

# **THERAPEUTIC JURISPRUDENCE AND THE DRUG COURTS: HYBRID JUSTICE AND ITS IMPLICATIONS FOR MODERN PENALTY.**

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## **ABSTRACT**

*This thesis explores the contradictory nature of current penal practices and contends that through the implementation of drug courts based on the teachings of therapeutic jurisprudence, there has emerged within the justice system a hybrid program that sufficiently appeals to a widespread audience in the punishment milieu. In its hybridity the drug court is able to breach the apparent inertia of modern penal practices and offer a program that is therapeutically oriented but is still able to resonate with the sensibilities of the 'tough on crime' bandwagon. Further, the thesis interrogates the reformist vocabulary used by the advocates of therapeutic jurisprudence, arguing that the ostensible shift away from paternalism and coercion and towards an emphasis on a freely choosing client is accompanied by an extension of the terrain upon which judgement is cast. This in turn, facilitates an extension of the operation of power beyond the traditional judicial terrain and makes newly available for judgement, and for failure, the achievement of the norms of daily life.*

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## **Introduction.**

Therapeutic Jurisprudence concentrates on the law's impact on emotional life and psychological well-being. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law's role as a potential therapeutic agent should be recognized and systematically studied.<sup>1</sup>

Drug Courts can be defined as a slow-track, court-based treatment program, where the key features are dedicated courtrooms that provide judicially monitored treatment, drug testing, and other services to drug-involved offenders.<sup>2</sup>

From little things big things grow.<sup>3</sup>

### **A Brief Chronology of Emergence**

Therapeutic jurisprudence has been, from the beginnings of its emergence in the area of mental health law, relatively slow in capturing the imagination of the wider legislature and even the judiciary.<sup>4</sup> However throughout the 1990s therapeutic

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<sup>1</sup> D. Wexler (2000), *Therapeutic Jurisprudence: an overview*, International Network on Therapeutic Jurisprudence, <http://www.law.arizona.edu/depts/upr-intj/>, (accessed September 2004).

<sup>2</sup> P. Bean, (2002), 'Drug courts, the Judge, and the rehabilitative ideal', in J. Nolan Jr. (ed.), *Drug Courts in Theory and Practice*, New York: Aldine De Gruyter, 235-255 p. 235.

<sup>3</sup> P. Kelly and K. Carmody, (1991), 'From little things big things grow', *Comedy*, Mushroom Records/Larikin®.

<sup>4</sup> D. Wexler (1972), one of the forefathers of therapeutic jurisprudence, first began writing about 'Therapeutic Justice', as he then termed it, with his article, 'Therapeutic Justice', *Minnesota Law Review*, 57, 289-338. However, he first termed the phrase 'therapeutic jurisprudence' in 1987, in a paper delivered to the National Institute of Mental Health. See P. Hora, W. Schma, J. Rosenthal, (1999), 'Therapeutic jurisprudence and the drug treatment court movement: revolutionizing the

jurisprudence underwent a rapid rise in popularity as the focus for scholarly endeavour, appealing to many areas of legal scholarship<sup>5</sup>. Yet even with support from within a wide range of legal areas, therapeutic jurisprudence was still unable to influence any areas of the legislature, let alone become a theoretical tool for a worldwide legal movement.<sup>6</sup> It was not until therapeutic jurisprudence was adopted as the theoretical base of the newly emergent drug treatment court movement that it became of interest to the legislature and especially to the judiciaries of various nations around the world. This marriage between two legal frameworks that emerged concurrently, one a jurisprudential tool, the other a program for specialised sentencing practices, was not made explicit until some years after they each emerged.

The first drug treatment courts appeared in Dade County, Miami, in 1989,<sup>7</sup> yet the link between the two emerging movements was not thoroughly articulated until a decade later. The convenient partnership between therapeutic jurisprudence and the drug treatment court movement was documented by judges Peggy Hora, William Schma and attorney John Rosenthal, in their influential 1999 article, 'Therapeutic jurisprudence and the drug treatment court movement: revolutionizing the criminal justice system's response to drug abuse and crime in America.'<sup>8</sup> It was this article that provided the impetus for the thorough articulation of the relationship between the

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criminal justice system's response to drug abuse and crime in America', *Notre Dame Law Review*, 74, 439-538.

<sup>5</sup> See D. Wexler and B. Winick (eds), (1996), *Law in a Therapeutic Key: developments in therapeutic jurisprudence*, Durham: Carolina Academic Press.

<sup>6</sup> International Network on Therapeutic Jurisprudence, <http://www.law.arizona.edu/depts/upr-intj/>, (accessed September 2004).

<sup>7</sup> Western Australia: Department of Justice (2003 a), *Evaluation of the Perth Drug Court Pilot Project*, Perth: Crime Research Centre, p. 9; J. Nolan Jr (2001), *Reinventing Justice: the American drug court movement*, Princeton: Princeton University Press, p. 39.

<sup>8</sup> P. Hora, W. Schma, J. Rosenthal, (1999).

two emerging movements.<sup>9</sup> In this marriage therapeutic jurisprudence found its influential space – the drug treatment court movement – and soon became the acclaimed theoretical base of knowledge for such endeavours. Winick and Wexler described the relationship as such:

There is a clear symbiotic relationship between problem-solving courts [specifically drug courts] and therapeutic jurisprudence. Simply put, problem-solving courts can serve as laboratories for therapeutic jurisprudence, insofar as therapeutic jurisprudence is especially interested in *which* legal arrangements lead to successful therapeutic outcomes and *why*.<sup>10</sup>

An analysis of the topics discussed in the core literature on therapeutic jurisprudence reveals the movement's progression towards an alignment with the drug courts. In the first few collections, in the early part of the 1990s, the emphasis was on mental health law; through the 1990s the emphasis shifted to demonstrate the ability of therapeutic jurisprudence to appeal to many areas of legal interest, whilst still acknowledging its roots in mental health law.<sup>11</sup> Then in 2000, therapeutic jurisprudence had further aligned itself with the area of preventative law – which may be read as a forerunner to the practices found in the teachings of the drug courts.<sup>12</sup> However it was not until 2003 that the issue of the drug courts and their applicability to therapeutic jurisprudence was officially recognised in a full edited collection by the 'fathers' of therapeutic jurisprudence, David Wexler and Bruce Winick. Their work, *Judging in a Therapeutic Key*, explores the possibilities of therapeutic jurisprudence being

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<sup>9</sup> J. Nolan Jr (2003), 'Redefining criminal courts: problem-solving and the meaning of justice', *American Criminal Law Review*, 40, 4, 1541-1566.

<sup>10</sup> B. Winick and D. Wexler (2003 *c*), 'Therapeutic jurisprudence as an underlying framework', in B. Winick and D. Wexler (eds), *Judging in a Therapeutic Key: therapeutic jurisprudence and the courts*, Durham: Carolina Academic Press, 105-6.

<sup>11</sup> D. Wexler (1990), *Therapeutic Jurisprudence: the law as at therapeutic agent*, Durham: Carolina Academic Press; D. Wexler and B. Winick (eds), (1991), *Essays in Therapeutic Jurisprudence*, Durham: Carolina Academic Press; D. Wexler and B. Winick, (1996); Winick (1997), *Therapeutic Jurisprudence Applied: essays on mental health law*, Durham: Carolina Academic Press.

incorporated into various court systems but the main emphasis is on the drug treatment court movement.<sup>13</sup> Furthermore the international network of therapeutic jurisprudence emphasises its influence in drug treatment court programs not only in the United States but also its influence in Australian programs of judicially sanctioned drug treatment, which will be the main focus of the present study.<sup>14</sup>

In 1999, the first Australian drug court appeared in New South Wales, initially on a trial basis, but it has now become part of the judicial landscape in that state. Since its inception similar drug courts have appeared in other Australian jurisdictions, with drug courts now in existence, either in trial form or as permanent fixtures, in Western Australia, South Australia, Queensland and Victoria. There are also some juvenile drug courts in operation in Australia.<sup>15</sup> When the first Australian drug court appeared in New South Wales it was quickly linked with the teachings of therapeutic jurisprudence and especially those teachings that had grown out of the American experience. New South Wales Government promotional material states: ‘The experience in courts of therapeutic jurisprudence including Drug Courts in the United States has strongly influenced the roles and functions of the New South Wales Drug Court’<sup>16</sup>. Likewise the drug court of Victoria, established in 2002, explicitly acknowledges that the ‘the Drug Court is based on therapeutic jurisprudence.’<sup>17</sup>

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<sup>12</sup> D. Stolle, D. Wexler, B. Winick (eds), (2000), *Practicing Therapeutic Jurisprudence: law as a helping profession*, Durham: Carolina Academic Press.

<sup>13</sup> B. Winick and D. Wexler (eds), (2003 a), *Judging in a Therapeutic Key: therapeutic jurisprudence and the courts*, Durham: Carolina Academic Press.

<sup>14</sup> International Network on Therapeutic Jurisprudence; Western Australia: Department of Justice, (2003), pp 9-35.

<sup>15</sup> Western Australia: Department of Justice (2003 a), pp 31-2.

<sup>16</sup> New South Wales: Attorney General’s Department (2003 a), *About the Drug Court of New South Wales*, New South Wales: Attorney General’s Department, [www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/drugcrt2](http://www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/drugcrt2), (accessed September 2004).

## Therapy and Punishment

The peculiarity of the emergence of therapeutic jurisprudence and the drug courts is that they have come about in a period of punitive fervour. How is it that therapeutic technologies of justice have appeared at a time of unprecedented growth in prison populations and populist punitive sensibility? This question along with an explanation of the degree to which therapeutic jurisprudence and the drug courts is able to appeal to the apparent contradictory aspirations of therapy and punishment will be the focus of the first chapter.

A number of social theorists of penalty explore the means by which modern technologies of punishment have become extremely punitive and they interrogate the contradictions inherent in such punitiveness. Critics such as Jonathan Simon, Nils Christie and Michael Tonry call attention to the increasingly punitive nature of penal discourses,<sup>18</sup> in which the political currency of the ‘tough on crime’ rhetoric alongside the media’s and public interest groups’ calls for ‘tougher penalties’ seem to feed off each other in a way that generates an escalation into a state of ‘hyper incarceration.’<sup>19</sup> But such critics also call attention, in various ways, to the contradictory nature of contemporary penalty. Tonry, for instance, highlights a growing opposition between, on the one hand, the ‘tough on crime’ fervour surrounding penal and sentencing practices, and, on the other hand, a growing number

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<sup>17</sup> Victoria: Department of Justice (2003 b), *Specialist Court Jurisdictions: Drug Court – Key Processes*, Victoria: Department of Justice, [www.justice.vic.gov.au](http://www.justice.vic.gov.au), (accessed September 2004).

