

FROM ALTERNATIVE TO THE NEW NORMAL

Therapeutic jurisprudence in the mainstream

PAULINE SPENCER

When it comes right down to it, the law is about people, their interactions with each other and the broader community. Given this, it is surprising that the law sometimes does not meet the needs of people and, at times, may even cause further harm. Therapeutic jurisprudence ('TJ') is a legal philosophy that explores the way the law affects people's physical health, mental health and well-being. It considers the therapeutic or anti-therapeutic impact of the law and provides that, unless inconsistent with other legal values, the therapeutic effect of the law should be maximised and the anti-therapeutic effect minimised.

Humane, just and effective legal systems are therapeutic in that they seek to restore and heal people who have been harmed, provide opportunities for people to improve their health and wellbeing, and minimise further harm. Legal systems that apply therapeutic jurisprudence approaches are interdisciplinary, drawing on what has been shown to be effective in psychology and behavioural sciences.¹

Since therapeutic jurisprudence was developed by David Wexler and Bruce Winick in the early 1990s, this legal philosophy has captured the imagination of a number of academics and students in law schools and the social sciences. Much has been written about TJ across a range of legal areas from mental health law to tort law, through to wills and estates. TJ has been given practical effect by policymakers, legislators, judges and court administrators in the development of specialist problem-solving courts and in programs that improve the effectiveness of mainstream courts and tribunals around the world. There are many examples of approaches that seek to maximise the therapeutic impact of the law from the comprehensive drug court network throughout the United States,² community courts starting with the Midtown Community Court in New York City,³ court support programs in mainstream court settings such as the Court Integrated Services Program in Victoria⁴ through to the application of TJ principles in a sentencing process in the remote Western Australian town of Geraldton.⁵

So, is there more that therapeutic jurisprudence can do to make our laws and legal systems more humane, just and effective? This article explores recent developments in therapeutic jurisprudence and, using sentencing law in Victoria as an example, explores a methodology that can be applied to analyse laws and legal systems to examine the potential for increasing their therapeutic impact.

A TJ methodology

Every area of the law is made up of laws, legal processes and the roles of legal actors. Each of these aspects can be examined with a view to identifying how therapeutic features can be enhanced and how anti-therapeutic features can be reduced. To assist this analysis, Professor David Wexler⁶ has developed a metaphor and methodology, 'New Wine in New Bottles' (or those working in the addiction field may wish to use 'liquid' instead of 'wine!').⁷

Wexler talks about the laws as 'bottles' and the practices, techniques and roles of legal actors as 'wine'. Wexler invites us to look at a law (bottle) to see how much, if any, TJ practices and techniques (wine) can be applied within that law (or poured into the bottle). If the bottle cannot hold any (or a lot of) TJ wine then the bottle may need to be changed, that is, law reform may be required. If a bottle does have the potential to hold a lot of TJ wine, it becomes a matter of working out how to pour more TJ wine into that bottle.

Processes may need to be changed (eg, change court listing practices so that, in targeted cases, a judge has more time to engage therapeutically with a person with complex needs), programs may need to be developed (eg, partnerships between court and drug treatment services) or legal actors (judges, staff, lawyers or prosecutors) may need professional development in TJ techniques. Addressing these areas may improve the therapeutic impact of the law without the need for reform of the law itself.

By way of example, sentencing law commonly allows for imprisonment. In one jurisdiction, imprisonment may involve a straight sentence to be served without the prospect of release or parole. Such a bottle would not be able to hold much TJ wine as there is limited scope to use TJ techniques or practices. In such a case, to improve therapeutic outcomes, the bottle itself may need to be changed, that is, the law reform may be necessary. In another jurisdiction, the sentencing law (bottle) may allow a prisoner to apply for early release or parole. That bottle may be able to hold quite a lot of TJ wine, that is, TJ practices and techniques that may increase therapeutic impact. Such techniques may include increasing the agency of an offender through allowing them to set goals for their own rehabilitation, providing offender rehabilitation programs as conditions of parole or allowing victims of crime to have voice through a restorative justice process prior to the offender's release. If these TJ practices are not in use then ways to

