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Therapeutic Jurisprudence and Due Process – Consistent in Principle and in Practice

Nigel Stobbs*

In light of recent criticisms in the US and Australia, this article considers the risks involved in the ongoing perception of tension or conflict between therapeutic jurisprudence and due process, especially in the context of the problem-solving courts. It analyses the nature of these criticisms and unpacks some invalid assumptions implicit in them. It argues that a criminal proceeding in which there are breaches of constitutional, statutory or common law principles of due process is inconsistent with either a therapeutic design of law or a therapeutic application of law, or with both. As with their mainstream counterparts, individual therapeutic-focused courts and programs can, and sometimes do, breach due process by failing to adhere to rules and standards by which they are regulated and on which they are modelled. But these breaches are not a manifestation of any fundamental incompatibility between therapeutic jurisprudence and the role of a team-oriented judge or lawyer on the one hand, and due process principles and the constitutional or ethical obligations of that same judge or lawyer on the other. The conceptual basis of the therapeutic jurisprudence method, articulated in a form describe here as the "TJ imperative", together with the procedural protections it demands, preclude any such incompatibility.

<DIV>INTRODUCTION

Therapeutic jurisprudence (TJ) is an approach to practical legal work and research that generates suggestions for reforms and innovations that do not breach any existing legal or procedural rights.[1] If a change is made (or suggested) to any particular legal rule, procedure or role that breaches due process, then that change is not consistent with TJ, regardless of any claims to the contrary. In fact, qualities such as due process, procedural fairness and procedural justice are characteristics of a court or legal proceeding[2] that TJ sees as of fundamental benefit and actively seeks to maximise.[3]

Yet, recent criticisms by some legal practitioners, academics and public policy commentators in both the US and Australia seem to have reignited the debate about whether TJ does pose significant risks to due process in the criminal justice system, to the extent that the rights of both defendants and victims of crime cannot be guaranteed.

Such assertions are not new. Claims that problem-solving courts and other criminal justice initiatives associated with TJ are a threat to due process have been aired ever since the drug treatment courts began to gain traction in the early 1990s. These criticisms have ranged from ideological

* Insert author details

[1] See DB Wexler and BJ Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) xvii. Also note unequivocal statements such as: "Therapeutic jurisprudence attempts to reconcile or accommodate its paradigm with traditional legal values, such as due process. It is important to note, therefore, that therapeutic jurisprudence does not seek to promote therapeutic goals over other ones. Rather, its objective is to creatively make the law as therapeutic as possible without offending those other values" (D Wexler, "Two Decades of Therapeutic Jurisprudence" (2008) 24 *Touro Law Review* 17, 20).

[2] These words are not synonyms and although the terms are sometimes used interchangeably (especially "due process" and "procedural fairness") they tend to have different substantive content, depending on jurisdiction and author.

[3] E Richardson, P Spencer and DB Wexler, "The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing" (2016) 25 JJA 148, 150.

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hyperbole,[4] grounded in very little (if any) evidence or awareness of the reality of the programs they berate,[5] to carefully considered and scholarly critiques, based on first-hand awareness of at least some of the relevant programs and a relatively robust engagement with the literature.[6] Responses to both these categories of claims of due process risks and incompatibility are not new either.[7]

What is of concern, however, is the potential magnitude of the emerging risk posed to TJ's reputation in the eyes of the public, as well as some members of the judiciary, the legal profession and the legal academy. This risk arises due partly to the speed in the expansion of both the range and number of criminal justice initiatives that claim to be manifesting TJ principles or to be implementing reforms based on TJ research. The trialling of a single drug court in New York City less than 20 years ago, for example, has now expanded into a State-wide network of over 200 problem-solving courts with a diverse range of target offender groups, treatment programs and operational procedures.[8] The take-up and expansion of the solution-focused court[9] approach in Australia has not been as dramatic, but the foothold they have established here is resilient and the trend seems to be that, as in the US, they are set to expand in both kind and number.[10]

The nature of the risk (which has been born out in the US experience) is that as the rate of expansion increases so does the likelihood that some of these initiatives and programs, in the ways in which they are being conceived and implemented, become incompatible with the core principles and

[4] MB Hoffman, "Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous" (2002) 29 *Fordham Urban Law Journal* 2063, 2069. See also MB Hoffman, "Problem-Solving Courts and the Psycholegal Error" (2011) 160 *University of Pennsylvania Law Review* 129; E Cohen, "The Drug Court Revolution: Do We Want Theory Rather Than Justice to Become the Basis of Our Legal System?", *The Weekly Standard*, 27 December 1999, 20.

[5] It is suggested below that these sort of criticisms, which seem to be clearly inconsistent with easily verifiable evidence and communicated in ways that border on evangelical, are most likely a manifestation of the set of socio-cognitive processes now referred to in the literature as "cultural cognition". Cultural cognition acts as a sort of heuristic in the rational processing of empirical information on public policy matters, whereby beliefs about the meaning of data are based on cultural worldviews and empirical claims about the consequences of controversial polices are accepted or rejected based on visions of what constitutes "a good society": DM Kahan and D Braman, "Cultural Cognition and Public Policy" (2006) 24(1) *Yale Law & Policy Review* 147, 149.

[6] MC Quinn, "Post-Ferguson Social Engineering: Problem-Solving Justice or Just Posturing?" (2016) 59(3) *Howard Law Journal* 739; C Slobogin, "Therapeutic Jurisprudence: Five Dilemmas to Ponder" (1995) 1 *Psychology, Public Policy and Law* 13; A-C Larsen and P Miles, "A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders" (2011) 18(1) *Murdoch University Electronic Journal of Law* 1.

[7] N Stobbs, "In Defence of Therapeutic Jurisprudence: Threat, Promise and Worldview" (2014) 8 *Arizona Summit Law Review* 325; P Fulton-Hora, WG Schma and JTA Rosenthal, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America" (1999) 74 *Notre Dame Law Review* 439; P Fulton-Hora and T Stalcup, "Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts" (2007) 42 *Georgia Law Review* 717; I Freckelton, "Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risk of Influence" (2008) 30 *Jefferson Law Review* 575.

[8] According to the Office of Policy and Planning for the New York State Unified Court System, as of March 2017 there were 218 problem-solving courts operating in New York State. These consisted of 127 drug treatment courts, 29 mental health treatment courts, 29 veterans courts, 11 human trafficking courts, nine adolescent diversion courts, seven sex offender courts and six community courts: see <https://www.nycourts.gov/COURTS/problem_solving/index.shtml>.

[9] The preferred description of the jurisdiction in Australia, see M King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) 20. M King, "Should Problem Solving Courts be Solution-Focused Courts?" (Revista Juridica Universidad de Puerto Rico – Monash University Faculty of Law Legal Studies Research Paper No 2010/15, 2010); M King, Australasian Institute of Judicial Administration and Victoria Legal Services Board, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009).

[10] The Victorian government has recently provided $32 million in funding for an additional drug court in Melbourne, which complements the 15-year-old Dandenong drug court and boosts the capacity of the system from 70 to 240 offenders. This follows the completion of an evaluation undertaken by KPMG in 2015, which confirmed "the success of the Drug Court in working effectively with individuals with severe drug and alcohol dependency to both improve community safety and reduce crime": [AQ: insert full ref for this report]. Unsurprisingly, this has been received with demands from legal practitioners in other areas (especially in rural Victoria) for the establishment of drug courts in their locations: A Thomas, "Calls for Drug Courts to be Expanded to Regional Victoria", *The Courier*, 31 March 2017.

associated method of TJ. If the incompatibility relates to the proscription against inconsistency with due process rights, then it invites conflation (in the minds of the critics, policy-makers and the public) between innovations that possess components that are the result of a rigorous application of TJ research and those that simply invoke it. Significant damage can be done where the conceptual locus of the criticism is wrongly focused on therapeutic jurisprudence itself. Again, this is a risk that was predicted[11] and is now becoming a reality.