<sup>18</sup> J. Simon (2000), ‘The ‘society of captives’ in the era of hyper-incarceration’, *Theoretical Criminology*, 4, 3, 285-308; N. Christie (2000), *Crime Control as Industry: towards gulags, western style*, London: Routledge; M. Tonry (2004), *Thinking About Crime: sense and sensibility in American penal culture*, New York: Oxford University Press.

of voices from those within the penal system who are increasingly advocating a ‘softening of policies’.<sup>20</sup>

Contemporary theorists of penality including Simon, Pat O’Malley, David Garland and John Pratt, though they all underscore the contradictory nature of contemporary penal practices, seek explanation in different understandings of the contemporary political landscape.<sup>21</sup> These explanations include the emergence of postmodernity in penality<sup>22</sup>, the blending of neo-liberal and neo-conservative ideologies<sup>23</sup> and the reaching of the limits of the sovereign state<sup>24</sup>. Garland, however, also suggests that we need to seek understanding beyond the political landscape; that the nature of punishment has to be understood in terms of its cultural significance, and as an indicator of the modern ‘culture of control’<sup>25</sup> as well as in terms of its political roots.

With the cultural significance of the punitive penal landscape in mind the chapter then turns to a further contradiction in the apparent punitive culture of modernity, namely the emergence of a ‘therapeutic state’.<sup>26</sup> The therapeutic idiom is, as theorists of culture including James L. Nolan Jr and Frank Furedi assert, embedded in the cultural

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<sup>19</sup> J. Simon (2000).

<sup>20</sup> M. Tonry (2004), pp 18-19.

<sup>21</sup> J. Simon (1993), *Poor Discipline: parole and the social control of the underclass, 1890-1990*, Chicago: University of Chicago Press; P. O’Malley (2001), ‘Risk, crime and prudentialism revisited’ in K. Stenson and R. Sullivan (eds), *Crime, Risk and Justice: the politics of crime control in liberal democracies*, Devon: Willan, 89-103; D. Garland (2001), *The Culture of Control: crime and social order in contemporary society*, Oxford: Oxford University Press; J. Pratt (1997), *Governing the Dangerous: dangerousness, law and social change*, Annandale: Federation Press.

<sup>22</sup> J. Simon (1995), ‘They died with their boots on: the boot camp and the limits of modern penality’, *Social Justice*, 22, 2, 25-48; J. Pratt, (2000), ‘The return of the wheelbarrow men; or, the arrival of postmodern penality?’, *British Journal of Criminology*, 40, 127-145.

<sup>23</sup> P. O’Malley (1999), ‘Volatile and contradictory punishment’, *Theoretical Criminology*, 3, 2, 175-196.

<sup>24</sup> D. Garland (1996), ‘The limits of the sovereign state: strategies of crime control in contemporary society’, *British Journal of Criminology*, 36, 4, 445-471.

<sup>25</sup> D. Garland, (1990), ‘Frameworks of inquiry in the sociology of punishment’, *British Journal of Sociology*, 41, 1, 1-15; D. Garland (2001).

ethos and moral understanding of western culture.<sup>27</sup> It is thoroughly enmeshed in the contemporary western political and cultural mindsets and lifestyles. Yet this has happened at precisely the same time as the apparently punitive mindset has been adopted. So on the one hand, theorists such as Garland characterise a broader contemporary cultural landscape as punitive. On the other hand, critics such as Nolan characterise contemporary western culture as ‘therapeutic’, characteristics that, at the very least would seem to sit at odds with one another.

Michael Tonry’s 2004 analysis of contemporary penal institutions enables us to make sense of this apparent contradiction.<sup>28</sup> Tonry asserts that those within the institutions of penalty wish to see the punitive march abate but he realises that the legislature is in a state of inertia, for the popularity of the punitive ideal is too strong. In other words Tonry sees that we are at an impasse, where although we see attempts to will the punitive march to a halt, the popularity of the punitive ideal makes it impossible to achieve. It is in this space that the first chapter situates itself. It explores the possibility that therapeutic jurisprudence finds its strength, through appealing to the therapeutic culture whilst still enabling the possibility of being ‘tough on crime’. Thus situated, therapeutic jurisprudence and the drug courts are able to appeal to apparently oppositional cultural sensibilities. It is through this impasse that therapeutic jurisprudence and its ‘laboratory’ – the drug courts – has been able to emerge into a ‘movement’ or, as some suggest, a ‘revolution’ in criminal justice.<sup>29</sup>

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<sup>26</sup> J. Nolan Jr (1998), *The Therapeutic State: justifying government at century’s end*, New York: New York University Press.

<sup>27</sup> J. Nolan Jr (1998); F. Furedi (2002), ‘Drug control and the ascendancy of Britain’s therapeutic culture’ in J. Nolan Jr (ed.), *Drug Courts in Theory and Practice*, New York: Aldine De Gruyter, 215-233.

<sup>28</sup> M. Tonry (2004).

<sup>29</sup> J. Nolan Jr (2001) commented that ‘The rapid expansion of the drug court model has led participants and observers alike to label the phenomenon a “movement,” even a “revolution” in criminal justice’. p. 39.

The first chapter argues that the ease with which the therapeutic ethos has been adopted into the judicial landscape is due to its ability not to dissolve, but to *appeal* to the contradictions of modern culture, especially the contradictions apparent in modern punishment.

### **Terms and Techniques**

The second chapter continues to explore the contradictions of modern penality but moves from examining a contradictory cultural landscape and the techniques of justice that emerge from that field, to a consideration of the specific terms employed, and specific techniques involved in courts of therapeutic jurisprudence, particularly the drug courts. The chapter explores how broader contradictions explored in the first chapter might manifest themselves in the aspirations and practices of the drug courts; how these contradictions are managed and the effects they produce. The work explores the production of what Nikolas Rose has called an ‘individual who is “free to choose”’.<sup>30</sup> Yet that freedom, Rose argues, is a freedom that is constructed by techniques of control in the guise of therapy.<sup>31</sup> Rose is not speaking specifically of therapeutic jurisprudence but via his analysis the chapter investigates the peculiar ways in which the drug court produces an ‘obligation to be free’.<sup>32</sup>

The second chapter highlights the hybrid nature of the court and the court personnel. Specifically, it examines the changing nature of the judge’s role in the drug court setting and the shift in focus from the traditional adversarial process to the treatment paradigm. It analyses the techniques used by the treatment ‘team’ and investigates

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<sup>30</sup> N. Rose, (1999 *a*), *Governing the Soul: the shaping of the private self*, (second ed.) London: Free Association Books, p. 232.

<sup>31</sup> N. Rose (1999 *a*), pp 231-2.

<sup>32</sup> N. Rose (1999 *a*), pp 217-232

their impact on both the judiciary and the offender, or rather the ‘client’.<sup>33</sup> Hand in hand with a shift away from the vocabulary of the adversarial system - offenders, guilt and coercion – is the adoption of a new vocabulary of voluntarism, volition, non-coercion, responsibility, self-esteem and empowerment. This chapter takes a critical look at the way in which this vocabulary is employed and argues that the deployment of this vocabulary cannot simply be taken at face value but needs to be understood as particular technologies of the self. Barbara Cruikshank noted that:

Self-esteem is a technology in the sense that it is a specialised knowledge of how to esteem our selves, how to estimate, calculate, measure, evaluate, discipline, and judge our selves.<sup>34</sup>

Taking its cue from Cruikshank the chapter analyses the use of techniques of empowerment and self-esteem as deployed in the drug court. It examines the ways the drug court aims to achieve the goals of self-esteem through a continued regime of what Cruikshank has termed ‘liberation therapy’<sup>35</sup> – a therapy that demands constant estimation, calculation, measurement, evaluation, discipline and judgement of our selves. The ostensible end point is a client who is empowered to attend to their civic duties.

The chapter critically examines the rhetoric of non-coercion in the context of the demands that the client accepts the tutelage of the therapeutic professionals and adopts the ‘therapeutic worldview’. Without the adoption of such a view, it is extremely difficult for one to succeed in the program, let alone be re-included into the

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<sup>33</sup> The Victorian drug court prefers the term ‘participant’, but for the purpose of this study the term ‘client’ is adopted for it is the more used term throughout the worlds drug court’s, see J. Nolan Jr (2001).

<sup>34</sup> B. Cruikshank (1999), *The Will to Empower: democratic citizens and other subjects*, Ithica: Cornell University Press, p. 89.

<sup>35</sup> B. Cruikshank (1999), pp 89-92.

‘continuous circuits and flows of control society’<sup>36</sup>. To assist in furthering the therapeutic worldview of the client, in the drug court a client is not guilty; guilt is of little importance in the drug court, yet acceptance is paramount. Acceptance of addiction, acceptance of treatment and acceptance of the technologies the drug court uses to instil within the client a sense of self worth is the important aspect of the drug court process. To succeed in the program, the client must identify themselves with the teachings of the court and must adopt the therapeutic perspective. It is the adoption of that perspective that will see a client prosper on the Drug Treatment Court order.

The chapter explores the possibility that judgement of guilt in the eyes of the law is being displaced by an ongoing and ever-extending set of judgements of the degree to which the client has adopted the therapeutic perspective, such that conformity to social norms, not to the law, emerges as the new imperative of the Drug *Treatment* Court Program. These judgments, made by the treatment ‘team’ and handed down by the judge, form the basis of knowledge for the court regime, even sometimes to the detriment of the traditional informants of knowledge to the court – the police.<sup>37</sup> It is the petty failures of life’s challenges that are evaluated by the treatment team, and even in the occurrence of further drug use it is the adherence to the therapeutic values of honesty and prompt disclosure of that use that is scrutinised.<sup>38</sup> This thesis explores the possibility that the drug court as a judicially sanctioned and monitored order, administered by an amalgam of expertise, extends, in problematic ways, the constant and continuous judging of the client

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<sup>36</sup> N. Rose (1999 *b*), *Powers of Freedom*, Cambridge: Cambridge University Press, p. 270.

<sup>37</sup> Western Australia; Department of Justice (2003 *a*), p. 207.

## Chapter One. Therapeutic culture and punitive penal discourses: negotiating an impasse.

This chapter focuses on the political and cultural contexts from which therapeutic jurisprudence emerges. It aims to identify the circumstances that allow therapeutic jurisprudence to emerge. It aims to illuminate the punitive trends of modern penal practices and to demonstrate how therapeutic jurisprudence, and its practical incarnation – the drug courts – have been so readily incorporated into the practices of the judicial administration. The chapter seeks to explore the wider political and cultural landscape – those patterns of cultural expression that allow for the possibility of a therapeutic culture to emerge within the seemingly punitive penal discourses of advanced liberal democracies. The peculiar aspect of the rise of therapeutic sensibilities within the judiciary is that it has come about at the same time, and on the coat tails of the ‘getting tough on crime’ rhetoric. In this chapter I will explore how these seemingly polar notions of therapy and punishment are able to cohere as penal practices of therapy.