REFERENCES

1. Pauline Spencer 'What is TJ?' on *Therapeutic Jurisprudence in the Mainstream* <<http://mainstreamtj.wordpress.com/what-is-tj/>>.
2. US Department of Justice, *Drug Courts* (May 2014) <<https://www.ncjrs.gov/pdffiles1/nij/238527.pdf>>
3. US Center for Court Innovation, *Community Court* <<http://www.courtinnovation.org/topic/community-court>>.
4. Magistrates Court of Victoria, *Court Integrated Services Program* (17 July 2013) <<https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-integrated-services-program-cisp>>.
5. Michael S King and Steve Ford, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime* <<https://elaw.murdoch.edu.au/archives/issues/special/exploring.pdf>>.
6. David B Wexler is Professor of Law and Director of the International Network on Therapeutic Jurisprudence at the University of Puerto Rico in San Juan, Puerto Rico, and Distinguished Research Professor of Law Emeritus at the University of Arizona.
7. Pauline Spencer, 'Wine & Bottles: A Metaphor & a Methodology for Mainstreaming TJ, by David Wexler' on *Therapeutic Jurisprudence in the Mainstream* <<http://mainstreamtj.wordpress.com/2014/07/29/wine-bottles-a-metaphor-a-methodology-for-mainstreaming-tj-by-david-wexler/>>; David Wexler 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence 'Code' of Proposed Criminal Processes and Practices' (2014) 7 *Arizona Summit Law Review* 463.

When the law requires other sentencing principles such as denunciation, deterrence, punishment and community protection to take precedence, there is still a role for therapeutic jurisprudence.

introduce these practices may be considered. There may be a need for procedural changes, program development and/or professional development.

The attraction of the 'Wine and Bottle' methodology is that it is non-prescriptive and avoids 'cookie-cutter' law reform or wholesale adoption of programs from other jurisdictions. This methodology can be applied in a range of mainstream legal areas, not just criminal justice. It guides our thinking about law reform and the improvement of legal practices and techniques. It can take into account local nuances and differences in the level of resources. It allows for incremental change by exploring what can be done within existing 'bottles' and then, if necessary, informing and building support for law reform. On a broader level, use of this methodology internationally will allow for comparative analysis and foster an exchange of ideas.

Applying the methodology: Sentencing in Victoria

As an example how this methodology may be applied we need look no further than what magistrates do most days of the week. In mainstream courts, the bulk of a magistrate's work is sentencing people who have committed offences — some minor and some more serious — with maximum sentences for one offence being two years imprisonment and multiple offences up to five years imprisonment. Sentencing involves 'bottles' — sentencing law — and a range of 'wine' — practices, techniques and the roles of the legal actors (the magistrates, prosecutors, defence lawyers, staff, support workers and external agencies). The 'Wine and Bottle' metaphor and methodology provides a way of thinking about these different features, identifying how TJ-friendly this system is, what could be done differently within existing laws and what might need to change.

A sentencing process that maximises therapeutic effects and minimises anti-therapeutic effects would be one that provides meaningful opportunities for the people affected — offenders and victims — to be involved in the process. The judicial officer would demonstrate an 'ethic of care' listening to all people affected and ensuring procedural justice. In sentencing, the judicial officer would take into account the individual circumstances of the person who offended as well as the impacts of the crime on the victim and the broader community. Where rehabilitation was appropriate, rehabilitation processes would seek to maximise successful behavioural change through the application

of principles such as self-determination/autonomy, procedural justice, accountability and techniques such as judicial supervision. Rehabilitation would comprise evidence-based interventions that aim to reduce recidivism and improve well-being by responding to criminogenic needs such as offender attitudes and peers, family and other social support, substance abuse and education/employment. The ongoing needs of victims would be met through restorative processes, practical assistance and compensation.

