

# RESTORATIVE JUSTICE, THERAPEUTIC JURISPRUDENCE AND THE RISE OF EMOTIONALLY INTELLIGENT JUSTICE

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*[Over the past 20 years, court and legal practices have changed due to the influence of more emotionally intelligent and less adversarial approaches to resolving legal disputes. Restorative justice encounters involving victims and offenders discussing what happened, why it happened and what reparation can be made have promoted victim wellbeing and offender rehabilitation. Therapeutic jurisprudence has suggested reforms to minimise the law's negative effects on wellbeing and to promote its wellbeing-related goals such as crime victims' safety and health, injured workers' rehabilitation and broken families' welfare. Both see the management of emotions and professionals' interpersonal skills as important in dispute resolution. This article argues that judging and legal practice should include exercising intrapersonal and interpersonal skills, and that legal education should train legal professionals accordingly.]*

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## I INTRODUCTION

In his 2002 presidential address to the American Society of Criminology, Lawrence Sherman spoke of an 'emotionally intelligent justice, in which the central tools will be inventions for helping offenders, victims, communities, and officials manage each others' emotions to minimize harm.'<sup>1</sup> Although these comments suggested a future direction for criminology and the criminal justice system, they are descriptive of a wider trend that is gaining momentum not only in the justice system as a whole, but also in dispute resolution processes in schools, community organisations and workplaces.

This trend has been called 'non-adversarial justice' or the 'comprehensive law movement'.<sup>2</sup> Both terms describe core features of this development but neither is entirely satisfactory: approaches such as procedural justice and therapeutic jurisprudence aim to enhance both adversarial and non-adversarial processes, and not all non-adversarial approaches are comprehensive.<sup>3</sup> Non-adversarial or comprehensive approaches to justice include alternative or appropriate dispute resolution, problem-solving courts, indigenous sentencing courts, diversion programs, holistic law, preventive law, procedural justice, creative problem-solving, restorative justice and therapeutic jurisprudence.

Non-adversarial justice uses processes that are generally more comprehensive and psychologically attuned than conventional justice system processes. Psychologically attuned approaches include an appreciation of the role of emotion in legal problems, problem resolution processes and legal outcomes. The central tools and inventions of these approaches are communicative techniques incorporating understanding, feelings and empathy, and the application of a broad definition of legal problems and outcomes.

These techniques and approaches have significant implications for the law, the way judges, magistrates and lawyers undertake their work and legal education. Although the traditional focus in training lawyers and members of the judiciary has been on knowledge of the law, skills in fact-finding and application of the law, key non-adversarial approaches suggest that emotional intelligence and interpersonal skills are also important parts of their roles.

Therapeutic jurisprudence and restorative justice assert that emotional issues can be intimately related to a dispute's development or to harmful behaviour, and that effective management of emotions is important in resolution processes. Therapeutic jurisprudence examines the law's effect on the wellbeing —

<sup>1</sup> Lawrence W Sherman, 'Reason for Emotion: Reinventing Justice with Theories, Innovations, and Research — The American Society of Criminology 2002 Presidential Address' (2003) 41 *Criminology* 1, 6.

<sup>2</sup> Arie Freiberg, 'Non-Adversarial Approaches to Criminal Justice' (2007) 16 *Journal of Judicial Administration* 205; Susan Daicoff, 'The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement' in Dennis P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000) 465; Michael S King et al, *Non-Adversarial Justice* (2009) (forthcoming).

<sup>3</sup> See generally Michael S King, 'Towards a More Comprehensive Resolution of Conflict: The Role of Restorative Justice' (Paper presented at the Restorative Justice: Bringing Justice and Community Together Conference, Melbourne, 14 May 2008) <[http://www.varj.asn.au/pdf/08\\_KingM\\_MoreComprehensiveConflictResolution\\_RoleofRJ.pdf](http://www.varj.asn.au/pdf/08_KingM_MoreComprehensiveConflictResolution_RoleofRJ.pdf)>.

including the emotional wellbeing — of its subjects.<sup>4</sup> It recommends law reform based on behavioural science to minimise negative effects and to promote positive effects on wellbeing. Restorative justice asserts that harmful behaviour, whether related to legal action or not, can cause not only material damage but also emotional or psychological harm that must be healed if the problem is to be comprehensively resolved.<sup>5</sup> The primary healing mechanism is a mediated encounter between victim and offender whereby the emotions of each may be expressed and soothed by discussing the events, their effects and what the offender might do to make amends.<sup>6</sup>

The increased appreciation of the significance of emotions in the emergence and resolution of legal problems mirrors developments in diverse disciplines and in the wider community, such as the growing influences of psychology and of the concept of emotional intelligence.<sup>7</sup>

## II EMOTIONAL INTELLIGENCE

Emotions affect how we perceive and behave towards other people. They commonly bring about ‘coordinated changes in physiology, motor readiness, behavior, cognition, and subjective experience.’<sup>8</sup> The significance of emotions to human wellbeing and behaviour has been considered by western and eastern philosophical traditions for several thousands of years.<sup>9</sup> They are also an important topic in psychology.

With the increase in scientific and popular interest in the role of emotions, some recent theories have endeavoured to link emotions to intelligence. The concept of emotional intelligence has been promoted within the academic community by the work of Peter Salovey and John Mayer and within popular culture by the work of Daniel Goleman.<sup>10</sup>

The concept of emotional intelligence emerged at a time when the idea of more than one intelligence was gaining support. In the early 1980s, Howard Gardner proposed a theory of multiple intelligences which are mental skills in particular areas of human functioning, such as logical, linguistic, musical and spatial

<sup>4</sup> David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (1990); David B Wexler and Bruce J Winick (eds), *Essays in Therapeutic Jurisprudence* (1991). A therapeutic jurisprudence bibliography is available on the website of the International Network on Therapeutic Jurisprudence: The University of Arizona James E Rogers College of Law, *TJ Bibliography Complete List* (2002) International Network on Therapeutic Jurisprudence <<http://www.law.arizona.edu/depts/upr-intj/>>. For Australasian resources, see the website of the Australasian Therapeutic Jurisprudence Clearinghouse: Australasian Therapeutic Jurisprudence Clearinghouse, *Resources* (2008) The Australasian Institute of Judicial Administration <[http://www.aija.org.au/index.php?option=com\\_content&task=view&id=421&Itemid=139](http://www.aija.org.au/index.php?option=com_content&task=view&id=421&Itemid=139)>.

<sup>5</sup> Daniel W Van Ness and Karen Heetderks Strong, *Restoring Justice* (2<sup>nd</sup> ed, 2002) 38.

<sup>6</sup> *Ibid* 55–78.

<sup>7</sup> See, eg, Daniel Goleman, *Emotional Intelligence* (1995).

<sup>8</sup> John D Mayer, Richard D Roberts and Sigal G Barsade, ‘Human Abilities: Emotional Intelligence’ (2008) 59 *Annual Review of Psychology* 507, 510 (citations omitted).

<sup>9</sup> See, eg, Keith Oatley, *Emotions: A Brief History* (2004); Michael S King, ‘Natural Law and the *Bhagavad-Gita*: The Vedic Concept of Natural Law’ (2003) 16 *Ratio Juris* 399.

<sup>10</sup> See, eg, John D Mayer and Peter Salovey, ‘The Intelligence of Emotional Intelligence’ (1993) 17 *Intelligence* 433; Goleman, *Emotional Intelligence*, above n 7.

skills.<sup>11</sup> For example, linguistic intelligence relates to the skill in using language, such as to persuade, explain or remember.

Gardner also suggested that there are interpersonal and intrapersonal intelligences which relate in part to understanding and managing emotions.<sup>12</sup> Intrapersonal intelligence involves being aware of one's feelings and using them to understand and guide one's behaviour. Interpersonal intelligence involves being aware of others' emotional states, motivations and intentions, and being able to use this knowledge to, for example, influence their behaviour.

These two intelligences overlap with the concept of emotional intelligence as well as with the concept of social intelligence — the capacity to interact wisely with other people.<sup>13</sup> Mayer and Salovey defined emotional intelligence as:

a type of social intelligence that involves the ability to monitor one's own and others' emotions, to discriminate among them, and to use the information to guide one's thinking and actions. The scope of emotional intelligence includes the verbal and nonverbal appraisal and expression of emotion, the regulation of emotion in the self and others, and the utilization of emotional content in problem solving.<sup>14</sup>

They later refined the concept, explaining that it encompasses four main areas: perceiving, understanding, using and managing emotions.<sup>15</sup> Their theory falls into what John Mayer, Richard Roberts and Sigal Barsade call integrative approaches to emotional intelligence, which integrate the different aspects into a comprehensive whole.<sup>16</sup> They distinguish these approaches from those that focus on specific abilities related to emotional intelligence such as perceiving emotions, the use of emotions in thinking and reasoning about emotions.<sup>17</sup>

There are also mixed models that include factors not specifically involved in perceiving, understanding, using and managing emotions.<sup>18</sup> For example, Reuven Bar-On links emotional intelligence to social intelligence, defining them as 'a multifactorial array of interrelated emotional, personal, and social abilities that influence our overall ability to actively and effectively cope with daily demands and pressures.'<sup>19</sup> Its components are accurate self-regard, emotional self-awareness, assertiveness, empathy, interpersonal relationship, stress tolerance, impulse control, reality testing, flexibility and problem-solving.<sup>20</sup>

<sup>11</sup> Howard Gardner, *Frames of Mind: The Theory of Multiple Intelligences* (1<sup>st</sup> ed, 1983).

<sup>12</sup> *Ibid* 240.

<sup>13</sup> Reuven Bar-On, 'The Impact of Emotional Intelligence on Subjective Well-Being' (2005) 23(2) *Perspectives in Education* 41.

<sup>14</sup> Mayer and Salovey, 'The Intelligence of Emotional Intelligence', above n 10, 433 (citations omitted).

<sup>15</sup> John D Mayer and Peter Salovey, 'What Is Emotional Intelligence?' in Peter Salovey and David J Sluyter (eds), *Emotional Development and Emotional Intelligence: Educational Implications* (1997) 3, 10.

<sup>16</sup> Mayer, Roberts and Barsade, above n 8, 511–14.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid* 514.

<sup>19</sup> Reuven Bar-On, 'Emotional and Social Intelligence: Insights from the Emotional Quotient Inventory' in Reuven Bar-On and James D A Parker (eds), *The Handbook of Emotional Intelligence: Theory, Development, Assessment, and Application at Home, School, and in the Workplace* (2000) 363, 385.

<sup>20</sup> *Ibid*.