### **A ‘new-punitiveness’ in the ‘era of hyper-incarceration’**

The ascendancy of the ‘get tough on crime’ rhetoric is apparent to modern penal theorists. As Russell Hogg and David Brown point out:

In law and order commonsense, crime is depicted as a problem of ever-increasing gravity set to overwhelm society unless urgent, typically punitive measures are taken to control and suppress it. It generates the aura of a

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<sup>38</sup> New South Wales: Attorney General’s Department (2003 *c*), *Drug Court Undertaking*, New South Wales: Attorney General’s Department, [www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/undertaking](http://www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/undertaking), (accessed September 2004), p. 4.

permanent state of emergency in which extraordinary measures are needed to defend society against the exceptional threat of rising crime rates.<sup>39</sup>

So in order to arrest the rising (fear of) crime rates, a ‘new punitiveness’ in sentencing has emerged and a political currency in evoking punitive sentiments is the result.<sup>40</sup>

As Jonathan Simon asserts:

Much of the current discussion of penal practices in the US presumes that political support for harsh measures reflects a belief by ordinary citizens, manipulated or otherwise, that crime is out of control and the past failure of government to impose certain and stiff penalties is to blame.<sup>41</sup>

This political will to impose ‘tougher’ penalties in turn provokes calls for tougher penalties from ‘public interest’ groups. It continues to accentuate the calls for more and more punitive measures to be taken on crime issues, calls such as those from Noel McNamara, of the Crime Victims Support Agency who asserts there is ‘a community perception that sentencing in this state [Victoria] was “soft” ’<sup>42</sup>. It is this sort of sentiment – that prisoners are mollycoddled and punishment is too ‘soft’ – that has seen the ‘new punitiveness’ become such a popular stance, especially in political rhetoric. In regard to the growth, in the last couple of decades, of the ‘tough on crime’ rhetoric, Michael Tonry comments:

‘Soft on crime’ became the most damaging and dreaded epithet with which one electoral candidate could tar another. Rather than risk the near-certain defeat that label – if successfully attached – would bring, candidates competed to assure voters of their toughness.<sup>43</sup>

Many theorists draw attention to the massive increase in the prison population as indicative of the current trends in the penal mentalities of the advanced liberal

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<sup>39</sup> R. Hogg and D. Brown (1998), *Rethinking Law and Order*, Annandale: Pluto Press, p. 4.

<sup>40</sup> J. Pratt (2001), ‘Beyond “gulags western style”? A reconsideration of Nils Christie’s ‘Crime Control as Industry’ ’, *Theoretical Criminology*, 5, 3, 283-314; J. Simon (2001), ‘ “Entitlement to cruelty”: the end of the welfare and the punitive mentality in the United States’, in K. Stenson and R. Sullivan (eds) *Crime, Risk and Justice: the politics of crime control in liberal democracies*, Devon: Willan, 125-143.

<sup>41</sup> J. Simon (2001), p. 125.

<sup>42</sup> S. Hodgson, April 21 2002, ‘State feared soft on crime’, *Sunday Herald Sun*, Melbourne, p. 28.

<sup>43</sup> M. Tonry (2004), p. 136.

societies.<sup>44</sup> It is, as these theorists contend, an era of ‘new punitiveness’<sup>45</sup> or of ‘hyper-incarceration’.<sup>46</sup> The calls for harsher penalties and less ‘mollycoddling’ of ‘criminals’ by the various interest groups, media commentators and politicians is demonstrative of the increasingly punitive nature of the penal discourses.<sup>47</sup> However, as David Garland notes, if we are to understand punishment, we need to look beyond penal systems per se, to the wider contemporary cultural landscape:

Punishment should be understood as a set of cultural practices which supports a complex pattern of regulatory, expressive and signifiatory effects, and any analytical approach should look for the pattern of cultural expression as well as the logic of social control.<sup>48</sup>

Alongside the punitiveness in penalty is another cultural theme, a theme that sits apart from the sensibilities that provoke what Nils Christie terms the ‘gulags, western style’<sup>49</sup>. It is a ‘cultural expression’ that appeals to the therapeutic sensibilities of western culture. As I shall demonstrate, the appeal of the therapeutic world, within the present culture, is one of ever-expanding necessity to all realms of person-hood; the political, personal and consumerist aspects of human identity are now therapeutically defined.

### **Soft Options?**

The appeal to therapeutic knowledges spans many areas of the social fabric. Therapy, as a consumer item has become a major part of social existence, a form of emancipation that can be consumed in a half-hour session of indulgence. From

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<sup>44</sup> See N. Christie (2000); J. Pratt (1997).

<sup>45</sup> J. Pratt (2001).

<sup>46</sup> J. Simon (2000).

<sup>47</sup> R. Hogg and D. Brown (1998).

<sup>48</sup> D. Garland (1990), p. 10.

<sup>49</sup> N. Christie (2000); J. Pratt (2001).

psychotherapy to beauty therapy, to therapy as a consumer activity (retail therapy), the therapeutic is part of our everyday experience. But therapy is an emancipatory technology that does not only appeal to the sensibilities of those that buy into the therapeutic economy; it also resonates within the political spectrum. Policy itself is offered in the language of therapy to those worthy, deserving constituents, from the appeals of a president that ‘feels your pain’, like Bill Clinton,<sup>50</sup> of a Prime Minister that ““feels” and “cares” and promises to “share” and “reach out” ’, like Tony Blair<sup>51</sup> to a would-be Prime Minister of Australia, like Mark Latham, promising not to neglect ‘the things that matter most to people: family relationships and people’s emotional well-being’.<sup>52</sup> The advantage of playing the therapeutically defined emotion card has extremely powerful political currency in what has been labelled by James L. Nolan Jr, the ‘therapeutic state’<sup>53</sup>

However, therapy as a reward for the weary battler is seen as a privilege of freedom only to be bestowed upon those who ‘deserve’ freedom and is to be kept from the deviant population, until they prove themselves worthy – once they have ‘paid’ for their crimes. It is an area of personal indulgence that, according to the advocates of the ‘tough on crime’ rhetoric, is to only be experienced by those who refrain from breaking the law, a kind of privilege of freedom. For example, Steve Medcraft, the president of the public interest group, ‘People Against Lenient Sentencing’ (PALS) asserted in a recent tabloid article, titled ‘Violent Youths get fast-food bribes: inmate rewards spark outrage’, that ‘juvenile justice centres have become like resorts’ and that the offenders have ‘got basically all that they have at home, and sometimes

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<sup>50</sup> F. Furedi (2002), p. 227.

<sup>51</sup> F. Furedi (2002), p. 225.

<sup>52</sup> G. McManus (2004), ‘Minister for happiness: Tanner keen to raise our spirits’, *Herald Sun*, January 30, p. 4.

they're better off inside than out'.<sup>54</sup> The article emphasises the trips to McDonalds and 'other luxuries enjoyed by the inmates [including] swimming pools and video games' and insists 'the McDonald's revelations have provoked outrage.'<sup>55</sup> This collective feeling of 'outrage' that is voiced by the 'public interest' groups and the popular press is especially demonstrative of the privileging of freedom for those who refrain from breaking the law, furthering the notion that therapeutic indulgence is something one receives for abstaining from breaking the law and not something that is to be experienced 'inside'. Therapy as a form of reward, at the very least, rubs incongruously with the 'new punitiveness' of the penal world. And yet the therapeutic culture and the new punitiveness have emerged at the same time, and, as we shall see, in the same penal environment.

Penal theorists such as Garland, Simon, Pratt, O'Malley and Christie, have commented that we are in a period of 'high-crime society'; 'hyper-incarceration'; witnessing the formation of 'gulags, western style'.<sup>56</sup> At the same time other theorists such as Nolan, Furedi, Hewitt, and Rieff, have commented that we are seeing the formation of 'the therapeutic state'; 'the institutionalization of the therapeutic ethos'; the 'triumph of the therapeutic'<sup>57</sup>. How then can the 'soft' notions of the 'therapeutic state' rise parallel to the punitive notions of the 'tough on crime' sentiment, especially when one considers Garland's premise that punishment should be understood as part of a wider pattern of cultural expression? Is one set of theorists off the mark? Or is it

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<sup>53</sup> See J. Nolan Jr (1998).

<sup>54</sup> C. Tinkler, I Haberfield and C Crawford (2004), 'Violent youths get fast food bribes: inmate rewards spark outrage', *Herald Sun*, April 1, p. 7.

<sup>55</sup> C. Tinkler et al. (2004).

<sup>56</sup> D. Garland (2001); D. Garland (2000), 'The culture of high crime societies: some preconditions of recent "law and order" policies', *British Journal of Criminology*, 40, 347-375; J. Simon (1993); J. Pratt (2001); P. O'Malley (1999 b); N. Christie (2000).

possible to understand therapy as a reward to those who refrain from breaking the law, leaving the punitiveness within penalty as an isolated phenomenon directed at only those who break the law? How then can therapeutic techniques be incorporated into justice, without generating mass public outrage?

### **Tough Therapy**

One of the ways in which therapy makes its claim in the punitive penal landscape, is to assert itself as, in fact, 'tough'. The neo-liberal ethos of individual responsibility allows for the knowledge of therapy as a liberating agent, to overcome the ills of one's life. The arduous task of starting a regime of therapy is seen as the first step toward the ultimate goal of the program – the production of an emancipated self.

Therapy also acts in the governance of the population by producing a certain type of individual, one that through their adherence to the therapeutically defined goals acts for the overall betterment of society. It helps to produce individuals who are 'free to choose'<sup>58</sup> the form of therapy that best suits their lifestyle and their society. As

Nikolas Rose succinctly notes:

Even pleasure has become a form of work to be accomplished with the aid of professional expertise and under the aegis of scientifically codified knowledge.<sup>59</sup>

Therapy, as a technology of governance, acts in the production of the enterprising individual; the individual who adheres to the scientifically coded knowledge of the therapeutic world, and works hard at earning their pleasurable moments. The self-regulating ends of the adoption of the therapeutic ethos enables one to go to the

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<sup>57</sup> J. Nolan Jr (1998); F. Furedi (2002); J. Hewitt (1998), *The Myth of Self-Esteem: finding happiness and solving problems in America*, New York: St. Martins Press; P. Rieff (1966), *The Triumph of the Therapeutic*, Chicago: University of Chicago Press.

<sup>58</sup> N. Rose (1999 a), p. 4.

<sup>59</sup> N. Rose (1999 a), p. 243.

gymnasium, eat the correct balance of various foods, express themselves in the correct therapeutic terminology and seek professional help when any sign of personal imbalance – be it psychological or physical – is demonstrated. The therapeutic ethos enables one to work to ensure all areas of life are ‘in balance’, or ‘in harmony’, in order to achieve their ‘pleasurable moments’

The tough work of therapy is quickly surpassed by the emancipation one feels by participating in the exercise of therapy – or such is the aim. However the degree to which one has reached this ‘aim’ must be constantly assessed and cultivated by the individual. In other words therapy becomes a process of *perpetual* self-assessment and analysis. With this in mind, then, is it such a huge leap to include techniques of therapy into the penal realm, even within the ‘new-punitiveness’ of the ‘era of hyper-incarceration’, given the penal institutions call for a greater exercise of control over the criminal population? For therapy itself is a pursuit which entails a level of difficulty in achieving and sustaining, so much so that one can never reach a finality of treatment.

