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Retained EU Law and Implications for Pregnant Workers: A Therapeutic Jurisprudence Perspective

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Abstract
Using the lenses and language of therapeutic jurisprudence, this paper will argue that the rights of pregnant workers are vulnerable in a post-Brexit climate. Whilst the sunset clause from the Retained EU Law Bill, which would have caused all retained EU law to automatically expire at the end of 2023 unless expressly stated otherwise by Ministers, was lifted, the original drafts of the Bill made clear the government's lack of respect for and interest in protecting workers' rights (amongst others). Furthermore, despite the abandonment of the sunset, the now legislated Retained EU Law (Revocation and Reform) Act 2023, aiming to deal with all laws that were once of European origin, still gives Ministers wide powers with limited input from Parliament to change EU derived legislation and replace with UK provision. Using an example from employment law, specifically, pregnant workers, this paper will show that the Act is a therapeutic jurisprudence unfriendly bottle as it has the potential to violate positive physical, social, and psychological outcomes. Recognising that these laws are currently vulnerable, we urge the government to keep intact (and potentially enhance) the laws protecting pregnant workers.

Keywords Therapeutic jurisprudence · Therapeutic design of the law · Retained EU law act · Pregnancy rights · European union law

Introduction

Withdrawal from the European Union (EU) has marked one of the greatest upheavals to core UK administrative systems during contemporary times, not least in the field of law, and it is difficult to remember another moment in history that has caused as much controversy, required as much manpower, and tested and put to the limit the

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fundamental principles of our constitution as has Brexit- (Green 2022). Yet, despite the fact that the UK triggered Article 50 of the Lisbon Treaty (stating its intention to withdraw from the EU) in 2017, the Brexit process is far from over, and its most disruptive effects are, arguably, yet been endured. This is because the legal element of Brexit – i.e., the withdrawal from the body of European law – is yet to happen.

Most relevant to this paper is the Retained EU Law (Revocation and Reform) Act 2023 (the Act), which received Royal Assent on 29 June 2023. Despite abandonment of the originally proposed sunset arrangement, the Act is set to have huge impacts on everyday protections and key areas of our everyday lives if it enters the UK statute books. The purpose of this paper is to raise awareness of some of the impacts that the 2023 Act may have on UK citizens more broadly, honing in on some of the implications that it may have on pregnant workers specifically. To do so, it will adopt therapeutic jurisprudence lenses, arguing that, fundamentally, the Act could violate therapeutic jurisprudence principles. Since (amongst others) we aim to reach out and raise awareness amongst the TJ audience, many of whom are scholars and practitioners from non-UK/EU parts of the globe, we will present some key background information regarding the relevant law and the EU/UK relationship and law-making procedures when presenting our information.

Therapeutic Jurisprudence

The therapeutic jurisprudence literature argues that the energy and agency of the law (along with its associated legal rules, procedures, roles, actors, and institutions) can by-produce therapeutic and / or anti-therapeutic consequences for those that experience it (Wexler 2018, pp.78–96). Fundamentally, it is adopts a frame of analysis that enables us to view the law and/or the practice of the law in terms of its therapeutic and anti-therapeutic effects (Wexler and Winick 2003) (Wexler 2000, p. 17) (Wexler, Winick, 1991, p. 45). Within the academic literature so far, the meaning of a therapeutic effect has been construed widely depending on the context under investigation and the philosophical position adopted by the author. However, most commonly, it has been interpreted as an effect that bolsters wellbeing and psychological, physical, and social benefits for any person encountering the law and it institutions (Freckleton, 2008, p. 575). As such, in context of this paper, "therapeutic" can be construed as a statutory provision that will frustrate physical, psychological, and social wellbeing outcomes. We view this as an entirely appropriate lens through which to view the Act as will show its potentially profound anti-therapeutic outcomes for the British public.