Goleman's 1998 formulation proposes five elements of emotional intelligence: self-awareness (knowing one's internal states, preferences, resources and intuitions), self-regulation, motivation, empathy and social skills (skills that bring about desirable responses in others).<sup>21</sup> He attributes a number of competencies to each area. For example, social skills include leadership, team capabilities and change catalyst, while motivation includes initiative and optimism.<sup>22</sup> However, critics consider that some components of mixed models — such as reality testing, stress tolerance and impulse control — do not comprise emotional intelligence.<sup>23</sup>

Some emotional intelligence advocates have been enthusiastic about its significance, attributing to it 80 per cent of the competencies required for excellence at work.<sup>24</sup> Critics assert that this claim is exaggerated.<sup>25</sup> However, research does support the value of emotional intelligence. For example, studies have reported that emotional intelligence is related to more positive social relationships,<sup>26</sup> better work performance,<sup>27</sup> transformational leadership,<sup>28</sup> more positive outcomes during negotiations, improved psychological health and better academic achievement (though not higher grades).<sup>29</sup> Research suggests that emotional intelligence is particularly important in customer service and in some occupations, for example, in connection with police officers' job performance.<sup>30</sup>

Emotional intelligence has generated a sustained debate between proponents and critics who assert that emotional intelligence is fundamentally flawed, embarrassingly unscientific and potentially dangerous.<sup>31</sup> Key concerns include:

- 1 whether emotional intelligence is too nebulous, given the numerous differing definitions available;
- 2 whether emotional intelligence adds anything new, or whether its supposed attributes are simply some combination of personality attributes and IQ;
- 3 whether research actually supports the existence of emotional intelligence;
- 4 whether the research supports any practical benefit from the application of the concept;

<sup>21</sup> Daniel Goleman, *Working with Emotional Intelligence* (1998) 26–7.

<sup>22</sup> *Ibid.*

<sup>23</sup> John D Mayer, Peter Salovey and David R Caruso, 'Emotional Intelligence as Zeitgeist, as Personality, and as a Mental Ability' in Reuven Bar-On and James D A Parker (eds), *The Handbook of Emotional Intelligence: Theory, Development, Assessment, and Application at Home, School, and in the Workplace* (2000) 92, 101–2.

<sup>24</sup> Goleman, *Working with Emotional Intelligence*, above n 21, 320.

<sup>25</sup> Gerald Matthews, Richard D Roberts and Moshe Zeidner, 'Seven Myths about Emotional Intelligence' (2004) 15 *Psychological Inquiry* 179, 189–92.

<sup>26</sup> Peter Salovey and Daisy Grewal, 'The Science of Emotional Intelligence' (2005) 14 *Current Directions in Psychological Science* 281, 283–4.

<sup>27</sup> *Ibid.* 284; Paulo N Lopes et al, 'Emotional Intelligence and Social Interaction' (2004) 30 *Personality and Social Psychology Bulletin* 1018, 1030–2.

<sup>28</sup> Catherine S Daus and Neal M Ashkanasy, 'The Case for the Ability-Based Model of Emotional Intelligence in Organizational Behavior' (2005) 26 *Journal of Organizational Behavior* 453, 459–60.

<sup>29</sup> Mayer, Roberts and Barsade, above n 8, 523.

<sup>30</sup> Daus and Ashkanasy, above n 28, 460–1.

<sup>31</sup> See, eg, Lynn Waterhouse, 'Multiple Intelligences, the Mozart Effect, and Emotional Intelligence: A Critical Review' (2006) 41 *Educational Psychologist* 207, 216–18, 220–1.

- 5 whether the tests developed to measure emotional intelligence are valid;  
 6 to what degree emotional intelligence is relevant to success; and  
 7 whether training programs are conceptually sound and whether they actually  
 develop emotional intelligence attributes.<sup>32</sup>

Although emotional intelligence has obvious historical roots, it is a comparatively young concept and is likely to continue undergoing conceptual development. Some of the critics' concerns will not be answered without extensive further research. However, perhaps the most important result from the emergence of the concept has been a heightened public and professional awareness of the significance of the perception, understanding, use and management of emotions in individual actions and group interactions.<sup>33</sup>

### III RESTORATIVE JUSTICE

#### A *The Nature and Development of Restorative Justice*

Around the globe over the last 30 years, there has been an emergence of practices involving mediated encounters between victims and offenders that discuss the offending behaviour, the effects thereof and the reparation the offender is to make to the victim.<sup>34</sup> Professionals involved in organising these encounters sought an intellectual framework to describe these practices and their effects. The concept of restorative justice was the result.<sup>35</sup>

Some proponents assert that restorative justice is essentially a return to practices of pre-state societies involving informal, participatory means of resolving disputes directed at restoring the parties and maintaining community integrity.<sup>36</sup> They contrast this approach — which they assert was successful — with the punitive and apparently unsuccessful approach of the modern justice system. While it is true that earlier communities used informal practices, the evidence that they were predominant is not compelling: punitive methods were also used, and where informal practices were used they were often accompanied by social pressure.<sup>37</sup> The evidence suggests that while restorative justice has similar elements to these past informal methods, it is a modern development based on contemporary needs and social and governmental structures.

<sup>32</sup> See, eg, Matthews, Roberts and Zeidner, above n 25; Joseph Ciarrochi and John D Mayer (eds), *Applying Emotional Intelligence: A Practitioner's Guide* (2007); Waterhouse, above n 31, 218; Daus and Ashkanasy, above n 28.

<sup>33</sup> Moshe Zeidner, Richard D Roberts and Gerald Matthews, 'The Emotional Intelligence Bandwagon: Too Fast to Live, Too Young to Die?' (2004) 15 *Psychological Inquiry* 239, 246.

<sup>34</sup> See Paul McCold, 'Primary Restorative Justice Practices' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001) 41.

<sup>35</sup> Tony F Marshall, 'The Evolution of Restorative Justice in Britain' (1996) 4(4) *European Journal on Criminal Policy and Research* 21, 34–5.

<sup>36</sup> See, eg, Elmar G M Weitekamp, 'The History of Restorative Justice' in Gordon Bazemore and Lode Walgrave (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (1999) 75.

<sup>37</sup> Anthony Bottoms, 'Some Sociological Reflections on Restorative Justice' in Andrew Von Hirsch et al (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003) 79; Declan Roche, *Accountability in Restorative Justice* (2003) 7, 33, 33 fn 8.

Encounter processes emerged at a time when there was increasing awareness of the plight of victims of crime.<sup>38</sup> The state had largely marginalised victims by assuming the role of the injured party and undertaking the investigation and prosecution of crimes.<sup>39</sup> While there were advantages to this arrangement — few individuals had the resources to investigate and prosecute offences — the manner in which it was done meant that victims were not involved in and uninformed of the process. Where victims participated, it was according to rules designed to meet the justice system's needs rather than victims' needs. Material or symbolic reparation for the victim was not a part of the court process.

Increased awareness of victims' marginalisation resulted in justice system reform internationally, including empowering courts to order restitution, criminal injuries compensation schemes, victim support services and the use of victim impact statements in sentencing.<sup>40</sup> By involving victims rather than marginalising them, encouraging offenders to make amends to victims and focusing on victims' needs, encounter processes shared common ground with concepts of restitution and victims' rights.<sup>41</sup>

The informal justice movement was also a significant influence on restorative justice.<sup>42</sup> In a graphic depiction of the victims' (and offenders') situation, Nils Christie described the state as having stolen the dispute from them.<sup>43</sup> He proposed less formal methods of resolution of harm involving the participation of victim and offender.<sup>44</sup> According to Daniel Van Ness and Karen Strong, social justice thinking in the areas of peacemaking criminology, feminism and critiques of imprisonment have also influenced restorative justice thinking.<sup>45</sup>

There is no single restorative justice theory. Themes within restorative justice such as victimisation, encounter and dialogue between victim and offender, apology, forgiveness, reconciliation and/or reparation, and collaborative decision-making have been accommodated within diverse perspectives including republicanism, communitarianism, feminist thought and spiritual and/or religious perspectives.

There is also no agreed definition of restorative justice. Tony Marshall's definition is most commonly cited: 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.'<sup>46</sup> Purists favour this definition as they stress the value of an encounter process that involves victims, offenders and the community in promoting their restoration.<sup>47</sup> Maximalists are more concerned with promoting the justice system's wider use of restorative

<sup>38</sup> See generally Van Ness and Strong, above n 5; Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (3<sup>rd</sup> ed, 2005).

<sup>39</sup> James Dignan, *Understanding Victims and Restorative Justice* (2005) 63–5.

<sup>40</sup> Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (2002) 1–24.

<sup>41</sup> See generally Dignan, above n 39.

<sup>42</sup> Van Ness and Strong, above n 5.

<sup>43</sup> Nils Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1, 3–4.

<sup>44</sup> Van Ness and Strong, above n 5, 17.

<sup>45</sup> *Ibid* 24–7.

<sup>46</sup> Marshall, above n 35, 37.

<sup>47</sup> See, eg, Paul McCold, 'Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model' (2000) 3 *Contemporary Justice Review* 357, 358.

processes and see the purists' narrow focus as counterproductive. Thus, maximalists consider community work performed by offenders as repairing the damage they have done to the community and therefore a form of restorative justice; purists do not agree.

This debate is unlikely to have a significant practical impact on the justice system. The justice system is likely to take a pragmatic approach which it has done in the past — adopting what it sees as valuable, and using terminology as it sees fit. This is consistent with its hybrid nature: an assemblage of practices reflecting diverse values and goals such as deterrence, prevention, community safety, offender rehabilitation, victim support and community trust. Nevertheless, the most commonly recognised restorative justice practices are the mediated meetings described by Marshall. They take three forms: victim–offender mediation, conferencing and circles.

Despite differences between proponents, all agree on the importance of victim restoration. Offending can produce differing dimensions of harm for victims,<sup>48</sup> depending on the severity and duration of the offence and the victim's reaction to it.<sup>49</sup> It may result in property damage and financial loss, physical injury, pain and suffering, disability, ongoing treatment, anger, diminished self-concept, post-traumatic stress disorder, fear of further victimisation, a desire for revenge or reduced quality of life. The justice system's insensitive handling of victims' cases may result in secondary victimisation. Furthermore, victims' families and social networks can also be adversely affected by the offence and its effect on victims. Restoration is seen as a process of attending to victims' needs, which include reassurance and support, reparation, vindication, meaning, safety and empowerment.<sup>50</sup>

Although restorative justice sees assisting victims as a priority, many proponents also value offender and community restoration. Howard Zehr suggests that offenders need to have dispelled any doubts or misconceptions they hold about their responsibility for the incident.<sup>51</sup> They may also need social support, assistance to deal with guilt, education and training, interpersonal skills, emotion management skills and a positive self-image.<sup>52</sup> According to Zehr, crime inhibits the community's sense of wholeness. Using processes that denounce offending behaviour, hold offenders accountable for their actions and promote the healing of victims and offenders can help address the community's need for restoration.

Restorative justice asserts that the current justice system does not adequately address victims', offenders' and the community's restoration needs.<sup>53</sup> By reinterpreting harmful behaviour as wrongs against the state rather than wrongs against victims and by investigating, prosecuting and punishing offenders in the current judicial manner, the state has excluded the victim and offender from having principal roles in dealing with the harm's aftermath. Deterrence, punish-

<sup>48</sup> For a review of these effects, see Dignan, above n 39, 23–31.

<sup>49</sup> *Ibid.* 24.

<sup>50</sup> Zehr, above n 38, 194.

<sup>51</sup> *Ibid.* 200.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

ment and rehabilitation currently outweigh more comprehensive values of restoration.