Therapy, as a method of social control, offers the state a ‘more humane’ form of control than the traditional incarceratory sanctions. Frank Furedi notes:

The institutionalization of the therapeutic ethos can also be interpreted as the constitution of a regime of social control. Those who run afoul of the norms of the therapeutic ethos often discover that they are not just offered but are coerced into receiving ‘help’.<sup>60</sup>

It is of little surprise then that Michael Tonry suggests that within the penal arena the majority of officials are loath to continue the punitive march that has seen ascendancy

in the last couple of decades. For the controlling ability of the therapeutic ethos – through its continual regime of self-analysis – has allowed policy makers to look at the therapeutic model as an alternative to the punitive procession. He continues:

...the [punitive] fervor is abating, policies gradually are softening, a wider range of voices is being heard, and the prison population is stabilizing and in some places declining a little.<sup>61</sup>

However he further suggests that we are at an impasse, where, although those within the penal system are advocating change, the politicians and legislators are in a state of inertia. It is, according to Tonry, ‘no political risk’ to continue with punitive measures.<sup>62</sup> The refusal to change legislation to ‘soft’ measures is to continue to win the political game, even when it is only a few that support the ‘tough’ measures. As Tonry makes clear:

No matter how amenable most voters may be to sensible policy changes, the existence of a few percent who will always oppose candidates who appear ‘soft’ on crime or likely to ‘coddle’ offenders can immobilize legislatures.<sup>63</sup>

It is at this impasse that therapeutic jurisprudence and its practical realization – the drug courts – finds its calling. For it offers a solution to what Tonry asserts is the unwanted punitive situation in penal institutions without compromising the ‘tough’ stance of the legislature. As Justice Greg James of the Supreme Court of New South Wales stressed when speaking of the drug courts as a therapeutic option in sentencing:

It is important that it be known that the measures imposed by the Drug Court includes punishment and that they not be seen simply as a ‘soft option’.<sup>64</sup>

The drug court, through its inclusion of punishment and its regime of continual self-analysis via the therapeutic ethos, manages to avoid being labelled a ‘soft option’ and

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<sup>60</sup> F. Furedi (2002), p. 229.

<sup>61</sup> M. Tonry (2004), p. 9.

<sup>62</sup> M. Tonry (2004), p. 15.

<sup>63</sup> M. Tonry (2004), p. 18.

<sup>64</sup> G. James (2002), ‘Future directions in sentencing – a judicial perspective’ in *Drugs, Rehabilitation and the Criminal Justice System*, (New South Wales Drug Court conference, Sydney, February 28 2002), proceedings at [www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/confgjspeech](http://www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/confgjspeech), (accessed September 2004).

effectively stakes its claim in both the therapeutic culture and the punitive penal landscape.

### **Negotiating the impasse**

The Drug Court ‘revolution’<sup>65</sup> is a form of control that although based explicitly on therapeutic guidelines manages nevertheless to carry with it a sensibility that resonates within the punitive forces of the penal discourses. As part of the Victorian Drug Court promotional pamphlet a question asked is ‘Why is a drug court being trialed?’ The answer is as follows:

The Bracks government is committed to providing Victorians with safe streets, workplaces and homes. *This is achieved by being tough on crime and tough on the causes of crime.* The government has put in place a number of programs, as part of its overall strategy, to combat the problem of drug abuse and drug related crime – one of the most important issues affecting our community.

The Drug Court trial is part of this strategy. The Drug Court is a new approach to dealing with offenders in an attempt to reduce drug and alcohol related crime by *addressing its underlying causes.*<sup>66</sup>

The above aspiration carries with it certain sense, a certain logic, that to get tough on crime, you address the underlying causes. Yet it is to be addressed by therapy; a ‘tough’ therapeutic program that attacks the ‘heart of the problem’. Such a program offers to impose a monitored behaviour-modificational form of punishment without the *necessity* of incarceration – although the possibility of incarceration is there and is ever present.

The drug court offers a therapeutic program that allows for the possibility of ‘re-responsibilizing’ a deviant section of the citizenry. But it also allows for the further

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<sup>65</sup> See A. Frieberg (2003), ‘Therapeutic jurisprudence in Australia: paradigm shift or pragmatic incrementalism?’ *Law in Context*, 20, 2, 6-23. See also J. Nolan Jr (2001).

confinement and exclusion of that deviant should they fail to participate properly within the therapeutic ethos. The possibility of incarceration enables the therapeutic program to directly appeal to the rhetoric of ‘getting tough on crime’. It allows one to accept the attempt at therapy, for if the therapeutic program fails the older systems of incarceration will prevail. In effect a failsafe has been created through the ability of the program to impose more traditional incarceratory sanctions. The Drug Court, therefore, with its appeal to the humanising notions of therapy<sup>67</sup> and its appeal to the punitive notions of incapacitation and incarceration allow the program to resonate with a large portion of the population. It sits especially comfortably with the notions of what Jonathan Simon calls ‘the entitlement to cruelty’, in which he asserts:

Cruelty as a kind of government benefit becomes increasingly relevant to individuals who already experience themselves as disaggregated from any social provision.<sup>68</sup>

The appeal of drug courts is that they allow for the possibility of punishment if the ‘clients’ fail. They manage to appeal to those who buy into the rhetoric of ‘not a hand out, but a hand up’ and allows them to test out such an initiative, that could otherwise be seen as ‘soft on crime’. It presents itself as a double edged sword: treatment until failure, then an imposition of incarceration. If the individual fails within the program, a society, constituted as victims of crime, will receive its entitlement to cruelty; it will see the unreformable individual ‘pay for their crime’. The underlying causes of the problem of crime are to be addressed through the implementation of a therapeutic form of justice, a hybrid form of justice that incorporates the ‘tough on crime’ rhetoric whilst appealing to the cultural sensibilities of the therapeutic ethos.

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<sup>66</sup> Victoria: Department of Justice (2002), *Drug Court: breaking the cycle of drug-related crime*, Melbourne, Department of Justice, (promotional pamphlet, emphasis added).

<sup>67</sup> D. Wexler and B. Winick (1996); P. Hora, W. Schma, J. Rosenthal (1999).

<sup>68</sup> J. Simon (2001), p. 138.

### **Hybrid Justice: nostalgia and progress**

The hybridity of the therapeutic and the punitive that I have argued have been incorporated into systems of therapeutic jurisprudence can also be interrogated in terms of nostalgia and progress. Therapeutic jurisprudence can appeal to the progress of scientific reasoning, through its incorporation of the language and expertise of the various ‘psy’ professionals<sup>69</sup>, an aspect of its operation that will be taken up in more detail in the next chapter. At the same time by attempting to implement a moral order based on these therapeutic understandings, the drug court allows for the possibility of moral reformation. Hence it also resonates with understandings that are reflective of religious sentiments. That is to say, it does not simply seek to reject a moral order based on quasi-religious understandings, in the name of rationalism; it seeks to appeal to aspects of both. By appealing to the production of a better self through the application of a *scientific* framework, the therapeutic model offers to humanise the harshness of life without removing the strenuous moral rigour of daily existence. As Nolan comments, the therapeutic model ‘offers to soften the harshness of life in the machine without removing the machine’.<sup>70</sup>

It is this curious admixture that enables the therapeutic model to negotiate the impasse highlighted earlier. For as Nikolas Rose has commented: ‘therapy is a method of learning how to endure the loneliness of a culture without faith’.<sup>71</sup> The drug court offers to substitute the missing faith of modernity with the moral understandings of the therapeutic ethos, whilst still enabling a system grounded in a scientific rationalism. That is, for the therapeutic model offers a progressive model of

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<sup>69</sup> J. Nolan Jr (1998), p. 19.

<sup>70</sup> J. Nolan Jr. (1998), p .20.

<sup>71</sup> N. Rose (1999 *a*), p. 220.

governance based on the scientific rationalism associated with modernity that appeals to the nostalgic notions of moral reformation and, as discussed earlier, incarceration.

A number of contemporary theorists have remarked upon, and attempted to explain, the admixture of appeals to nostalgia and to progress in contemporary penal practices. It is an aspect that Pat O'Malley alludes to in his discussion of the volatile and contradictory nature of modern punishment.<sup>72</sup> Here he suggests that the reasons for the contradiction of modern penal practices is due, in the large part, to the 'changing paradigms of government'<sup>73</sup>, which has seen a destabilizing of old political certainties and a blending of neo-liberal and neo-conservative ideologies. Jonathan Simon also underscores the importance of nostalgic appeals in contemporary penality, though he attributes this nostalgic appeal to retributive penal practices to the anxieties of the postmodern era.<sup>74</sup> Simon contends that the anxieties of current penal practices have been created through the decaying of modernity and that this has borne a 'willful nostalgia' which provides an infusion of 'meaningfulness for practices that can no longer find sustenance in real external referents.'<sup>75</sup> Simon uses the example of the boot camp for his analysis and contends that the coherence and plausibility of modern punishment is in advanced decay.<sup>76</sup>

Like the drug court movement, much of the appeal of the boot camps, and the 'wheelbarrow men'<sup>77</sup> has been in its ability to appeal to a wide range of constituents in the punishment milieu. As Simon notes:

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<sup>72</sup> N. Rose (1999 *a*), pp 175-6.

<sup>73</sup> P. O'Malley (1999 *b*), p. 192.

<sup>74</sup> J. Simon (1995).

<sup>75</sup> J. Simon (1995), p. 43; P. O'Malley, (1999), pp 182-3.

<sup>76</sup> J. Simon (1995), p. 41.

<sup>77</sup> J. Pratt (2000 *c*).

During a period of massive public concern with crime, when policy matters have set the criminal justice officials against the politicians and the public against both, the boot camp has been one of the few initiatives that seems to resonate with all three.<sup>78</sup>

Simon also points to the ability of the boot camp program to evoke considerable enthusiasm from both sides of the political spectrum:

Conservatives find in the boot camps confirmation of the philosophy that the collapse of personal discipline is behind the crime problem. [Meanwhile] liberals applaud the rhetoric of transformation.<sup>79</sup>

Simon suggests that the willful nostalgia involved in programs like that of the boot camp, though lending them ‘a short-term jump in popular confidence’ also gives them only a ‘fleeting evocation’<sup>80</sup> – because they possess no real external referents. He asserts that there is ‘little reason to believe that these oases of discipline can function effectively in a social world that offers little resonance.’<sup>81</sup> Furthermore Simon echoes Tonry and argues that modern penality is at an impasse by insisting that the willful nostalgia associated with the boot camps ‘reinforces complacency with the present and inertia against any real change.’<sup>82</sup>

However, the drug court is able to reconcile those anxieties alluded to by Simon in a way that gives them more than a ‘fleeting evocation’. In contrast to the boot camps of Simon’s analysis, the drug courts are able to appeal to real external referents. The ubiquitous nature of the therapeutic ethos has allowed for the drug court to appeal to those therapeutic cultural referents that theorists like Nolan underscore as a well-

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<sup>78</sup> J. Simon (1995), p. 27.