What seems to be strongly catalysing this risk at present is the ubiquity of law and order politics in a political environment that makes it ever more difficult for governments to maintain stable public policy agendas. Especially given the potential for mistaken or conflated criticism to nevertheless dominate the public imagination due to its "availability" and the quality of heuristic "vividness" created by the way in which it is communicated.[12] Until recently in Australia, it is unlikely that anyone outside of legal academia and a limited number of legal practitioners and judges would have heard of TJ. For most, the first they will hear of it is by way of vociferous and poorly informed criticism (as argued below).

Solution-focused courts are particularly vulnerable to fluctuations in law and justice policy as a result of changes in government. In Queensland, for example, a successful drug court pilot program[13] began in three magistrates courts in 2000 and was then confirmed as a permanent jurisdiction in five locations. It was cancelled in 2013, the courts were closed, the staff redeployed and the relevant legislation repealed with the election of a new government, which was implementing its election promise to "get tough on crime". Then, in 2015, yet another incoming government commenced a review into the reinstatement of a drug court in the State as part of its own election commitment to reinstate specialist courts and diversionary programs.

The re-emergence of reputation risk comes at a critical period for criminal justice reform in Australia, where retributive policies appear to be resurgent and criminal justice policy is becoming increasingly reactive to public opinion.[14] TJ can ill afford to allow itself to become invoked as a panacea for every criminal justice reform in search of theoretical or methodological credibility. This would continue to make it a target for both the more opportunistic mavens of law and order politics, and a beacon for those sort of ideological critics, referred to above, who may be less likely to assess its potential value objectively.

<subdiv>Therapeutic Jurisprudence and Due Process

TJ is a way of studying the extra-legal effects and consequences of how "the law" functions. It is concerned not with technical legal consequences, but with the wellbeing of those involved in the legal process. Traditional legal research may, for example, consider what percentage of offenders manage to successfully complete a probation order, given that courts are able to impose probation orders as an alternative to a custodial sentence. A TJ research question could then be (and has been[15]) whether a

[11] Historically, there has been a noticeable trend for TJ critics to, either consciously or unconsciously, ground their objections and predictions of potential due process incompatibility in perceptions that TJ sets out to be something or achieve something it has never claimed for itself. That is, as Freckelton notes, "a coherent body of scholarship with a unified focus that proffers coherent and straightforward answers to complex issues in law and practice": Freckelton, n 7, 591.

[12] MJ Saks and RF Kidd, "Human Information Processing and Adjudication: Trial by Heuristics" (1980) 15 *Law and Society Review* 123, 137.

[13] J Payne, "The Queensland Drug Court: A Recidivism Study of the First 100 Graduates" (Research and Public Policy Series No 83, Australian Institute of Criminology, 2008).

[14] Such as recent calls for reform to bail and parole laws, including the Prime Minister's reported commitment to "'a strong presumption against the granting of parole and bail to persons who have shown support for, or have links to, violent extremist or terrorism" and State premiers' support for involvement from both ASIO and the AFP in parole hearings "at the table helping the boards to make the best decisions": K Loussikian, "Federal and State Governments to Toughen Up Terror Parole and Bail Laws at COAG Meeting", *The Daily Telegraph* (online), 9 June 2017.

[15] D Wexler, "New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence Code of Proposed Criminal Processes and Practices" (2014) 7(3) *Arizona Summit Law Review* 463; DB Johnson, "Mainstreaming Therapeutic Jurisprudence in Criminal Courts with a Focus on Behavioral Contracting, Prevention Planning, and Reinforcing Law-Abiding Behavior" (2016) 1 *International Journal of Therapeutic Jurisprudence* 313.

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sentencing judge could adapt knowledge from the behavioural sciences (such as according voice, validation and vibrant participation) to inform the way in which they interact with an offender when imposing a probation order, which might increase the likelihood of compliance with the order.

This second question makes the assumption that the law has "agency". In other words, "law" is conceived not simply as an inanimate, reactive and abstract set of rules and processes, which is shaped and driven by external forces, but as a dynamic, organic and proactive collection of rules and processes implemented by actors who have significant power and discretion to influence the extra-legal consequences of their legal work in both designing and applying law.

"Due process" generally refers to a collection of procedural rights guaranteed to citizens within the Amendments to the US Constitution (the Bill of Rights). The due process rights apply throughout the application of criminal procedure from investigation and arrest to questioning, trial and sentencing. The Fifth Amendment, for example, provides inter alia that:

> <blockquote>
>
> No person shall be held to answer for [a crime] … for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law* ...[16] [emphasis added]</blockquote>

What constitutes "due process of law" has been a matter for extensive debate and litigation but a general consensus among the appellate judiciary has centred on a list of processes, proposed by Federal Appeals Judge Henry J Friendly, as potentially grounding an argument that due process has been breached.[17] In order of priority, his Honour proposed:

1. an unbiased tribunal;
2. notice of the proposed action and the grounds asserted for it;
3. opportunity to present reasons why the proposed action should not be taken;
4. the right to present evidence, including the right to call witnesses;
5. the right to know opposing evidence;
6. the right to cross-examine adverse witnesses;
7. a decision based exclusively on the evidence presented;
8. opportunity to be represented by counsel;
9. requirement that the tribunal prepare a record of the evidence presented; and
10. requirement that the tribunal prepare written findings of fact and reasons for its decision.

As shown throughout this article, various incarnations of these 10 "Friendly processes" arise frequently, both in the TJ literature and the court standards it informs. That this occurs is no coincidence but a natural working out of what is referred to here as the "TJ imperative".

In practice, when it comes to the problem-solving or "therapeutic" courts, due process breaches seem to be most often the subject of appeals to higher courts from drug courts and juvenile courts in the US jurisdictions. The sorts of breaches alleged, and the stages of the various proceedings at which they arise, vary widely. But clusters do seem to occur in relation to: decisions to terminate offender participation (often on the grounds that a judge who was responsible for imposing intermediate sanctions during the treatment program is compromised with respect to their impartiality if they preside at the termination hearing); decisions to impose custodial sanctions during the administration of a program (often on the grounds that these decisions are made in "closed" team meetings in which the offender is not directly involved); and whether waivers of hearings in relation to the imposition of various sanctions are constitutional. Some specific cases relating to confirmed breaches are discussed below.

[16] [AQ: provide full ref for this quote]

[17] HJ Friendly, "Some Kind of Hearing" (1975) 123(6) *University of Pennsylvania Law Review* 1267.

Although the Australian Constitution provides no express due process guarantees of the kind contained in the Fifth and Fourteenth Amendments to the US Constitution,[18] some principles akin to due process have emerged as a result of the Constitution's separation of powers and the subsequent common law consideration of what constitutes the content of "judicial power".[19] The High Court in *Dietrich v The Queen*[20] affirmed that the common law also recognises a right not to be tried unfairly. Mason CJ and McHugh J observed that this right is manifested in rules of law and of practice designed to regulate the course of the trial (including the usual pre-trial adversarial components).[21] Although the High Court has not listed these attributes of a "fair trial" exhaustively, they have in *Dietrich* (and subsequently) acknowledged that these would include many of the sorts of procedural rights that criminals accused in US courts enjoy – such as "basic minimum rights of an accused as the right to have adequate time and facilities for the preparation of his or her defence" (which is captured by point (4) of the Friendly processes, listed above).