According to restorative justice, the best means of promoting the parties' and community's restoration needs is through processes that promote active participation, discussion where each party may express feelings and exchange information about the harmful behaviour in a supportive environment, collaborative, deliberative decision-making processes, creating opportunities for the offender to express remorse and convey an apology as well as for the victim to forgive, and the making of an agreement for reparation to be made to the victim.<sup>54</sup>

### B Primary Restorative Justice Practices

The forerunner of victim-offender mediation was an experiment in Kitchener, Ontario, where a probation officer and the Mennonite Central Committee, with the sanction of the court, arranged for offenders to visit the victims of their vandalism offences and offer to pay restitution.<sup>55</sup> The success of this case led to the development of victim-offender mediation processes. Such programs have since become popular in much of the western world.<sup>56</sup> Where parties do not wish to meet in person but still wish to participate in mediation, a shuttle or indirect form of mediation is used where communication is facilitated through a mediator.

Conferencing is arguably the most influential restorative justice practice in Australia, being a critical part of the diversionary approach at the basis of contemporary juvenile justice practice. The first and most well-known form — family group conferencing — began in New Zealand as part of a new, diversion-focused response to children at risk, following concerns raised by the Maori community that existing strategies were culturally inappropriate and failed to address underlying issues.<sup>57</sup> These conferences include the family of the young offender in the conference hearing and decision-making processes. A youth justice coordinator facilitates the conference, which involves an introduction of parties and processes, a police officer reading the facts, the offender admitting the facts and the victim describing the effects of the offence. Then there is a general discussion about the effects of the offence and options for making amends. The family meets privately to discuss making an offer of amends. An agreement may then be reached and the parties may share food together. If the

<sup>54</sup> Ibid.

<sup>55</sup> Dean E Peachey, 'The Kitchener Experiment' in Martin Wright and Burt Galaway (eds), *Mediation and Criminal Justice: Victims, Offenders and Community* (1989) 14, 14–16.

<sup>56</sup> For example, ss 27–30 of the *Sentencing Act 1995* (WA) empowers a court to order a victim-offender mediation report. The mediation is conducted by the Victim Offender Mediation Unit of the Department of Corrective Services: Department of Corrective Services, Government of Western Australia, *Offender Mediation* <[http://www.correctiveservices.wa.gov.au/O/offender\\_mediation.aspx](http://www.correctiveservices.wa.gov.au/O/offender_mediation.aspx)>. The Department of Corrective Services in New South Wales also offers victim-offender mediation: Department of Corrective Services, New South Wales Government, *The NSW Department of Corrective Services: Restorative Justice Unit* <[http://www.dcs.nsw.gov.au/offender\\_management/restorative\\_justice/index.asp](http://www.dcs.nsw.gov.au/offender_management/restorative_justice/index.asp)>. See also Mark S Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* (2001).

<sup>57</sup> McCold, 'Primary Restorative Justice Practices', above n 34, 45.

young person does not make an admission, the conference ends and the matter is referred to a court.

Police-mediated conferencing began in Wagga Wagga in 1991 as part of a community policing initiative and was influenced by the New Zealand model and John Braithwaite's reintegrative shaming theory.<sup>58</sup> In this model, there is no private family meeting. Discussion of what took place, who was affected and what must be done to make things right happens in a group comprising the victim, the offender, their supporters and the police mediator. If an agreement is reached, the mediator prepares a formal agreement while the others take refreshments and talk in an informal way. Although the Wagga Wagga approach was later replaced by a statutory scheme in New South Wales,<sup>59</sup> it became the basis of police-led conferencing around the world.

Community group conferencing involves scripted conferences adapted from the Wagga Wagga model.<sup>60</sup> The facilitator uses the script to introduce the conference, its processes and purpose. The script can also assist the facilitator in guiding the participants through the discussion, from the incident and its effects to the completion of an agreement for reparation. It is used in diverse contexts, including in schools, workplaces and community organisations.

Circle methods involve a broader range of participants than conferencing: victim, offender, their supporters, community leaders and other members of the community. Indigenous approaches to justice have influenced the use of circle methods within the justice system, and some contemporary indigenous communities use circle methods in collaboration with the justice system. A Manitoba community used this approach to address its incest and sexual assault problems.<sup>61</sup> In Australia, circle processes have been adapted for use in the justice system in the form of Aboriginal sentencing courts (such as Koori courts in Victoria),<sup>62</sup> in circle sentencing in NSW<sup>63</sup> and in various courts in Western Australia.<sup>64</sup>

<sup>58</sup> See Terry O'Connell, 'From Wagga Wagga to Minnesota' (Paper presented at the First North American Conference on Conferencing, Minneapolis, 6–8 August 1998) <[http://www.iirp.org/library/nacc/nacc\\_oco.html](http://www.iirp.org/library/nacc/nacc_oco.html)>; John Braithwaite, *Crime, Shame and Reintegration* (1989).

<sup>59</sup> *Young Offenders Act 1997* (NSW) pt 5.

<sup>60</sup> Terry O'Connell, Ben Wachtel and Ted Wachtel, *Conferencing Handbook: The Real Justice Training Manual* (1999).

<sup>61</sup> McCold, 'Primary Restorative Justice Practices', above n 34, 52–3.

<sup>62</sup> For a discussion on the nature and effectiveness of Aboriginal sentencing courts in Australia, see Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture — Final Report*, Project No 94 (2006) 122–36; Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415. Koori courts operate at the Bairnsdale, Broadmeadows, Latrobe Valley, Mildura, Shepparton, Swan Hill and Warrnambool Magistrates' Courts: Magistrates' Court of Victoria, *Koori Court* (2008) <<http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Specialist+Jurisdictions/Koori+Court/>>. A Koori Court has also recently been established at the County Court of Victoria to operate as a pilot program at the La Trobe Valley Law Courts, Morwell: County Court of Victoria, *County Koori Court Practice Note* (Reference No PNCR 3/2008, 2008) <[http://www.vicbar.com.au/GetFile.ashx?file=GeneralFiles%2FPNCR\\_3-2008\\_County\\_Koori\\_Court+\(2\).pdf](http://www.vicbar.com.au/GetFile.ashx?file=GeneralFiles%2FPNCR_3-2008_County_Koori_Court+(2).pdf)>.

<sup>63</sup> See Jacqueline Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending?' (Crime and Justice Bulletin No 115, New South Wales Bureau of Crime Statistics and Research, 2008)

### C Restorative Justice Outcomes

There is a growing body of research on the effects of restorative justice processes on victims' and offenders' psychology and behaviour.<sup>65</sup> However, given the variable quality of the research, it is difficult to reach firm, general conclusions regarding these effects.

Two hundred and ten Australian and United Kingdom victims who participated in restorative justice conferences experienced reduced anger and fear of victimisation, an almost threefold increase in sympathy for the offender and increased satisfaction concerning the question 'why me?'.<sup>66</sup> Although there was no control group, Heather Strang, Lawrence Sherman, Caroline M Angel, Daniel J Woods, Sarah Bennett, Dorothy Newbury-Birch and Nova Inkpen argue that the consistency of results across different sites, offences and backgrounds suggests that even more significant results may come from controlled studies.<sup>67</sup> There is also evidence that restorative justice promotes decreased desire for revenge in victims.<sup>68</sup> Victims who participated in a restorative justice conference as compared to those whose cases were processed by the justice system also experienced decreased symptoms of post-traumatic stress disorder immediately following and six months after the conference.<sup>69</sup> Furthermore, victims participating in a restorative justice conference returned to work marginally faster than those who used the criminal justice process. Sherman and Strang suggest that this points to personal and community savings from using the conferences.<sup>70</sup>

Determining restorative justice's effect on recidivism has been problematic, primarily due to methodological issues. For example, the quality of studies ranges from anecdotal reports to (a relatively few) randomised controlled studies. Studies have also differed in their definition of restorative justice — some used a broadly inclusive maximalist definition,<sup>71</sup> while others only included victim-offender-community encounter processes.<sup>72</sup> There are also differences concerning measures of recidivism — for example, some use new convictions

<[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/cjb115.pdf/\\$file/cjb115.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb115.pdf/$file/cjb115.pdf)>.

<sup>64</sup> See, eg, Elena Marchetti and Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (Trends and Issues in Crime and Criminal Justice No 277, Australian Institute of Criminology, Australian Government, 2004) 4.

<sup>65</sup> For a review, see Lawrence W Sherman and Heather Strang, *Restorative Justice: The Evidence* (2007).

<sup>66</sup> Heather Strang et al, 'Victim Evaluations of Face-to-Face Restorative Justice Conferences: A Quasi-Experimental Analysis' (2006) 62 *Journal of Social Issues* 281, 285, 295, 298, 300–1.

<sup>67</sup> *Ibid* 302.

<sup>68</sup> Lawrence W Sherman et al, 'Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized, Controlled Trials' (2005) 1 *Journal of Experimental Criminology* 367, 392.

<sup>69</sup> Caroline M Angel, *Crime Victims Meet Their Offenders: Testing the Impact of Restorative Justice Conferences on Victims' Post-Traumatic Stress Symptoms* (PhD Thesis, University of Pennsylvania, 2005); Sherman and Strang, above n 65, 64.

<sup>70</sup> Sherman and Strang, above n 65, 64.

<sup>71</sup> See, eg, James Bonta, Suzanne Wallace-Capretta and Jennifer Rooney, *Restorative Justice: An Evaluation of the Restorative Resolutions Project* (1998) <[http://ww2.ps-sp.gc.ca/publications/corrections/pdf/199810b\\_e.pdf](http://ww2.ps-sp.gc.ca/publications/corrections/pdf/199810b_e.pdf)>.

<sup>72</sup> See, eg, Jeff Latimer, Craig Dowden and Danielle Muise, 'The Effectiveness of Restorative Justice Practices: A Meta-Analysis' (2005) 85 *Prison Journal* 127, 131.

while others use rates of arrest.<sup>73</sup> Studies have produced inconsistent results, with some finding decreased recidivism from restorative justice participation and others finding no effect or even the opposite effect.<sup>74</sup>

A meta-analysis of 22 studies involving 35 restorative justice programs found that on average they reduced recidivism compared with traditional justice system processing.<sup>75</sup> Other meta-analyses have also found the possibility of decreased recidivism following participation in victim–offender mediation<sup>76</sup> and family group conferencing.<sup>77</sup> Sherman and Strang’s literature review concluded that restorative justice processes have a more consistent effect in reducing recidivism of violent crime than property offences and ‘victimless’ crimes.<sup>78</sup>

Much of the recidivism research involves juvenile offenders. However, studies of adult offenders have found that restorative justice practices alleviate offence-related factors<sup>79</sup> and in some cases reduce recidivism.<sup>80</sup> There is also evidence that a higher proportion of cases are brought to justice where restorative justice is used rather than conventional criminal justice system processing.<sup>81</sup>

Research has consistently found that victims participating in restorative justice processes have high satisfaction levels,<sup>82</sup> and that for offenders there is a moderate to weak increase in satisfaction when restorative justice is used compared to traditional justice system processes.<sup>83</sup> More recently, a study of three UK schemes found high levels of offender satisfaction with direct and indirect victim–offender mediation and conferencing.<sup>84</sup>

However, a small number of participants are dissatisfied following mediation or conferencing. Mostly, it appears that dissatisfaction is caused by an aspect of

<sup>73</sup> Rates of arrest are regarded by some commentators as less rigorous than conviction rates as they are affected by police arrest practices and, in some jurisdictions, offenders can be arrested on several occasions for the same offence: Joanna Shapland et al, ‘Does Restorative Justice Affect Reconviction?: The Fourth Report from the Evaluation of Three Schemes’ (Ministry of Justice Research Series 10/08, 2008) 10.