The bottle: Sentencing law in Victoria

Sentencing law in Victoria is a mix of statute and common law.⁸ The purposes of sentencing are to punish, deter (the offender or others), rehabilitate, denounce, and protect the community.⁹ The court must have regard to a number of factors relating to the offender such as character and mitigating factors. The court must have regard to the impact on any victim, the personal circumstances of the victim and any injury, loss or damage resulting directly from the offence.¹⁰

There are a range of sentences available — from dismissals, undertakings and fines through to community corrections orders and imprisonment with or without a community corrections order following the term, or with or without the possibility of parole.¹¹ Various offences carry maximum penalties and there are some limited areas where there are mandatory minimum penalties.

The sentencing process also allows for ongoing judicial supervision of a person's rehabilitation pre-sentence through bail deferral of sentences¹² and post-sentence through judicial monitoring while on a community corrections order.¹³

There are particular provisions relating to how the experiences of victims can be considered by the court such as through the tendering of Victim Impact Statements.¹⁴ The meaningful involvement of victims of crime in the criminal justice system is supported by legislation.¹⁵ Victoria provides for victims of crime to be provided with practical and financial assistance through the Victims of Crime Tribunal.¹⁶ Victims may also seek compensation directly from offenders.¹⁷

While there is scope for more detailed TJ analysis of particular provisions of Victorian sentencing law, overall the sentencing 'bottle' as it currently stands in Victoria has the potential to hold quite a lot of TJ 'wine'. The law requires the experiences of victims to be heard and considered by the court. There are laws

8. *Sentencing Act 1991 (Vic)*; Judicial College of Victoria, *Victorian Sentencing Manual (2005)* <<http://www.judicialcollege.vic.edu.au/publications/victorian-sentencing-manual>>.

9. *Sentencing Act 1991 (Vic)*, s 5(1).

10. *Sentencing Act 1991 (Vic)*, s 5(2).

11. *Sentencing Act 1991 (Vic)*, s 7.

12. *Sentencing Act 1991 (Vic)*, s 83A.

13. *Sentencing Act 1991 (Vic)*, s 48K.

14. *Sentencing Act 1991 (Vic)*, Part 3 Division 1C.

15. *Victims' Charter Act 2006 (Vic)*.

16. *Victims of Crime Assistance Act 1996 (Vic)*.

17. *Sentencing Act 1991 (Vic)*, ss 83A–87.

that enable the needs of victims to be considered and assistance provided. In the main, the law allows the sentence to reflect the individual circumstances of the offender.¹⁸ There is a range sentencing options available to the court and, where appropriate, rehabilitation may be facilitated by particular sentences and the use of sentencing processes such as judicial supervision before, during and after sentencing.

The wine: TJ practices and the role of legal actors

So, given that the Victorian sentencing 'bottle' has the potential to be filled with TJ 'wine', how could this be achieved? Three areas for consideration are the role of the judicial officer, the roles of prosecutors/defence lawyers and the role of court support programs.

Role of the judicial officer

It is important to note that a therapeutic jurisprudence approach is not just about rehabilitation. When the law requires other sentencing principles such as denunciation, deterrence, punishment and community protection to take precedence, there is still a role for therapeutic jurisprudence. A judicial officer acting therapeutically in such circumstances may pay particular attention to how the victim is involved in a hearing. The judicial officer may frame the sentencing remarks and engage with the offender in a way that demonstrates procedural justice, maximising the potential of compliance with court imposed sanctions and the law in the future.¹⁹ Such remarks may admonish the behaviour of the person rather than the person themselves, seek to build victim empathy by talking about the impact on the victim, stress the need for the person to take responsibility for their actions, acknowledge the individual circumstances of the offender and discuss the choices that the person has to desist from future offending.