<sup>79</sup> J. Simon (1995), p. 28; P. O’Malley (1999).

<sup>80</sup> J. Simon (1995), p. 39.

<sup>81</sup> J. Simon (1993), p. 248.

<sup>82</sup> J. Simon (1995), p. 42; M. Tonry (2004).

embedded part of our social reality.<sup>83</sup> It is through this appeal that the drug court movement has grown at such a rapid rate, and across national boundaries, whereas the boot camps have remained a comparatively isolated phenomenon. It is the ability of the drug court program to find sustenance in real external referents that enables it to negotiate that impasse and reconcile the anxieties of modern punishment.

This chapter has sought to highlight the ability of the drug courts to appeal to the very volatility and contradiction that has been commented on. This chapter has contended that the drug courts hybrid nature is the very aspect that allows it to have such a high level of cultural resonance, especially its ability to appeal to the punitive ideals of modern penal practices whilst being grounded in an explicitly therapeutic form of justice; therapeutic jurisprudence. Insofar as it does not reject one process of reform over the other the drug court is empowered to successfully negotiate the conflict between the 'tough on crime' march and the will to therapy within the penal institutions and the judiciary. However it also overcomes the 'fleeting evocation' of previous attempts at hybrid systems by appealing to 'real external referents', which has given the drug court the institutional strength to sustain its appeal. It is through its hybridity and widespread appeal to various knowledges that the drug courts and the wider therapeutic jurisprudence movement is able to negotiate the impasse of modern penalty and flourish as a movement, maybe even a revolution.<sup>84</sup>

The following chapter moves from an investigation of the emergence of the drug courts in a contradictory field to the contradictions inherent *in* the drug court, and how they impact on the various actors involved within the drug court. Winick and Wexler

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<sup>83</sup> J. Nolan Jr. (1998).

<sup>84</sup> P. Hora, W. Schma, J. Rosenthal (1999).

assert that the drug courts can gain, through therapeutic jurisprudence ‘an interdisciplinary perspective that can provide a grounding for the new judicial movement, for therapeutic jurisprudence specifically asked *what* legal arrangements work and *why*.<sup>85</sup> In the following chapter I will seek to explore *how* these legal arrangements of therapeutic jurisprudence, captured specifically by the drug court movement, work.

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<sup>85</sup> B. Winick and D. Wexler (2003 *b*), ‘Therapeutic jurisprudence as a theoretical foundation for these new judicial approaches’, in B. Winick and D. Wexler (eds), *Judging in a Therapeutic Key: therapeutic jurisprudence and the courts*, Durham: Carolina Academic Press, 7-10.

## **Chapter Two Terms of Negotiation.**

Treatment of the participants as adults in a respectful fashion increases their self-esteem. In the Drug Court we are teaching them to progress towards independence, and to develop trust in the system. The positive structure of the system is directed towards extracting honesty which encourages them to become more mature and self-reflective.<sup>86</sup>

The rise of therapeutic procedures of justice, especially in relation to drug treatment courts, places a significant emphasis upon the value of self-esteem, empowerment, voice, volition and validation on the part of the 'client'. The drug addict is to be 'cured' through techniques of the self that gear the addict towards a life of citizenry. The central importance of knowing one's self and of being able to articulate that knowledge of the self within the therapeutic language is forever on display within existing drug court theory and practice.<sup>87</sup>

The implementation of drug courts across the English speaking world has seen a significant shift in the techniques used to hand out justice in relation to drugs and crime. It is that shift in the understanding of justice that will be investigated in this chapter. Specifically, this chapter will explore the techniques of this new juridical form as celebrated by its advocates, but also as techniques of governance that demand more critical scrutiny. Key concepts, including self-esteem, empowerment, volition and validation are examined in terms of the role they play, as understood by the advocates of therapeutic jurisprudence. But these concepts are also examined critically as techniques for the exercise of power, and indeed, finally, for the extension of power beyond what we might think of as the legitimate limits of legal judgements.

### Advocating a new team approach

In a recent conference on Drug Courts in New South Wales, three different professionals spoke about the relevance of therapeutic jurisprudence to the formation and effectiveness of drug courts<sup>88</sup>. Although the conference was itself mainly aimed at judges and lawyers, two of the three speakers were non-legal professionals, one a criminologist and the other a psychiatrist. It may not be overly unusual for professionals from other areas to speak at legal conferences, but it is indicative of the hybridity of the knowledges therapeutic jurisprudence creates. The rise of therapeutic knowledges within the drug court drama has meant that legal professionals – especially judges, for traditionally they are the central characters – have undertaken a transformation from a rigid legal standpoint to a view of the world that encompasses knowledges of the therapeutic framework. As Judge Neil Milson put it in the 2002 conference, ‘In this context the continuing professional education takes on an added dimension. The judge and all the members of the team need to gain knowledge about drugs, addiction, and treatment.’<sup>89</sup> Further, judges are, at times, having to allow their powers within the courtroom to be implicitly usurped by therapeutic professionals within the team. Again Milson emphasises this point:

One has to be prepared to accept advice or to be led or even to be corrected by the other professionals in the area. You cannot be the judge who is father who knows best at all times, because it doesn’t work and because you don’t.<sup>90</sup>

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<sup>86</sup> New South Wales: Attorney General’s Department (2002 *b*), *New South Wales Drug Court Evaluation: a process evaluation*, Sydney: Bureau of Crime Statistics and Research, [www.lawlink.nsw.gov.au/bocsar1.nsf/pages/113textsection11](http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/113textsection11), (accessed September 2004).

<sup>87</sup> J. Nolan Jr (2001).

<sup>88</sup> New South Wales: Attorney General’s Department (2002 *a*), ‘Workshop No.1: Therapeutic jurisprudence and the role of the judicial officer in a therapeutic court’ in *Drugs, Rehabilitation and the Criminal Justice System*, (Drug Court conference, Sydney, February 28 2002), proceedings at [www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/confw1](http://www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/confw1), (accessed September 2004), p. 1.

<sup>89</sup> New South Wales: Attorney General’s Department (2002 *a*), p. 13.

<sup>90</sup> New South Wales: Attorney General’s Department (2002 *a*), p. 13.

Through the injection of therapeutic knowledges into the arm of the legal realm, judges and other traditional legal professionals have begun to understand their roles in the proceedings of drug courts and other therapeutic jurisprudence-based initiatives as being aimed at the betterment of society through the deployment of therapeutic values, not only legal values. This transformation of traditional understandings of justice has seen the placement of therapeutic professionals within the judicial team and has given therapeutic professionals a much larger scope to influence the behaviours of the court and its clients. This injection, however, is celebrated by the proponents of the drug courts, including the legal professionals. It has allowed the legal realm to understand the reasons given for addiction in terms provided by the different therapeutic experts that are on hand to disseminate their knowledges through the court. Through the tutelage of therapeutic professionals the traditional court professionals have gained the therapeutic knowledge that criminality, in instances that come before the drug court<sup>91</sup>, is caused by drug dependency, which if curbed, it is hoped can end the criminality of the individual and even of those close to that individual<sup>92</sup>. However, it is not via a re-education in terms of drug hazards and harm minimisation policies that the client will be seen to prosper, although they may be involved. It is through the re-education of clients in terms of their self-worth and the building of self-esteem that the cycle of drug dependency and the cycle of criminality will be broken. As the Aboriginal Legal Service in Western Australia noted, in response to a recently instituted alternative sentencing regime:

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<sup>91</sup> Victoria: Department of Justice (2003 *a*), *Drug Court*, Victoria: Department of Justice, [www.justice.vic.gov.au](http://www.justice.vic.gov.au), (accessed September 2004).

<sup>92</sup> M. King (2003 *b*), 'Innovation in Court Practice: using therapeutic Jurisprudence in a multi-jurisdictional regional magistrates' court' in *New Challenges, Fresh Solutions*, (21<sup>st</sup> Annual Conference of the Australian Institute of Judicial Administration, Fremantle, September 20, 2003), proceedings at [www.aija.org.au/ac03/papers/Hannam.rtf](http://www.aija.org.au/ac03/papers/Hannam.rtf), (accessed September 2004).

We believe that the skills learned, disciplines acquired and raised self-esteem have the potential to break intergenerational offending behaviour.<sup>93</sup>

The emphasis on self-esteem is echoed by Magistrate Hillary Hannam, of Wagga Wagga Local Court, through an anecdote of therapeutic jurisprudence in action:

I remember for example dealing with one young person whose main problem was far too much spare time on his hands which would lead to offending, but who was a gifted Rugby League player. Although I am not a fan of that particular game myself, I did end up through this 'negotiation' imposing a condition on his probation order that he play Rugby League as that was an activity which enhanced the young man's self esteem and assisted in his rehabilitation.<sup>94</sup>

Here, the emphasis on increasing the levels of self-esteem in order to end the offending behaviour of the client of the court is paramount to the therapeutic exercise. This particular, specialized, professional therapeutic knowledge, within the drug court, is celebrated by the advocates of the drug court program, especially the judges.<sup>95</sup>

Some limited criticism has recently surfaced as to the blurring of roles that the drug court creates. In the May 2003 Perth Drug Court evaluation the report commented:

It is not surprising that boundaries have become blurred, responsibilities and lines of authority have become unclear and this has led to considerable distress. Further, it raises the issue as to whether those individuals who are best trained and most qualified to make decisions in regard to a particular area of expertise are being usurped by those less qualified.<sup>96</sup>

The passage, however, follows a definition of the profiles of the various professionals involved in the drug court – such as the magistrate being legally qualified and the

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<sup>93</sup> M. King (2003 *b*), p. 10.

<sup>94</sup> H. Hannam (2003), 'Therapeutic Justice' in *new challenges, fresh solutions*, (21<sup>st</sup> Annual Conference of the Australian Institute of Judicial Administration Fremantle, September 20, 2003), proceedings at [www.aija.org.au/ac03/papers/Hannam.rtf](http://www.aija.org.au/ac03/papers/Hannam.rtf), (accessed September 2004), p. 1-2.

<sup>95</sup> New South Wales: Attorney General's Department (2002 *a*).

treatment team being qualified in areas of expertise like; social work, psychology, clinical psychology and medicine – and was given as a criticism, not of the hybridity the program causes but rather as a criticism of the current forms of delegation. In essence the celebration of the hybrid nature of the drug court just needs to be put on hold until all the administrative glitches are ironed out. The sentiment remains that the hybrid program *is* a potentially liberating source for both treatment personnel and legal personnel. Hence the treatment ethos that, even in the light of such criticism, the building of self-esteem and self-worth within the offenders is to continue to be embraced by the legal system.