The court in *Dietrich* also made express reference to Art 14 of the *International Covenant on Civil and Political Rights*[22] (ICCPR), to which Australia is a party, and noted that "similar rights have been discerned in the 'due process' clauses of the Fifth and Fourteenth Amendments to the United States Constitution". Articles 14(3), (5), (6) and (7) of the ICCPR establish a set of 10 due process guarantees that must be observed in criminal proceedings, which also closely resemble the Friendly processes.[23]

Statutory requirements[24] of procedural fairness or natural justice[25] in criminal procedure (at State and Territory level) are also close equivalents of "due process". "Procedural fairness" and "natural justice" are terms more usually associated with administrative law and challenges to executive decision-making. Nevertheless the central tenets, whether in civil, administrative or criminal jurisdictions are grappled to Australian jurisprudence with hoops of steel. The specific process requirements are (again) usually not specifically defined and although flexible are generally satisfied by a "fair hearing" and "lack of bias".[26] The rationale for due process rights in criminal matters, then, is based on the need to ensure as far as possible that, given the obvious power imbalance between the state and an individual citizen, innocent people are not convicted of criminal offences.[27] This is crucial to keep in mind when considering the US-based TJ criticisms below.

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[18] G Winterton, "The Separation of Powers as an Implied Bill of Rights" in G Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 185, 204–205; M Mathieson, "Section 117 of the Constitution: The Unfinished Rehabilitation" (1999) 27 *Federal Law Review* 393, 395–396.

[19] *R v Kirby; Ex p Boilermakers' Society of Australia* (1956) 94 CLR 254. Given that Ch III of the Constitution, "The Judicature", provides for the judicial power of the Commonwealth, vesting it in the High Court of Australia, and then limiting the power of the Parliament to encroach on or alter the courts' powers. The "due process" protections are therefore functions of judicial power, but the effect has been that such things as the "right to a fair trial" and aspects of procedural fairness have been held to be integral to these constitutional judicial powers and functions.

[20] *Dietrich v The Queen* (1992) 177 CLR 292.

[21] *Dietrich v The Queen* (1992) 177 CLR 292, 300.

[22] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[23] For the purposes of Australian law, the Commonwealth Attorney-General's Department sets out what it considers to be the "Minimum guarantees in criminal proceedings": see <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Minimumguaranteesincriminalproceedings.aspx>.

[24] Common law adopts the position that it is simply a matter of statutory construction that a power conferred by statute ought to be exercised with "procedural fairness to those whose interests may be adversely affected by the exercise of that power": *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97].

[25] "Procedural fairness or natural justice" are terms more usually associated with administrative law and challenges to executive decision-making. But the central tenets, whether in civil, administrative or criminal jurisdictions are [AQ: missing text]

[26] W Bateman, "Procedural Due Process Under the Australian Constitution" (2009) 31 *Sydney Law Review* 411, citing *Re Minister for Immigration and Multicultural Affairs; Ex p Lam* (2003) 214 CLR 1, 34.

[27] *Bunning v Cross* (1978) 141 CLR 54; *R v Sang* [1980] AC 402.

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Common law jurisprudence in Australia also holds that the third stakeholder in due process rights is "the public" – in the sense that the community has a right to expect that people who commit offences will be called to account for their actions, and that this will involve criminal prosecution and a trial where appropriate. So although the public interest certainly is not served by abuse of process, what constitutes an abuse of process or a fair trial – and the legal consequences of an alleged breach of due process – will usually involve an exercise of judicial discretion in which public interest and individual rights are balanced.[28] Again, this is important to note in the context of the Australian criticisms of TJ analysed below.

<DIV>THE DUE PROCESS CRITICISMS

<subdiv>The Asserted Damage to the Rights of Defendants

The focus of the renewed TJ criticism in the US has been on the rights of defendants. The thrust of these vigorous objections are that, in being too eager to focus on treatment or on "therapy", defence lawyers in problem-solving courts have abandoned their adversarial obligations to monitor the legal and procedural rights of their clients. Similarly, according to this rationale, judges have sacrificed their impartiality for paternalistic concerns for the non-legal welfare of the offenders. In a widely discussed opinion piece co-written by US academic Steve Zeidman and an anonymous NYC public defender, the authors declared that the problem-solving courts:

> <blockquote>
>
> Although imbued with noble goals … actually discourage a careful, critical examination of the constitutionality of the police behavior that brought the accused into court in the first place. Many experts believe that by *abandoning even the semblance of the adversarial system, problem-solving courts* inappropriately fast forward to sentencing [and] encourage defendants … to plead guilty early in the proceedings. Additional due process concerns are raised in those courts that impose pre-adjudication conditions on the accused.[29] [AQ: emphasis added or in original?]</blockquote>

They warn that promoting a "mindset of cooperation among all the institutional players" and urging lawyers to "shift from a litigation-based, adversarial approach to a team-based problem-solving ideal" creates a system "exactly the opposite of one that encourages a probing examination of the legality of the underlying arrest and proof of the accused's guilt".[30] This spurious claim of a total abandonment of the adversarial "system"[31] and that TJ encourages courts to simply reject the need for due process, echoes a similar blanket statement by Miller from 2004 to the effect that:

> <blockquote>
>
> Drug courts' 'strong emphasis on interventionist styles of interaction and authority *reject the propriety of due process* restrictions on the courts' therapeutic models.[32] [emphasis added] </blockquote>

[28] *Jago v District Court of New South Wales* (1989) 168 CLR 23, 583 (Mason CJ).

[29] S Zeidman and CB, "The Treatment Court Cottage Industry and its Unintended Consequences", *Gotham Gazette* (New York), 27 October 2016 <http://www.gothamgazette.com/city/130-opinion/6593-specialty-courts-may-do-more-harm-than-good>.

[30] Zeidman and CB, n 29.

[31] It need hardly be pointed out that problem-solving courts operate within the adversarial court system from which they draw their statutory jurisdiction – not as any constitutionally separate jurisdiction. Adversarial processes also persist throughout virtually all programs. For any problem-solving court participant, the potential for imposition of an intermediate order or other criminal sanction is a constant companion. That potential is part of the essential power of the drug court model (in particular) to shape behaviour in relation to both proximate and distil factors. Defence lawyers in these courts are required to represent the interests of their clients against undue interference from the state (at least where no operative waiver applies) not to become just another compliant team member. The adversarial representation that Zeidman and others say has been abandoned is an ever present potential for PSC lawyers, who may need to appear on issues of termination, imposition of final sentence, arrest, bail and other matters at any time.

[32] E Miller, "Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism" (2004) 65 *Ohio State Law Journal* 1479, 1494.

"Intervention" is, in fact, probably a better description for what happens in the problem-solving court model than "treatment" because, as Birgden pointed out in the context of sex offender desistance programs, "intervention … captures the role of all psycholegal actors, not just therapists".[33]

In US jurisdictions where hundreds of self-described problem-solving courts are operational – some of which (as discussed below) merely invoke TJ (for whatever reasons) and often ignore the operating principles established by peak bodies[34] – due process breaches do occur. The fallacy arises, of course, where such breaches are claimed to occur because courts that adopt a "therapeutic model" "reject the propriety of due process restrictions".[35]

Most US problem-solving courts, and particularly the drug treatment courts, are post-plea courts, as are their Australian counterparts. This means that in order to qualify for the program the offender will have been charged with an offence for which a custodial sentence is within range, will have been assessed as being drug dependent to a degree that the coercive nature of the program is likely to benefit them, and the offender is willing to enter a plea of guilty. The defence lawyer who represents them before entering the treatment program will almost certainly not be the same defence lawyer who works as part of the drug court team.