To provide further nuance to these propositions, co-pioneer of the therapeutic jurisprudence movement, Professor David Wexler, devised a therapeutic jurisprudence wine-bottle metaphor as a proposed evaluative framework to think about therapeutic factors on two levels (Wexler 2014, p. 463) (Wexler 2015). The first is to consider therapeutic factors at 'bottle' (or the 'therapeutic design of the law') and the 'wine' (or the 'therapeutic application of the law') levels (Wexler 2014). The former are structural factors, such as: statutes, provisions, rules governing legal institutions, policies and procedural norms and values – these cannot easily be changed,

developed, or manipulated in everyday practice (Wexler 2014). The latter are practitioners' techniques, skills, or approaches, filling gaps left by the bottle, where judicial discretion can be used to infiltrate and influence practice (Wexler 2014). Wexler theorises that we can view the law on both or either one of these levels to understand how a law or legal setting operates in context of therapeutic jurisprudence propositions (Wexler 2014).

This paper is concerned with an Act of Parliament, the Retained EU Law (Revocation and Reform) Act 2023. As such, we are interested in the therapeutic quality at "bottle" level, i.e., the therapeutic design of the law. When looking at the law on this level, it has recently been argued that legal analyses follow the trajectory of the sociological jurisprudents since "bottle" level scholarship of therapeutic jurisprudence 'might make claims about the links between society, law, and legal enterprises…. This is then contextualised into implications on individual people, that is, how these general themes impact psycho-social outcomes and wellbeing'. This paper considers the negative psycho-social implications on pregnant workers that may be incurred through legislation of the Act. As such, it will show that it is a therapeutic jurisprudence unfriendly bottle putting at risk core rights and protections that were therapeutic jurisprudence friendly.

The original Retained EU Law (Revocation and Reform) Bill 2022–2023 (the "The Retained EU Law Bill") and the critiques.

It goes without saying that during its 47-year membership of the EU, the UK legal system was hugely impacted by the laws of the EU. Since Westminster Parliament legislated the European Communities Act in 1972,[1] which brought the UK into the European Union and gave EU law supremacy over national law, the UK's legal trajectory has been significantly shaped, influenced, and guided by that of the EU to the extent that it became hard to imagine how many of the UK's core laws could exist independently to Europe. This was of course one of the main gripes of the Brexit proponents, whose campaign partly centred round the ostensible compromise to parliamentary sovereignty brought about by membership of the EU (ignoring the irony that the 1972 act was legislated freely by Parliament itself and could therefore, theoretically, be repealed at any time) (Green 2020a, b).

Regardless of where one situates one's view regarding the relative strengths and weaknesses of membership of the EU, such membership created a series of not just legal, but also culturally embedded expectations about basic rights, freedoms and privileges, standards and quality assurances, and norms and values. Arguably, those voting in favour of Brexit did not comprehend the sheer volume of core life protections – now well-adapted into mainstream UK culture – that were afforded primarily by the law of the EU not the UK. To provide a few examples, UK citizens may expect protections against fire and rehire, working time and breaks, holidays and holiday pay, equal pay between genders, job security if job is outsourced, safety at work, pregnancy and family-friendly protections, clean air and water, proper waste disposal, product standards, and limits on harmful chemicals making their way into consumables. Whilst these examples from the fields of employment law, environmental law, and health and safety law may seem like commonplace or even obvious

[1] European Communities Act 1972.

expectations from our society (after all, could we imagine a society where people are paid differently due to their gender, are forced to drink dirty water, or eat food could be sold knowingly contaminated?), they were in fact rights derived from, shielded by, and given effect by EU law (Gentile 2023). Given this, it would be tempting to assume that the UK would swiftly seek measures to ensure continuity of rights rendered vulnerable in a post-Brexit climate. However, the Bill was originally set to have the opposite effect, and the Act still currently leaves many important laws vulnerable.