When rehabilitation is an appropriate focus of a sentence, sentencing law in Victoria allows judicial officers to use TJ approaches such as judicial supervision pre-plea in bail review hearings, pre-sentence through deferral of sentence or post-sentence through judicial monitoring on a community corrections order.²⁰

Judicial supervision is a core component of effective program-solving courts such as drug courts, as it provides the opportunity to motivate behavioural change and ensures offender accountability. It is in judicial supervision sessions that solutions focused judging skills come to the fore:

Solution-focused judging involves developing a rapport with participants until they finish participation in the program. The judicial officer should use skills that promote participant trust in the judicial officer, including communication and listening skills and skills that promote participant self-determination, problem solving and self-efficacy.²¹

If a particular case warrants a focus on rehabilitation then such efforts are more likely to reduce reoffending if they are informed by what is known to work in the relevant fields such as psychology, addiction medicine and other social sciences.²² Judicial officers need to understand the nature of the underlying cause of

offending, how behavioural change occurs and the stages of such change, and they need to be adept at behavioural change techniques such as motivational interviewing and collaborative problem-solving.²³

This judicial approach is relatively new for many judicial officers and requires particular knowledge and skills. While the use of behavioural change techniques are becoming more widespread, ongoing professional development is important to ensure judicial officers are confident to use these processes and techniques to maximise the effectiveness of sentencing.

Role of the prosecutors and defence lawyers

There is significant scope for the prosecutors and defence lawyers to improve the effectiveness of the sentencing process through utilising therapeutic jurisprudence approaches.

The role of prosecutors in problem-solving courts such as drug courts and mental health courts are well documented.²⁴ In such courts, prosecutors are knowledgeable about the underlying issues such as drug addiction or mental ill health and the treatments that are available. They make informed and realistic submissions. The prosecutors play a key role in ensuring accountability through advocating for appropriate incentives for goals met and timely sanctions for non-compliance. They ensure the court is aware of any factors that may impact on risk to community safety.

In terms of the therapeutic response for victims of crime, prosecutors plays a vital role in ensuring victims of crime are supported to participate in a meaningful way in the sentencing process. Prosecutors working therapeutically would ensure that Victim Impact Statements are available prior to sentencing and that victims at court are well supported.

Defence lawyers work for the best outcome for their clients. Taking a therapeutic jurisprudence approach in a mainstream court, defence lawyers can work holistically with their client identifying underlying causes of offending at the earliest opportunity, identifying treatment and support options and making submissions to the judicial officer about available options. Defence lawyers can motivate change by empowering their clients to articulate what they need and assisting them to identify rehabilitation goals. They can use therapeutic jurisprudence techniques such as brief motivational interviewing to help their clients find the meaning in the change they want to make. They can empower their client to make the changes by involving them in problem-solving as problems arise. They can prepare clients to speak to a judicial officer in court in judicial supervision sessions.

Again, there is much that can be done in this regard. Ongoing professional development is key to ensuring that prosecutors and lawyers are informed about the TJ practices and techniques they can use in their daily work.²⁵

Role of court support programs

The Magistrates' Court of Victoria has led the way in developing court support programs such as

18. Mandatory minimum sentences in some areas (eg, *Sentencing Act 1991* (Vic) s 10) reduces the ability of the court to consider all sentencing principles in the light of individual circumstances.

19. Procedural justice research shows when defendants and litigants perceive the court process to be fair, they are more likely to comply with court orders and follow the law in the future: See, US Center for Court Innovation, *Procedural Justice* <<http://www.courtinnovation.org/topic/procedural-justice>>.

20. See *Sentencing Act 1991*, above n 12; n 13.

21. Michael S King, *Solutions-Focused Judging Bench Book* (AJJA, 2009) <<http://www.ajja.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>>.

22. Kevin Howells & Andrew Day, *The Rehabilitation of Offenders: International Perspectives Applied to Australian Correctional Systems* (Australian Institute of Criminology, Trends & Issues, 1999).