The most vociferous of US TJ critics, who routinely come at it via the "if it happened in a problem solving court then it happened because TJ willed it so" route, typically caveat their assault with the observation that there are indeed faults in the criminal justice system, as a mechanism for highlighting the perceived naivety and lack of understanding for the "real" causes of dysfunction in the system. Note, of course that TJ itself makes no claim to an agenda of "fixing" the system or even of being an appropriate vehicle for providing one-source solutions to complex legal or socio-legal issues.[36] Zeidman identified a range of courts[37] (which he characterised as the "the problem-solving court industrial complex") and condemned them in that vein:

> <blockquote>
>
> While it is indisputable that the old way of doing business in the Criminal Court was not working, the problem-solving court cottage industry still must be carefully scrutinized.[38]</blockquote>

Quinn followed much the same tack, yet engaged in even greater over-reach in lamenting that:

> <blockquote>
>
> … continuing down the primrose path of assuming problem solving courts are the answer-particularly at this historic moment with all of its opportunities, is contrary to [the need for] radical social engineering by committed, knowledgeable lawyers who are mindful of constitutional rights and equal justice under the law.[39]</blockquote>

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[33] A Birgden, "Maximizing Desistance: Adding Therapeutic Jurisprudence and Human Rights to the Mix" (2015) 42(1) *Criminal Justice and Behavior* 19, 29.

[34] See, eg *The Drug Court Judicial Benchbook* (2011) prepared by the National Drug Court Institute (the education, research, and scholarship affiliate of the National Association of Drug Court Professionals (NADCP)) <https://www.ndci.org/wp-content/uploads/14146_NDCI_Benchbook_v6.pdf>, especially Ch 8 – "Constitutional and Legal Issues in Drug Courts" (which has detailed guidance, with reference to case law and statute, on how and when potential due process questions arise and how to approach them) and Ch 10 – "Ethical Obligations of Judges in Drug Courts".

[35] [AQ: insert ref for this quote]

[36] Freckelton rightly observes that this initial wedging of TJ as somehow promising solutions to notorious problems of injustice or inequality are the result of a misunderstanding of "the relatively modest aspirations expressed repeatedly by Winick and Wexler that TJ scholarship should merely provide a fillip for new perspectives and analyses that place therapeutic consequences of the law and its processes on the agenda and factor them into policy formulation and decision making, as appropriate": Freckelton, n 7, [AQ: insert page no.].

[37] "… community courts, domestic violence courts, fathering courts, youth courts, drug courts, mental health courts, sex offense courts, driving while intoxicated courts, human trafficking courts, and more": [AQ: provide ref for this quote – is it Zeidman, n 29?]

[38] [AQ: insert ref for this quote – is it Zeidman, n 29?]

[39] Quinn, n 6, 764.

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Quinn went on to emphasise the need to "protect against disingenuous allies hijacking reform efforts, vacuous theories from being deployed to maintain the status quo, and feel-good fixes from getting in the way".[40]

Zeidman, Hoffman and Cohen (and to a lesser degree Miller[41]) all appealed to an anecdote of a defendant who had a negative story to tell about their experience in a drug court. Occasionally this extended to a collection of second or third-hand anecdotes related to a few defendants. In the latter case, the characteristics of these defendants and the individual problems they experienced (whether actual or apocryphal) were then constructed into a tragic "straw man" who exemplifies what the author claimed are the fundamental flaws with the drug court model,[42] rather than any isolated flaws in implementation.

Zeidman, for instance, attempted to give impact to his piece with a lengthy (and colourful) fictional vignette about a young addict who is arrested for purchasing drugs from an undercover police officer in circumstances that make the procedural legality of the arrest questionable. The addict is then pressured to accept an offer to enter a drug court program despite his own belief in his innocence, his public defender bluntly refuses to question the arresting officer and he is treated dismissively and impersonally by the assessment team so that he declares:

<blockquote>

I'm qualified. That's what these people say instead of saying I'm a fucking junky. I'm 'qualified' like I just got approved for a loan to buy a house or start a business. But it really just means I'm a fucked up junky with no options.[43]</blockquote>

Apart from the mischaracterisation of TJ as the source of due process breaches, two other obvious problems with these criticisms arise. First, a lack of supporting data in relation to credibility of claims about the general tension. Zeidman referred to the "many experts" who are claimed to have concerns that guilty pleas in problem-solving courts are unsafe in that undue pressure is placed on the accused – pressure evidenced not by the sort of qualitative data that might be expected[44] but by anecdote and dramatisation.

A second objection relates to the claim that "these courts abandon the adversarial system" and its due process requirements. Zeidman described the predicament of the harried and over-worked, publicly funded defence lawyer aggressively "advising" a client to enter a guilty plea, regardless of the merits of their case. Is this common in the drug courts or even in some sense part of the operating ethos of the problem-solving courts? In response to this question, Cooper observed that the genesis of drug courts in the US in Miami's Dade County, which certainly did evolve according to the TJ tenet of not seeking to promote therapeutic goals over any legal or procedural rights, was one in which:

<blockquote>

… the public defender was one of the most outstanding defense offices in the country, and built in to the process strong safeguards to protect defendants' constitutional rights throughout the process. It was a pre-plea program that entailed continuous and vigorous

[40] Considering the measured objectivity of much of Quinn's other scholarship – see, eg MC Quinn, A Moscowitz Kross and the Home Term Part, "A Second Look at the Nation's First Criminal Domestic Violence Court" (2008) 41 *Akron Law Review* 733 – it is disappointing to see her descend into the sort of hyperbolic and far less rigorous critique usually associated with writers such as Hoffman, who articulates his views in this way: "The therapeutic jurisprudence movement is not only anti-intellectual, it is wholly ineffective. The treatment is a strange combination of Freud, Alcoholics Anonymous, and Amway, whose apparent object is not really to change behaviours so much as to change feelings … In fact I suspect that it is the improved feelings of the treaters and not of the treated, that is really driving judges" infatuation with therapeutic courts …" and "Judges are a bizarre amalgam of untrained psychiatrists, parental figures, storytellers, and confessors" (Hoffman (2002), n 4, 2069).

[41] Miller, n 32, 1494.

[42] This can be a legitimate device for critique if carefully linked to robust data to support both the occurrence of an actual instance of the problem experienced and, more importantly, its representative nature.

[43] Zeidman [AQ: insert ref for this quote – is it Zeidman, n 29?]: "What follows is drug treatment court from the point of view of the accused. It is based on a composite of many clients who have gone through the treatment court process."

[44] Interview records and analysis perhaps.

> defense representation throughout the process. The only constitutional right that the defendant relinquished was the right to a speedy trial – suspended while he/she participated in the treatment program.[45]</blockquote>

Cooper further noted that in Portland, Oregon, another early adoption jurisdiction for the drug court model:

> <blockquote>
>
> … an 'opt in/opt out' period was part of the program designed to permit defense, after the initial interview with the defendant and review of the arrest documents, to obtain additional discovery, including lab test results, and the prosecutor obtain the criminal history of the participant, including any outstanding warrants, with the defendant still promptly beginning the treatment program provisionally until the defense and prosecution had the necessary information to adequately assess the charges and the defendant's interest in and eligibility for participating in the drug court …[46]</blockquote>

So who are the "many concerned experts" to whom Zeidman referred, whose observations of the reality of drug court practice might cause doubt on the existence or efficacy of what Cooper described as the "strong safeguards to protect defendants' constitutional rights throughout the process", which were indeed "built in to the process"? They aren't named or cited in his article. In a survey and classification of published criticisms of TJ generally (and as manifested in the work of drug courts particularly) published in 2014, the only "experts" who seem to clearly fall into the category identified by Zeidman are Hoffman, Cohen, and to a lesser extent Quinn. This is a far more fundamental criticism than simply suggesting that some, or even many, courts breach due process as a result of failing to *maintain* the safeguards, which is a fault in management and application – not of design.