<sup>74</sup> See, eg, *ibid*; Sherman and Strang, above n 65, 68–71.

<sup>75</sup> Latimer, Dowden and Muise, above n 72, 137.

<sup>76</sup> William R Nugent, Mona Williams and Mark S Umbreit, ‘Participation in Victim–Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis’ [2003] *Utah Law Review* 137, 161–3; William Bradshaw and David Roseborough, ‘Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism’ (2005) 69(2) *Federal Probation* 15, 19.

<sup>77</sup> Bradshaw and Roseborough, above n 76, 19.

<sup>78</sup> Sherman and Strang, above n 65, 70.

<sup>79</sup> Jaimie P Beven et al, ‘Restoration or Renovation? Evaluating Restorative Justice Outcomes’ (2005) 12 *Psychiatry, Psychology and Law* 194, 195–6.

<sup>80</sup> Shapland et al, ‘Does Restorative Justice Affect Reconviction?’, above n 73.

<sup>81</sup> Sherman and Strang, above n 65, 20. Not all offences brought to the attention of police result in a successful prosecution. Prosecutors do not always proceed with charges and defendants may also abscond. The research cited suggests that restorative justice is more effective in resolving offences than the prosecutorial alternative. Perhaps this is because offenders do not face the risk of imprisonment and because the process is more sensitive to the needs of victims and offenders than conventional court processes. Thus, offenders may be more prepared to admit to their wrongdoing and accept the consequences.

<sup>82</sup> *Ibid* 136.

<sup>83</sup> Latimer, Dowden and Muise, above n 72, 136.

<sup>84</sup> Joanna Shapland et al, Centre for Criminological Research, University of Sheffield, ‘Restorative Justice: The Views of Victims and Offenders — The Third Report from the Evaluation of Three Schemes’ (Ministry of Justice Research Series 3/07, 2007).

the process — such as failure to resolve some issues, failure to complete conference agreements, lack of notification about reports concerning the mediation or disagreement with how the mediation was facilitated — rather than it being caused by the restorative justice approach itself.<sup>85</sup>

Despite methodological concerns, the research suggests that restorative justice produces positive outcomes for victims and offenders. However, further research should identify which cases and parties can most benefit from restorative justice processes and under what circumstances.

#### D *Emotions and the Dynamics of Restorative Justice Conferences*

Why should a face-to-face mediated encounter between a victim and offender bring them psychological and behavioural benefits? It appears that particular aspects of the conference process, individually or combined, are therapeutic.

Active participation appears important because research has found that it promotes victim satisfaction.<sup>86</sup> By actively participating in a restorative justice encounter, victims and offenders are likely to be involved in several processes: exchanging information, expressing feelings and often formulating reparation agreements.<sup>87</sup> Typically, the victim hears about why the offender wronged the victim while the offender hears about the effect on the victim and on others associated with either the victim or the offender. The victim may express hurt feelings, the offender shame and remorse, and in some cases the victim may also express forgiveness.<sup>88</sup>

For restorative justice advocates, the expression and management of emotions is crucial to positive outcomes.<sup>89</sup> For victims, it has been suggested that telling their story and expressing their feelings removes negative mental images associated with the offence.<sup>90</sup> Additionally, in contrast to the disempowerment of victimisation, victims gain the power to grant or withhold forgiveness.<sup>91</sup> For the offenders, such encounters can provide a sense of closure for the offence committed.<sup>92</sup>

Shame management is also important. According to Zehr, victims experience the shame of being overwhelmed and humiliated by the offender.<sup>93</sup> That experience can be aggravated if the justice system and community do not accept the victim's account. Removing this shame requires vindication, which can come from a conference in which the effects of the offence on the victim are addressed, the offender admits responsibility and seeks remorse, and reparation is made.<sup>94</sup>

<sup>85</sup> Ibid 27.

<sup>86</sup> Beven et al, above n 79, 196–7.

<sup>87</sup> Van Ness and Strong, above n 5, 55–78.

<sup>88</sup> Ibid; Strang, above n 40, 110–11.

<sup>89</sup> Van Ness and Strong, above n 5, 68–9.

<sup>90</sup> Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (2005) 117.

<sup>91</sup> Nathan Harris, Lode Walgrave and John Braithwaite, 'Emotional Dynamics in Restorative Conferences' (2004) 8 *Theoretical Criminology* 191, 202–3.

<sup>92</sup> Johnstone, *Restorative Justice*, above n 90, 117.

<sup>93</sup> Zehr, above n 38, 20–1.

<sup>94</sup> Ibid.

Restorative justice encounters facilitate situations where offenders express shame for wronging the victim in a way that promotes reintegration into the community.<sup>95</sup> While the conference may lead to denunciation of offenders' behaviour, mediators are careful to ensure that denunciation is not directed at offenders as individuals. Instead, the conference reaffirms the offenders' value as human beings and helps them redefine themselves as worthwhile citizens. Nathan Harris, Lode Walgrave and John Braithwaite have suggested that actual denunciation of the behaviour is unnecessary and that orchestrated disapproval may be harmful.<sup>96</sup> It is sufficient that the victim recounts the suffering that has been caused; the offender's natural response will be to feel shame.

Restorative justice proponents contrast this experience with offenders' public shaming and humiliation in court. While the first form of shaming is reintegrative, the second is stigmatic, alienating and potentially criminogenic.<sup>97</sup>

Gabrielle Maxwell and Allison Morris have questioned whether shame produces remorse in offenders.<sup>98</sup> In their observations of family group conferences in New Zealand, shame did not have any significant place. Rather, they suggested, remorse comes from the offender's empathy for the victim. Perhaps the experience of empathy not only engenders remorse but also shame and guilt.<sup>99</sup>

The restorative justice literature has emphasised a core sequence of events during encounters where the offender expresses remorse and the victim 'takes at least a first step towards forgiving the offender for the trespass.'<sup>100</sup> However, some acknowledge that this sequence does not always happen; indeed, it may be reversed. Braithwaite reports observing conferences in which the victim first forgave the offender, which then elicited the offender's remorse.<sup>101</sup>

Evidence that restorative justice has a greater effect in reducing recidivism of more serious offenders supports the contention that its effect is mediated through the level of emotions, such as remorse for the significant harm caused to victims.<sup>102</sup> Similarly, research has found that restorative justice in 'victimless' crimes is generally far less effective than in other cases.<sup>103</sup>

Although research on restorative justice encounter processes is in its early stages, it is likely that emotional dynamics play a significant role in effecting change in victim and offender. They create a supportive space where parties may express their emotions.<sup>104</sup> By risking the expression of emotion, one party may

<sup>95</sup> Harris, Walgrave and Braithwaite, above n 91, 192.

<sup>96</sup> Ibid.

<sup>97</sup> See Braithwaite, *Crime, Shame and Reintegration*, above n 58, 55.

<sup>98</sup> See Gabrielle Maxwell and Allison Morris, 'The Role of Shame, Guilt, and Remorse in Restorative Justice Processes for Young People' in Elmar G M Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (2002) 267.

<sup>99</sup> Harris, Walgrave and Braithwaite, above n 91, 202.

<sup>100</sup> Suzanne M Retzinger and Thomas J Scheff, 'Strategy for Community Conferences: Emotions and Social Bonds' in Burt Galaway and Joe Hudson (eds), *Restorative Justice: International Perspectives* (1996) 315, 316.

<sup>101</sup> John Braithwaite, 'Doing Justice Intelligently in Civil Society' (2006) 62 *Journal of Social Issues* 393, 404.

<sup>102</sup> Sherman and Strang, above n 65, 70.

<sup>103</sup> Ibid.

<sup>104</sup> Braithwaite, 'Doing Justice Intelligently in Civil Society', above n 101, 407.

accordingly make it easier for another party to reciprocate.<sup>105</sup> The evidence suggests that the actual sequence of conveying emotions may depend on the parties' personal characteristics and how the encounter is facilitated.<sup>106</sup> More research is needed in this area.

Offenders come into a restorative justice conference with differing attitudes towards rehabilitation. Some think they have no problem and are rebellious or resistant to change; some are considering change; others are committed to change and have formulated a plan but not implemented it; and the remainder have progressed towards rehabilitation by engaging in rehabilitation programs, further education and training and/or employment.<sup>107</sup> Concerning the latter, Gwen Robinson and Joanna Shapland found that some offenders attending restorative justice conferences in the UK had already taken steps to change and were remorseful for offending.<sup>108</sup> For offenders contemplating change, a conference may help motivate them to change; for those who are already moving in the direction of change, a properly conducted conference may support them and their efforts.

#### E *Criticisms of Restorative Justice*

Principal criticisms of restorative justice in operation include that: it puts pressure on victims to participate; far more than an encounter is needed for healing; there is a risk that victim and/or offender will be harmed by it; it is particularly problematic in cases of sexual assault and domestic violence, where there is a power imbalance between victim and offender; it promotes net-widening; and it undermines deterrence.<sup>109</sup>

Certainly for some restorative justice theorists, encounter processes, while necessary to promote the parties' healing, are seen as victim-centred and thus not to be used without victim consent.<sup>110</sup> Restorative justice also acknowledges that the parties should have ongoing support and treatment according to their needs in the period following the encounter process.<sup>111</sup>

People are emotionally vulnerable in a situation that fosters the expression of hurt emotions. Without proper screening and preparation for the encounter or without proper facilitation by the mediator, there is a risk of further harm to the

<sup>105</sup> Ibid 406.

<sup>106</sup> See above nn 93–103 and accompanying text.

<sup>107</sup> This analysis applies the transtheoretical stages of change model that describes the stages and processes involved in deliberate behavioural change: James O Prochaska, Carlo C DiClemente and John C Norcross, 'In Search of How People Change: Applications to Addictive Behaviors' (1992) 47 *American Psychologist* 1102, 1103–4.

<sup>108</sup> Gwen Robinson and Joanna Shapland, 'Reducing Recidivism: A Task for Restorative Justice?' (2008) 48 *British Journal of Criminology* 337, 347.

<sup>109</sup> For a review of principal criticisms of restorative justice, see Gerry Johnstone, 'Critical Perspectives on Restorative Justice' in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (2007) 598.

<sup>110</sup> Zehr, above n 38.

<sup>111</sup> Ibid; John Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice: A Review of Research* 1, 69, 80, 105–6. See also Umbreit, above n 56, 43.

parties.<sup>112</sup> Some offenders may deny they have a problem, may have no victim empathy or may enjoy seeing victims suffer.<sup>113</sup> Some victims may be so consumed with anger or desire for revenge that their denunciation of an offender may be stigmatic.<sup>114</sup> Some parties may be accustomed to values promoted in the encounter process — such as remorse, forgiveness and reconciliation — due to their dysfunctional use in the domestic violence in which they were involved.<sup>115</sup> Proper guidelines for eligibility for restorative justice processes and the use of professionally trained, emotionally intelligent mediators are therefore vital for the protection of the parties and the process.<sup>116</sup> In many cases, a power imbalance can be addressed by the mediator's firmer guidance of the conference process and by the presence of the parties' supporters.<sup>117</sup>

Net-widening refers to criminal justice programs bringing into the system offenders who may have otherwise been dealt with in a less serious manner, such as by police caution. There is evidence that restorative justice can produce net-widening.<sup>118</sup> However, proper training of criminal justice system personnel, particularly police officers, can help to minimise it.