Before discussing the Act in more detail, let us provide some further context to the processes of EU law-making for our non-EU friends. EU regulations and Directives are the most predominant types of legal sources that provided the British people with the fundamental rights and everyday protections afforded within the abovementioned examples during membership of the EU. Fundamentally, the difference between Directives and Regulations is that a Regulation is directly applicable to a Member State in its entirety as soon as it becomes a legal source in the EU context thus requiring no domestic legislation to make it legally enforceable, bypassing local implementation. Comparably, a Directive is not directly applicable and needs domestic transposition to make it legally enforceable through a Member State's own legal apparatus acting as a link between local and EU law (De Mars 2020, p. 93). As such, an implemented Directive gives rise to an independent, domestic source of law within the jurisdiction of respective Member States. In the UK Brexit context, this may have made Regulations and unimplemented Directives more vulnerable to expiration because we might assume that withdrawal from the EU body of law cannot apply to the UK interpretations of EU law already embedded into the tapestry of the UK legal system (Barnard 2022, p. 101). However, as will be shown in this paper, the perhaps peculiar method that the UK chose to withdraw from the law of the EU makes these and other sources of EU law, and the core protections that they afford, vulnerable in most areas (De Mars 2020, p. 119).

Given the far-reaching protections provided by the body of EU law, sudden withdrawal from the law of the EU was not deemed possible within the earlier stages of Brexit. In order 'to avoid an enormous legal black hole from arising' (Elliot 2018), Parliament legislated the EU Withdrawal Act 2018,[2] amended by the EU Withdrawal Act 2020.[3] The Act would provide a 'legal foundation of a substantial amount of domestic law post-Brexit' (Cowie 2019), by taking 'a snapshot of EU law as it exists immediately before Brexit, converting it into domestic law' (Cowie 2019). In other words, the Withdrawal Act would, sensibly and pragmatically, create a body of law known as "retained EU law", transferring all law that was once European in nature onto a domestic legislative foothold prior to the end of the Brexit transition period (2020). This would give the UK the necessary 'legal continuity and certainty' (Cowie 2019) to cool off from EU law membership, space and time to process European laws, and to implement their own versions to avoid any break in continuity (Cowie 2019). The main categories of EU law that, through the Withdrawal Act, were made into retained EU law were:

[2] EU Withdrawal Act 2018.

[3] EU Withdrawal Act 2020.

1. EU-derived domestic legislation (the UK's own legislation implemented to perform EU obligations). This includes domestic subordinate legislation made under the European Communities Act 1972.
2. Retained EU and domestic case law (decisions of the Court of Justice of the European Union (CJEU) and UK domestic courts on EU law related matters);
3. Retained general principles of EU law (core principles of EU Law effecting domestic law);
4. Retained direct EU legislation (predominantly EU Regulations);
5. Retained directly effective provisions of EU law (direct effects of EU treaties and directives).

As such, retained EU law covers most types of EU law including domestic subordinate legislation made under the European Communities Act 1972 (a point we will develop later),[4] (De Mars 2020, p. 93) (Barnard 2022, p. 98). However, the spirit of the Withdrawal Act and its desire to provide a careful and considered legal withdrawal from the EU was very much in conflict with the first version of Retained EU Law Bill.[5] Presented in the House of Commons for its first reading in September 2022, the Act has now received Royal Assent – only in revised form from its original draft; in the later readings of the Act, there was resistance to its contents shown by the Lords, catalysed by critiques from lawyers and pressure groups. This caused many of the original proposals to be scrapped. Nevertheless, the Government's concern for employment rights were expressed in the original version, and we thus worry about the trajectory of many core rights of the British people, not least in the field of pregnant workers, given the vulnerabilities that the Act leaves in this field..

Delivery of the Retained EU Withdrawal Act was overseen Secretary of State for the Department for Business, Energy & Industrial Strategy, Mr Jacob Rees-Mogg. However, it was born out of Lord Frost's (the UK's former Cabinet Minister overseeing the Brexit Opportunities Unit dissatisfaction) dissatisfaction with the Withdrawal Act (Cabinet Office, Frost, 2021). Concerned with the constitutional arrangements that the Act would leave (including the message it would send around the supremacy of EU law and its alleged threat to Parliamentary Sovereignty and democracy) as well as the volume of EU law that would be left on the UK statute books, Frost felt that that the Withdrawal Act would leave too much of an EU stain on UK law (Cabinet Office, Frost, 2021). The Retained EU Law Bill was thus suggested as a method of quickly severing ties between the UK and the EU bodies of law and to regain control of UK law, thus bolstering parliamentary sovereignty (Cabinet Office, Frost, 2021).