<subdiv>The Asserted Damage to the Rights of Victims and the Community

In Australia, criticism seems to have focused more specifically on the plight of victims, arguing that not only does TJ privilege the treatment of whatever problems may have caused an offender's criminal conduct over the "retributive rights"[47] of the victim and the community, but that the efficacy of this treatment in reducing recidivism is doubtful. Most notable among these was an opinion piece written by a public policy analyst, Jennifer Oriel, for *The Australian* newspaper, which characterised TJ as a "political ideal" that has been the catalyst for an undemocratic "revolution" in court procedure.[48]

As with the US critics, Oriel grounded her position in the conceptually unsound assertion of a necessary dichotomy between legal rights (this time of victims) and extra-legal concerns (manifest in a "therapy culture"). She signalled this in claiming:

> <blockquote>
>
> The systemic failure of our legal system to protect innocent citizens from violent criminals is inseparable from the quiet revolution transforming court practice from black letter law to therapy culture.[49]</blockquote>

A therapeutic court ought to be having measurable impacts on recidivism, Oriel argued. The public have a right to expect that public resources expended on these courts produce the predicted public goods – reduced recidivism rates being most prominent among them. However, not much appears to hang on whether it is agreed that recidivism on a broad scale is the key public good to be expected from a problem-solving court. Oriel mistakenly asserted that the problem-solving courts cannot claim to reduce recidivism because the evidence pointed to by "TJ advocates" is "rarely

[45] Email from Professor Caroline Cooper to tj-listserv, 2 November 2016.

[46] Cooper, n 45.

[47] The commonly observed assertion of an individual citizen's or community's "right" to retribution is fallacious. In a common law jurisdiction the right to impose a penalty in relation to an offence vests in the state (or Crown).

[48] J Oriel, "Society Expects Justice from Courts, Not Therapy", *The Australian* (Sydney), 30 January 2017.

[49] Oriel, n 48.

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checked by independent research using the gold standard of longitudinal impact evaluation".[50] In fact, exactly these sorts of studies have been regularly carried out by a range of bodies in both the US and Australia, with both the studies themselves and the results readily available.[51]

There is a simplistic value trade-off argument at work in this reasoning, creating an unnecessary tension between what are clear statutory sentencing purposes (in Australian jurisdictions at least) of punishment and rehabilitation.[52] It is reminiscent of an equally uninspiring argument that asserts magistrates can only shape "high quality" sentences that make the sentence relevant to the subject circumstances of a particular offender as well as the objective nature and seriousness of the offence if they are authorised to impose sentences that are objectively inconsistent. The implication being that there is somehow a fundamental incompatibility between consistency and "decision quality", which is "operationalized in this case by sentences that will effectively rehabilitate criminals".[53]

Oriel betrayed a deeper level of ideological angst regarding the criminal justice system, therefore, which ought to concern the reader just as much as spurious or questionable claims about recidivism rates or comments designed to incite a shallow public appraisal of TJ.[54] It demonstrates an ideological link between the TJ critics' assertions of damage to defendants and damage to victims – ie a deep suspicion that TJ seeks to deny or erode individual autonomy.

Oriel asserted: "The tension between a rehabilitative and retributive approach to law and order has driven the therapeutic jurisprudence approach, transforming court practices around the country."[55] Is this an indication that, for some TJ critics, expressions of concern about a tension between "therapy" and due process are really a proxy war for what they perceive as competition between retribution and rehabilitation as legitimate sentencing justifications? There are strong indications of this in Oriel's narrative as she seemed to blame TJ for robbing the community of the value of punishment: "It is an activist movement that denies the social benefits of retributive punishment by replacing black letter law with specialist courts modelled on the therapeutic ideal."[56]

Lest we are tempted to believe that Oriel's desire to situate TJ within an even broader perception of incompatibility "between a rehabilitative and retributive approach to law and order" is a mere outlier position without support in contemporary sentencing jurisprudence, consider the views of Boldt. His 1988 paper argued that attempts to rehabilitate an offender via the coercive mechanisms of the criminal justice system necessarily "imperils some of the most fundamental commitments of liberal society".[57] He insisted that the state should not approach the task of rehabilitation through the agency of anything other than the public health system. He recounted the decline in emphasis on deterrence and rehabilitation as sentencing justifications in the 1980s in the US and UK as "part of a larger reaction against the 'scientistic social engineering' of a welfare state that had come to be seen as part of the problem and not the solution".[58] Furthermore, he noted a loss of confidence in

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[50] Oriel, n 48.

[51] Just one excellent example is the US National Institute of Justice sponsored 2011 Multisite Adult Drug Court Evaluation (MADCE), which was a five-year longitudinal study combining robust process, impact and cost evaluations of adult treatment drug court programs, employing a hierarchical model that sampled approximately 1,800 drug court and non-drug-court probationers from 29 rural, suburban and urban jurisdictions across the US. A full report on the methodology and all findings of the evaluations are publicly available at <https://www.nij.gov/topics/courts/drug-courts/pages/madce.aspx>.

[52] See, eg *Sentencing Act 1991* (Vic) s 1(d)(ii), (v).

[53] [AQ: Insert ref for this quote]

[54] See, eg "One gains the impression that many TJ advocates are engaged in a kind of virtue-signalling …" and "Left activists believe … deserving of special consideration … Conservatives view it as an opportunity to … deport criminal thugs …": Oriel, n 48.

[55] Oriel, n 48.

[56] Oriel, n 48. That this narrative of persuasion is aimed squarely at the public and at law and order sensitive policy-makers is readily apparent from her follow-up observation that "… when a perpetrator on bail … runs over and kills a three-month-old baby sleeping in his pram … therapy is no substitute for justice".

[57] RC Boldt, "Rehabilitative Punishment and the Drug Court Movement" (1998) 76 *Washington University Law Quarterly* 1233, 1234.

[58] Boldt, n 57, [AQ: insert page ref].

institutions "concerned with character development and public education", which severely eroded community belief in "the malleability of human nature, essential to a regime focused on the treatment of offenders" and a "sufficient consensus of values to make possible a working agreement on what it means to be rehabilitated".[59]

The liberal-minded (in the sense of libertarian) critics seem to come from a perspective that therapeutic reforms of any kind – and especially those that strive to rehabilitate – are nothing more than masked punishment in that they "undermine defendants' dignity interests, obscure the unique perspective of those who are the objects of [sic] coercive treatment".[60] And the state is only ever justified in deploying coercive measures if its purpose is to promote other public interests, a test contingent upon defence lawyers ensuring there is a demonstrated need for the particular coercive measures to be applied to any given individual.

Contrast this perspective with TJ's express, fundamental concern with offender autonomy – ie autonomy seen as the respect of the person's agency to make an informed choice. Winick, considering JS Mill's political philosophy, which emphasises the need to exercise individual autonomy of choice in order to foster citizens of psychological and moral maturity, engaged in extensive meta-analyses of work on the actual psychological benefit of choice. On that basis, writing contemporaneously with the functioning of the first drug courts and stating TJ principles that contributed strongly to their operating protocols, Winick spoke of:

> <blockquote>
>
> Treating individuals as competent adults able to make choices and exercise a degree of control over their lives rather than as incompetent subjects of governmental paternalism and control will predictably have a beneficial effect. Self-determining capabilities that are essential to mature, adult functioning. Paternalism, especially excessive paternalism, is inevitably infantilizing.[61]</blockquote>

This fundamental aspect of any legal process that purports to be TJ driven requires that programs that seek to promote rehabilitation represent the exercise of real choice – on the grounds that extra-legal concerns must not trump legal rights and duties and that the exercise of self-determination is itself a basic human need[62] and a human right.[63] That this requirement was acknowledged and implemented at the origin point of the drug court model cannot be disputed, as Cooper noted above.

