

# Therapeutic Jurisprudence: Beyond Prisons Sentences

**Chloe Furley**

*University of Stirling*

## **Introduction**

Therapeutic jurisprudence (TJ) is the study of the role of the law as a therapeutic agent.<sup>1</sup> It is not concerned with reinventing the law, but with applying the law in a restorative manner. Although TJ has obtained little recognition in the law, its innovative approaches to the law's application have the ability to reconstruct the concept of sentencing and punishment. Much of what legal actors do has an impact on the psychological well-being or emotional life of persons affected by the law.<sup>2</sup> A prison sentence can have grave consequences on the mental wellbeing of convicts, and in some cases begin a downward spiral of poverty, addiction and reconviction. This is where TJ can have an influence on the outcome of convictions. According to Gordon and Temerlin, "since truth today may be error tomorrow, nothing in science is sacred. Science therefore is an open system without finality. Law is just the opposite. The law respects precedent and authority and the facts of today's cases are interpreted in light of yesterday's facts and decisions."<sup>3</sup> In intertwining science and the law, TJ can be used as a first step to creating real change. TJ grew out of mental health law, and therefore has an extensive effect on the behaviour and situations of criminals. David B. Wexler developed TJ into what it is today, and his ideas apply to many situations in the criminal justice system. This article will discuss how TJ can reinvent the criminal justice system by creating a system of rehabilitation within the existing legal framework.

---

<sup>1</sup> David Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 T M Cooley L Rev 125 citing David B. Wexler & Bruce J. Winick. 'Law in Therapeutic Key: Developments in Therapeutic Jurisprudence' (1996) *Carolina Academic Press*

<sup>2</sup> Wexler (n 1) citing Marjorie A. Silver, 'Love, Hate and Other Emotional Interference in the Lawyer/ Client Relationship' (1999) 6 *Clinical L Rev* 259, 293-94

<sup>3</sup> Robert I Gordon & Maurice K Temerlin, 'Forensic Psychology: The Judge and the Jury' (1969) *Judicature* 52 (8) 328

## Therapeutic Jurisprudence in practice

TJ began as an academic interdisciplinary approach in the field of mental health and provides the theoretical foundation for problem-solving courts.<sup>4</sup> The core aspect of TJ is its consideration of how the law affects the wellbeing of individuals. According to Wexler, the task of TJ is to identify—and ultimately examine empirically—relationships between legal arrangements and therapeutic outcomes.<sup>5</sup> This, in turn, will lead to a greater understanding of how the law must be applied in a way that benefits the individual, and has the aim of preventing further crime rather than solely punishing the individual. In many places across the world, there is an attachment to a rigid notion of ‘thinking like a lawyer’ which is exacerbated by the presence of a common law system.<sup>6</sup> This traditional approach is based on judicial precedent; therefore, the courts are hesitant to introduce new concepts. This can hinder the development of TJ, which has the ability to change the courts’ approach to sentencing and punishment.

Concerns over an individual’s wellbeing can often be disregarded in a criminal setting, and patients with mental illnesses may be more prone to violence if they do not receive adequate treatment.<sup>7</sup> TJ is a framework for asking questions and for raising certain questions that might otherwise go unaddressed.<sup>8</sup> Therefore, it is in a country’s best interest to apply the law in a way that will reduce the levels of crime and address the needs of convicts. Poor mental health is exceptionally common in prisons. For example, 45% of adults in English prisons suffering from anxiety and depression, 8% having a diagnosis of psychosis, and 60% experiencing a traumatic brain injury.<sup>9</sup> TJ tries to use this information from behavioural science to relate to cognitive distortions of offenders. Therapists suggest that in order to take a first step in the treatment of offenders, one needs to tackle denial or minimisation.<sup>10</sup> By helping offenders to become aware of triggers and tendencies, crime can

---

<sup>4</sup> Bruce J. Winick, ‘Therapeutic Jurisprudence and Problem Solving Courts’ (2002) *Fordham Urban Law Journal* 30, 1105-1103

<sup>5</sup> David Wexler, ‘Putting Mental-Health into Mental-Health Law- Therapeutic Jurisprudence’ (1992) *16 L & Human Behav.* 27,32

<sup>6</sup> Emma Jones & Anna Kawalek, ‘Dissolving the stiff upper lip: Opportunities and challenges for the mainstreaming of therapeutic jurisprudence in the United Kingdom’ (2018) *International Journal of Law and Psychiatry* 63 76-84