However, within the House of Common's research briefing for the original version, Cowie and Shalchi argued that the original Bill went much further than to redress the dissatisfactions originally expressed by Lord Frost (Cowie, Shalchi, 2022). At the time, they stated that it was forecast to 'make major changes to the EU

[4] Albeit with the exception of the EU Charter of Fundamental Rights.

[5] Retained EU Law (Revocation and Reform) Bill Government Bill < https://bills.parliament.uk/bills/3340 > .

(Withdrawal) Act 2018 and its system of retained EU law' (Cowie, Shalchi, 2022). Most relevantly, Sections 1 (1) (a) and (b) of the Bill stated that:

> "The following are revoked at the end of 2023— (a) EU-derived subordinate legislation; (b) retained direct EU legislation."[6]

In other words, Section 1 placed something called a Sunset Clause, i.e., a stated expiry date, on all retained EU law from the Withdrawal Act 2018. The implication of the original Bill was therefore that all retained EU law, which was transferred onto a UK legal foundation through the Withdrawal Act, would automatically expire through the sunset by the end of 2023. Thus, it aimed to 'completely overhaul' any retained EU Law in what was considered a drastic, dramatic, and potentially careless move with dangerous physical, social, and psychological consequences for the public, famously, described by critics as a 'bonfire of workers' rights' (McCulloch 2022), making a clear statement as to the Government's respect of core rights of the British people. With its profound negative effects on key aspects of the public's rights, this would be in violation of the philosophy of therapeutic jurisprudence.

Notably, there were some exceptions to the proposed sunset arrangements. For instance, primary Acts of Parliament that deal with a European-related matters were exempt and thus it only applied to UK made secondary legislation. Further, where there was an independent source of UK law, particularly ones that implemented Directives given their indirect applicability, this legal source is immune from Section 1. However, other protected areas were those not designed to primarily protect basic and fundamental individual rights of the British people, reinforcing the point that the Bill symbolises the respect that the current Government has for safeguarding and protecting the rights of its people.

Perhaps most significantly from a UK constitutional law perspective, according to Section 3, any aspect of retained EU law could have been protected from the sunset arrangement if stated so by a Minister.[7] Specifically, 3(1) stated that a Minister, by enacting a regulation, may enable chosen aspects to be exempt from the sunset.[8] Furthermore, Section 3(4) stated that chosen aspects of EU law could have been protected from the sunset arrangements until June 2026 if specified by a Minister.[9] As such and ironically given the purported intention to protect parliamentary sovereignty and democracy, this would have meant that retained EU Law could only be prevented for expiration via the sunset if expressed so by statutory instrument made by a Government Minister, rather than through the democratic parliamentary process. Notably, any retained EU law has been renamed "assimilated law" to remove all references to the EU under Section 5.[10]

If core rights could only be protected from abrupt expiration only as decided by an individual Minister, this was anything but democratic and came dangerously close to a government by decree (Green 2020a, b). Research Fellow, Giulia Gentile,

[6] Section 1 (1) (a) and (b).

[7] Section 3.

[8] Section 3(1).

[9] Section 3(4).

[10] Section 7.

from LSE Law school described it as 'xenophobic populism, and one which is liable to harm UK citizens if it continues to ignore wider practical and legal issues (Gentile 2023). She continued 'why should some sectors of legislation receive scrutiny but not others prior to their revocation, repeal or amendment? Would ministers pick and choose at whim which EU law to retain and which to revoke?' (Gentile 2023). We had similar questions concerns about the amount of arbitrary power that would have been given to executive Ministers to change important and fundamental – ultimately, therapeutic jurisprudence friendly – rights without consultation with Parliament. Given the radical nature of the Bill and the changes to our society it could have made if legislated in original form, we would have expected a higher level of scrutiny in line with the theoretical principles and values of our constitution, rather than a provision based on Minister's own discretion (Gentile 2023). This view was been reflected by Labour MP, Stella Creasy, who the Guardian newspaper reported has argued 'it's simply reinforcing control in Downing Street, not our parliament' (Adu, O'Carroll, 2023).