23. See King, above n 21; Pauline Spencer, 'To Dream the Impossible Dream? Therapeutic Jurisprudence in Mainstream Courts', *Journal of Judicial Administration* (October 2012); 'For Judges: Bench Books for Judges' on *Therapeutic Jurisprudence in the Mainstream* <<http://mainstreamtj.wordpress.com/resources/for-judges/>>.

24. For example, Stephanie Taplin, *The New South Wales Drug Court Evaluation: A Process Evaluation* (NSW BOSCAR, 2002), Chapter 8 <<http://www.boscar.nsw.gov.au/agdbasev7wr/boscar/documents/pdf/113.pdf>>.

25. Lawyers and prosecutors interested in therapeutic jurisprudence approaches may wish to refer to *Therapeutic Jurisprudence in the Mainstream* <<http://mainstreamtj.wordpress.com/resources/for-lawyers-prosecutors/>>.

26. Stuart Ross, *Evaluation of the Court Integrated Services Program* (University of Melbourne, 2009).

Prosecutors working therapeutically would ensure that Victim Impact Statements are available prior to sentencing and that victims at court are well supported.

Credit Bail and the more expansive Court Integrated Support Program ('CISP').²⁶ The Drug Court and the Assessment and Referral Court ('ARC') List (for people experiencing mental ill health) are available for people with more complex needs in particular regions.²⁷ The Neighbourhood Justice Centre showcases collaborative community justice and can inform interventions statewide.²⁸ Koori Courts seek to provide a culturally appropriate response to the over-representation of aboriginal people in the criminal justice system.²⁹

There is more that can be done, however, to ensure that this network of support is even more comprehensive, effective and accessible across Victoria. A comprehensive statewide court support for the Magistrates' Court could involve triage and assessment of a person's needs at the earliest opportunity. Early intervention would reduce harm to the community by ensuring people are matched with services at the earliest sign of offending. Triage and assessment would match people's needs with the right intervention ensuring resources are targeted for best effect. Interventions may range from community referral to external partner agencies, through to ongoing judicial supervision as part of a court support program and then, for people with more complex needs, a more intensive specialist intervention such as Drug Court or ARC List would be available. The interventions could be accessible across the state with mainstream court support available at each court and complex needs interventions available at a regional level. A court innovation unit that would oversee continual improvement through evaluation, piloting and dissemination of research and good practice could inform the system. Therapeutic justice practices would be integrated into the core business of the court through qualitative and quantitative justice measures that ensure the emphasis shifts from merely measuring how many cases are moved through the system, and how quickly, to measuring the quality and effectiveness of the sentencing process.

As can be seen through this therapeutic jurisprudence analysis, even without further reform of the sentencing law 'bottle', there is a significant amount of TJ 'wine' that is yet to be poured into the sentencing process in Victoria.

The potential for law reform

There is quite a lot of scope for TJ practices and techniques to be poured into the existing Victorian sentencing law bottle, but are there ways that the

bottle could be changed to allow for an even greater therapeutic impact? Areas for consideration include the improvement of the experiences of victims of crime and increased opportunities for diversion away from the criminal justice system for those who require treatment/support.

For victims of crime, the sentencing law allows Victim Impact Statements to be provided to the court, however victims may be able to be provided with a more supportive therapeutic processes. Currently victim-offender mediation or restorative justice is not available in the adult criminal jurisdiction. This is in contrast to the Children's Court of Victoria where Group Conferencing has been found to be effective.³⁰ A restorative justice process enables victims of crime to meet with the offender in a supportive environment, to talk about the impact of the offending on them and to get answers to unresolved questions such as why they were targeted by the offender. Offenders are provided with an opportunity to understand the impact of their behaviour on others. Both victims and offenders have input into action plans and ways the offender can make amends. The healing power of a restorative justice process can be seen in this case example from the North Liverpool Community Justice Centre:

An 84 year old man's car was stolen by a young offender. The victim wanted to meet the offender, however the offender did not want to meet the victim but was prevailed upon to do so. At the Restorative Justice conference, the victim proposed that part of the penalty imposed consist of the offender working in the community garden solidly for two weeks. The victim attended the community garden while the young offender was working there, and a rapport was established between them. The pair now have a good relationship and still keep in touch. As a result of his work in the community garden, the youth secured full-time employment as a landscape gardener, and won a national horticultural award for the garden.³¹

A Group Conferencing restorative justice program in the adult jurisdiction thus has the potential to be of therapeutic benefit to victims who choose to participate.