<sup>7</sup> Jan Volavka & Leslie Citrome, ‘Pathways to aggression in schizophrenia affect results of treatment’ (2011) *Schizophrenia Bulletin* 37(5) 921-929

<sup>8</sup> Wexler (n 1) pg. 127

<sup>9</sup> Dr. Graham Duncan, ‘The future of prison mental health care in England’ (25th June 2021) *Centre for Mental Health* accessed 20/05/2022 at <https://www.centreformentalhealth.org.uk/publications/future-prison-mental-health-care-england>

<sup>10</sup> Wexler (n 1) pg. 131

be reduced drastically. Not only are the current prison systems detrimental to the health of individuals in these institutions, but they are doing so at extreme costs, for example a cost of 5.63 billion pounds each year in the UK.<sup>11</sup> Official bodies applying TJ will result in expenditure on resources that actually benefit criminals and the wider community. For example, Wexler recommends that problem-solving reasoning and rehabilitation type programmes are made widely available in correctional and community settings.<sup>12</sup> This could have positive effects for criminals and their potential victims within society, as crime will be reduced within the community. By this token, it is impossible to ignore how the criminal justice system's reliability on prisons as punishment could be transformed with TJ's application in the courtroom.

### **Therapeutic Jurisprudence in the Netherlands**

Problems such as drug addiction, alcoholism, domestic violence, untreated mental illness, and prisoner re-entry into society have taken up more and more judicial time.<sup>13</sup> However, it is understood that since the early 1990s, incarceration alone does not break the cycle of drug use and crime.<sup>14</sup> It seems obvious that there must be more to justice than locking a convict away and hoping they will not commit an offence again. Stolle (1997) published a piece that showed how preventative law techniques are enhanced when infused with therapeutic jurisprudence.<sup>15</sup> This has the potential to fragment the vicious, what I call 'anguish cycle' of crime: prison, release, and repeat. This is why the Netherlands has introduced TJ into the courtroom, and have begun applying the law in a way that meets the needs of the individual.

The numbers in prison have dropped dramatically in the Netherlands since applying a more therapeutic approach to prison sentencing. A 2016 government study on capacity noted that a focus on sentencing, with both an increase in shorter sentences and examining how

---

<sup>11</sup> Based on the year 2020/21, D Clark, 'Government spending on prisons in the UK 2009-21' (2021) *Public Sector Expenditure on Prisons in the United Kingdom from 2009/10 to 2020/21* accessed 20/05/2022 at <https://www.statista.com/statistics/298654/united-kingdom-uk-public-sector-expenditure-prisons/#:~:text=The%20United%20Kingdom%20spent%20approximately,compared%20to%20the%20previous%20year>.

<sup>12</sup> Wexler (n 1) pg. 133

<sup>13</sup> Bruce J. Winick, 'Problem-Solving Courts: A Judicial Revolution' in Richard L. Weiner, Eve M. Branks, *Problem Solving Courts: Social Science and Legal Perspectives* (Springer, 2013) 211

<sup>14</sup> The Honourable Peggy Fulton Hora & Theodore Stalcup, 'Drug treatment courts in the twenty-first century: the evolution of the revolution in problem-solving courts' (2008) *Ga. L. Rev.*, 42

<sup>15</sup> Wexler (n 6)

crimes impact society, have helped reduce the prison population.<sup>16</sup> By attending to a convict's needs, problems of overcrowding and drug-use have rapidly reduced in a more natural way. As well as that, this is contributing to a decline in what is described as institutionalisation. In a 2019 investigation, Crane found that many convicts described this state of institutionalisation as remaining with them even after release, adding to the already numerous challenges of re-entry to society after prison.<sup>17</sup> By the courts in the Netherlands simply applying the law in a more remedial manner, the criminal justice system is beginning to actually provide justice, not only to past victims, but to future possible victims in society.