The predicted outcome of the Retained EU Law Bill was therefore substantial gaps in UK legislation, and key rights derived from laws once protected by Europe, would be void – its negative repercussions on physical, psychological, and social outcomes thus violated the principles of therapeutic jurisprudence. Ostensibly, a 'more likely' outcome was that powers given to Ministers would have been mobilised to 'restate, replicate, revoke, replace and update parts of Retained EU Law' (Cowie, Shalchi, 2022). However, if the Bill became an Act in June 2023, this would have left just 6-months for a vast body of EU law to be swiftly protected by UK Ministers before the sunset clause came into effect. The Government themselves stated that there were over 2,400 pieces of retained EU law (Department for Business, Energy & Industrial Strategy, 2022), with others predicting up to 4,000 or more (Gentile 2023), to be able to address and transfer much of this into assimilated law within such short space of time was likely impossible. As such, critics speculated that the most likely outcome would have been that retained EU laws expire with no backup protections offered, and the Law Society stated that 'the speed at which government intends to review retained EU law is a recipe for bad law-making and, coupled with bypassing parliamentary scrutiny and stakeholder consultation, could yield a period of uncertainty over the status of regulations' (Law Society, 2023). Moreover, according to Section 8 of the Bill, the UK courts will no long need to be governed by the traditional principles governing the interpretation of EU retained law,[11] which Gentile has posited 'could lead to fractures and inconsistencies in UK case law' (Gentile 2023).

Interestingly, the Government were keen to push ahead with legislating the Bill despite the Regulatory Policy Committee applying a "red rating" when assessing the impact assessment of the Bill due to their perceived concerns that it is 'not fit for purpose'.[12] Again, this gave a clear signal as to the Government's respect for core

[11] Section 8.

[12] Retained EU Law (Revocation and Reform) Bill 2022, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1118976/RPC-CO-5223_1_-_IA_f__-_opinion.pdf>.

rights of the British people. Ultimately, all of this shows that we should lack trust in our current Government when it comes to valuing, prioritising, and protecting core and fundamental rights. Not only this, but the Government demonstrated its clear desire for a power grab and lack of respect for democracy.

All of this created a backlash, and on 10 May 2023 caused Kemi Badenoch (Secretary of State for the Department for Business and Trade the Government) to revoke the sunset clause. For all intents and purposes, this has been replaced by Section 1 of the Act,[13] which instead repeals only the EU-derived legislation that is specifically identified in a list provided within Schedule 1.[14] Whilst many breathed a sigh of relief at the abandonment of the sunset, the legislated version of the Act is enacted in such a way that still poses similar concerns to the original Bill; it provides Ministers with notably wide powers to amend EU derived legislation and replace it with its own provision without any parliamentary input or approval. It does this in part by repealing Section 4 of the European Union (Withdrawal) Act 2018,[15] which previously protected rights that had been derived from EU directives and regulations. This means that no such protections will continue to exist, and it remains unclear – much like the original iterations of the Bill – which rights of this nature will be protected.

Moreover, wide power and discretion is given to Ministers – for instance, under Section 14, which gives powers to revoke or replace any secondary retained EU law with its own provision, means that rights and protections that were derived from the EU are still vulnerable – only the method by which they can be removed or amended has changed. Thus, the Act raises similar concerns to that of the earlier Bill. Though the abandonment of the sunset does technically give a new degree of certainty, ultimately, the Act gives wide discretion for Ministers to make changes to core rights now that this protection cannot be offered at international level.

