WILL THERAPEUTIC JURISPRUDENCE PROVIDE A PATH FORWARD FOR MAORI?

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I. INTRODUCTION

Prior to colonisation, Maori had effective legal and social systems in place. The Maori system of law was based on values and because it was a values-based system Maori adhered to principles rather than rules. Upon colonisation these systems were not encouraged by colonial rule. The Maori cultural definitions and theology that shaped notions of criminality were instead replaced by those of the colonising power. This resulted in a changing world for Maori. Critics[1] argue that this problem in part is manifested in statistics such as those released by the Justice Department's publication *Responses to Crime: Annual Review*.[2] They indicate that Maori offending rate is higher than any other ethnic group in New Zealand. This statistical trend reappears in the January 2003 report released from the Crime and Justice Research Centre at Victoria University.[3] The Law Commission in a recent report concurs with this finding, that Maori are disproportionately represented in court.[4] This is similar to other indigenous peoples in many post-colonial countries such as Australia and Canada.[5] Maori appear more highly in recorded rates of criminal offending and incarceration than other ethnic groups when measured on a population size.

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1 See M Jackson, *The Maori and the Criminal Justice System: A New Perspective: He Whaipaanga Hou (Part 2)* (Department of Justice, 1987-88), and R Walker Nga Pepa a Ranginui (1996). Also see New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (2001) NZLC SP9, 15, for a discussion of Maori customary law; and A Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Maori' in M Belgrave et al (eds) *Waitangi Revisited* (2005), 330 for discussion of the recognition of the Treaty of Waitangi.

2 See Ministry of Justice, *Responses to Crime: Annual Review Statistics – Responses to offending by Maori and Pacific Peoples* (2000) chap 7, available <www.justice.govt.nz >.

3 G Maxwell and E Poppelwell *Youth Court Offending Rates – Final Report to the Department for Courts* (Crime and Justice Research Centre, Victoria University, 2003), 11.

4 New Zealand Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System: Have Your Say: Part 2*. (2002) NZLC PP52, 218.

5 P Spier, *Conviction and Sentencing of Offenders in New Zealand 1990 to 1999*, (Ministry of Justice, 2000), available < www.justice.govt.nz >.

These perturbing statistics have social and economic repercussions for both Maori and non-Maori. This concern has led to a raft of initiatives introduced by the Government such as the Kaiwhakanama Intervention Programme[6] and Te Whanau Awhina[7] Programmes. These initiatives have shown some success, however it is hard to ignore the recent statistics from the Ministry of Justice.[8] These statistics support the findings that Maori offending rate continues to remain higher than any other ethnic group within New Zealand. Sociological theorists[9] propose explanations for this social phenomenon that range from colonisation and the social marginalisation of Maori to traditional Maori culture itself.[10]

This article suggests that therapeutic jurisprudence is a solution to the problem of disproportionate representation of Maori in the negative criminal justice statistics. Therapeutic jurisprudence would involve a specialized court, embracing Maori customs, ethics, values, and norms. It offers a way for underlying reasons for Maori offending to be addressed in a Maori manner, so as to produce positive therapeutic outcomes.

Maori are today disproportionately represented in New Zealand prisons.[11] Although there are subsisting methodological difficulties[12] associated with gathering of statistics, such as the classification of how a person is determined to be Maori, who is a 'Maori', the circumstances under which the statistics were gathered, and the interpretation of the statistics; it must be acknowledged that these statistics[13] suggest 50 per cent of the New Zealand prison population[14] is Maori. Furthermore, Maori have a higher offending rate and recidivism rate than non-Maori.[15] In 2000, Maori comprised 42 per cent of all convictions, 46 per cent of convictions for violence and 56 per cent of proved cases in the Youth Court.[16] More troubling perhaps, are the statistics from the Department of Corrections[17] that forecast Maori offending rates will not only remain high but will continue to surpass non-Maori offending rates.

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6 Launched by Corrections Minister Matt Robson in Rotorua 9th May 2002, see M Robson 'Intelligent approach to reduce re-offending is working, says Robson' (2002), available <www.beehive.govt.nz>.

7 A programme is run at Hoani Waititi Marae, Henderson, West Auckland.

8 P Spier, *Conviction and Sentencing of Offenders in New Zealand 1992 to 2001*, (Ministry of Justice, 2002), available <www.justice.govt.nz>.

9 See J Pratt *Punishment in a Perfect Society: The New Zealand Penal System 1840-1939* (1992); also Jackson above n 1.

10 R Webb, 'Social Change and Theorising on Maori Crime' (2000) available <apru.nsu.edu>.

11 M Rich, *Census of Prison Inmates 1999* (Department of Corrections, 2000), 43, available <www.corrections.govt.nz>.

12 On problems of self-identification or justice system identification, see J M Tauri 'Indigenous Justice or Popular Justice Issues in the Development of a Maori Criminal Justice System', in P Spoonley et al (eds) *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand* (1996), 214.

13 B Baybrook and R O'Neill, *A Census of Prison Inmates* (Department of Justice, 1988); see also Rich above n 11.

14 Rich, ibid, identifies 54% inmates as Maori. See also Department of Corrections *About Us, Facts and Statistics, Prison Statistics* (2003), which identifies 50% of male inmates as Maori, available <www.corrections.govt.nz>.

15 J Lux, 'Kia Mauritau' in D Biles and J Vernon (eds), *Private Sector and Community Involvement in the Criminal Justice System: Proceedings of a Conference held 30 November 1992, Wellington, New Zealand* (Australian Institute of Criminology, 1994), available <www.aic.gov.au>.

16 Refer Ministerial Briefings, *Justice, Maori and Pacific Crime and Victimisation*, 2.3.6, (2002) available <www.beehive.govt.nz>.

17 Ibid.

A rider on these statistics that has not been accounted for is the interplay between Maori and the police. It is a commonly held view by Maori[18] that the police harass them with the intent of provoking them into retaliation to justify subsequent arrest and conviction. Maori perceive the police as a racist institution that perpetuates strong anti Maori attitudes. The associated disrespect for tikanga values by the police, the continual stopping and questioning of Maori on the pretext of criminal suspicion when no crime has been committed, racist verbal abuse by the police that precede or accompany physical abuse, and or arrest, and the minimalisation by the police of racist attacks all foster this commonly-held view.[19]

It appears that the police have not kept pace with the times as far as Maori are concerned. While Maori society had changed over the last 160 years, the policing of Maori has not. This has given rise to accusations by Maori that they are still undergoing a systematic outdated process of colonisation by the police.[20] This highlights the importance of the relational element between Maori and the police. On the assumption that there could be an effective relationship between Maori and the police, the Maori offending rate in part can be attributable to mistrust and relationship breakdown. The importance of trust and the relational ethic is central to a healing process.

The present criminal justice system recognises the problem and has taken steps to address it. But Maori offending rates remain high. Maori society and all of New Zealand bear a heavy cost from criminal offending. I propose to identify the ingredients of programmes that have shown some success and develop them further. I suggest a shift in direction to investigate whether the answer might lie in the philosophy of therapeutic jurisprudence.