Quinn recently contributed to offender-focused criticisms based on her construction of an amalgam of basic mischaracterisations of procedural justice and TJ.[64] Procedural justice, she said, focuses on the feelings of court-involved persons and that their beliefs of how they are treated are "are more important than the actual fairness of the process or outcome of their cases".[65] Note that Quinn chose the phrase "more important" over "more important to them". This creates the (incorrect) impression that procedural justice places the substantive fairness of a proceeding as somehow secondary to the subjective states of litigants or defendants. Anyone familiar with the scholarship and practice related to procedural justice effects would be aware that neither TJ nor procedural justice advocate for this. Procedural justice focuses on the fact that, when asked whether a particular decision

[59] Boldt, n 57, 1221–1223.

[60] Boldt, n 57, 1216. In constructing this narrative, Boldt cites FA Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (Yale University Press, 1981) 11, 22–24, 30–31.

[61] BJ Winick, "On Autonomy: Legal and Psychological Perspectives" (1992) 37 *Villanova Law Review* 1705, 1707 fn 4.

[62] RM Ryan and EL Deci, "Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being" (2000) 55(1) *American Psychologist* 68.

[63] Perlin has explained that the necessary relationship between TJ and human rights provides for liberty, due process, the right to receive or refuse treatment, and the exercise of informed decision-making. Problem-solving courts, he argues, are simply an attempt to achieve better outcomes while protecting individual rights. M Perlin, "The Ladder of the Law has No Top and No Bottom: How Therapeutic Jurisprudence Can Give Life to International Human Rights" (2014) 37(6) *International Journal of Law and Psychiatry* 535.

[64] Quinn, n 6, 739.

[65] Quinn, n 6, 757.

was fair, a person's opinion is affected by both the actual outcome and their subjective perception of whether the process involved in reaching that decision were fair.[66] One consequence of this, confirmed in many contexts and studies, is that if the person perceives the process as fair then they are more likely to accept the decision and to comply with it. The relevance for judges being that both substantive and procedural fairness can be critical to maximising compliance with court decisions and orders – and, at a systemic level, that improvements in the objective performance of courts alone is unlikely to lead to higher levels of public trust and confidence in them.[67] The extent to which these effects are implemented in judicial policy and practice is purely a matter for the courts concerned.

Quinn also fundamentally mischaracterised TJ by her assertion that it "claims that we should adopt justice system policies and practices that seem 'therapeutic' in nature".[68] The mischaracterisation arises because she wrongly stated that a TJ-informed change in procedure that reduces anti-therapeutic consequences should be made in ignorance (or in spite of) any other rights or consequences: "Proponents [of TJ] remarkably laud … [its] ability to encourage greater compliance with 'the law' and orders of the court in the days ahead without any critical analysis of what that actually means."[69]

<DIV>DUE PROCESS PROTECTIONS

In a court that claims to be applying a process grounded in principles of TJ, two fundamental levels of protection operate to guarantee that processes due to an offender by operation of constitution, statute or common law (or any combination of these sources) are observed. If a process that is due is nevertheless denied, then one or both of these levels of protection has been ignored by ignorance or design of the officers of the court. The first level of protection exists due to the essential nature of the TJ imperative; the second due to implementation restrictions, which the TJ imperative necessarily imposes on any court model that invokes it.

<subdiv>The TJ Imperative as "Rights Plus"

Daicoff positions TJ within that group of approaches to law that have been described as having a focus on "rights plus" factors. Meaning, TJ both integrates and values extra-legal concerns – factors complementing and in addition to strict legal rights and duties.[70] If TJ is framed as an imperative directed towards its proponents it might read something like this:

1. Study the practical, therapeutic consequences of various legal rules and practices for those impacted by them, and consider whether these consequences can be improved in the context of any countervailing normative considerations that might outweigh these therapeutic consequences.
2. Where countervailing normative considerations are identified, do not invoke therapeutic jurisprudence as a method for determining which consideration(s) should predominate in decision-making.[71]

The "strict legal rights and duties" referred to by Daicoff are an example of "countervailing normative considerations" to which the imperative directs the TJ proponent. Constitutional, statutory and common law due process requirements are then examples of "strict legal rights and duties".

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[66] TR Tyler, "What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22 *Law and Society Review* 103.

[67] TR Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law" (2003) 30 *Crime and Justice* 283.

[68] Quinn, n 6, 757.

[69] Quinn, n 6, 758.

[70] These rights plus factors include, Daicoff suggests: needs; resources; goals; morals; values; beliefs; psychological matters; personal wellbeing; human development and growth; interpersonal relations; and community wellbeing. S Daicoff, "Law as a Healing Profession: The 'Comprehensive Law Movement'" (2006) 691 *Pepperdine Dispute Resolution Journal* 1, 4. Dacioff attributes the term "rights plus" to PH Tesler, collaborative law co-founder and San Francisco attorney.

[71] It is acknowledged that this article has a degree of reliance on (and inspiration from) the early articulation of some key principles by TJ pioneer Bruce Winick: Winick, n 61, 1707, fn 4.

Throughout this article, numerous articulations of that component of the TJ method are considered that protects due process of law. Perhaps the most recent authoritative articulation is from Richardson, Spencer and Wexler:

> <blockquote>
>
> Through the lens of TJ, courts and tribunals can seek to maximise therapeutic consequences and minimise anti-therapeutic consequences of the law and legal processes *in so far as other values, such as justice and due process, can be fully respected*.[72] [emphasis added] </blockquote>

They make this observation in the context of an analysis of the potential for TJ principles to be incorporated into the *International Framework for Court Excellence*[73] and of courts and tribunals using the Framework to assess proposed TJ reforms. The Framework sets out fundamental values of its own, which would then inform a court or tribunal in assessing any TJ-based reform. Interestingly, there are 10 such "fundamental values", which (again) map fairly neatly onto the set of processes Friendly J suggested as derivative of the US constitutional protections.[74] They are:

1. equality before the law;
2. fairness;
3. impartiality;
4. independence of decision-making;
5. competence;
6. integrity;
7. transparency;
8. accessibility;
9. timeliness; and
10. certainty.

<subdiv>Integrated Protections in the Problem-Solving Court Models

Problem-solving courts generally, and drug treatment courts in particular, are, as one appellate judge described it, "philosophically, functionally, and intentionally different" from mainstream criminal courts. Sanctions are imposed on offenders in a mainstream court to deter both the offender and others from committing similar offences in the future and to protect the community by incapacitating the offender for a time. But where the offences are linked to drug dependence, it may be that these typical sanctions are functionally meaningless in that they do not address the underlying "problem" that is the main catalyst for the offending. Once the offender is released from prison, drug abuse is likely to recommence and the cycle of recidivism continues. Drug treatment courts seek to disrupt that cycle for some offenders for whom treatment is deemed to be a viable alternative.[75]

The enabling legislation (where it is necessary and exists) will usually provide for criteria by which to assess the eligibility of an accused person who has been charged with offences related to the person's long-term drug dependency and associated lifestyle for entry to a drug court program.[76]

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[72] Richardson, Spencer and Wexler, n 3, 153.

[73] See <http://www.courtexcellence.com/>.