As such, in a post-Brexit climate where obligations at international level no longer provide an added layer of protection, core rights are vulnerable. This concern is epitomised by the vulnerabilities faced by other areas of employment law that were previously under the auspices of EU law. For instance, there have been claims that the recent changes to holiday pay, once protected by EU jurisprudence, are detrimental to workers (UK Department for Business and Trade, 2023). The EU mandate 20 days holiday pay, which the UK implemented and took further by providing an additional 8 days (UK Department for Business and Trade, 2023). However, there are discrepancies in the way that these are calculated; the EU calculation is made according to 'normal remuneration' whereas the 8 days of extra UK pay is calculated by reference to basic pay (UK Department for Business and Trade, 2023). The new plan is for the Government to create a singular 28-day entitlement calculated by reference to basic pay only despite being potentially detrimental to workers (UK Department for Business and Trade, 2023).[16] For instance, workers who are renumerated by way of work carried out in alternative formats, such as

[13] Retained EU Law (Revocation and Reform) Act 2023, Section 1.

[14] Schedule 1.

[15] Section 14.

[16] Ibid.

commission payments, bonus payments, or compulsory overtime would be detrimentally impacted if their holiday pay was calculated by reference to their basic pay only (and not their 'normal remuneration') – this may deter them to take leave. This change might seem subtle, but it provides just one example of the negative consequences that Brexit may have on workers rights, leaving vulnerabilities in UK law for core rights.

Directive 92/85/EEC

The previous section showed that whilst the impact of the legislated version of the Act is narrower than its originally proposed format (the Bill) particularly in context of sunset, the Act still gives broad powers to the Government in how it deals with retained EU law. Moreover, the Act goes ahead and repeals Section 4 of the European Union (Withdrawal) Act 2018[17] which protected directly effective rights derived from EU treaties and directives. Given the vulnerabilities left by the Act and the intentions expressed by the original Bill, in this section, we focus on laws relevant to pregnant workers and the potential impact on these rights in a post-EU law climate. We will facilitate our discussion by presenting some other UK laws that are linked to these EU law rights and cases relevant to these laws. The purpose is not to provide a comprehensive overview of all the case law relevant to these areas, but a snapshot that demonstrates the significance of one EU Directive (Directive 92/85/EEC), given these noted vulnerabilities.

Directive 92/85/EEC was given effect in October 1992 as an 'introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding'.[18] Some of its core provisions are to protect pregnant workers from being obliged to work in conditions that would jeopardise health and safety (Article 6),[19] from being obliged to work night shifts (where a daytime working option should be offered) (Article 7),[20] to bring entitlements to take at least 14-weeks maternity leave (Article 8),[21] to take time off, without loss of pay, to attend antenatal examinations during working hours (Article 9),[22] prohibition from dismissal unless in exceptional circumstances and only with duly substantiated grounds in writing (Article 10),[23] statutory and employment maternity pay as per the local guidelines (Article 11),[24] and defence of

[17] European Union (Withdrawal) Act 2018, Section 4.

[18] European Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

[19] Art 6.

[20] Art 7.

[21] Art 8.

[22] Art 9.

[23] Art 10.

[24] Art 11.

these rights through (Article 12).[25] Given these protections and others, Michael Ford KC stated in advice to the Trades Union Congress: 'it is difficult to overstate the significance of EU law in protecting against sex discrimination' (Ford 2016). Ultimately, therefore, the Directive offered itself as affording therapeutic jurisprudence friendly protections across core rights and key areas.

In the UK context, two main regulations were created to transpose obligations from Directive 92/85/EE. These are the Management of Health and Safety at Work Regulations 1999[26] and the Maternity and Parental Leave etc. Regulations 1999.[27] During membership of the EU, violation of these laws on domestic level would have constituted a breach of the Directive and obligations found at international level. However, withdrawal of the UK from membership of the EU means that there is no longer an obligation to implement such protections rendering them vulnerable to amendment.