This approach is not novel. J McGuire[21] addressed the question of whether criminal law, especially in sentencing and penological aspects, can be adjusted in its workings to incorporate the perspective of therapeutic jurisprudence. He notes that of considerable importance in this exercise is a mounting volume of evidence concerning the outcomes of work with adjudicated offenders. The evidence illustrates the potential of psycho-educational, behavioural cognitive skills training and therapeutic programmes for the reduction of recidivism. This work is not too dissimilar to those programmes offered by Te Whanau Awhina and implemented in Rimutaka Prison. McGuire concludes that in principle the criminal law can have positive therapeutic outcomes. I propose to extend this notion to a Maori model.

II. Therapeutic Jurisprudence

A. Definition

Therapeutic jurisprudence developed out of the mental health system. American Professors Bruce Winick and David Wexler, from the academic practice of mental health issues, are known as the pioneers of this movement. During their practice within the American health system, they

18 P T Whaiti and M Roguski, *Maori Perceptions of the Police* (He Parekereke Victoria Link Ltd, 1998), 2. See also G Maxwell and C Smith, *Police Perceptions of Maori A Report to the New Zealand Police and Ministry of Maori Development: Te Puni Kokiri* (Institute of Criminology, Victoria University, 1998), 37, available <www.police.govt.nz>.

19 Whaiti and Roguski, ibid.

20 Ibid.

21 J McGuire 'Can Criminal Law ever be Therapeutic?' (2000) 18 Behavioural Sciences and the Law 413.

conceived the idea that the operation of law and its accompanying legal processes can have a direct psychological impact on all the players including lawyers, judges and the offender. This impact could be both therapeutic or anti-therapeutic. Thus a system that is designed to help people recover or achieve mental health often backfires and has the opposite effect.

Therapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviours and consequences. Sometimes these consequences fall within the realm of what we call therapeutic; other times anti-therapeutic consequences are produced. Therapeutic jurisprudence raises our attention to this and encourages us to see whether the law can be made or applied in a more therapeutic way so long as other values such as justice, can be fully respected.[22] It does not trump other considerations or override important societal values such as due process or freedom of speech and press.[23] Therefore therapeutic jurisprudence is the study of therapeutic and non-therapeutic consequences of the law.

Therapeutic jurisprudence is thus described as the 'study of the role of law as a therapeutic agent'.[24] One author offers the following definition as best capturing the essence of therapeutic jurisprudence: 'the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well being of the people it affects.'[25] In this sense therapeutic jurisprudence is more a descriptive and instrumental tool than an analytical theory.[26] It focuses on the law's impact on emotional life and psychological well being.[27] Therapeutic jurisprudence can be thought of as a lens through which to view regulations and laws as well as the roles and behaviour of legal actors, legislators, lawyers, judges, and administrators.[28]

B. Therapeutic Jurisprudence within a Court Setting: Current Models

One of the basic premises of the therapeutic movement has been to refocus the court from a finality to a process.[29] It seeks to examine the psychological effects of the process on the participants. The continuity of the relationship between the parties, or the evolution of the participants after the court process is often recognised and emphasised.[30] Therapeutic jurisprudence at present has a strong practical focus. It is noted by Judge William Schma that therapeutic jurisprudence is the study of law as a healing agent,[31] which has now grown into problem-solving courts.[32]

Judge Stan Thorburn recently stated:[33]

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22 D Wexler and B Winick, *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996).

23 W Schma, 'Judging for the New Millenium' (2000) Court Review, available <aja.ncsc.dni.us>.

24 Wexler and Winick, above n 22.

25 C Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 Psychol Pol and Law 193, 196, reprinted in Wexler and Winick, above n 22.

26 W Brookbanks, 'Therapeutic Jurisprudence: Implications for Judging' delivered at the District Court Judges' Triennial Conference, Rotorua, 1 April 2003.

27 Wexler and Winick, above n 22.

28 Schma, above n 23.

29 N Des Rosiers, 'From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts'. (2000) 37 Court Review 54, available <aja.ncsc.dni.us>.

30 Ibid, 55.

31 Schma, above n 23.

32 Such as the Drug Court in Dade County, Miami, USA.

> Therapeutic Jurisprudence proposes a broadening of the role of the judge, which has traditionally been limited to fact-finding and law-applying. Therapeutic Jurisprudence asks why the judicial role should not extend to the search for solutions to an individual's cycle of offending. This is a perspective that deserves to be taken very seriously by the judiciary.

Problem-solving courts usually focus on the underlying chronic behaviours of criminal defendants. The precursor to the development of therapeutic jurisprudence into problem-solving courts can be traced back to the juvenile court that started in Chicago in the United States in 1899. This was an attempt to provide a rehabilitative approach to juvenile criminal behaviour. 'Early' modern models can be found in the drug treatment courts that originated in Miami in 1989. It was recognised that the sentencing of an offender to prison for non-violent drug possession charges did not change the offender's addictive behaviour.[34] Instead of relying on the traditional criminal justice approach, the drug treatment court emphasised the rehabilitation of the offender and cast the judge into a role as a member of the treatment team. The recognised success of these courts has resulted in a proliferation of similar drug courts throughout the United States and, recently, in Australia[35] and in New Zealand.[36] This model has also been used as a way of effectively combating other social problems. This has led to the establishment of domestic violence courts,[37] mental health courts,[38] teen courts,[39] and re-entry courts.[40]

In Queensland, the increasing number of mental health patients together with the increasing complexity of the governing legislation, led to the development of a separate mental health jurisdiction and an accompanying specialist court being established. The same situation could occur in New Zealand with the raft of current[41] and proposed legislation[42] afoot. This 'global approach' was foreshadowed in recommendations made by Associate Professor Warren Brookbanks.[43] He suggested a model that would manage the needs of the intellectually disabled who fall foul of the criminal justice system. This model would take the 'offender' right through to appropriate aftercare.

The programmes in place for Maori offenders may be stemming the tide but are not solving the problem. The physical and spiritual move of Maori away from their turangawaewae (place to stand) over the generations have effectively alienated many urban Maori from their culture. The result of this is manifested in part, with some Maori perceiving a marae setting for the Te Awhina

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33 Comments made by Judge Thorburn in his Book Review of B Winick and D Wexler (eds) *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) available <www.brucewinick.com>.

34 B Winick and D Wexler *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003), 4.

35 Such as the Geraldton Alternative Sentencing Regime in Western Australia.

36 Such as the recently-established Drug Court in Christchurch which specifically targets young offenders.

37 Such as domestic violence courts attempt to protect the victims and motivate the perpetrator to seek help and monitor the behaviour of the perpetrator.

38 For example the court in Broward County, Florida.

39 Such as teen courts deal with juveniles charged with minor offences. The court is like a peer mediating forum. It is effectively a court run by teens for teens. Similar ideas such as the Peer Mediator Council is established at Victoria Ave Primary School, Remuera, Auckland.