[74] Friendly, n 17.

[75] Section 3(1) of the *Drug Court Act 1998* (NSW), for example, provides that the objects of that Act (which establishes the New South Wales Drug Court) include reducing the drug dependency of eligible persons and convicted offenders, promoting their reintegration into the community, and reducing the need for them to resort to criminal activity to support their drug dependencies.

[76] Section 5(1) of the *Drug Court Act 1998* (NSW), for example, provides that an "eligible convicted offender" will be a person convicted of an offence (excluding one in which a firearm was used) who has never been convicted of a range of disqualifying offences (such as homicide, certain sex or drug trafficking offences) and who does not suffer from a mental condition, illness or disorder that is serious or leads to the person being violent and that could prevent or restrict the person's active participation in a drug treatment program.

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Typically, a suitable candidate will be required to enter a plea of guilty (in a post-plea jurisdiction[77]) and upon conviction be sentenced to a term of actual (full-time) custody. Before entering the plea, the accused enters into an agreement by which they accept the statutory conditions of the drug treatment order; a significant amount of discretion is bestowed upon the drug court judge to determine and vary procedure in these cases. There will be a statutory requirement that before entering into that agreement, the accused will have been informed by their legal representative of the drug court's powers and of the respective consequences, as regards the sentence to be imposed, of the person's compliance or non-compliance with conditions and orders. It is at this point that the potential arises for a disparity between what is contemplated by the relevant drug court/problem-solving court model (or ideal) and what actually occurs, procedurally, in a given court.

In the relevant agreement, the offender, now usually referred to as a "participant", will have agreed to waive a number of standard procedural and due process rights bestowed by constitution, statute or common law. These may include the right to public trial, the right to a trial by jury, the right to silence, as well as some rights to lead evidence and call witnesses etc. In so doing, the participant formally agrees to abide by the rules of the particular treatment or problem-solving court.

The legality and constitutionality of these statutory waivers appear sound and have not been challenged in Australia. Some have been tested at a State level in the US and have withstood the challenge. In *State v Sykes*,[78] for example, the Supreme Court of Washington had to decide whether the usual practice of the drug court team holding closed meetings (usually referred to as "staffings") where the drug court judge, attorneys and treatment professionals meet to discuss each drug court participant's progress in the absence of the participant, was a breach of the participant's due process right pursuant to the Washington Constitution that "Justice in all cases shall be administered openly, and without unnecessary delay".[79] The Supreme Court found that to allow public access to team meetings in the drug court would interfere with both the appearance and fact of the team collaboration ethos, which is what "differentiates adult drug courts from ordinary criminal adjudications", and that allowing access would "not play a significant positive role in adult drug court functioning". It also found that in signing a written waiver and agreement when she entered the drug court program, which expressly waived her public trial right, Sykes not only acquiesced to the closed staffings but her counsel actively participated in those staffings. This meant she invited the constitutional error that she erroneously claimed in her favour.[80]

As already established, drug courts and other problem-solving courts exist within the adversarial legal system and may be subject to oversight by adversarial appellate courts, although by design this is not meant to be the major mechanism for procedural quality. Although some procedural rights will generally be waived by offenders once they enter into a binding statutory agreement and become participants in a court-supervised treatment program, some of the more fundamental rights remain. This is a more significant reality for practical purposes in the US due to the comprehensive nature of

[77] In a pre-plea jurisdiction, the prosecution agrees to defer trial proceedings against the accused while they undertake the program designed by the drug court team. That means that no plea to the charges is required in order to be accepted into the program. These pre-plea programs are most common for low-risk offenders who do not necessarily need the… Accused persons facing more serious custodial sentences and in need of more … Are better suited to a post-plea jurisdiction, in which a plea of guilty is a requirement of acceptance into the program and the sentence to be served if the program is not successfully completed is known. [AQ: is there missing text, or is this a quote?]

[78] *State v Sykes*, 182 Wash 2d 168, 190; 339 P 3d 972, 983 (2014).

[79] *Revised Code of Washington* 2.28.170(3); *West's Revised Code of Washington Annotated*, Title 2: Courts of Record (Refs & Annos) Ch 2.28 – "Powers of Courts and General Provisions".

[80] In the later case of *State v Kelifa* (Wash App, 2015), the First Division Court of Appeals of Washington, provides more detail in relation to the content of particular waiver agreement, which is instructive: "20. As Part of the Drug Court Protocol, the judge will meet regularly with a group consisting of my attorney, the prosecutor and treatment staff to discuss my case. I will not be present during these meetings, they will not be recorded, and they will not be open to the public. The judge will not make any decisions at these meetings and will give me the opportunity to provide input at a subsequent hearing before making a decision in my case. I agree to this procedure and ask the Court to proceed without me in these meetings. My lawyer and I have reviewed and discussed all of the above paragraphs 1 through 20. I understand them all and do hereby knowingly give up these rights."

the constitutional guarantees in the Bill of Rights. For this reason, breaches of due process alluded to above are those that have been reported by US courts. Details of such cases, the constitutional and other rights that have been alleged to have been denied, the appellate decisions and reasoning (such as that in *Sykes* above) are reported and a number of agencies keep curated lists of these to assist problem-solving courts in improving their procedures.[81]

There is scope for the participant to appeal to a higher court on the basis of alleged due process violations for some decisions, although the scope of any appeal right is highly dependent upon the jurisdiction in which the particular court operates and the content of the agreement or order. In Australian drug treatment courts, for example, the relevant enabling statute is likely to provide that no appeal lies against the decision of a drug court judge to terminate a particular offender's program.[82]

The most significant procedural protections within the relevant problem-solving court model will be found in the manuals of best practice and principles, produced by the national organisational bodies, and bench books of the particular court jurisdiction. If such models do not exist, or a particular court invokes TJ as a basis of its operating philosophy without in fact operating according to an equivalent set of operational procedures that comply with the TJ imperative prohibition against decision-making in the face of "countervailing normative considerations", then that invocation of TJ is simply invalid.

The clearest, most rigorous and tested collection of best practice and principles that illustrate the depth of integrated due process protections is *Defining Drug Courts: The Key Components*, compiled and updated by the Drug Court Standards Committee of the National Association of Drug Court Professionals.[83] In some States there will be a statutory requirement that in order to operate as a drug court specified standards must be complied with and these are typically (although not exclusively) the 10 Key Components. There is often a certification process that the State will also require the court to undertake, which may include evaluations of compliance with the 10 Key Components or equivalent. Demonstrating adequate implementation of these would generally be linked to continued funding. The rigour with which these sorts of evaluations are undertaken varies as does the extent to which similar processes apply to other problem-solving courts[84] or therapeutic programs.[85] As with so many justice system benchmarking processes, a lot often depends on the attitudes, enthusiasm and levels of training and education[86] of the relevant judges and team members.[87] That can be an especially probative factor where a degree of self-reporting and auditing is involved. Another limiting factor can be the extent to which those tasked with implementing standards across such a large number and diversity of courts have an understanding of the substantive "meaning" of each standard, which is consistent both across the jurisdiction and with what the expert drafters intend(ed).[88] The implication

[81] The National Drug Court Institute (NDCI) curates an annotated list of constitutional and due process breach cases on its website: see NDCI, "Constitutional and Other Legal Issues in Drug Court: A Webliography" <https://www.ndci.org/judges-20/law/>.

[82] See, eg *Drug Court Act 1998* (NSW) s 11(2).

[83] US Department of Justice, Office of Justice Programs, Drug Courts Program Office and National Association of Drug Court Professionals, *Defining Drug Courts: The Key Components* (Bureau of Justice Assistance, 1997) <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf>

[84] L Blair et al, "Juvenile Drug Courts: A Process, Outcome, and Impact Evaluation" (*OJJDP Juvenile Justice Bulletin*, 2015).