Self-esteem, empowerment, voice and volition

The centrality of self-esteem to the drug court theatre is an aspect that James L. Nolan Jr. alludes to in his analysis of American drug courts. After various interviews with drug court judges, all emphasising the importance of self-esteem, Nolan concludes that ‘the raising of self-esteem is a central component of the drug court judge’s role.’<sup>97</sup> Further, ‘building someone’s self-esteem through affirmation is the key to changing bad behaviour.’<sup>98</sup>

The issue of self-esteem as the precursor for reforming criminality is not confined to the American example. Stipendiary Magistrate of Geraldton, Western Australia, Michael S King asserts that ‘a lack of wellbeing in one or more areas of life often underlies the reason why people come before a court in criminal, family and some

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<sup>96</sup> Western Australia: Department of Justice (2003 *a*), p. 192.

<sup>97</sup> J. Nolan Jr (2001), p. 138.

<sup>98</sup> J. Nolan Jr (2001), p. 140.

civil cases'.<sup>99</sup> For King it is through the building of self-esteem within the offender that will reap the greatest benefit for the individual and the community. To achieve this the Geraldton judiciary has set up an initiative known as the Geraldton Alternative Sentencing Regime (GASR), which endeavours to promote the rehabilitation of those with substance abuse, domestic violence and other offending related problems.<sup>100</sup> Under the GASR Practice Direction of August 2<sup>nd</sup> 2001,

...rehabilitation is more than the absence of offending; it is also the ability to function in society, the ability to deal with life challenges in a constructive manner and without abusing alcohol or illicit drugs... The end result of rehabilitation should be the person's empowerment to lead a productive, harmonious and fulfilling life in the community.<sup>101</sup>

The importance of realising that social betterment starts from within the self is central to much of the therapeutic jurisprudence literature and most problem solving courts that use therapeutic jurisprudence as their theoretical base. As King noted, 'processes used in problem solving courts are thought to promote the self-esteem of participants.'<sup>102</sup> It is contended by the therapeutic jurisprudence advocates that 'this sort of judging may... have both short-term and long-term benefits. Ultimately, the benefits may be for the offenders, and, in turn, for society as a whole.'<sup>103</sup> It is hoped the rehabilitated individual will fulfill their civic responsibilities and achieve gainful employment and enriched social interactions.

By entering into programs of therapy subjects gain the ability to learn and understand their previous disenfranchised state. One is able to learn of one's inability to self-

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<sup>99</sup> M. King (2003 *a*), 'Applying therapeutic jurisprudence in regional areas – the Western Australian experience', *Murdoch University Electronic Journal of Law*, 10, 2, [www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html](http://www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html), (accessed September 2004), p. 4.

<sup>100</sup> M. King (2003 *a*), p. 3.

<sup>101</sup> M. King (2003 *a*), p. 6.

<sup>102</sup> M. King (2003 *a*), p. 4.

<sup>103</sup> D. Wexler (2003), 'Robes and rehabilitation', in B. Winick and D. Wexler (eds), *Judging in a Therapeutic Key: therapeutic jurisprudence and the courts*, Durham: Carolina Academic Press, 249-254, p. 253.

govern. It is only through attending programs that tutor subjects in self-betterment, self-realisation and empowerment that one is able to recognise a previous helplessness and lack of self-control and the inevitable lack of self-worth. Fostering self-esteem aids in the creation of law-abiding civility within the 'community'. It will instil within the subjects of the therapeutic program a sense of responsibility and civic consciousness. In other words the drug court team are able to convince the offender, through the building of self-esteem, that civic life, not the deviant version they were previously living, is a desirable life and one that can be achieved and continued through the 'living skills' acquired throughout the program. The means by which the drug court team are able to convince the offenders must, however, be very carefully enunciated. Paternalism for example is firmly rejected.

The drug courts, and all therapeutic programs of justice that understand therapeutic jurisprudence as their theoretical base see paternalism as a counter-productive exercise and telling a client what to do is an aspect the new juridical forms of therapeutic jurisprudence-based initiatives attempt to avoid. As Bruce Winick, one of the co-founders and leading theorists on therapeutic jurisprudence notes:

Paternalism is often experienced as offensive by its recipients. It may produce resentment, and as a result, may backfire, producing a psychological reactance to the advice offered that might be counter-productive. Many offenders will be in denial about their underlying problems, and paternalism is unlikely to succeed in allowing them to deal with such denial. Instead, it may produce anxiety and other psychological distress that will make it harder for them to do so.<sup>104</sup>

To avoid the possibility of paternalism, and the patronizing dependency of the earlier forms of penal welfare programs, the therapeutic programs of justice aim to foster the

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<sup>104</sup> B. Winick (2003), 'The Judge's role in encouraging motivation for change', in B. Winick and D. Wexler (eds), *Judging in a Therapeutic Key: therapeutic jurisprudence and the courts*, Durham: Carolina Academic Press, 181-188, p. 182.

offender's own will to succeed in the program. By working on the will of the individual the therapeutic forms of justice enable subjects to learn freedom. Both GASR and the drug courts tutor the offender in the workings of 'freedom'. They do this by emphasising the ethics of responsibility, honesty and respect for the court and themselves. Freedom, in relation to the therapeutic forms of justice, is seen as the ultimate outcome of the program. It is a freedom that emphasises the importance of life skills, employment and relationship cohesion to name a few. This emphasis is designed to re-introduce the addict into civic life, with the possibility of full inclusion.

So, fostering self-esteem and volition are understood by the advocates of therapeutic jurisprudence as the keys to reforming deviant behaviour. But a number of theorists also suggest that these are not just key therapeutic practices for empowering individuals, but are also key techniques in the exercise of power. As Barbara Cruikshank notes:

Self-fulfillment is no longer a personal or private goal. According to advocates, taking up the goal of self-esteem is something we owe to society, something that will defray the costs of social problems, something that will create 'true' democracy.<sup>105</sup>

Self-esteem and technologies of the self, are as Cruikshank has demonstrated, technologies that aim to bring about a better level of equality in all areas of social life. Yet it is done not through the targeting of large areas of inequality such as poverty or gender or race, it is done by the technique of 'empowerment'.<sup>106</sup> The technique of empowerment is a strategy of governing to act upon others by 'empowering' them to

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<sup>105</sup> B. Cruikshank (1996), 'Revolutions within: self-government and self-esteem', in A. Barry, T. Osborne and N, Rose (eds), *Foucault and Political Reason: liberalism, neo-liberalism and rationalities of government*, London: University College London Press, 231-251, p. 232.

<sup>106</sup> B. Cruikshank (1996), pp 231-2.

act in their own interests, but these 'own' interests are determined by those implementing the programs.<sup>107</sup>

Of course, the therapeutic technologies involved in the judicial processes of GASR and the drug courts is a technology that aims to regulate the behaviour of the deviant individual via the realization of self-betterment. But Cruikshank's work allows us to consider the possibility that the building of self-esteem within the judicial setting as a technology, that, although it has a 'softer' regulatory sound than methods like incarceration, nonetheless, uses legal coercion as a means of reinventing subjects' capacities for self-government. As she points out:

Self-esteem is a technology of citizenship and self-government for evaluating and acting upon our selves so that the police, the guards and the doctors do not have to.<sup>108</sup>

The therapeutic programs, through judicial coercion, aim to instill a greater emphasis upon the importance of appreciating oneself, in order to produce self-governing citizens, free of the burden of drugs and crime.<sup>109</sup> Through technologies of self-government the therapeutic practices of the drug courts and programs like GASR are able to govern the 'conduct of conduct'<sup>110</sup> of the offenders whilst in the program and it is envisaged that success will continue after their successful completion or graduation from the program.

The processes of the drug treatment court and their emphasis on self-esteem act in performing a technology of governance through the guise of therapy so that the

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<sup>107</sup> B. Cruikshank (1999), p. 68.

<sup>108</sup> B. Cruikshank (1996), p. 234.

<sup>109</sup> J. Nolan Jr (2001).

judiciary no longer has to concern itself with that individual. Through the use of therapeutic technologies of governing, the drug courts, inasmuch as they hail therapeutic jurisprudence as their theoretical base, act upon the regulation of ‘free’ democratic subjects, who now that they have been coerced into a form of civility, are in a position to *be made* to learn ‘freedom’. As Nikolas Rose puts it:

The beauty of empowerment [as a governing technology] is that it appears to reject the logics of patronizing dependency that infused earlier welfare modes of expertise. Subjects are to do the work on themselves, not in the name of conformity, but to make them free.<sup>111</sup>

As noted earlier, freedom, is understood as the ultimate outcome of the program; it is a freedom that emphasises life skills, employment and relationship cohesion. It is a freedom that is designed to re-introduce the addict into civic life. However this re-introduction also acts in the further control of the offender once their sentence is finished and the program has been completed. Again, Rose states:

For those who can be included, control is now to operate through the rational reconstruction of the will, and of the habits of independence, life planning, self-improvement, autonomous life conduct, so that the individual can be re-inserted into family, work and consumption, and hence into the *continuous* circuits and flows of control society.<sup>112</sup>

For these therapeutic technologies of governance to be effective the therapeutic ethos must reside within the value systems of the individual concerned, the addict/offender, now client. The client must not only understand the value of therapy but must also be willing to adopt, within their individual make-up, the value of therapeutic knowledges. The clients must learn to speak in the therapeutic language of the drug court *for* themselves.

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<sup>110</sup> C. Gordon (1991), ‘Governmental Rationality: an introduction’ in G. Burchell, C. Gordon, P. Miller (eds), *The Foucault Effect: studies in governmentality with two lectures by and an interview with Michel Foucault*, Chicago: University of Chicago Press, pp 1-51, p. 2.

<sup>111</sup> N. Rose (1999 *b*), p. 268.

### **Speaking for the self: honest voices**

Governor of New South Wales and professor of psychiatry, Marie Bashir, illustrated that within the Drug Court Program, ‘an expectation of responsibility is placed on the offender’, which instills in the individual a new level of ‘openness, honesty and respect’<sup>113</sup>, not just for the court system but for themselves. These newfound qualities of ‘openness, honesty and respect’ for one’s self comes through the ability of the Drug Court to promote ‘a sense of self-worth and optimism’<sup>114</sup>. However Bashir recognises that the new level of confidence within the clients is a fragile confidence; it is a confidence that needs to be cultivated and nurtured, which it is hoped can be achieved through the adoption of a comprehensive ‘team approach to decision making’<sup>115</sup>. Central to the ability of the team to effectively work is the offender or client of the Drug Court. It is, after all, the offender who is the focus of the therapeutic lens.