40 Re-entry courts are designed to assist offenders released from prison re-enter the community.

41 Mental Health Act 1992, Human Rights Convention Criminal Justice Amendment Bill No 7.

42 Intellectual Disability (Compulsory Care) Bill 1999.

43 W Brookbanks, *The Development of Legislation to Meet the Needs of Individuals with Intellectual Disability, Who Because of their Disability, are Considered to Present a Serious Risk to Others* (Ministry Of Health, 1995).

Whanau programme as being as alien as a courtroom, and therefore having an anti-therapeutic effect. This supports the need to consider an alternative system to address the disproportionate Maori offending rate.

Therapeutic jurisprudence thinking has encouraged people to think creatively about how to bring promising developments into the legal system. The avenue of using the tools of the social sciences to promote psychological and physical well being opens the door to tikanga Maori. In doing so, therapeutic jurisprudence may be able to offer a vehicle to ultimately decrease Maori offending rates. I will now address the tikanga Maori issues involved.

III. Tikanga Maori

A. Disputes

The two overarching concepts of tikanga Maori affecting law and legal processes, mana[44] and tapu,[45] are the relevant foundational principles for dispute resolution.[46] Disputes such as an assault, rape or killing involved a breach of personal tapu, whereas eloping, cheating on spouse, insults to your reputation or groups of people were insults to mana. Collective disputes arose when outsiders challenged the mana of a group. This was seen, for example when one tribe took resources from another area. This was a challenge to the mana of the area, a challenge to their mana whenua,[47] a trespass. These disputes could be criminally, politically, or territorially based.

In disputes, it was the breach of human integrity and authority that was considered important, an intention to offend was not essential. The spiritual violation of the individual and the ensuing damage to the mana and tapu of the group were major reasons for disputes amongst individuals and groups.[48] The collective nature of disputes could result in inter-hapu battles and matters would continue to deteriorate until a rangatira intervened.

A major criticism of the pakeha criminal law system is that it does not recognise collective structures, in contrast for example to its treatment of corporate law. It provides instead a forum in which a series of individual rights are enforceable against other individuals thereby creating strangers of close relatives. Some Maori today, who find marae justice alien, prefer to use the pakeha legal system.[49] The reasons for this include anonymity, privacy, and an unwillingness to take responsibility for their actions. But, as previously indicated, I submit that the effects of colonisation and urbanisation on past generations has effectively alienated many urban Maori from tikanga values. This preference, I suggest, could be accommodated in a community court model.

1. Facilitator

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44 P Ryan, *Reed Dictionary of Modern Maori* (1997), 143 'mana' defined as integrity, charisma.

45 Ibid, 277 'tapu' defined as sacred, forbidden.

46 N Tomas and K Quince 'Maori Disputes and their Resolution' in P Spiller (ed) *Dispute Resolution in New Zealand* (1999), 222.

47 Ryan above n 44, 143 'mana whenua' defined as trusteeship of land.

48 Tomas and Quince above n 46, 210.

49 For some urban Maori who do not desire to affiliate to an iwi group, it is not unusual that they find a marae forum alien, and prefer to use the general court system.

The facilitation is usually by a rangatira[50] as an advocate, and the responsibility for the muru and dispute lies with the group. Most facilitators or rangatira were born into the role[51] and are trained for this position from an early age. They acted on behalf of their people in public forums, entered into binding agreements with other hapu and their leadership largely went unchallenged.

In demonstrating her mana and strengthening the cohesiveness of the group, the rangatira demonstrated three principles of whanaungatanga (relatedness). The first was aroha (love); an emotional response instigated by kindness to others. The second was atawhai (support); the obligation to protect the well being of their people. The third was manaaki (blessing); the ability to look after those temporarily in your care. A parallel exists here between the rangatira and a judge in therapeutic jurisprudence forum. However, in the pakeha criminal system, principles such as aroha and atawhai as a basis for dispute resolution were replaced by strict rules of common law and statutory law.

Through employing these principles the rangatira was able to settle disputes. The ultimate objective of the rangatira was always to maintain the integrity of the whakapapa line, to keep strong the obligations of whanaungatanga amongst the individuals of the group, and to uphold and extend the mana of the group.[52] In this way, the well-being and balance of the group is restored to enable the successful functioning of the community. This is analogous to the healing approach inherent in therapeutic jurisprudence.

2. Forum

The importance of the marae as a forum cannot be underestimated, it represents the body of ancestors and represented a world in balance. It is a place where mana could be restored and wairua healed. The marae protocol is similar to court protocol in the sense that there is an agreed framework. The whole point of marae encounter is to dispel tapu and bind people together; the notion of pae heretangata. So, dispute resolutions and marae encounter have a metaphorical weaving exercise dispelling tapu of visitors/disputants in uniting for a common purpose.

3. Process

The re-offending of an individual on a regular basis indicates an imbalance of their tinana (body), wairua (spirit), and mauri (life force). This results in the inability to establish a state of ora or balance and in turn creates an imbalance within the community. The process of dispute resolution is to identify the causes of the dispute or reasons for offending in order to uncover and address the source of the problem.[53] This moves the focus away from the individual to an analysis of cause and effect.

The principle of kotahitanga (inclusiveness) in participation and accountability underpins any process of Maori dispute resolution.[54] All parties to a dispute must be represented and given the opportunity to be heard. Unlike the present criminal justice system, it is not essential that the

50 Ryan above n 44, 239 'rangatira' is defined as chief, noble.

51 It is acknowledged that instances can arise where a rangatira can be appointed by their people for example when a hapu loses a rangatira.

52 Tomas and Quince above n 46, 215

53 Ibid, 229.

54 Ibid.

individual be present as the defendant and plaintiff are the collective. But the individual will suffer a loss of mana if they do not attend.

If the wrong-doing is not admitted to by the group or offender, it passes to the living relations by whanaungatanga because of the obligations between each other, an intergenerational relationship. The offender is encouraged to accept responsibility and in doing so re-establish mana among the group. The group then decides what actions are required by the offender to establish utu with the victim and their community. The dispute process was one of pono or just and tika or right. In the dispelling of tapu between people, food is shared to show acceptance.

4. Overall Aim

'Going through the process' was seen as cathartic or therapeutic. For Maori, procedural justice was just as important as the result. There was no distinction between the procedural or substantive justice. Maori place much value on the process as distinct from the outcome. The process is seen as an inherent good, because it empowers the parties and the community to take responsibility for the future. Allowing time and resources for a proper airing of the grievance is, of itself a large part of the healing process.[55] In practical contemporary terms, this can be demonstrated in the Waitangi Tribunal claims[56] where the cathartic nature of airing the grievance is an essential part of the process, ensuring that healing can occur. This fundamental element is also a tenet central to therapeutic jurisprudence.

The overall aim of dispute resolution remains the restoration of mana through utu, to achieve a balance of all considerations and to achieve a consensus; it is not an adversarial process. When there has been a dispute that has affected the spirit and mauri, the question is how to bring it back into balance. Regardless of what level or who is involved the same fundamental principle is involved, the principle of whakahoki mauri or restoring the balance. Apparent here is the parallel notion of 'healing' with therapeutic jurisprudence.