The concern that restorative justice undermines deterrence assumes that its processes are a 'soft option'. Similarly, problem-solving courts have been criticised as soft.<sup>119</sup> In both cases, the opposite is true: it can be challenging and painful to deal with the consequences of one's behaviour and to address underlying causes. In any event, there is no evidence that restorative justice undermines deterrence.<sup>120</sup>

#### IV THERAPEUTIC JURISPRUDENCE

##### A *The Nature and Scope of Therapeutic Jurisprudence*

The legal system in action affects everyone in society. However, at times some people — such as parties to litigation (and their families), victims, offenders, witnesses and jurors — are more significantly affected by it than others.

Law can affect people in different ways: economically, socially and in their relationships. Therapeutic jurisprudence asserts that the law can affect wellbeing.<sup>121</sup> It studies the law to see how it affects the wellbeing of those involved in its operation.

<sup>112</sup> Braithwaite, 'Restorative Justice', above n 111, 49–50.

<sup>113</sup> Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (2004) 148.

<sup>114</sup> Braithwaite, 'Restorative Justice', above n 111, 82–3.

<sup>115</sup> Acorn, above n 113, 72–4.

<sup>116</sup> Braithwaite, 'Restorative Justice', above n 111, 84; Umbreit, above n 56, 116–31.

<sup>117</sup> Braithwaite, 'Restorative Justice', above n 111, 83–4; Allison Morris and Loraine Gelsthorpe, 'Re-Visioning Men's Violence against Female Partners' (2000) 39 *Howard Journal* 412, 417.

<sup>118</sup> M S Umbreit, B Vos and R B Coates, Center for Restorative Justice & Peacemaking, *Restorative Justice Dialogue: Evidence-Based Practice* (2006) 8–9, cf 11 <[http://cehd.umn.edu/ssw/rjp/PDFs/RJ\\_Dialogue\\_Evidence-based\\_Practice\\_1-06.pdf](http://cehd.umn.edu/ssw/rjp/PDFs/RJ_Dialogue_Evidence-based_Practice_1-06.pdf)>.

<sup>119</sup> Law Reform Commission of Western Australia, *Court Intervention Programs: Consultation Paper*, Project No 96 (2008) 31.

<sup>120</sup> Sherman and Strang, above n 65, 78.

<sup>121</sup> Wexler, *Therapeutic Jurisprudence*, above n 4; Wexler and Winick, *Essays in Therapeutic Jurisprudence*, above n 4.

Although much of the therapeutic jurisprudence work relates to courts, its scope is much broader. Indeed, it originated in work undertaken by David Wexler and Bruce Winick in mental health law in the United States in the late 1980s.<sup>122</sup> Since then, it has been extended to many areas of domestic as well as international law. For example, Alfred Allan and Marietjie Allan studied the therapeutic aspects of South Africa's Truth and Reconciliation Commission.<sup>123</sup> Gregory Baker described the use of therapeutic jurisprudence principles in environmental justice;<sup>124</sup> James Cooper considered the implications of therapeutic jurisprudence for the human right of self-determination in international law;<sup>125</sup> Michael King and Rob Guthrie suggested that the Northern Territory Emergency Response legislation is anti-therapeutic, hindering the legislation's objective of the wellbeing of the relevant Northern Territory communities;<sup>126</sup> Marjorie Silver considered the effect of legal representation on client wellbeing in a multicultural context;<sup>127</sup> Caroline Nicholson examined anti-therapeutic effects of child labour laws in South Africa;<sup>128</sup> and Muhammad Munir considered therapeutic jurisprudence in relation to juvenile justice in Pakistan.<sup>129</sup>

Therapeutic jurisprudence has also been applied in areas such as school safety,<sup>130</sup> family law,<sup>131</sup> legal practice in criminal cases,<sup>132</sup> legal practice in litigation generally,<sup>133</sup> civil law,<sup>134</sup> appeal courts,<sup>135</sup> workers' compensation,<sup>136</sup> disciplinary processes,<sup>137</sup> and problem-solving judging and legal practice.<sup>138</sup>

<sup>122</sup> Wexler, *Therapeutic Jurisprudence*, above n 4; Wexler and Winick, *Essays in Therapeutic Jurisprudence*, above n 4.

<sup>123</sup> Alfred Allan and Marietjie M Allan, 'The South African Truth and Reconciliation Commission as a Therapeutic Tool' (2000) 18 *Behavioral Sciences & the Law* 459.

<sup>124</sup> Gregory Baker, 'Rediscovering Therapeutic Jurisprudence in Overlooked Areas of the Law — How Exposing Its Presence in the Environmental Justice Movement Can Legitimize the Paradigm and Make the Case for Its Inclusion into All Aspects of Legal Education and the Practice of Law' (2008) 9 *Florida Coastal Law Review* 215.

<sup>125</sup> James M Cooper, 'State of the Nation: Therapeutic Jurisprudence and the Evolution of the Right of Self-Determination in International Law' (1999) 17 *Behavioral Sciences & the Law* 607.

<sup>126</sup> Michael S King and Rob Guthrie, 'Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response' (2008) 89 *Precedent* 39.

<sup>127</sup> Marjorie A Silver, 'Emotional Competence, Multicultural Lawyering and Race' (2002) 3 *Florida Coastal Law Review* 219.

<sup>128</sup> Caroline M A Nicholson, 'The Impact of Child Labor Legislation on Child-Headed Households in South Africa' (2008) 30 *Thomas Jefferson Law Review* 407.

<sup>129</sup> Muhammad Ahmad Munir, 'Therapeutic Jurisprudence in Pakistan: Juvenile Delinquency & the Role of the Defense Lawyer' in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (2007) 85.

<sup>130</sup> See Susan L Brooks, 'Therapeutic and Preventive Approaches to School Safety: Applications of a Family Systems Model' (2000) 34 *New England Law Review* 615.

<sup>131</sup> See Diana Bryant and John Faulks, 'The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 93.

<sup>132</sup> See David B Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (2008).

<sup>133</sup> See Bruce J Winick, 'Therapeutic Jurisprudence and the Role of Counsel in Litigation' in Dennis P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000) 309.

<sup>134</sup> See Nicholas James Murfett, 'The Case for a Paradigm Shift in Civil and Commercial Dispute Resolution — Moving from Fear to Love: A Solicitor's Perspective' (Paper presented at the 3<sup>rd</sup> International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) <<http://www.ajia.org.au/TherapJurisp06/Papers/Murfett5B.pdf>>.

Therapeutic jurisprudence does not assert that wellbeing promotion should be the law's paramount role. However, it asserts that — like medicine — the law should as far as possible 'do no harm'.<sup>139</sup> It acknowledges that there can be a conflict between the values of the justice system. In these cases, a study from the perspective of the effects on wellbeing of the law, legal processes and legal actors can bring conflicting values into sharper focus.<sup>140</sup> Even where therapeutic values must be subordinated to other values, therapeutic jurisprudence can suggest a more therapeutic procedure. For example, when Judge David Fletcher of the North Liverpool Community Justice Centre sentences offenders to imprisonment, he also sends them a letter explaining why they were imprisoned and advising them that a Centre officer will visit them to ensure that they are put in touch with rehabilitation agencies for assistance.<sup>141</sup>

Therapeutic jurisprudence is directed at improving how the law operates and directed towards law reform. It has suggested ways in which policy development and legislative drafting may be improved,<sup>142</sup> the techniques which judicial officers can use to minimise the negative effects of court processes for complainants in child sexual abuse cases,<sup>143</sup> the strategies which judicial officers and lawyers can use to promote offender rehabilitation,<sup>144</sup> how therapeutic ap-

<sup>135</sup> See David B Wexler, 'Therapeutic Jurisprudence: Issues, Analysis, and Applications — Introduction: Therapeutic Jurisprudence in the Appellate Arena' (2000) 24 *Seattle University Law Review* 217. See also Michael S King, 'Therapeutic Jurisprudence, Leadership and the Role of Appeal Courts' (2008) 30 *Australian Bar Review* 201.

<sup>136</sup> See Michael King and Robert Guthrie, 'Using Alternative Therapeutic Intervention Strategies to Reduce the Costs and Anti-Therapeutic Effects of Work Stress and Litigation' (2007) 17 *Journal of Judicial Administration* 30.

<sup>137</sup> See Ian Freckelton, 'Disciplinary Investigations and Hearings: A Therapeutic Jurisprudence Perspective' in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (2007) 139.

<sup>138</sup> See Peggy Fulton Hora, William G Schma and John T A Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439; Michael S King, 'Problem-Solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership' (2008) 17 *Journal of Judicial Administration* 155; Michael S King, 'Therapeutic Jurisprudence and Criminal Law Practice: A Judicial Perspective' (2007) 31 *Criminal Law Journal* 12.

<sup>139</sup> Wexler, *Therapeutic Jurisprudence*, above n 4, 4.

<sup>140</sup> David B Wexler and Bruce J Winick, 'Introduction' in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996) i, xvii.

<sup>141</sup> Judge David Fletcher, 'Judging in a Therapeutic Key' (Panel presentation delivered at the 3<sup>rd</sup> International Conference on Therapeutic Jurisprudence, Perth, 7–9 June, 2006).

<sup>142</sup> King and Guthrie, 'Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response', above n 126.

<sup>143</sup> See Michael S King, 'Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial' (2008) 32 *Criminal Law Journal* 303, 307–11.

<sup>144</sup> See, eg, Wexler, *Rehabilitating Lawyers*, above n 132, 20; David B Wexler, 'Robes and Rehabilitation: How Judges Can Help Offenders "Make Good"' (2001) 38 *Court Review* 18; Bruce J Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055; King, 'Problem-Solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership', above n 138; Deen Potter, 'Lawyer, Social Worker, Psychologist and More: The Role of the Defence Lawyer in Therapeutic Jurisprudence' (2006) (Special Series) *E Law — Murdoch University Electronic Journal of Law* 95 <<https://elaw.murdoch.edu.au/issues/special/lawyer.pdf>>.

proaches to estate planning may be implemented<sup>145</sup> and ways in which mainstream courts can promote community confidence in and litigant respect for courts and the law.<sup>146</sup>

The behavioural sciences are the principal sources of suggestions for therapeutic jurisprudence law reform. The law has an interest in human behaviour and behavioural change. Thus, it is natural that the behavioural sciences should also be consulted in therapeutic jurisprudence debate. Psychology and psychiatry have been fertile sources for therapeutic jurisprudence research since its introduction. However, therapeutic jurisprudence researchers have also been active in exploring other areas for research findings and principles that could assist in promoting better processes and outcomes in the legal system. These other areas include anthropology, criminology, public health, social work, architecture and leadership.

