolan, 2001).

Casey and Rottman (2000) have argued that adherence to due process requirements without attention to defendants' needs and relationships may lead to 'legally relevant but ineffective decisions' (p. 447). However Mackenzie (2008) adopts a more cynical position, suggesting that problem solving court practices reflect 'a retreat from the prison of procedural justice to justice with a happy face' (p.522) while Hoffman (2000, p. 1534) contends that 'It is time, especially for judges, to resist the lemming-like dash toward a society in which bedrock legal principles that have served us for generations are sacrificed for the immediate gratification of the latest political fad.'

Alert to concerns such as these, the Law Commission for Western Australia (2009), in a recent consultation on court intervention programmes, highlights the importance of procedural safeguards being in place and legal rights not being prejudiced to achieve court intervention goals. Proponents of therapeutic jurisprudence themselves acknowledge the need for practice to be subsumed under principles of rights and justice and for therapeutic jurisprudence only to be applied once the law has been administered fairly, impartially and with regard to due process (Nolan, 2001). For example, King and Wager (2005) argue that judicial case management can be carried out such a way that it does not compromise traditional values of judging because therapeutic jurisprudence represents a *practice* reform

rather than *legal* reform (Casey and Rottman, 2000), while Rosenthal (2002) observes that the goal of therapeutic jurisprudence is not to eclipse or ignore other judicial considerations but to ensure that they are placed in a proper context. In this regard, Nolan (2009) highlights the Scottish drug court pilots as an example of therapeutic jurisprudence (even if not explicitly acknowledged as such by the sheriffs themselves) which operates within a clear set of procedural safeguards, suggesting that the adoption of a problem solving approach that includes active judicial oversight of court orders need not necessarily conflict with other legal and judicial concerns.

## **Conclusions**

The enhanced role that sentencers are adopting with respect to the supervision of offenders on court orders represents an important shift in judicial practice. However, if judicial oversight of offenders aims to promote both procedural justice and improved outcomes for offenders, the preceding discussion suggests that a number of considerations should apply. For example, not all sentencers will have the necessary skills or inclination to successfully undertake this wider role and it is important that those who do so do it on a voluntary basis with the necessary training and support. It is also critical that sentencers are facilitated to reach decisions based upon the advice of other relevant professionals, without stepping into professional terrain and taking on responsibilities for which they are not qualified. This requires that professional roles and responsibilities are clearly defined and appropriate procedural safeguards are in place to ensure that offenders' rights are not infringed. Finally, given the apparent significance of offenders having contact with the same judge throughout the course of an order, arrangements should be made to ensure judicial continuity over successive reviews. This will enable sentencers to better get to know the offenders they are dealing with, establish rapport with them and communicate and reinforce consistent messages from the court.

Despite widespread enthusiasm for an increasingly active role in the monitoring of offenders' progress among judges who have embraced problem-solving court practices, others have sounded a cautionary note regarding adverse consequences that may arise, including the risks of increased surveillance into areas of private life that were hitherto beyond the gaze of the state, threats to due process arising from the knowledge that is gained and the engagement of judges in practices that extend beyond their professional competence and expertise. Yet there is evidence that through engaging offenders in regular dialogue about their progress and circumstances, judges can improve offenders' compliance with court orders and play an active role in supporting their efforts to change. On balance, therefore, the increased involvement of judges in offender management may have something to contribute to the supervision of offenders in the community, so long as the practices involved avoid flaunting long-standing values that have traditionally underpinned the administration of justice in criminal law.

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