B. Criminality

1. Concepts

For Maori, a hara[57] means both a sin and a crime and there is no distinction between the two. This is completely different to the State's definition of a crime in section 2 of the Crimes Act 1961 as 'an offence for which the offender may be proceeded against by indictment'. Also, unlike the pakeha criminal system, which requires both mens rea and actus reus for a crime, a hara is seen as strict liability where the intention of mens rea is not required. Intention and motive are relevant only to the penalty.

The definitions of 'hara' arose from a framework of social relationships based on group rather than individual concerns. The rights of individuals, or the hurt they might suffer when their rights were abused, were indivisible from the welfare of the whanau, the hapu, the iwi.[58] This is the notion of 'collective responsibility'. An interesting extension of collective responsibility is the

55 Ibid, 230.

56 See Waitangi Tribunal, *Muriwhenua Report*, Wai 45 (1987), particularly submissions given on 7 July 1993, available <www.waitangi-tribunal.govt.nz>. See also E Durie and G Orr 'The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence' (1990) 14 NZULR 62.

57 Ryan above n 44, 89 'hara' is defined as sin, crime.

58 Jackson above n 1, 27.

notion of 'rota rota' when no one accepted responsibility. The 'drawing of the short straw' from among the offender group represented the ultimate of collective responsibility.

2. Overall Aim

For pakeha, the concept of punishment is not always necessary. For instance the court can impose a penalty such as discharge without conviction: section 19 of the Criminal Justice Act 1985. But for Maori utu is always necessary. Although both punishment and utu involve a deliberate response to an offence and aim to achieve retribution they differ in important aspects. Ethically speaking punishment can be foregone, but utu cannot; punishment should be unpleasant enough to deter, but utu may be entirely friendly and welcome; punishment should be confined to offenders who have been proven of guilty intentional offences, but utu may be exacted from individuals who have done no wrong.[59] This different conceptual thinking cannot be accommodated in the existing criminal justice system, but can be adopted in a therapeutic jurisprudential forum.[60]

In assessing what muru (to absolve from sin) was to be paid, factors such as precedents, the status of the parties, what could be afforded, and was appropriate for the type of offending were considered. The penalty agreed reflected a 'collective' concern. Muru like hara was inter-generational and taking the penalty also increases the group's mana.

The primary aim in the breach of hara, as in dispute resolution, is to restore the balance – whakahoki mauri – to restore the individual mauri, to restore both the mana of the offender and victim, so that they can be continue to be part of a functioning community, a healing approach. The group as a collective has an interest to maintain its mauri. The utu was an ongoing process of restoring the balance. This holistic healing approach again has similarities in therapeutic jurisprudence.

IV. Therapeutic Jurisprudence

A. Disadvantages and Criticisms

One of the early criticisms of therapeutic jurisprudence was that it was paternalistic, perhaps a confusion in the title itself which may have suggested a return to a therapeutic state.[61] But the state legal system is paternalistic; so, if therapeutic jurisprudence is successful in reducing Maori offending rates then the positive outcome would justify the paternalistic means.

Judge Arthur Christean in a recent article[62] has outlined a number of criticisms that are echoed by David Wexler.[63] These criticisms involve the use of therapeutic jurisprudence within a specialist court setting. They include the belief that therapeutic jurisprudence puts a tremendous strain on resources and judicial collegiality because of the one-court-one-judge concept common to specialised courts. Nevertheless, in New Zealand there is a trend towards a proliferation of

59 J Patterson, *Exploring Maori Values* (1992), 135.

60 See below, under 'Procedure.'

61 D P Stolle, D B Wexler, B J Winick and E A Dauer 'Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering' in D P Stolle, D B Wexler and B J Winick (eds) *Practising Therapeutic Jurisprudence: Law as a Helping Profession* (2000), 8.

62 A G Christean 'Therapeutic Jurisprudence: Embracing a Tainted Ideal' (Sutherland Institute, 2002) available <www.sutherlandinstitute.org>.

63 Wexler and Winick above n 22, 80.

specialised courts.[64] Christean further adds that therapeutic jurisprudence works against the goal of unified courts in the direction of a proliferation of specialised courts that operate on the basis of a different judicial philosophy from those of other courts within the same district. However, proponents of problem-solving courts have been adamant about not allowing critics to pick apart these new initiatives by comparing them to an idealised vision of justice that does not exist in real life.[65]

There is also the concern that therapeutic jurisprudence compromises the separation of powers by asking the courts to fashion solutions to social problems rather than leaving that to the legislature. Christean states that the line between the judicial and executive branch becomes blurred when courts become service providers intent on achieving specific outcomes. The judge thus becomes part of a treatment team and assumes the responsibility of overseeing programmes sponsored by the team so exercises an executive and a judicial function. Nonetheless, this occurs in New Zealand in the youth justice sector as well as in family court jurisdiction. The judge in effect makes policy by taking advantage of the discretion that has been traditionally afforded to them over sentencing to craft more meaningful sanctions.[66]

There is merit in maintaining clear boundaries with respect to the doctrine of parliamentary sovereignty[67] and separation of powers.[68] But, in a therapeutic problem-solving court, it could result in undermining the relational element that is necessary between the judge and the offender. By stating clear boundaries and defining roles at the outset this problem may be overcome and the judge's position of respect maintained. Also, therapeutic jurisprudence does not trump longstanding notions of due process or the rule of law. But to work strictly within the current Westminster system a compromise has to be made.

In a marae forum everyone is on the same level and the whole process belongs to the people. It is a face-to-face or kanohi ki te kanohi meeting. So this criticism is not fatal.

It has been claimed that therapeutic jurisprudence compromises the objectivity and impartiality of judges. Christean argues that the collaborative process requires the judge to act as part of the therapeutic team. Acting as part of a clinical team the judge cannot avoid unethical ex parte communications that are traditionally a serious ethical breach for judges, but such communications form a regular part of the therapeutic process.[69] When the judge becomes the central focus of the entire effort as the enforcer of the treatment team decisions, rather than an independent adjudicator of the facts and the law, the appearance of bias cannot be avoided. To the defendant the judge becomes one of them. On the other hand, this can also be seen to be an effort by the judge to deal more effectively and humanely with the people who come before the court.

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64 Such as the Family Court, Youth Court, Environment Court, and Maori Land Court.

65 Wexler and Winick above n 22, 82.

66 Wexler and Winick above n 22.

67 See P Joseph, *Constitutional and Administrative Law in New Zealand* (1993), 418, 'Parliament enjoys unlimited and illimitable powers of legislation'.

68 Ibid, 208, 'the doctrine of separation of powers seeks a unified reconciling theory of constitutional government – the separation of powers identifies the legislative, executive and judicial functions of government – it provides a check and balance system'.