Therapeutic jurisprudence has examined the effect of the law, legal processes and legal actors on diverse dimensions of wellbeing. Emotional wellbeing has been a particular area of interest. For example, therapeutic jurisprudence has considered emotional wellbeing in the interactions between judicial officers, litigants and witnesses, and in the interaction between lawyer and client.<sup>147</sup> Regarding dispute resolution's effects on emotional wellbeing, therapeutic jurisprudence and restorative justice share common ground with procedural justice. Procedural justice research suggests that people are more likely to accept and follow the directions of legal authorities where they feel that the authorities' processes are fair and their motives legitimate.<sup>148</sup> For example, a study found that when perpetrators of spousal assaults were accorded procedural justice by the police, there were fewer new assaults than when they were not.<sup>149</sup>

Tom Tyler observes that people coming to a court or other legal authority seek validation of themselves as worthwhile citizens,<sup>150</sup> and part of such validation comes from processes that allow them to present their case to and have it taken into account by a respectful legal authority. When treated with respect, people are more likely to follow the legal authority's decision. Notably, following the decision is not in response to the authority's coercive power but to internal commitment based on being treated fairly.

<sup>145</sup> Jessica Cousineau, 'Practical Considerations in Choosing a Representative' (July 2006) 2(4) *GP|Solo Law Trends and News: Practice Area Newsletter* <<http://www.abanet.org/genpractice/newsletter/lawtrends/0607/lawtrends0607.pdf>>.

<sup>146</sup> See, eg, Michael King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?' (2007) 32 *Alternative Law Journal* 91.

<sup>147</sup> See, eg, *ibid*; King, 'Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial', above n 143; Silver, 'Emotional Competence, Multicultural Lawyering and Race', above n 127.

<sup>148</sup> See generally Tom R Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996) 3; Tom R Tyler, *Why People Obey the Law* (2<sup>nd</sup> ed, 2006); Tom R Tyler and Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (2002).

<sup>149</sup> Raymond Paternoster et al, 'Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault' (1997) 31 *Law & Society Review* 163.

<sup>150</sup> Tyler, 'The Psychological Consequences of Judicial Procedures', above n 148.

Similar to procedural justice, restorative justice and therapeutic jurisprudence value active participation of the parties in resolving their case. Indeed, both greatly value self-determination in dispute resolution. But while restorative justice has criticised the criminal justice system for stealing the resolution of criminal matters from victims and offenders and has emphasised the need to hand the process back to them, the work of therapeutic jurisprudence has focused more on improving court processes and advocacy through the application of therapeutic principles such as self-determination.<sup>151</sup> Therapeutic jurisprudence acknowledges the therapeutic value of restorative justice processes but, by contrast, does not assert that they should be the primary justice system response.

Restorative justice and therapeutic jurisprudence both value processes that empower participants and thereby promote restoration — therapeutic jurisprudence would regard the restoration sought by restorative justice as therapeutic. Therapeutic jurisprudence has suggested how self-determination may be promoted in diverse contexts in the legal system, including giving offenders the option to participate in a problem-solving court program, involving defendants in determining the content of their rehabilitation program, having government/community collaborative decision-making processes in addressing problems of child sexual abuse in Aboriginal communities, involving litigants in the formulation of trial strategy and involving injured workers in the design of their rehabilitation programs.

Therapeutic jurisprudence values self-determination as it activates motivation and other inner resources needed for successful action, and recognises that coercion and paternalism have the reverse effect and promote resistance to change.<sup>152</sup> Indeed, John Stuart Mill asserts that being compelled to act contrary to one's belief promotes inertia.<sup>153</sup> Those who are subject to coercion and paternalistic practices generally perceive those practices as offensive. Self-determination is valued by diverse disciplines and approaches including the behavioural sciences, economics, politics, human rights, philosophy, spiritual thought and indigenous studies.<sup>154</sup>

### B *Criticisms of Therapeutic Jurisprudence*

A fundamental criticism of therapeutic jurisprudence relates to its broad and, some argue, vague conception of what is 'therapeutic'.<sup>155</sup> In part, this problem arises from the ambitious scope of therapeutic jurisprudence: examining the impact of the law, legal processes and legal actors on wellbeing. It encompasses the whole field of the law, domestic and international. What is important in one

<sup>151</sup> Bruce J Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705, 1715–21; King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?', above n 146, 92.

<sup>152</sup> Winick, 'On Autonomy', above n 151, 1770–1.

<sup>153</sup> John Stuart Mill, *On Liberty* (1863) 113.

<sup>154</sup> See Winick, 'On Autonomy', above n 151; King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?', above n 146, 92; King, 'Natural Law and the *Bhagavad-Gita*', above n 9.

<sup>155</sup> See Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy, and Law* 193, 196–204.

area of law may be less so in another area, and consequently a broad definition is required to cover the field. Furthermore, different laws, legal processes and legal actors may affect different aspects of wellbeing. Nevertheless, if therapeutic jurisprudence is to be an effective tool for analysis and law reform, what is included in 'therapeutic' requires determination. Without it, therapeutic jurisprudence becomes indistinguishable from other analyses of the benefit of law.<sup>156</sup> Wexler and Winick have agreed with Christopher Slobogin's suggestion that 'therapeutic' should mean some aspect of physical or psychological wellbeing.<sup>157</sup>

Some commentators say that therapeutic jurisprudence tends to be paternalistic,<sup>158</sup> but it is important to distinguish between therapeutic jurisprudence and justice system projects that seek to promote rehabilitation. Although rehabilitation is concerned with wellbeing and is therefore relevant to therapeutic jurisprudence, it does not mean that the methods used by justice system projects are necessarily consistent with therapeutic jurisprudence. As noted earlier, therapeutic jurisprudence is strongly opposed to paternalistic and coercive methods.<sup>159</sup> Nonetheless, some problem-solving courts regularly use coercive and paternalistic methods, even though therapeutic jurisprudence has come to be regarded as their underlying philosophy.<sup>160</sup>

Some aspects of problem-solving courts or diversion programs considered by critics may well have paternalistic tendencies, but they are unrelated to therapeutic jurisprudence.<sup>161</sup> The coexistence of differing approaches in court programs is not surprising — they can easily be influenced by competing justice system values, such as efficient use of resources, time limitations, and competing rehabilitation philosophies and sentencing principles. Furthermore, the nomenclature of therapeutic jurisprudence has often been adopted by these programs without formal training of its personnel in its practices.

A number of Australian commentators criticise therapeutic jurisprudence as being offender-oriented.<sup>162</sup> Some assert that it is court-oriented.<sup>163</sup> However, in its formulation and application, therapeutic jurisprudence is very wide. The values it regards as therapeutic — such as voice, validation, respect and self-determination — are universal and do not conflict with victims' interests.

<sup>156</sup> Ibid 196.

<sup>157</sup> Wexler and Winick, 'Introduction', above n 140, xvii.

<sup>158</sup> See Harry Blagg, Law Reform Commission of Western Australia, *Problem-Oriented Courts: A Research Paper Prepared for the Law Reform Commission of Western Australia*, Project No 96 (2008) 28.

<sup>159</sup> It does, however, concede that the ideal of avoiding coercion in a system that is supported by the use of force is problematic.

<sup>160</sup> Michael S King and Becky Batagol, 'Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts' (Paper presented at the Just Partners: Family Violence, Specialist Courts and the Idea of Integration Conference, Canberra, 22–23 May 2008).

<sup>161</sup> Blagg, above n 158, 16.

<sup>162</sup> See, eg, Julie Stewart, 'Specialist Domestic/Family Violence Courts within the Australian Context' (Issues Paper 5, Australian Domestic & Family Violence Clearinghouse, 2005) 5, 35 <[http://www.austdvclearinghouse.unsw.edu.au/documents/Issuespaper\\_10.pdf](http://www.austdvclearinghouse.unsw.edu.au/documents/Issuespaper_10.pdf)>; Robyn Holder, 'The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence' (2006) 16 *Journal of Judicial Administration* 30, 37–40; Andrew Cannon, 'Therapeutic Jurisprudence in the Magistrates Court: Some Issues of Practice and Principle' in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (2007) 129, 135.

<sup>163</sup> Marchetti and Daly, 'Indigenous Sentencing Courts', above n 64, 438.

Indeed, much of the work for victims in the justice system has been about promoting these values.

However, these criticisms are understandable given that therapeutic jurisprudence was introduced into Australia at the same time as problem-solving courts and at a time when it was increasingly recognised to be their philosophical basis. Much of the subsequent Australian therapeutic jurisprudence literature describes the application of therapeutic jurisprudence to judging, court and legal practice concerning offenders. Studying that literature in a vacuum would explain the criticism of some victims' rights commentators, who are reluctant to endorse therapeutic jurisprudence.

It is also understandable that some family violence commentators are sceptical about therapeutic jurisprudence given the understanding that: family violence is commonly a gender-based abuse of power by a male perpetrator in relation to a female victim; ensuring victims' safety and providing adequate support services for them should be the paramount consideration; perpetrator rehabilitation programs are largely ineffective; and the justice system response to family violence should involve a more effective detection and prosecution of perpetrators, making perpetrators accountable for their actions and re-educating them regarding gender issues.<sup>164</sup> In essence, it is asserted that therapeutic jurisprudence provides insufficient support to the victims of these crimes.

However, the criticism ignores the literature, beginning in the early days of therapeutic jurisprudence scholarship, that applies its principles to victims' situations. For example, it has been applied to the situation of domestic violence victims, battered immigrant women, child sexual abuse victims and survivors of sexual violence following armed conflict.<sup>165</sup> Nevertheless, far more needs to be done to advance the application of therapeutic jurisprudence to the situation of victims of crime, both in Australia and elsewhere.

Some criticisms are based on misconceptions concerning the nature of therapeutic jurisprudence.<sup>166</sup> For example, Roderick and Krumholz incorrectly contend that therapeutic jurisprudence is a theory and then proceed to critique the supposed elements of that theory.<sup>167</sup>

Finally, some judicial officers and lawyers have questioned their ability to use therapeutic jurisprudence, asserting that they are not therapists.<sup>168</sup> From this

<sup>164</sup> See generally King and Batagol, above n 160.

<sup>165</sup> Leonore M J Simon, 'A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases' (1995) 1 *Psychology, Public Policy, and Law* 43; Bruce J Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (2000) 69 *University of Missouri at Kansas City Law Review* 33; Edna Erez and Carolyn Copps Hartley, 'Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective' (2003) 4 *Western Criminology Review* 155; King, 'Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial', above n 143; Nicola Michele Henry, *Disclosure, Sexual Violence and International Jurisprudence: A Therapeutic Approach* (PhD Thesis, The University of Melbourne, 2005).

<sup>166</sup> Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' (2008) 30 *Thomas Jefferson Law Review* 575.

<sup>167</sup> Dennis Roderick and Susan T Krumholz, 'Much Ado about Nothing? A Critical Examination of Therapeutic Jurisprudence' (2006) 1 *Southern New England Roundtable Symposium Law Journal* 201.

<sup>168</sup> Blagg, above n 158, 25.

perspective, the judiciary's role is to determine the facts and the law, apply the law to the facts and determine a legal outcome; the wellbeing of those affected is a matter for other professionals. This kind of objection is less prevalent amongst magistrates today; the advent of diversion programs, indigenous sentencing courts and problem-solving courts has led to therapeutic jurisprudence principles being helpful in a growing dimension of their work.