### **Problem-Solving Courts**

One easy way of applying TJ is through designated courts. A recently emerging problem-solving court model is the mental health court, which began in 1997 in Broward County, Florida.<sup>18</sup> This court aims to apply treatment for illnesses, while rewarding those who succeed with a drop in criminal charges. It is an alternative to traditional criminal court processing and is based on the principles of TJ.<sup>19</sup> The real issue with this system is the post-crime individual. A person who progresses while surrounded by people cannot be abandoned into normal society again without the pillars of a community and a support network. Many prisoners suffering with mental health issues are sentenced to a lonely imprisonment, and a third of liberated convicts are subsequently released to go to homeless accommodation or other unsupportive and unsuitable locations.<sup>20</sup> This is not only disastrous for their mental health, but simply enters them into the 'anguish cycle.' In fact, people leaving prison are known to re-commit crime to avoid homelessness, and having stable accommodation can reduce the risk of re-offending by 20%.<sup>21</sup> Therefore, designated courts would have a more positive and direct impact on how the law is applied to accommodate mental health

---

<sup>16</sup> Danielle Batist, 'How the Dutch are closing their prisons' (13 May 2019) accessed 23/05/22 at

<https://www.usnews.com/news/best-countries/articles/2019-05-13/the-netherlands-is-closing-its-prisons>

<sup>17</sup> Johanna Crane, 'Becoming Institutionalised: Incarceration and "Slow Death"' (16th July 2019) *Social Science Research Council* accessed 23/05/22 available at <https://items.ssrc.org/insights/becoming-institutionalized-incarceration-and-slow-death/>

<sup>18</sup> Weiner, Branks (n 13) pg. 214

<sup>19</sup> Sheryl Kubiak, Liz Tillander & Bradley Ray, 'Assessing the Role of Legal Actors across Eight Mental Health Courts' (2012) *17 Mich St UJ Med & L* 301 pg. 303

<sup>20</sup> Dr. Vickie Cooper, 'No Fixed Abode: The implications for homeless people in the criminal justice system' *The Howard League for Penal Reform*

<sup>21</sup> Crisis.org, 'Prison Leavers' accessed 04/06/2022 available at <https://www.crisis.org.uk/ending-homelessness/law-and-rights/prison-leavers/> citing 'Reducing Re-Offending by Ex-Prisoners' (2002) *ICPS* pg.

requirements, and would help support past offenders to gain access to accommodation, an income and other basic resources.

As noted, the law is a legal force with legislation having direct effect on individuals. However, it clearly has consequences in the psychological realm,<sup>22</sup> and as Wexler put it, much of what legal actors do has an impact on the psychological well-being or emotional life of persons affected by the law.<sup>23</sup> Legal actors include the judge, lawyers, the police, and many more individuals who have contrasting impacts on the case. Unlike traditional courts, mental-health courts use a non-adversarial approach in which a judge, prosecutors, defence counsel, mental health professionals, probation officers, and other professionals collaborate to link defendants to treatment and services.<sup>24</sup> For example, TJ changes judges' role from neutral or passive to one where they are important rehabilitation components for offenders.<sup>25</sup> One idea Wexler discussed in which the courts can make a positive influence is through conditions of probation or parole that one might complete or attend a rehabilitation course.<sup>26</sup> However, he importantly considered the importance of self-awareness in convicts to succeed in this. It must not be a case of a judge imposing something on you, but something you are coming up with so you should think it is fair.<sup>27</sup> This will encourage co-operation and ultimately have a greater success rate, thus leading to fewer prison sentences and a reduction in crime.

## Conclusion

To conclude, many countries have discovered the benefits of TJ and have begun applying it in their legal systems. It is evident that by using alternatives to prison, such as drug programmes and mental health treatment schemes, the numbers of those institutionalised and bound for reoffending drastically drop. Addressing the needs of individuals is the only solution for the mental-health problems of criminals. TJ encourages people to think creatively about how these promising developments might be brought into the legal system,<sup>28</sup> and therefore has the potential to reinvent the criminal justice system and its use of prisons. For

---

<sup>22</sup> Wexler (n 6)

<sup>23</sup> Wexler (n 1)

<sup>24</sup> Kubiak (n 18) pg. 304

<sup>25</sup> Shannon Portillo, Danielle S. Rudes, Jill Viglione & Matthew Nelson, 'Front-Stage Stars and Backstage Producers in Problem-Solving Courts'(2013) *Victims & Offenders*, Vol. 8 Taylor & Francis Online

<sup>26</sup> Wexler (n 1) 134

<sup>27</sup> Ibid

<sup>28</sup> Wexler (n 1)

years there was a real pessimism in rehabilitation and rehabilitative efforts, but with new programmes such as cognitive behavioural treatments, which encourage offenders to think through the chain of events that lead to criminality,<sup>29</sup> opinions around the globe have shifted and become more open-minded to new and improved concepts of rehabilitation. The criminal justice system, like any system designed by human beings, clearly has its flaws.<sup>30</sup> It is a system combining law and science, the latter adapting willingly to change and progression in contrast to the former. TJ has the ability to strike the perfect balance between the two. As Martin-Luther King Jr. once said, “injustice anywhere is a threat to justice everywhere.” Thus, it is necessary to ensure an adequate, modern criminal justice system, and therapeutic jurisprudence can provide that.