69 Christean above n 62.

Turning to tikanga Maori, the facilitator in a dispute is usually a rangatira or tohunga.[70] The set of principles attached to resolving disputes is supported by other principles that provided the guidelines for actions amongst individuals and groups throughout Maori society. When incorporated into a system of resolving disputes the principles provided endless flexibility as to choice of action.[71] There is less emphasis on the rule but more emphasis on the principle. So, within a tikanga Maori perspective the principle of a healing outcome would move towards outweighing the rule based notion of unethical ex parte communications. The collectivity tenet central to tikanga together with the principle of everyone being on the same level, effectively dispels the idea that the defendant perceives the judge becoming the same as them together with the objectivity and impartiality criticism. Therapeutic jurisprudence like tikanga Maori is a relational ethic.

It is also argued that the new model substitutes a judge's subjective judgement for time honoured due process checks. This eliminates a vital check on the abuse of government power. Christean is concerned that judges cannot effectively act as impartial and detached judicial officers to hear and rule on the competing claims of adversaries when they simultaneously function as advocates and defenders of the programmes and procedures under challenge. Beneficial intent not legal soundness is seen to be the benchmark of the effectiveness of treatment regimes that are imposed.[72]

Finally, therapeutic jurisprudence abandons the role of equal justice under the law, in that programmes are necessarily limited to those offenders who qualify rather than all defendants who would like to participate. This implies that some defendants will be treated differently from others depending on whether they are deemed worthy candidates for available programme openings. Christean suggests that difficult or resistant candidates are 'screened out' in favour of presenting a public face to a programme that may be attractive to the media and an endorsement of the programme's success. However, there would be no reason why the jurisdiction could be widened to include all offenders after the programme becomes successful.

I acknowledge the validity of these criticisms, and therapeutic jurisprudence advocates are currently addressing them.[73] Nonetheless, one should not lose sight of the aim and bear in mind that law does not exist in a vacuum and is ever-changing. If therapeutic jurisprudence has the desired healing effect it will result in less offending. The flow-on from this will be a lighter case load and a lessening strain on resources and arguably one justification against these criticisms.

If this is the case, it seems possible from a policy perspective that therapeutic jurisprudence can be mainstreamed. This rationalisation is not new. The mainstreaming of Restorative Justice[74] into the Sentencing Act 2002 requires the court to take into account offer, agreement, and response to make amends: section 10.

These criticisms should not discount the possibility that therapeutic jurisprudence as a vehicle may assist in the reducing the Maori offending rate. The commonalities between the philosophy

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70 Ryan above n 44, 305 'tohunga' is defined as expert.

71 Tomas and Quince above n 46, 214.

72 Brookbanks, above n 26, 9.

73 Wexler and Winick, above n 22.

74 See J Braithwaite 'Restorative Justice and Therapeutic Jurisprudence' (2000) 38 CLB 244. Restorative Justice is defined as 'a process where all stakeholders involved in an injustice have an opportunity to discuss its effect on people and to decide what is to be done to attempt to heal those hurts'.

behind therapeutic jurisprudence and the Maori world view will show that therapeutic jurisprudence should not be dismissed as a relevant and effective model.

B. Advantages and Suitability

From a practical point of view, a significant advantage of therapeutic jurisprudence is that it co-exists with the existing legal system. This would answer the political arguments against a separate system for Maori. Additionally, therapeutic jurisprudence contemporaneously allows for the incorporation of tikanga Maori. The inclusion of tikanga can occur, prima facie, at all levels of the criminal justice process. I apply this to my proposed model.[75]

Collectivity is a central tenet to Maori.[76] Therapeutic jurisprudence is asserted as being a relationally-based construct.[77] The Maori world view, like therapeutic jurisprudence, shares the idea of communitarianism or collectiveness and the notion of whanaungatanga or relatedness. This move away from a rule-based approach towards a principle-based approach is consistent with Maori tikanga. So, from a conceptual point of view therapeutic jurisprudence represents a movement away from the heavily rule-based approach to legal processes to one that is more communitarian, relational and principle-based.

Therapeutic jurisprudence allows and acknowledges different conceptual frameworks. The Maori conceptual framework is at odds with the existing monocultural system in New Zealand. Issues central to Maori such as reciprocity have no equal in the State system. So we see the different approaches and administration of justice between the Maori and State systems. Critics[78] widely voice their concern that the current system does not allow Maori to administer justice to Maori.

Therapeutic jurisprudence like tikanga Maori is a forward-looking concept. The criminal justice system in comparison looks back, punishing the past actions and focussing on the penalty. Tikanga Maori like therapeutic jurisprudence is not primarily penalty orientated. It looks for the 'right way' or the tika way, ultimately resulting in a healing for the participants.

There are two important points to be made from this. The first is that the commonalities between therapeutic jurisprudence and tikanga Maori allow them to work in tandem. This also provides a window to introduce social theories such as those offered by Jackson into the process. The second is that the theory of therapeutic jurisprudence allows the administration of justice in the existing legal system to promote the well-being of communities, thereby allowing Maori to look after Maori.[79] This point I will again address when I explore the proposal of a specialised Maori Court. The challenge will be the realisation, implementation, and practicality of therapeutic jurisprudence in a suitable Court forum.

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75 Refer below 'Proposed Maori Court Model.'

76 Jackson, above n 1.

77 W Brookbanks, 'Therapeutic Jurisprudence: Conceiving an Ethical Framework' (2001) 8 J Law and Medicine 328.

78 Radio New Zealand 'National Programme Morning Report Interview by Linda Clark with Annette Sykes' 18 July 2003; also Spier, above n 5, 191.

79 Ibid.

V. A Specialised Maori Court: A Way Forward

The idea of a specialised court for Maori is perhaps not as revolutionary as it seems. There are current calls for the powers of the Maori Land Court to be expanded or even transformed into a new Maori court with jurisdiction over family and criminal cases.[80] A national hui was called by the Law Commission and Te Puni Kokiri in Taupo to debate the court system. Law Commissioner Dr Ngatata Love noted that the hui followed discussion documents circulated by the Commission two years ago which proposed the widening of the Maori Land Court jurisdiction.[81] There were also views that the Land Court precedents, together with the Judge's knowledge of tikanga Maori, and Maori communities, meant it could respond better to family disputes.[82]

Critics of this initiative, however, point out that the Maori Land Court was established by the Crown in the first instance to turn customary Maori Land into freehold hold enabling settlers to acquire land and for the land to come under Crown control.[83] The actions of the Maori (Native) Land Court were also reasons and grounds for Waitangi Tribunal[84] proceedings. This heightened Maori mistrust of the Court. Over time the Crown has 'fiddled'[85] with the constitution of the Court adding to this scepticism. The Maori Land Court facilitated land-based actions predicated upon a Crown system, and did not allow for any cathartic processes associated with Waitangi Tribunal claims. There is therefore some feeling that this creature of colonisation is not the appropriate vehicle for taking Maori forward, to effectively manage wider Maori issues. Irrespective of where the Court comes from, the recognition of the possibility of an alternative justice system by the Law Commission[86] supports a framework such as a community-based, specialised, problem-solving hybrid court. It is not a question of different laws and different rules, but different processes and different principles.