Indeed, therapeutic jurisprudence does not assert that judicial officers and lawyers should be therapists — it recognises that therapy is best left to trained professionals. Even in a problem-solving court, the judicial officer is not a therapist; the role, does, however, have some significant similarities to that of a coach. Therapeutic jurisprudence asserts that the actions of lawyers and judicial officers affect a range of people involved in legal processes, whether intentionally or not. Better judging and legal practice requires knowledge of this effect and its significance for parties/clients and other participants in the process and for the goals of the justice system.

#### V EMOTIONAL INTELLIGENCE, THERAPEUTIC JURISPRUDENCE, RESTORATIVE JUSTICE AND THE LAW

Emotional intelligence research suggests that perceiving, understanding and managing emotions are important processes in problem-solving and in job performance, particularly in the helping professions and service industries.<sup>169</sup> Therapeutic jurisprudence and restorative justice suggest that, in particular contexts of legal problem-solving, processes that take into account the problem's emotional dimensions and that involve professionals exercising skills in perceiving, understanding and handling their own and the parties' emotions are important in promoting the problem's comprehensive resolution. This Part gives examples from the courts, legal practice and legal education of the practical application of these approaches.

##### *A Courts*

Parties to court proceedings often have multi-layered problems, such as how the interests of children are best served, whether a contract is enforceable, a tort committed, a crime proven, a will valid or the determination of an appropriate remedy (if any). These are the matters that principally concern a court and the legal profession. However, for the party involved there may be a number of other important issues, such as the legal problem's effect on emotional wellbeing, finances, personal relationships and health. In addition, there may be deeper problems that have contributed to the legal problem, such as conflict between business partners or neighbours and a consequent inability to communicate, family dysfunction, substance abuse, unresolved past trauma or financial distress. The resolution of the party's problem may require addressing these other dimensions as well as the legal dimensions.

<sup>169</sup> See above nn 24–30 and accompanying text.

However, legal processes have generally not been directed at addressing the non-legal dimensions of a problem. Where underlying issues have been acknowledged, it has merely been said that they fall outside the court's jurisdiction but come within the province of some other organisation. Thus, addressing substance abuse that leads to offending is a matter for corrections rather than for the court.

Furthermore, court processes have focused on fact-finding, determination of the law, applying the law to the facts via rules of evidence, court procedure, statutory interpretation and case law. These are regarded as essential to a court's proper functioning, but the emotional implications are not. This is not to say that courts are devoid of emotion. For example, courts allow distressed witnesses a short adjournment to compose themselves and refer to victim impact statements to ascertain a crime's emotional effects on victims when sentencing. Some judicial officers take a more personable approach to judging by virtue of their personality or past experiences. However, these are exceptions. Judicial officers and lawyers have not systematically taken into account the emotional effects of legal processes.

A failure to consider emotional dimensions can compromise court processes. For example, courts have often allowed extensive and sometimes intimidating cross-examination of child complainants well beyond their intellectual and emotional capacity.<sup>170</sup> Common tactics include using complex language and concepts beyond the child's developmental level, repetitive questions, and an overbearing or demeaning manner. Children's coping strategies — including silence or agreeing with a proposition put by counsel that is inconsistent with a prior answer — have been construed as evidence of lying. Thus, the very processes can vitiate accurate fact-finding. Furthermore, the child's faith in the court system can be destroyed.<sup>171</sup> Child sexual abuse victims can be deterred from reporting offences if courts disrespect their emotional wellbeing and use processes that impair the telling of their story with integrity. While defence interests require the ability to test the evidence, it should not be at the expense of the veracity of court processes and the respect the court should accord to all those coming before it.

Therapeutic jurisprudence has suggested ways in which judicial officers can promote a less traumatic experience for child complainants while preserving a trial's integrity.<sup>172</sup> The suggested methods are therapeutic and emotionally intelligent, with the judicial officer being sensitive to not only a child witness's cognitive state but also the child's emotional wellbeing. The techniques include modelling proper questioning of and interaction with children, being sensitive to their desire for a break in giving evidence and intervening to prevent inappropriate cross-examination.

<sup>170</sup> King, 'Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial', above n 143, 306–9.

<sup>171</sup> *Ibid* 309.

<sup>172</sup> *Ibid* 310–11.

Judging's emotional dimensions have been explored most fully in problem-solving court programs applying therapeutic jurisprudence.<sup>173</sup> These programs — including drug courts, family violence courts, mental health courts and general programs such as the Geraldton Alternative Sentencing Regime<sup>174</sup> — seek to address the whole offending problem, including underlying issues. They take a collaborative, team-based approach. A key component is judicial monitoring or judicial case management, in which program participants appear before a judicial officer regularly for review and to address any problems. Judicial officers applying therapeutic jurisprudence principles utilise emotional intelligence by being sensitive to participants' emotional issues, expressing empathy for their situation and approaching problem-solving in a way that uplifts participants and aids their progress.

Research on judicial involvement in program outcomes such as recidivism is in its early stages and no firm conclusions can be drawn.<sup>175</sup> However, it suggests that the quality of judicial interaction is important. A study of the Bronx Misdemeanor Domestic Violence Court found that judicial monitoring did not affect recidivism.<sup>176</sup> However, the retired judge who undertook the monitoring did little more than check whether participants were complying, refer those in breach to a sitting judge for disposition and adjourn the rest to another review date.<sup>177</sup> On the other hand, Carrie Petrucci found that a judge in a domestic violence court who took a more therapeutic approach — one that demonstrated an active interest in the participants and their wellbeing — promoted participants' respect for him.<sup>178</sup>

Moreover, an exploratory study found that the nature of judicial interaction with defendants in a drug court affects treatment compliance and abstinence from drugs.<sup>179</sup> Defendants receiving the most supportive comments from the judge (for example, praise and encouragement) were more likely to complete the program than those with fewer supportive comments. A focus group study of

<sup>173</sup> Ibid 304–5. The degree to which they apply therapeutic jurisprudence will vary from court to court.

<sup>174</sup> Michael S King and Steve Ford, 'Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime' (2006) (Special Series) *E Law — Murdoch University Electronic Journal of Law* 9 <<https://elaw.murdoch.edu.au/v1/issues/special/exploring.pdf>>.

<sup>175</sup> There are well-designed studies finding positive outcomes such as decreased recidivism and improved wellbeing from participation in a drug court program. However, there are several potentially therapeutic elements in drug courts of which judicial case management is just one. It is yet to be established which factors are the most important or whether there is a synergistic effect from the operation of several factors.

<sup>176</sup> Michael Rempel, Melissa Labriola and Robert C Davis, 'Does Judicial Monitoring Deter Domestic Violence Recidivism? Results of a Quasi-Experimental Comparison in the Bronx' (2008) 14 *Violence Against Women* 185.

<sup>177</sup> Ibid 195–6.

<sup>178</sup> See Carrie J Petrucci, 'Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court That Utilizes Therapeutic Jurisprudence' (2002) 38 *Criminal Law Bulletin* 263.

<sup>179</sup> Scott R Senjo and Leslie A Leip, 'Testing and Developing Theory in Drug Court: A Four-Part Logit Model to Predict Program Completion' (2001) 12 *Criminal Justice Policy Review* 66; Scott Senjo and Leslie A Leip, 'Testing Therapeutic Jurisprudence Theory: An Empirical Assessment of the Drug Court Process' (2001) 3(1) *Western Criminology Review* <<http://wcr.sonoma.edu/v3n1/senjo.html>>.

drug court participants found significant support for a judicial role in promoting treatment compliance and participant wellbeing.<sup>180</sup>

Part of the judicial role, particularly in therapeutic jurisprudence-oriented programs, involves managing participants' emotions.<sup>181</sup> When judicial officers develop a close rapport with participants, participants may feel shame when they breach program obligations as they feel they have disappointed the officer, or they may feel that they are failures. The judicial officer must address the breach of program conditions while being sensitive about participants' emotions. An insensitive approach may reinforce participants' self-conceptions as failures, inhibiting their rehabilitation. In contrast, a sensitive approach may help them to work through their emotions and resume progress. Instead of condemning participants, judicial officers should listen to them and demonstrate they are listening, noting not only what happened but also how participants felt and expressing empathy for them.<sup>182</sup> If the participant can continue in the program, then the judicial officer should engage in collaborative problem-solving with the participant and the court team, where appropriate.

Therapeutic jurisprudence also suggests that the way judicial officers formulate judgments can produce therapeutic or anti-therapeutic effects. Nathalie Des Rosiers suggests that therapeutic judgments display care and empathy for the parties' situation; educate parties about the need to listen to and respect other parties' positions; promote positive aspects of the parties' continuing relationship (where it exists), including the ability to resolve future conflicts by themselves; critique the parties' positions without destroying them as individuals; and use language that promotes the losing party's acceptance of the decision.<sup>183</sup> Furthermore, such therapeutic or anti-therapeutic effects can affect not only the parties to the dispute but also judicial officers whose judgments are the subject of appeal.<sup>184</sup>

Courts can also benefit from using restorative justice. For example, some jurisdictions permit a court dealing with adult offenders to adjourn a case for victim-offender mediation prior to sentencing.<sup>185</sup> This process gives victim and offender the opportunity to address emotional issues needed to promote healing, to gain further information about the offence, to deal with apology and forgiveness (if appropriate) and to take an active role in determining outcomes such as reparation. The court can also assess offenders' commitment to rehabilitation through their willingness to attend the conference, degree of active participation and making of reparation. Restorative justice could also be used in non-criminal

<sup>180</sup> John S Goldkamp, Michael D White and Jennifer B Robinson, 'An Honest Chance: Perspectives on Drug Courts — Findings from Drug Court Participant Focus Groups in Brooklyn, Las Vegas, Miami, Portland, San Bernardino, and Seattle April 2002' (2002) 14 *Federal Sentencing Reporter* 369, 371.

<sup>181</sup> Winick, 'Therapeutic Jurisprudence and Problem Solving Courts', above n 144, 1069.

<sup>182</sup> King, 'Problem-Solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership', above n 138, 162.

<sup>183</sup> See Nathalie Des Rosiers, 'From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts' (2000) 31 *Court Review* 54.

<sup>184</sup> King, 'Therapeutic Jurisprudence, Leadership and the Role of Appeal Courts', above n 135, 208–9.

<sup>185</sup> See, eg, *Sentencing Act 1995* (WA) ss 27–30.

cases. For example, coronial and defamation cases may be suitable where they involve harmful conduct that has affected a party's emotional wellbeing.<sup>186</sup>

### B *Legal Practice*

A lawyer taking a therapeutic jurisprudence approach views the client holistically, instead of merely in terms of the facts of the case, the applicable law and the possible legal outcomes.<sup>187</sup> The client's best interest is therefore widely construed, encompassing health, economic, vocational, familial, social and, for some, spiritual domains. Before or while pursuing a particular legal outcome, the client may need to address emotional and other psychological issues.