[85] E Evans et al, "Comparative Effectiveness of California's Proposition 36 and Drug Court Programs Before and After Propensity Score Matching" (2014) 60(6) *Crime and Delinquency* 909.

[86] T Tyler and D Rottman, "Thinking About Judges and Judicial Performance: Perspective of the Public and Court Users" (2014) 4(5) *Oñati Socio-Legal Series* 1046.

[87] A Cissner et al, "A State-Wide Evaluation of New York's Adult Drug Courts: Identifying Which Policies Work Best" (Center for Court Innovation, 2013) <https://www.bja.gov/Publications/CCI-UI-NYS_Adult_DC_Evaluation.pdf>.

[88] When I directed the U.S. Department of Justice's Drug Court Technical Assistance Project, there was major stress on complying with the key components including having a therapeutic focus. But one of the underlying issues re the 10 Key Components is that, for those of us who were on the original committee that developed them, we all shared an implicit understanding of what they meant and their interrelationship and interdependence. I don't think that's always the case anymore. Email received from Professor Caroline Cooper 12 June 2017. [AQ: is this a quote from Cooper or the words of the author?]

of these combined caveats being that a program that calls itself a "drug court" and that invokes TJ as one of its operating philosophies or underpinning rationales may be certified as such and appear to be functioning perfectly well in a bureaucratic context, but still not be consistent with the drug court model to the extent that its therapeutic implementation complies with the TJ imperative suggested above.[89]

Given those practical limitations and caveats, it is well worth examining the content of the Key Component most relevant to this discussion, Key Component (2).[90]

<group>Key Component (2) – Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights

The crucial factor to note about this Component is the express requirement to protect due process rights. In practice this means that the statutory and ethical requirements applying to defence lawyers in relation to due process are not displaced in any way (on the basis of the model) in the lead up to the commencement of a program, and once the relevant agreement is executed, only to the extent that is provided for by that agreement and any other relevant law. A generalisable statement of the collaborative nature of the work of the problem solving court lawyers is provided by this explanation of the Component:

> <blockquote>
>
> The responsibility of the prosecuting attorney is to protect the public's safety by ensuring that each candidate is appropriate for the program and complies with all drug court requirements. The responsibility of the defense counsel is to protect the participant's due process rights while encouraging full participation. Both the prosecuting attorney and the defense counsel play important roles in the court's coordinated strategy for responding to noncompliance.[91]</blockquote>

Benchmark 4 of this Component, against which defence lawyers working in the jurisdiction will be evaluated, also prescribes a fairly comprehensive list of tasks and responsibilities, which, again and not by coincidence, closely reflect the list of due process components suggested by Friendly J. These include:

- reviewing the arrest warrant, affidavits, charging document and other relevant information, and reviews all program documents (eg waivers, written agreements);
- advising the defendant as to the nature and purpose of the drug court, the rules governing participation, the consequences of abiding or failing to abide by the rules, and how participating or not participating in the drug court will affect their interests;
- explaining all of the rights that the defendant will temporarily or permanently relinquish;
- advising on alternative courses of action, including legal and treatment alternatives available outside the drug court program, and discussing with the defendant the long-term benefits of a drug-free life; and
- explaining that because criminal prosecution for admitting to alcohol and other drug use in open court will not be invoked, the defendant is encouraged to be truthful with the judge and

[89] Anecdotally, some of the most experienced drug court judges and educators have expressed to the author concerns that the high termination rates in federally funded US drug courts (50% in the first six months of a year, for example) confirms their view that due to rapid expansion and demand many practitioners new to the drug court jurisdiction have very little knowledge or experience of the therapeutic dimension. It could be that they have insufficient appreciation that the early stages of participation in a drug addiction treatment program present the greatest risk of breach, and of the impact of co-factors such as poor self-esteem, mental health problems, physical distress etc, which catalyse that early risk.

[90] Most of the Key Components have relevance to this discussion, but (4) is the most substantive. Those worth taking a closer look at would be Key Component (9) – "Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations", and Key Component (6) – "Ongoing judicial interaction with each drug court participant is essential".

[91] [AQ: provide a ref for this quote or state if it is the author's]

with treatment staff, and informing the participant that they will be expected to speak directly to the judge, not through an attorney.

In an Australian drug court, the lawyer who represents the offender during the pre-program procedures will generally not be the same lawyer who acts for them as part of the drug court team. Any perceived or actual risk that this pre-program lawyer might, as Zeidman insisted, act out undue haste or be "evangelical" about the benefits of entering into the relevant agreement loses much of its sting in that arrangement. Once the court-appointed defence lawyer takes over, their focus needs to be on maximising the chances of the participant's recovery and completion, not on the adversarial or technical legal merits of any impending trial or similar procedures. As noted above, this is not an abandonment of the adversarial system; it is an arrangement acknowledged as lawful and essential by appellate courts.

<DIV>CONCLUSION

Perhaps the clearest articulation of the TJ position on due process has come from Astrid Birgden, who noted:

<blockquote>

… therapeutic jurisprudence balances 'justice principles' (e.g. due process and the right to a fair trial) with therapeutic principles (e.g. individual autonomy and psychological well-being), with there being no presumption in favour of therapeutic principles when a conflict arises … When values conflict, therapeutic jurisprudence does not purport to determine what should be done but rather sets the stage for the sharp articulation of issues which arise.[92]</blockquote>

The claim that TJ poses any threat to due process rights or to any countervailing normative considerations is simply unsustainable. To make that claim demonstrates a fundamental misunderstanding of what TJ directs its proponents to do and how to do it. The TJ imperative itself places very few limitations on what a researcher, practitioner, policy-maker or judge can or cannot do. This is deliberate in that both the founders of TJ and its contemporary proponents are strongly committed to collaborative, interdisciplinary work and scholarship, which allows those who see its value to "roam within the intuitive and common sense contours of the concept".[93] Those common sense contours, as demonstrated in this article, need to be understood more clearly by the more vociferous and ideological of the TJ critics. TJ is, and promotes itself as, "not so much a body of substance as it is an approach (through careful analysis and empirical research) to creating a body of substance".[94]

The mainstreaming success of TJ is contingent upon a rigorous calling out of practices that invoke TJ but are in fact inconsistent with established law and natural justice. As pioneering TJ magistrate Jelena Popovic has observed:

<blockquote>

Currently, the most significant factors influencing whether or not individual judicial officers adopt therapeutic jurisprudence practices are their perceived 'legitimacy' and compatibility with current statutory and common law. Judicial officers need to be persuaded that therapeutic jurisprudence is a legitimate jurisprudential technique which is complementary to

[92] A Birgden, "Can Convicted Sexual Offenders Be Treated Effectively Within a Correctional System?" (Paper delivered at the *ANZAPPL Conference*, November 1997). A very thoughtful discussion of the balance between TJ principles, offender rights and human rights in practice is also undertaken in A Birgden, "Maximizing Desistance: Adding Therapeutic Jurisprudence and Human Rights to the Mix" (2015) 42(1) *Criminal Justice and Behavior* 19, 23.

[93] [AQ: insert ref for this quote]

[94] DP Stolle, DB Wexler and BJ Winick (eds), *Practicing Therapeutic Jurisprudence: Law as A Helping Profession* (Carolina Academic Press, 2000) 31.

traditional law and does not demean the status of the officer nor detract from the authority of the law.[95]</blockquote>

[95] J Popovic, "Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary" (2002) 20 *Law in Context* 121.