---

<sup>29</sup> Ibid

<sup>30</sup> Ben Whishaw, ‘In the Dock’ accessed 30/05/2022 at [https://www.bbc.co.uk/pressoffice/propinfo/tv/wk27/feature\\_criminaljustice.shtml](https://www.bbc.co.uk/pressoffice/propinfo/tv/wk27/feature_criminaljustice.shtml)

## **Bibliography**

### Books:

Weiner R. L., Branks E. M., '*Problem Solving Courts: Social Science and Legal Perspectives*' (Springer, New York, 2013)

### Articles:

Dr. Cooper V., 'No Fixed Abode: The implications for homeless people in the criminal justice system' *The Howard League for Penal Reform*

Gordon R.I., Temerlin M. K., 'Forensic Psychology: The Judge and the Jury' (1969) *Judicature* 52 (8)

Hon. Fulton Hora P., Stalcup T., 'Drug treatment courts in the twenty-first century: the evolution of the revolution in problem-solving courts' (2008) *Ga. L. Rev.* 42

Jones E., Kawase A., 'Dissolving the stiff upper lip: Opportunities and challengers for the mainstreaming of therapeutic jurisprudence in the United Kingdom' (2018) *International Journal of Law and Psychiatry* 63

Kubiak S., Tillander L. & Ra B., 'Assessing the Role of Legal Actors across Eight Mental Health Courts' (2012) *17 Mich St U J Med & L* 301

Silver M. A., 'Love, Hate and Other Emotional Interference in the Lawyer/ Client Relationship' (1999) *6 Clinical L Rev* 259

Stolle D., & Wexler D., 'Therapeutic Jurisprudence and Preventive Law: A combined Concentration to Invigorate the Everyday Practice of Law' (1997) *39 Ariz. L. Rev.* 25, 27

Volavka J., Citrome L., 'Pathways to aggression in schizophrenia affect results of treatment' (2011) *Schizophrenia Bulletin* 37(5)

Wexler D., Bruce J. Winick. 'Law in Therapeutic Key: Developments in Therapeutic Jurisprudence' (1996) *Carolina Academic Press*

Wexler D., 'Putting Mental-Health into Mental-Health Law- Therapeutic Jurisprudence' (1992) *16 L & Human Behav.* 27

Wexler D., 'Therapeutic Jurisprudence: An Overview' (2000) *17 T M Cooley L Rev* 125

Wexler D., 'Two Decades of Therapeutic Jurisprudence' (2008) *24 Touro L Rev* 17

Winick B. J., 'Therapeutic Jurisprudence and Problem Solving Courts' (2002) *Fordham Urban Law Journal* 30

## Online Journals

- Batist D., 'How the Dutch are closing their prisons' (13 May 2019) accessed 23/05/22 at <https://www.usnews.com/news/best-countries/articles/2019-05-13/the-netherlands-is-closing-its-prisons>
- Clark D., 'Government spending on prisons in the UK 2009-21' (2021) *Public Sector Expenditure on Prisons in the United Kingdom from 2009/10 to 2020/21* accessed 20/05/2022 at <https://www.statista.com/statistics/298654/united-kingdom-uk-public-sector-expenditure-prisons/#:~:text=The%20United%20Kingdom%20spent%20approximately,compared%20to%20the%20previous%20year.>
- Crane J., 'Becoming Institutionalised: Incarceration and "Slow Death"' (16th July 2019) *Social Science Research Council* accessed 23/05/22 available at <https://items.ssrc.org/insights/becoming-institutionalized-incarceration-and-slow-death/>
- Dr. Duncan G., 'The future of prison mental health care in England' (25th June 2021) *Centre for Mental Health* accessed 20/05/2022 at <https://www.centreformentalhealth.org.uk/publications/future-prison-mental-health-care-england>
- Whishaw B., 'In the Dock' accessed 30/05/2022 at [https://www.bbc.co.uk/pressoffice/proginfo/tv/wk27/feature\\_criminaljustice.shtml](https://www.bbc.co.uk/pressoffice/proginfo/tv/wk27/feature_criminaljustice.shtml)