VI. How Can Therapeutic Jurisprudence Help in a Specialised Court?

The therapeutic consequences of court actions and decisions should be sought provided those consequences do not violate other standards of good court performance.[87] They should not, for example, create a backlog of cases, a position that currently exists in the court system or interfere with due process. Even though application of therapeutic jurisprudence principles should not 'trump' other legal precepts in respect of a Maori Community Court, the incorporation of tikanga Maori would not be seen as trumping other legal precepts. Rather it would 'parallel' those precepts or be more applicable in particular circumstances particularly when there may be

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80 R Berry, 'Hui looks at parallel justice for Maori' New Zealand Herald, 17 July 2003.

81 Law Commission, *Seeking Solutions*, above n 4.

82 There is limited legislative provision to allow tikanga Maori to be adopted under Te Ture Whenua Maori Land Act 1993 s 62. But the subject matter is primarily tangible and does not deal with criminal or family court matters. Also see comments of Judge Williams in Mikaere, above n 1, 339.

83 See D V Williams *Te Kooti Tanga Whenua: The Native Land Court 1864-1909* (1999).

84 Waitangi Tribunal, *Waiheke Report*, Wai 010, (2001), in particular the commentary on history, available <www.waitangi-tribunal.govt.nz>.

85 Such as the implementation of the Preamble in Te Ture Whenua Act 1993 now to promote retention of Maori land in Maori hands.

86 Law Commission, *Seeking Solutions*, above n 4, 27.

87 P Casey and D B Rottman, 'Therapeutic Jurisprudence in the Courts' (2000) 18 Behavioural Science and Law 445.

conflicting principles. For instance the notion and importance of reciprocity for a Maori offender should not be compromised.

A therapeutic jurisprudence examination of legal rules, procedures and roles would be conducted in conjunction with social science theory. At this time for instance, other Maori social theories can be utilised conjointly with legal rules and procedures. A therapeutic jurisprudence approach is not necessarily automatically paternalistic in its objectives and methods. The term 'therapeutic jurisprudence' might suggest a paternalistic role for the legal system for some observers, but such a role is decidedly not the vision of the proponents of therapeutic jurisprudence. In some cases, paternalistic behaviours may be more therapeutic and in other cases behaviours which foster individual self determination may be more therapeutic.[88] Indeed Winick writes that much of his work:[89]

> rather than defending government paternalism is animated by the insight that such paternalism is often anti therapeutic and that legal protection for individual autonomy can have positive therapeutic value.

The concept of tino rangatiratanga or self determinism can be sourced from the Treaty of Waitangi signed between the Crown and Maori in 1840. Therapeutic jurisprudence recognises the anti therapeutic effects of a paternalistic government. As such, legal protection for individual autonomy or self-determination, as indicated from above, becomes a possibility. The use of a Maori system and a Maori court process would consolidate the establishment of tino rangatiratanga, self-determination or autonomy that is inherent in therapeutic jurisprudence and Maoridom – iwi katoa. So, potentially, it appears that the implementation of therapeutic jurisprudence would support Maori self determination.

VII. Implementation of Therapeutic Jurisprudence in a Specialised Court

Therapeutic jurisprudence is an approach, a practice, a way of looking at the law and the legal system. A specialised court must systematically reinforce that approach and allow it to flourish to be an optimal venue for the practice of therapeutic jurisprudence.

The worldwide lesson is that effective justice for indigenous peoples relies upon:

- traditional institutions;
- the use of traditional values and procedures;
- community settings;
- the traditional language where it is still spoken;
- affirmation of spiritual religious and moral values; and
- use of all human facilities in the process, including emotions.[90]

These can all be accommodated within a specialised Maori court. Pamela Casey and Brian Rottman[91] propose several reasons to support the premise that a specialist court might reinforce and enhance therapeutic jurisprudence principles. One can apply them to a hypothetical specialised Maori court situation.

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88 Ibid.

89 Wexler and Winick above n 22.

90 D D Hall 'Restorative Justice: A Maori Perspective' in J Consedine and H Bowen (eds) *Restorative Justice: Contemporary Themes and Practice* (1999), 32.

91 Casey and Rottman, above n 87.

When a court's caseload includes a large proportion of cases in which similar therapeutic jurisprudence issues are likely to arise, judges and court staff would become more sensitive to identifying issues and more adept at developing individual and systemic responses to address the issues. For example, the identification that reciprocity is important for a Maori offender. The same therapeutic issues might be overlooked if a judge is handling a more general docket case.

Greater flexibility in procedures and practice may be easier to achieve in a specialised context than in a general court. In particular Casey and Rottman[92] state that a specialised court facilitates the modification of the adversarial process in ways that support new judicial roles and highlight ethic of care considerations to achieve therapeutic jurisprudence outcomes. A Maori specialised court may, for example, facilitate a collective offender/victim hui as a step to healing the damage.[93] Skill development in applying therapeutic jurisprudence principles may proceed faster because of a common focus, or in this case the education of judges. In New Zealand the judicial fraternity already engage the education of tikanga issues.[94] So, theoretically judges should be able to apply and maintain this knowledge more successfully in this forum. Courts (such as a specialised court) with exclusive subject matter jurisdiction are more likely to attract a vigilant bar. This will further enhance the identification of therapeutic issues and possible remedies such as the consideration of an 'Anger Management Course' for a violent offender.

Economies of scale can potentially be achieved with specialised courts. Casey and Rottman add that establishing a specialised court may allow judges to have routine access to mental health and other professionals who can assist in identifying and addressing therapeutic issues. This could include recognising certain trends in offenders such as dysfunctional behaviour as a result of abuse.

Integrating the work of community services into the judicial system may be easier in a specialised court than in a general court. Specialised subject matter allows the judges and community professionals a frequency of contact that builds mutual understanding and respect. Such regard is hard to foster through infrequent contacts that judges have in a generalist court. Casey and Rottman pose two additional reasons in favour of a specialist court. They include cost effectiveness with regard to access to social services and treatments; and the specialised judge's expertise in the relevant jurisdiction, which enables her to secure community wide support for the operation of the court.

Problems with a specialised court relate to the mechanics of the court itself. They include burnout of the judges, ability to define the subject matter of the court so it is not too broad or too wide and disadvantages to judges' career advancement in specialising. With regard to specialist courts, these judicial constraints are also expressed by the Law Commission.[95] But some think it is unrealistic for judges to continue being generalists, believing they would work more effectively within their own areas of expertise.[96]

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92 Ibid.

93 Te Whanau Awhina programmes. See also comments of Judge Cooper in Department of Corrections, 'Rotorua Judges Innovative Sentencing' (2001) Judges Update, available <www.corrections.govt.nz>.

94 Institute of Judicial Studies, *Report on Activities 1 July 2000-30 June 2001*, where inter-bench activities such as marae visits and te reo/tikanga seminars are held, available <www.beehive.govt.nz >.