Legal practice's psychological and emotional dimensions are perhaps most obvious in criminal and family law cases but can arise in any area. Knowing how clients' emotions influence their behaviour and attitude to their legal problem, and understanding the appropriate strategies to use to provide support or to work through the emotions and other psychological issues related to the resolution of a legal problem, are important skills for a lawyer seeking to take a therapeutic approach.<sup>188</sup>

A client's inability to resolve emotional issues surrounding a legal problem may be a barrier to resolving a case without bitter and protracted litigation. Emotion may fuel a legal dispute and hinder a dispassionate assessment of costs and benefits of litigation as compared with other dispute resolution methods.<sup>189</sup> It may blind litigants to the possible adverse psychological, social and economic costs of litigation, including the aggravation of their emotional problems. Winick gives examples of the 'client who wants to sue the bastards', the angry client, the client in denial and the client who will not admit that they were wrong.<sup>190</sup> Clients may also be filled with shame or anxiety and be unwilling to face legal and other associated consequences of their actions.

The process of resolving a legal problem can also be traumatic. The lawyer may have a crucial role to play in supporting clients through difficult times. As Deen Potter observes,

such a lawyer must be a shoulder to cry on during the hard times, for often he or she is the only real confidante of the client, must be a coach and provide encouragement and must advocate the benefits of wholesale lifestyle change.<sup>191</sup>

<sup>186</sup> See Michael S King, 'Non-Adversarial Justice and the Coroner's Court: A Proposed Therapeutic, Restorative, Problem-Solving Model' (2008) 16 *Journal of Law and Medicine* 442; King, 'Towards a More Comprehensive Resolution of Conflict', above n 3, 10.

<sup>187</sup> See generally Wexler, *Rehabilitating Lawyers*, above n 132.

<sup>188</sup> See generally Dennis P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000).

<sup>189</sup> See generally Marjorie A Silver (ed), *The Affective Assistance of Counsel: Practicing Law as a Healing Profession* (2007).

<sup>190</sup> Bruce J Winick, 'Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer' in Marjorie A Silver (ed), *The Affective Assistance of Counsel: Practicing Law as a Healing Profession* (2007) 341.

<sup>191</sup> Potter, above n 144, 97.

In some cases, the client may have problems in multiple life domains that intersect with the legal problem, such as substance abuse, mental health, housing, financial and family problems.

From a therapeutic jurisprudence perspective, confrontation is sometimes needed for a client to see the situation more realistically. However, it is generally a last resort. Therapeutic jurisprudence advocates the use of emotionally intelligent interpersonal skills to address such situations.<sup>192</sup> The abilities to listen, to demonstrate listening, to understand the client's emotional situation, to express empathy, to be supportive and not judgemental or paternalistic, and to engage the client in problem-solving to address issues are critical skills for a lawyer to use in addressing difficult legal problems.

Winick also suggests techniques that lawyers can use to help clients deal with emotions affecting their attitude to the legal problem.<sup>193</sup> For example, concerning the 'sue the bastards' client, he suggests exploring the client's assumptions underlying the pursuance of litigation and its prospects of success, and to gently address any client misconceptions.<sup>194</sup> Regarding angry clients, strategies to vent the anger may be needed. In some cases a client will need psychological assistance to address underlying issues and a lawyer will need to sensitively suggest that option. In carefully considering the client's best interests holistically, a lawyer practising therapeutic jurisprudence discusses with the client the options available to resolve the problem — including negotiation and different forms of alternative dispute resolution such as mediation, arbitration and collaborative law — and strategies to address underlying issues including, in criminal cases, formulating a rehabilitation plan.

Restorative justice may also be an option in other areas of legal practice, particularly where there are unresolved issues — including emotional issues — between the parties concerning harmful behaviour that mediated dialogue may help to resolve. Its use in education, workplaces and the community suggests its value beyond the criminal context.<sup>195</sup>

Therapeutic legal practice, like client-centred legal practice, takes a less hierarchical and more collaborative approach than traditional legal practice.<sup>196</sup> A dominant mode of legal practice has been the client seeking the advice of the lawyer who undertakes the resolution of the legal problem on the client's behalf. While the lawyer acts on the client's instructions, they have the prime responsibility for providing authoritative advice and implementing strategies. By contrast, therapeutic jurisprudential legal practice is driven to a significant degree by the importance of self-determination to wellbeing. Hence, therapeutic jurisprudence commonly recommends involving clients in determining and

<sup>192</sup> Wexler, *Rehabilitating Lawyers*, above n 132.

<sup>193</sup> Winick, 'Overcoming Psychological Barriers to Settlement', above n 190.

<sup>194</sup> *Ibid* 346.

<sup>195</sup> See, eg, O'Connell, Wachtel and Wachtel, above n 60; Brenda Morrison, *Restoring Safe School Communities: A Whole School Response to Bullying, Violence and Alienation* (2007).

<sup>196</sup> Bruce J Winick, 'Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model' in Dennis P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000) 245, 286–7.

implementing strategies, including the determination of trial strategy and the use of rehabilitation and relapse prevention plans.

Emotional issues can arise between lawyer and client that can interfere with their relationship. These are commonly caused by miscommunication and misunderstanding. They can arise in varied situations due to the power imbalance between lawyer and client — particularly aggravated due to age, social, cultural or educational differences. Lawyers need to be able to deal with these situations sensitively to preserve their professional relationships with their clients.

### *C Legal Education*<sup>197</sup>

Traditionally, law schools have taught students by reference to the most adversarial legal problems — cases that the parties and their lawyers have been unable to settle and that have often involved a trial and an appeal.<sup>198</sup> Legal education has not been concerned with why these cases fail to settle. It has regarded legal problem-solving as a dispassionate, detached intellectual analysis involving determination of the legal principles, the application of such principles to the facts to produce an outcome and the arguing of the case in court. This approach to legal reasoning has not incorporated emotional intelligence processes. Instead, legal education has assumed that the dispassionate way is the best approach to any legal problem.

Similar to the courts and the legal profession, legal education has focused on the immediate problem without considering its possible underlying issues, including the emotional dimensions of the legal problem and how they may be addressed.<sup>199</sup> It has not given students the skills to address underlying issues or to engage in creative problem-solving with the client to prevent a legal problem from producing protracted, expensive and possibly psychologically damaging litigation. In short, the law has dehumanised problems.

Over the last 30 years, law schools have introduced legal practice skills programs including legal clinics that give students ‘hands-on’ experience in how a legal practice operates and alternative dispute resolution and negotiation units. To some degree, these subjects address the more human dimensions of legal practice, but they do not provide the necessary breadth of coverage concerning the application of interpersonal skills — including emotional intelligence — to the diverse fields of legal practice. In any event, many of these units are electives and the primacy of the adversarial method remains the core philosophy behind legal education.

<sup>197</sup> The application of therapeutic jurisprudence and emotional intelligence to legal education is only considered here briefly. For a more detailed discussion, see Marjorie A Silver, ‘Emotional Intelligence and Legal Education’ (1999) 5 *Psychology, Public Policy, and Law* 1173. See also ‘Symposium: Therapeutic Jurisprudence in Clinical Legal Education and Legal Skills Training’ (2005) 17(3) *St Thomas Law Review* 403.

<sup>198</sup> For a critique of the case method of teaching, see Janeen Kerper, ‘Creative Problem Solving vs the Case Method: A Marvellous Adventure in Which Winnie-the-Pooh Meets Mrs Palsgraf’ (1998) 34 *California Western Law Review* 351.

<sup>199</sup> *Ibid.*

The previous two Parts illustrated how lawyers and judicial officers who know clients' or parties' related emotional and other psychological issues can more effectively resolve problems by exercising emotionally intelligent interpersonal skills. This is therapeutic jurisprudence in action. However, it is also vital that lawyers and judicial officers understand their own emotions and past emotional experiences and their effects.

Emotional experiences can affect how a lawyer or judicial officer perceives and reacts to a client's/litigant's problem.<sup>200</sup> For example, a judicial officer or lawyer who has had a family member suffer ongoing substance abuse problems may have particular feelings concerning substance abuse, such as an aversion to drug suppliers. Those feelings may surface when a defendant comes to them charged with supplying drugs and can potentially colour their actions. Judges and lawyers in that situation must be aware of their feelings and influences and not let them interfere with their professional responsibilities.

Silver summarises the potential problems if lawyers are not emotionally intelligent:

Lack of self-awareness takes its toll on lawyers, leading to disproportionately high levels of stress, substance abuse, and depression. Deficits in interpersonal relationship skills adversely affect our capacity to empathise with our clients, to counsel them, and to gain their trust. An inability to understand the emotional undercurrents among our adversaries is also likely to limit our skill in negotiating and resolving controversies.<sup>201</sup>

Legal education and judicial training programs should include therapeutic jurisprudence, restorative justice and other non-adversarial modalities not as components of separate units but as key components integrated into the teaching of core legal subjects. Teaching of restorative justice and therapeutic jurisprudence in particular can highlight for present and future legal professionals the multidimensional nature of legal problems — including their emotional dimensions — and suggest more comprehensive strategies to promote their resolution.

The National Judicial College of Australia has already begun with the inclusion of therapeutic jurisprudence in the national curriculum for professional development of Australian judicial officers.<sup>202</sup> Education for all law students, lawyers and judicial officers should similarly include training in interpersonal skills, creative problem-solving and emotional intelligence skills, particularly as they apply in the legal professional contexts in which the judiciary and legal profession operate.<sup>203</sup>

<sup>200</sup> See generally Winick, 'Therapeutic Jurisprudence and Problem Solving Courts', above n 144; Silver, *The Affective Assistance of Counsel*, above n 189.

<sup>201</sup> Marjorie A Silver, 'Emotional Competence and the Lawyer's Journey' in Marjorie A Silver (ed), *The Affective Assistance of Counsel: Practicing Law as a Healing Profession* (2007) 5, 9.

<sup>202</sup> Christopher Roper, National Judicial College of Australia, *Report: A Curriculum for Professional Development for Australian Judicial Officers* (2007) 26 <<http://njca.anu.edu.au/Projects/Curriculum/Curriculum.htm>>.

<sup>203</sup> Michael S King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129, 138; Silver, 'Emotional Intelligence and Legal Education', above n 197.

## VI CONCLUSION

Restorative justice and therapeutic jurisprudence highlight the importance of empowering parties, of actively involving them in dispute resolution processes and of using processes that comprehensively address underlying issues.<sup>204</sup> They also stress the value of helping parties manage emotions associated with their legal problems and the importance of professionals exercising emotional intelligence skills in their work. The values and processes they promote have significant implications for the functioning of courts, lawyers and the justice system in general. They challenge conventional thinking about courts, legal practice and the role of litigants and clients, while offering a richer and more professionally rewarding vision of their respective roles. However, they are not a panacea for the justice system's problems. Restorative justice is not effective in all cases, and other values of the justice system may outweigh therapeutic values in particular cases.<sup>205</sup>

Nevertheless, there are good reasons for considering how therapeutic jurisprudence and restorative justice can be more extensively used in the justice system and how their values can be incorporated into legal education. In addition to providing knowledge of the law and its application and advocacy, legal education should provide the interpersonal, intrapersonal and problem-solving skills needed for a happy and successful professional life.

<sup>204</sup> John Braithwaite, 'Restorative Justice and Therapeutic Jurisprudence' (2002) 38 *Criminal Law Bulletin* 244.

<sup>205</sup> See above Part IV(A).