The ability of an individual to succeed in the Drug Court program depends largely upon that individual’s ability to transform their behaviour according to the will of the court’s therapeutic ideals. To do so one must adhere to the values set out by the Drug Court upon one’s acceptance into the program. Amongst the many values of the Drug Court, offenders must commit to honestly and promptly disclosing any drug use to the court and seek immediate counselling to help the offender avoid any further use.<sup>116</sup>

The drug court will even defer immediate drug testing, in favour of ‘delayed’

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<sup>112</sup> N. Rose (1999 *b*), p. 270, (emphasis added).

<sup>113</sup> M. Bashir (2002), ‘Keynote Address’ in *Drugs, Rehabilitation and the Criminal Justice System*, (New South Wales Drug Court conference, Sydney, February 28 2002), proceedings at [www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/confw1](http://www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/confw1), (accessed September 2004), p.2.

<sup>114</sup> M. Bashir (2002), p.2.

<sup>115</sup> New South Wales: Attorney General’s Department (2002 *a*), p. 6.

<sup>116</sup> New South Wales: Attorney General’s Department (2003 *c*), p. 4.

laboratory testing to elicit honesty from the clients of the court. As was made clear in the New South Wales Drug Court, 2002 Annual Review:

If the participant responds swiftly, by admitting the use and seeking help from a counsellor, the court can wait. We are explaining to participants that testing is to allow them to prove their honesty and the reduced level of use, not for the court to catch them.<sup>117</sup>

The emphasis on honesty stems from the Drug Court's theoretical base of therapeutic jurisprudence<sup>118</sup>. Within therapeutic jurisprudence literature there is a large emphasis placed on the importance of voice and validation and the prospects of that voice and validation producing feelings of empowerment for the offender. Once again Winick emphasises this point:

Problem solving court judges should...[treat] the individuals they face with dignity and respect and according them voice and validation in the interactions they have with them. They should avoid negative pressures and threats, relying instead on positive pressures like persuasion and inducement. If they do so, it is more likely that they will experience the treatment they have consented to as voluntary rather than coerced, and as a result, will experience the psychological benefits of choice and avoid the negative psychological effects of coercion. People resent being treated as incompetent subjects of paternalism and suffer a diminished sense of self-esteem and self-efficacy when not permitted to make decisions themselves.<sup>119</sup>

Here, it is the clients who must 'choose' to change. The judge's role as is suggested by the title of Winick's piece – 'The Judge's role in encouraging motivation for change'<sup>120</sup> – is to simply encourage the client to get to the stage that they want to change. Yet, as Winick asserts, the judge must 'avoid the negative psychological effects of coercion'. This places the judge in an extremely difficult position, to encourage, as a judge – a traditionally coercive position – without using techniques of

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<sup>117</sup> New South Wales: Attorney General's Department (2003 *d*), *Extracts from 2002 Annual Review*, New South Wales: Attorney General's Department, [www.lawlink.nsw.gov.au/drugcrt/drugcrt\\_nsf/pages/drugcrt\\_new](http://www.lawlink.nsw.gov.au/drugcrt/drugcrt_nsf/pages/drugcrt_new), (accessed March 2004), p. 4.

<sup>118</sup> P. Hora, W. Schma, J. Rosenthal (1999).

<sup>119</sup> B. Winick (2003), p. 185.

<sup>120</sup> B. Winick (2003).

coercion. Even with this obvious ambiguity the judges are able to convince the clients of the drug courts that their treatment is voluntary, for they chose this route, not the incarceratory route. Yet the possibility of incarceration still applies. The Victorian Drug Court allows magistrates to impose sanctions of varying degrees upon the clients if non-compliance is encountered. The sanctions vary from a verbal reprimand through to the cancellation of the order and the re-sentencing of the offender, most likely to a custodial term.<sup>121</sup> However, this is not the only way a custodial sentence can be enforced. Prior to the cancellation of the order the client will, as a form of sanction, undergo small periods of incarceration for non-compliance. Yet this is still not understood as coercion, it is seen as a sanction, which because it was agreed upon by both parties from the outset, is non-coercive. As Winick again makes clear:

The individual knows that if he or she fails to comply, the court can apply sanctions, typically graduated sanctions agreed to in advance by the individual. Moreover, the individual knows that repeated non-compliance can result in expulsion from the program and return to criminal court... While in a manner of speaking, these potentially may pressure the individual to comply and even induce his or her compliance, there is no need to regard this as coercion.<sup>122</sup>

The drug court treatment team, headed by the judge, is there to see the client through the difficult period of adjustment to civility, and are there to help motivate the intrinsic will of the offender/client to pursue the goals of a responsible civic life. Once in the program the client must learn to accept their treatment and begin to understand that they are *not* being coerced but they are being 'helped'. They *must* learn that for them to be helped they *must*, in the neo-liberal ethos, help themselves. Once the client is in a position to accept the therapeutic tutelage, they are then able learn civility.

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<sup>121</sup> Victoria: Department of Justice (2002).

The offender, like the conglomeration of professionals that make up the drug court team, must undergo a transformation of their traditional role. To succeed in the treatment program the offender must be able to prove to the 'team' that they are worthy of reinstatement into functioning society. To achieve reinstatement the New South Wales drug court has incorporated into its policy a section entitled, 'Reintegration into the community', which states:

To promote re-integration into the community the program will focus on:

- Housing and income stability
- Health – diagnosis and treatment
- Behaviour modification and living skills appropriate to the ability of the individual
- Education – readiness for employment where possible
- Employment where possible
- Relationships, child care &c
- Legal Responsibilities – fines/CSO/PD &c<sup>123</sup>

The focus on living skills, education, relationships, fulfilling the responsibilities of citizenship, such as paying fines, and promoting the virtues of stability within all these areas of life, demonstrates the drug court's aspirations for the offender/client not only to attain a drug-and-crime-free existence, but to lead a cohesive and socially productive life, full of the civic responsibilities that brings.

To fulfill their civic duties effectively, the offender must learn how to behave within the therapeutic setting and an imperative of that setting is the offender's ability to articulate themselves within the therapeutic framework. The offender must first come to understand themselves as the client, not the offender. The client, from the outset is exposed to the language of the process they are about to enter. Within the conditions

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<sup>122</sup> B. Winick (2003), p. 184.

of entry into the New South Wales drug court program the client must ‘be honest and not attempt to deceive the Drug Court’, they must, ‘punctually attend all personal development courses, courses on obtaining employment and educational courses’. If in the somewhat expected occurrence of relapse the client must ‘honestly and promptly disclose [prohibited drug] use to the court’<sup>124</sup>. Through the reading and consequent signing of the undertaking the client of the Drug Court begins to learn the importance of telling the truth and once in the program the client begins to understand the imperative of telling the truth within the therapeutic language.

### **Not ‘guilty’: transforming offenders into clients**

The judges involved in Drug Court take the view that the people that enter their court are no longer ‘the accused’ or ‘the defendant,’ they are now known as ‘the client’.<sup>125</sup> That transformation, is itself indicative of the changes happening within the Drug Court setting. It displays the different reasoning for courts; instead of being a place to determine guilt, it has become a place for the imposition of a sentence, a sentence that is determined and executed by a whole set of techniques of therapy, and techniques for the governing of one’s self.<sup>126</sup> In their very influential piece on the relevance of therapeutic jurisprudence to drug treatment courts, prominent advocates of the drug court, judges Peggy Hora, William Schma and attorney John Rosenthal assert ‘In a drug court, the treatment experience begins in the courtroom’.<sup>127</sup> Within the drug court process the traditional court process of the determination of guilt is non-existent. To be eligible for the Victorian and New South Wales drug court program an offender

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<sup>123</sup> New South Wales: Attorney General’s Department (2003 *b*), *Drug Court Program Goals and Measures*, New South Wales: Attorney General’s Department, [www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf](http://www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf), (accessed September 2004), p.2.

<sup>124</sup> New South Wales: Attorney General’s Department (2003 *c*).

<sup>125</sup> The Victorian drug court prefers the term ‘participant’, but for the purpose of this study the term ‘client’ is adopted for it is the more used throughout the worlds drug court’s, see J. Nolan Jr (2001).

must plead guilty to their offence.<sup>128</sup> They are then sent from their initial hearing within a court to a different court for the imposition of their sentence.

As discussed earlier the role of the judge has been seriously altered by the inclusion of drug court programs into the legal system. Judges are now in a role of therapeutic intervention, not just adjudication and incarceration. Yet for a judge to initiate the therapeutic sanction upon a client the client must first admit guilt of the crime and then 'guilt' of their addiction, but not in so many words. As James L. Nolan Jr. contends:

The drug court demands a therapeutically revised form of confession: 'I am sick' instead of 'I am guilty'. Of greater importance is the therapeutically correct view that one recognize, come to terms with, and confess one's addiction. Simply to admit guilt but not addiction, is to remain in denial. Guilt, in the context of therapeutic jurisprudence, is meaningless.<sup>129</sup>

The process by which 'I am guilty' is translated into 'I am sick' can be seen through the deployment of the concept of 'denial' as a clinical, psychological term. Especially when a client chooses to reject the terms of the therapeutic idiom, those terms are thrust upon the individual, quickly rendering that individual as 'in denial', and labeled as such.<sup>130</sup> Again Hora, Schma and Rosenthal made this clear in their influential article:

In a DTC [Drug Treatment Court]—through regular court appearances before the same judge, rigorous case management, and treatment—addicts are forced to confront their denial of substance abuse, accept their addiction problem, and embrace the recovery process.<sup>131</sup>

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<sup>126</sup> J. Nolan Jr (2001) pp 123-126.

<sup>127</sup> P. Hora, W. Schma, J. Rosenthal (1999), p. 473, brackets in original.

<sup>128</sup> Victoria: Department of Justice (2002); New South Wales: Attorney General's Department (2003 a).

<sup>129</sup> J. Nolan Jr (2001), p. 142.

<sup>130</sup> See J. Nolan Jr (2001), pp 123-126.

<sup>131</sup> P. Hora, W. Schma, J. Rosenthal (1999), pp 472-3.

While confessing 'guilt' might expose the 'criminal' to a set of limited, traditional legal sanctions, confessing 'denial', and engaging in the attempt to overcome that denial, opens the floodgates to the therapeutic expertise. If clients fail to accept the view that they are addicts, then they are clearly in denial and the process cannot continue. In drug court one must not only admit their guilt of a crime they must also admit their guilt of addiction, an addiction that is the reason for the crime. Without an admission of addiction the therapeutic program cannot competently exorcise the client of the addiction demon. As associate professor of law and former Assistant US Attorney, Stephanos Bibas asserted: 'In short, denial obstructs treatment, which in turn greatly increases the risk of recidivism'.<sup>132</sup>

For one to succeed in a therapeutic drug treatment program one is forced to accept the language and articulation of the therapeutic world, to do so is to avoid being labeled as 'in denial' and to progress into civility. To fail to use the therapeutically defined language is to fail to succeed in the completion of the program.