95 Law Commission, Seeking Solutions, above n 4 at 173.

96 Ibid.

The biggest hurdle is the balance between a 'rights of the offender' approach and an 'ethic of care' approach. The shift in this balance has consequences for the judge's role and the courts' independence. But an ethic-of-care approach as reflected in the concept of 'appropriate trust'[97] calls for greater levels of accountability precisely in order to limit the destructiveness caused by relationally unconnected clinical and administrative regimes.[98] So when considering a Maori specialised court or similar model with therapeutic jurisprudence as its vehicle, there must be a robust set of defining principles sourced in tikanga Maori as opposed to a set of rules. This would theoretically overcome any perceived imbalance.

VIII. Can a Community Court Model Work?

Community courts are types of problem-solving courts and devote resources to learn about the unique problems of a community. Community courts grew out of frustration. They are located in the community close to where the crimes take place. They repay the community damaged by requiring offenders to compensate the neighbourhood through community service. Community courts use the leverage of the court sentence to complete social services that will help them address problems such as drug addiction. This brings the court and the community closer by making the court accessible and uses the court as a gateway to treatment and making social services available to offenders right at the courthouse.

A Community court may not satisfy Moana Jackson's call for a separate legal system for Maori, but I submit if the court is tikanga based it will cater for Maori, including urban Maori, who at times feel ostracised from tribal based Maori. This Court would not be located on a traditional marae nor in a modern courtroom. It could be a facility some where between the two.

IX. Proposed Maori Court Model

Community justice is about creating new relationships between the justice system and stakeholders in the community such as residents. The aim is to test new and aggressive approaches to public safety rather than just responding to crime. Partnership and problem-solving are at the core of community justice. Community courts are problem-solving courts, and must devote significant resources to learning about the unique problems of a neighbourhood. Solutions to neighbourhood problems need to be derived from input from community members acknowledging that even so called victimless crimes inflict injury to the community. This reflects the tikanga Maori view that there is no victimless crime.

Problem-solving courts generally focus on the underlying chronic behaviours of criminal defendants. Acting on the input of a team of experts from the community, a problem-solving court judge orders the defendant to comply with an individualised plan, and then the judge (with the assistance of the community team) exercises intensive supervision over the defendant to ensure compliance with the terms of the plan.[99]

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97 Brookbanks, above n 77.

98 Brookbanks, ibid.

99 D J Becker and M D Corrigan 'Moving Problem Solving Courts into the Mainstream' (2002) Court Review <aja.ncsc.dni.us>.

The model I propose is a hybrid of both the community court and problem-solving court that implements the vehicle of therapeutic jurisprudence as a solution for Maori offending rates. From a practical point of view this model will utilise the relevant systems and framework already in place such as the existing court forums, existing marae, Maori Committees and existing legislative provisions such as the Community Development Act 1962. To some extent, the hui in Taupo has foreshadowed the need for a suitable forum to address Maori offending rate, with the calls to expand the jurisdiction of the Maori Land Court.

Ideally, the judges would be Maori. However, it is acknowledged that there is a shortage of Maori judges. Considering the education and continuing training of judges in the fields of tikanga, te reo and marae protocol, it is possible that non-Maori judges could fill the roles. But, they would need to be well versed. In the alternative, kaumatua or a panel of kaumatua could assist a non-Maori judge in an advisory capacity.[100]

A. Procedure

The jurisdiction would ideally be open to all offenders. But the practical difficulties of dealing with hardened criminals alongside first offenders is acknowledged. In the initial stages the jurisdiction could be confined to first-time offenders for minor offences (excluding any violence to person crimes). It is anticipated that after the success of this model has been proven, the jurisdiction be widened to include all offending. At this time necessary provisions for security of the offender and community would need to be addressed.

This model and accompanying process is totally integrated. It takes effect at the beginning of the criminal procedure, upon arrest of the offender. The arresting officer would inquire as to whether the offender identifies himself or herself as Maori and advise them of the process. If identified as Maori, it would be mandatory that a Maori representative is called in and mandatory that the offender becomes part of the programme.[101] This is similar to the arrest of a juvenile. It is helpful but not vital that the representative be legal. This representative would become responsible for the offender until their court appearance. At this point if the offender is clearly non-Maori, but identifies as being Maori, this should not inhibit the offender from partaking in the process, primarily because the process is a principle-based process. If successful there should be no reason why it should not be extended to non-Maori.[102] However, as this paper is primarily focussed on reducing Maori offending rate, then Maori offenders would be targeted.

The offender would be assessed within the local marae forum allowing for whanau involvement. The offender has no choice of which marae.[103] After the 'intake' has been completed, an appropriate programme would be specified for the offender, thus taking on board the success from Te Whanau Awhina Programmes and utilising existing Youth Programmes.[104] This process demonstrates direct intervention, administration of tikanga Maori and the notion of Maori looking after Maori.

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100 Section 62 Te Ture Whenua Maori Land Act 1993 – Additional members with knowledge and experience in tikanga Maori.

101 See for discussion of powers for mandatory involvement to compel whanau to attend, etc and employ Maori justice practices see Tauri, above n 12, 204.

102 See Tomas and Quince, above 46, 221.

103 This is similar to the Maori Focus Units in prisons where upon sentencing the offender has no choice but is allocated to an area where his protocol or kawa may or may not apply.

Alternatively, at this point there is room for the adoption of Moana Jackson's concept of a marae-based model of diversion. Maori Committees established under legislation such as The Maori Social and Economic Advancement Act 1945 and its replacement the Maori Welfare Act 1962 could easily be reconstituted as community or marae-based committees. These committees would then have the right to hear all charges under the Maori Community Development Act 1977 and instead of processing them under the Summary Offences Act. Where the offender is Maori and there is no conventional question of guilt, the offender would enter into a marae-based programme.

The philosophy behind this 'First Intervention Step' or 'Pre Plea' is two fold. First, it allows involvement of whanau and implementation of tikanga Maori. This moves towards satisfying the call for the administration of justice to Maori by Maori.[105] Secondly, this recognises that defendants often come before the court with problems that place them at risk of offending. Such defendants if left without treatment may well find themselves back before a court having been charged with further offences committed while on bail. Early treatment or intervention may prevent this situation from occurring and reduce the amount of offending while on bail.[106] Ideally admission to this first intervention stage would be contingent upon the offender having a problem that places them at risk of offending. Also, their acknowledgement of the existence of the problem, a commitment to its resolution, and participation in the marae or other suitable programme would be preferable.

Upon the offender's court appearance the judge would call for a report from the Maori representative, similar to a probation report. The judge, taking into account the findings of the report, would then assess the effectiveness of the programme, and, if he or she was satisfied, the offender could be returned to the community and be convicted and discharged.[107]

However, there will also be offenders who have not satisfactorily completed the programme for various reasons that may include the marae forum being an alien forum for the offender. If in the opinion of the judge the programme had not worked,[108] the judge could incorporate other social sciences to assist in further treating the offender. For instance, the judge, in recognising the offender's adverse behaviour has led to the offending, could adopt a preventive approach such as confining the offender to home detention on the days he is more likely to offend.[109]

The Judge could also incorporate tikanga Maori. For instance:

- kanohi ki te kanohi encounter;
- maintaining the importance of reciprocity between the offender and victim; and
- Adhering to the principles used by rangatira such as aroha, atawhai and manaaki.