Another area for reform may be the development of sentencing options that divert people away from the criminal justice system who would be more effectively provided with treatment or support in the community. This is particularly necessary for people with significant drug and alcohol addictions, mental ill health, intellectual disability and acquired brain injury. People with these challenges often find it difficult to engage in mainstream sentencing options such as

27. See, Magistrates Court of Victoria, *Specialist Jurisdictions* (2 July 2012) <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions>.

28. See Neighbourhood Justice Centre (13 March 2014) <<http://www.neighbourhoodjustice.vic.gov.au/>>.

29. See Magistrates Court of Victoria, above n 27.

30. *Children Youth and Families Act 2005* (Vic), s 415; KPMG, *Review of the Youth Justice Group Conference Program, Final Report* (Department of Human Services, 2010).

31. Jelena Popovic, *Meaningful Sentencing of Low-Level Indigent Offenders* (Winston Churchill Memorial Trust, 2011) <http://www.churchilltrust.com.au/media/fellows/2011_Popovic_Jelena.pdf> 22.

community corrections orders. They require specialist support programs that are not generally available in the justice system. A lack of availability of such programs means that many people end up in custody in circumstances where this could have been avoided if they had been provided with the appropriate community intervention. Of course, such diversion systems would require these community-based services to be available and adequately resourced. Approaches such as justice reinvestment can provide a mechanism for shifting resources towards more effective interventions. In a recent report, the Senate Standing Committees on Legal and Constitutional Affairs summed up this approach:

It involves long, medium and short term strategies. Funding is provided for tailored programs in those communities to strengthen the community and address the causes of crime to mitigate against individuals being caught up in the criminal justice system. Those who have committed offences are diverted away from prison using other forms of punishment and those likely to reoffend are prevented from doing so through effective rehabilitation, parole supervision and after-prison support.³²

32. Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a justice reinvestment approach to criminal justice in Australia* (2013), Ch 5.2.

33. *Therapeutic Jurisprudence in the Mainstream* blog <www.mainstreamtj.wordpress.com>. Twitter @mainstream TJ.

Where to from here?

Recently TJ innovators from 18 countries around the world joined to further develop and promote therapeutic jurisprudence approaches in mainstream legal settings. The International Therapeutic Jurisprudence in the Mainstream project is using social media to provide the latest resources for the people

who are doing this work ‘on the ground’ in courts and tribunals — judges, lawyers, prosecutors, managers, staff and court support workers.³³ It also aims to encourage and share TJ scholarship among academics and students in law and other disciplines, and link people with expertise in this area with those who wanting to develop new initiatives.

Since its inception in the early 90s, the legal philosophy of therapeutic jurisprudence has transformed our legal landscape. Many people and organisations have been involved in developing exciting new approaches in both specialist and mainstream legal settings. There is however much more to be done. David Wexler’s recent ‘Bottle and Wine’ metaphor and methodology provides a framework improving mainstream laws and legal systems. This article used this methodology to explore sentencing law in Victoria. Academics, law students and legal actors through the legal system can use this methodology to examine any area of the law, legal process or role of a legal actor. Therapeutic jurisprudence has the potential to shift from being an alternative legal philosophy to being the ‘new normal’ and in doing so make our laws and legal systems more humane, just and effective.

PAULINE SPENCER is a magistrate in the Magistrates’ Court of Victoria and a member of the advisory group of the International Therapeutic Jurisprudence in the Mainstream project: <mainstreamtj@gmail.com>.

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