The shifting grounds of 'guilt' from an imperative of the judiciary to an irrelevant term within the judicial setting of drug courts demonstrates the shifting paradigm that the drug court is bringing to the legal system: a paradigm of therapy, self-esteem and guiltlessness all aimed at the regulation of deviance and the reinstatement of a previously excluded citizenry through the techniques of the therapeutic world. Yet the notion of guiltless justice is an aspect that needs further scrutiny.

Although the necessity for the determination of guilt is no longer an imperative in the traditional form, there still is room for the determination of guilt. The guilt in the drug court setting is not a guilt of laws but a guilt of norms, norms such as those mentioned earlier; living skills, education, relationships and the fulfilling of the responsibilities of citizenship; norms that the New South Wales Drug Court emphasizes as integral to the successful completion of the drug court program.<sup>133</sup> The transgressing of norms of the functioning of the court such as punctuality and the attendance of courses tutoring clients in ‘living’ are what is judged by the new form of guiltless justice. The traditional notions of laws are no longer relevant to this form of court, for they are not to be judged in this setting. It is the ability of the client to adhere to the life assistance given by the court that is to be judged in this setting.<sup>134</sup>

It is, however, not only the judge who is to conduct the ‘judging’ in the new guiltless form of adjudication; it is the entire treatment team, the amalgamation of professional knowledges that are ever-present in the workings of the drug court. This hybrid collection of therapeutic professionals and legal professionals enable the client to be rendered guilty, in a guiltless setting – guilty of the transgression of norms – not of the transgression of laws. Nikolas Rose and Mariana Valverde allow us to consider the possibility that it is in fact through this hybridity of differing expertise that normalization is able to appear:

Normalization does not describe an achievement, but rather a kind of mobile and heterogeneous transactional zone of conflict and alliance between forms of expertise.<sup>135</sup>

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<sup>132</sup> S. Bibas (2003), ‘Using plea procedures to combat denial and minimization’, in B. Winick and D. Wexler (eds), *Judging in a Therapeutic Key: therapeutic jurisprudence and the courts*, Durham: Carolina Academic Press, 169-176, p.170.

<sup>133</sup> These norms were cited in dot point form earlier, note 37.

<sup>134</sup> Although traditional law-breaking can and does mitigate an offender’s participation in the drug court, it is not judged in the drug court. The offence is judged and sentenced in a separate court.

<sup>135</sup> N. Rose and M. Valverde (1998), ‘Governed by law’ *Social and Legal Studies*, 7, 4, 541-551, p. 549.

The alliance between the therapeutic and legal experts, within the drug court setting and the wider scholarly setting of therapeutic jurisprudence allows for the judging of norms to occur. It allows us to view something like the failure of a client to attend a class on the improvement of their relationship with their child as a precursor of a return to criminality, and a gauge of a lack of responsabilisation.<sup>136</sup> Yet these judgements – although handed down to the client by the judge – are not exclusively made by the judge. They are first made by the treatment official conducting the class as to the punctuality of the client, then passed on to the court officials and other members of the team who decide the possible sanction for the offence. It is not only punctuality that is of concern to the drug court. The evaluation of the Perth Drug Court indicates that the court is given reports on the progress of clients on many varying issues, none of which relate to transgression of the law:

The DVD [Domestic Violence Drugs] contains information from treatment staff on the progress of drug court participants. Treatment staff rate the attendance, motivation, attitude and participation of each offender on a scale ranging from 0 to 10, and have the option to make comments... In the majority of cases information was entered weekly.<sup>137</sup>

The ability of the treatment team to pass judgement upon the client and for it to be a matter of official judgement in a specialized court has meant that the transgressing of norms is the focus of the adjudication process within the drug court setting. According to the Perth Drug Court evaluation this shift in focus has caused some unease within police ranks because of the difference in authority given to the treatment team over traditional law enforcement agencies:

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<sup>136</sup> Cf. J. Simon (1993), specifically pp 239-249.

<sup>137</sup> Western Australia: Department of Justice (2003 a), p. 100. The DVD (Domestic Violence Drugs) is a database used by the Court Assessment and Treatment Team (CATS) which can be accessed by the magistrate when dealing with specific clients in the Perth Drug Court, it contains information on all areas of treatment, see Western Australia: Department of Justice (2003 b), *Evaluation of the Perth Drug Court Pilot Project Appendices 1*, Perth: Crime Research Centre, p.3.

Team discussions are not constrained by the rules of evidence that apply in normal courts. Given that the focus is on developing therapeutic interventions, this is understandable. However, it has generated some issues and the police prosecutor firmly expressed the view that the system is rather one-sided. He commented that positive statements about offenders by CATS [Court Assessment and Treatment Service] officers and treatment agencies are almost always accepted at face value. However, he said that, when more negative questions arise out of police intelligence information, the traditional rules are invoked and such intelligence tends to be discounted with comments such as ‘prove it’!<sup>138</sup>

This sentiment demonstrates the shift from traditional adjudication of laws to a shift in the adjudication of norms. It also signifies a certain unease amongst the traditional upholders of the law, the police. It also demonstrates the need for offenders to learn the new rules that they will be judged by, not the traditional laws but the therapeutic rules of the treatment team. It is, after all, the treatment *team* that will be doing the judging.

The drug court through its hybridity of expertise allows for what Rose and Valverde have called ‘the petty judges of the psyche’, to exercise their judging prowess in the regulation of deviance *within* the judicial setting. This constant judging by the treatment team allows for the extension of offender control to continue to last after the order has ceased, for the treatment paradigm is a constant, continuous exercise. The contradiction of the control is that it is proclaimed as a non-coercive, therapeutic sanction, where the client is not guilty.

This form of judging has allowed the traditional judges of normalization, the social workers, psychologists and others ‘petty judges of the psyche’ to infiltrate the workings of the legal system.<sup>139</sup> The regulation of addicts, through the drug court program has seen a deployment of therapeutic adjudication within the judicial

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<sup>138</sup> Western Australia: Department of Justice (2003 *a*), p. 207.

arrangement. This deployment has seen the focus of the legal lens – in the drug court and other therapeutic programs of justice – widen from judging and sentencing on the grounds of traditional laws and has turned to the therapeutic world for the judging and sentencing requirements. The requirements however, have shifted to be more centralized on normalization of the client, via the indoctrination of the therapeutic ethos within the client, than on purely sanctioning of subjects. Sanctioning now takes place once the client has transgressed the norms set out by the technicians of therapy. As Rose and Valverde asserted it is in these areas of control, the areas of therapeutic intervention that ‘all the little judges of conduct exercise their petty powers of adjudication and enforcement’.<sup>140</sup> Although as Nolan commented, ‘guilt in the context of therapeutic jurisprudence is meaningless’<sup>141</sup>, it is not meaningless when placed in the context of the adjudication of the transgression of norms. The drug courts and other practical versions of therapeutic jurisprudence do not deal in the ‘guilt’ of laws, they deal in the ‘guilt’ in relation to the therapeutic necessity of normalization.

### **Conclusion.**

This thesis has taken as its focus a newly emergent, widely embraced system of legal thought – therapeutic jurisprudence, and in particular, its practical realisation of the drug courts. It has sought to explain the possibility of that emergence, given what many critics describe as the ever-increasing punitive character of modern penal practices, which would seem to sit at odds with the ‘humanising’ ideals of therapeutic jurisprudence. It has argued that if we are to understand the rise of therapeutic

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<sup>139</sup> N. Rose and M. Valverde (1998), p. 543.

<sup>140</sup> N. Rose and M. Valverde (1998), p. 546.

jurisprudence we need to look beyond the penal practices per se and to recognise its emergence as part of a wider therapeutic ethos. While a therapeutic ethos and a punitive ethos would seem to sit at odds with one another, it is argued that it is in this apparent contradictory space that therapeutic jurisprudence finds its strength.

In its hybridity, therapeutic jurisprudence serves not to dissolve a contradiction, but to negotiate it, managing to appeal to many in the punishment milieu via its direct appeal to contradictions inherent in the wider social and cultural environment. This appeal manifests itself in the form the drug court takes. Via its embrace of therapeutic professionals the drug court has enabled a hybrid form of adjudicative power to be injected into the arm of the legal realm, an injection that has seen a whole new set of terms and techniques, understood as integral to the breaking of criminality, deployed within the judicial setting.

This thesis has argued that the techniques used to break the cycle of drug dependency and criminality, techniques such as fostering self-esteem and empowerment, are to be seen not only in terms of their therapeutic value but also as techniques or strategies of social control. Central to the practice of therapeutic jurisprudence in the drug courts is the aim of constituting the client as a freely choosing citizen. This notion of freedom is interrogated as a technique of governance, a technology that aims to re-include the client 'into the continuous circuits and flows of control society'.<sup>142</sup>

To achieve its aim the drug court places a large amount of emphasis on the ability of the client to accept the treatment paradigm. Acceptance becomes paramount:

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<sup>141</sup> J. Nolan Jr (2001), p. 142.

<sup>142</sup> N. Rose (1999 *b*), p. 270.

acceptance of addiction, acceptance of the therapeutic language of the court and acceptance of the choice to take this route. The emphasis upon acceptance allows the drug court to be seen as non-coercive and as avoiding the negative effects of paternalism, something the advocates of the movement thoroughly reject. The client, upon choosing this form of justice must not only accept that they are guilty of a crime, they must also accept that they are guilty of addiction, for it is only then that the issue of their criminality can be addressed and broken. It is only once the client has admitted guilt of their addiction and overcome all denial that the therapeutic exercise can truly begin the exorcism of the addiction demon.

Through the admission of guilt of both the crime and the addiction the drug court places its clients in an unusual position: not guilty in the eyes of the court. But the client must still undergo a period of court-sanctioned and monitored control. In fact in the drug court, guilt is ostensibly of little importance. However, the issue of guilt, this thesis has argued, is far from an irrelevant term in the drug court. The traditional measures of guilt in relation to law have been displaced by therapeutic measures of normality, by which, the clients of the drug court are now judged. This form of judging is based on the techniques of the therapeutic ethos, and, it is hoped, will be carried on by the client after the treatment order has ceased. Through these techniques, the therapeutic program is able to inculcate a 'willing' client to continue to adhere to proscribed norms after the cessation of the 'treatment order'. The norms, however will no longer be judged by the 'team', they will now be judged by the client. The client will be efficient in the evaluation of the self, and will perform the constant and continuous judging upon the self.

The intention of this thesis has been to cast a critical eye on the workings of the drug court and has argued that the techniques involved in courts of therapeutic jurisprudence need to be understood beyond the overwhelmingly positive claims of the advocates of the movement. The thesis does not aim to expose the intentions of the drug courts as other than honourable. Rather, it argues that the actual techniques deployed require further scrutiny as to the knowledges deployed and the techniques used to elicit compliance. It has argued that through the institutionalisation of the therapeutic ethos power is exercised in such a way as to extend the level of control beyond the traditional limits of the justice system, into the life habits of the clients of the court.

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