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104 He Tete Kura Mana Tangata Program for Maori violent offenders based at Nga Whare Waatea Marae in Mangere Auckland. See also Department of Corrections 'Judges Update: Information for the Judiciary' 2001, available <www.corrections.govt.nz>.

105 Sykes, above n 78.

106 Ministry Of Justice, *Trends in the Use of Bail and Offending while on Bail 1990-1999* (2003) available <www.justice.govt.nz> indicates that 21% of people offended while on bail.

107 Criminal Justice Act 1985 s 19.

108 Unlike the Youth Court where the Judge does not tend to depart from the Family Group Conference Report, the discretion would be broader here for various reasons one being there is still another step before the General Court process would come into effect and secondly the offender would not always be a youth.

109 See for discussion Wexler and Winick above n 22.

By considering the notion of utu, the Judge could also incorporate the offender's wider family in assisting the offender complete the programme. This is in the understanding that utu may be exacted from those who have done no wrong, and that utu is essentially a mechanism for restoring lost mana; a 'healing' tool.

The judge would take a more active role with the offender similar to the probation or re-entry courts by using the court processes aimed at promoting the rehabilitation or crime prevention process. These processes will seek to facilitate an offender's participation in a programme, to maintain the dignity of the offender and to promote the offender's trust. Upon entry into the programme the offender would sign a behavioural contract[110] agreeing to comply with the programme agenda. The offender could also be encouraged to participate to develop the programme. So, this programme could be tailormade to suit the problem or offence relevant to the offender, and could be specific such as an anger management course. Part of the programme would include regular court appearances for review that decline as progress is made. Participants would be actively involved in the process and could provide input into the programme for changes. The judge would interact with the offender expressing interest in their life and praising any progress that has been made. This is an endeavour to establish the 'tika' or correct approach.

Successful completion is acknowledged with the award of a 'graduation certificate'. This philosophy is based on the ethic of care and the central tenet of therapeutic jurisprudence, of it being a 'relational-based' construct. The ethic of care recognizes, and is capable of offering, such an alternative approach to legal problem-solving which is more overtly relational and deliberately less adversarial.[111] There will be occasions when the offender makes no progress in the programme. In such instances the programme would be terminated and offender made subject to the jurisdiction of the general court process.

Once assigned to the general court system, when the jurisdiction broadens to catch all offenders, there is still the possibility of the intervention found at the Maori Focus Units in prisons. Although contrary to the philosophy of therapeutic jurisprudence, at least tikanga Maori is utilised and may have a positive effect in the prison system. This enables a basic framework while preserving flexibility. It acknowledges and provides the opportunity for implementation of tikanga Maori at three stages, pre-plea, post-plea, and in prison. Similar processes have already occurred within the existing system. I note that Judge Cooper,[112] taking an innovative approach to sentencing, attempted to break the cycle of offending by allowing the intervention of the probation officer. A series of victim and offender hui were held, a community programme was entered into by the offender, and now the two protagonists have shaken hands and 'healed.'

A similar model in operation in Geraldton in Western Australia has integrated therapeutic jurisprudence into its sentencing regime and has already shown promising results.[113] This is comparable to the drug courts and uses therapeutic jurisprudence to import holistic concepts such as transcendental meditation. This is based on the premise that alleviating stress related problems

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110 See also D B Wexler 'Robes and Rehabilitation: How Judges can Help Offenders Make Good' (2001) Court Review 19; D B Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 TM Cooley Review 131, available <www.law.arizonz.edu>.

111 Brookbanks, above n 77.

112 See Judges Update above n 93.

113 M King, 'Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush' (2002) 26 Criminal L J 260.

on the levels of mind, body and behaviour and promoting overall growth in life can remove the underlying causes of substance abuse and offending.[114]

Introducing a mix of tikanga Maori values and problem-solving skills or other more mainstreamed legal practices is not a new concept and conforms to the long term plan to integrate problem-solving courts into established judicial systems.[115] Judge Williams, the Chief Judge of the Maori Land Court, in considering the future of the Maori Land Court, proposed a model which would incorporate principles from equity and public law mixed with tikanga values.[116] The changes envisaged also included a name change and a change to a forum like that of the Waitangi Tribunal, incorporating more of a community or people's court notion.

To undertake an analysis of the practicalities in terms of government resourcing for such a model is beyond the scope of this article, except to note that it is a problem recognised by the government which has allocated resources[117] to reduce the Maori offending rate. If this system is trialed and shown to be effective, then the end result should go towards overcoming the resourcing hurdle. To put this into perspective, the proposed Intellectual Disability (Compulsory Care) Bill introduced in 1999, but not yet implemented, has attracted $50 million in funding. This amount is over three years and will be set aside at the time of introduction and is expected to have a jurisdiction of at most 200 people.[118] A large amount of funding has been allocated for relatively few people. This same funding applied to implementation of a proposed model would benefit more people both directly and indirectly.

X. Conclusion

The primary aim of this article was to examine why Maori offending rates remain high and in doing so propose a workable model to address and reduce the disproportionate rate of offending by Maori. The current criminal justice system is not working. Elements of the existing system such as the inaccessibility of the judge to the offender's dynamic, the alien court process, the lack of concern or relationship with the offender after their court appearance have shown to be monocultural and in opposition to tikanga Maori. The persistence of these elements have resulted in anti therapeutic results. Therapeutic jurisprudence as a vehicle allows:

- Maori to take responsibility;
- formal recognition of the validity and applicability of tikanga Maori;
- a fully integrated bicultural approach;
- involvement of Maori through the whole process;
- Maori to administer justice;
- the placing of decision-making back to the community; and
- a system predicated upon tikanga Maori as well as Maori people.

The most important commonality between tikanga Maori and therapeutic jurisprudence is the recognition of collective responsibility or communitarianism in the healing process. Therapeutic jurisprudence allows the underlying reasons for Maori offending to be addressed in a Maori way.

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114 Ibid, 267.

115 Becker and Corrigan, above n 99, 7.

116 J Williams, 'The Maori Land Court' lecture, University of Auckland, 24 July 2003.

117 Such as the Tahua Kaihoatu Fund that is administered by Te Puni Kokiri.

118 W Brookbanks, 'Compulsory Care and Intellectual Disability' lecture, University of Auckland 23 August 2003.

The goal for both therapeutic jurisprudence and tikanga Maori is whakahoki mauri or restoring the balance through healing. This enables the offender to successfully participate in the community. The recognised social problem of offending challenges our politicians and judiciary to rise to the occasion to implement a therapeutic jurisprudential approach within a New Zealand court setting. If they can, it will effectively open a pathway for tikanga Maori to walk together with te ture pakeha to turn around the disproportionate offending rates of Maori.