The regulations from 1999 are not the only pieces of UK law dealing with employment rights for pregnant workers. In fact, these regulations, and the rights they confer upon pregnant workers, are heavily intertwined with other aspects of UK and other law. For instance, the Employment Rights Act 1996 was legislated around the same time as these statutory instruments to 'consolidate enactments relating to employment rights'.[28] Though this is a primary Act of Parliament not legislated specifically to give effect to Directive 92/85/EEC (and is thus unlikely to be affected by the Retained EU Law Act), it does reflect rights also derived from Directive 92/85/EEC. The case law has shown the intersection between EU derived law and this Act itself.[29] For instance, Section 55[30] gives a pregnant worker the right to take off time to attend antenatal appointments during working hours and Section 56[31] gives entitlement to claim remuneration for time off for this reason (thus implementing obligations under Article 9 of 92/85/EEC). Elsewhere, Section 99 of the Employment Rights Act protects leave for family reasons and legislates that unfair dismissal would be found if reason related to pregnancy including 3(a), pregnancy, childbirth or maternity, time off for antenatal appointments 3(aa) (Article 8 and 10). Though as an independent source of UK law this Act will not be affected by the 2023 Act directly, withdrawal from the body of European law and Directive 92/85/EEC will mean that there is no international obligation to keep these aspects of the Employment Rights Act, which leaves parts of this Act vulnerable and a question mark over the gaps that might be left if its effects were to be removed.

Looking towards other overlapping areas of law in this field, the case law shows a further interaction between the UK 1999 regulations made to implement Directive 92/85/EEC and Article 8 of the European Convention of Human Rights.[32] By

[25] Art 12.

[26] Management of Health and Safety at Work Regulations 1999.

[27] Maternity and Parental Leave etc. Regulations 1999.

[28] Employment Rights Act 1996.

[29] Gregg v Troy Asset Management Ltd [2015] 7 WLUK 168.

[30] Section 55.

[31] Section 56.

[32] European Convention of Human Rights, Article 8.

creating a right to private life (Birth Rights 2023), Article 8 is broad enough to cover family and pregnancy matters, physical autonomy, and integrity.[33] Elsewhere, Section 4 of the Equality Act 2010[34] provides pregnancy as a protected characteristic where its interaction with the UK regulations from 1999 has also been considered in the UK case law.[35] A similar theme can be found for the Sex Discrimination Act[36] where the case law has shown a similar legal intersection – this will be discussed shortly.[37] Each of these examples demonstrate that there is a nexus of laws protecting pregnancy rights in the UK, some of which originated in Europe and have been transposed into UK regulations, with others sources of UK law independently giving effect to parts of the Directive, or derived from other places. Ultimately, all laws that originate in Europe are under threat as there is no longer an international obligation to keep them. In this context, removal of some laws transposing the international Directive will leave behind a patchy and inconsistent framework of rights – beyond the importance of the rights themselves, this legal continuity gives further need for them to be protected. To imagine that rights to take maternity leave under the Directive could be void whilst keeping rights protecting time out to take antenatal appointments under Section 55 of the Employment Act is a strange concept. As such, given how closely the jurisprudence of the EU entwines with other areas of law relevant to the UK, the removal of EU law requires careful unpicking and considerable thought.

Management of Health and Safety at Work Regulations 1999

As stated at the beginning of this section, to implement Directive 92/85/EEC within the national context, the UK created a series of their own regulations to ensure transposition of international obligations – we will detail these here. The first is the Management of Health and Safety at Work Regulations 1999, a statutory instrument stating that an employer must assess the risks to pregnant women and new mothers and take reasonable action remove any risks by altering working conditions, thus implementing Article 6 of the Directive. Regulation 16 considers 'risk assessment in respect of new or expectant mothers', specifically stating that where there is a health and safety risk that might harm the mother or baby as per the circumstances outlined in Annex I and II of Council Directive 92/85/EEC, employers are required to avoid such risks or alter the pregnant worker's working conditions or hours of work or if

[33] As an aside point, the ongoing discussion to replace the progressive Human Rights Act 1998 with a more restrictive piece of legislation, the Bill of Rights, if implemented will make it harder to make human rights claims, but this creates a separate anxiety altogether. See:
Government Bill, 'Bill of Rights Bill' (*Parliamentary Bills*) < https://bills.parliament.uk/bills/3227#timeline >.

[34] Equality Act 2010, Section 4.

[35] Commissioner of the City of London Police v Claire Geldart [2021] EWCA Civ 611; Karavadra v B J Cheese Packaging Ltd [2019] 9 WLUK 426; Lyons v DWP Jobcentre Plus [2014] UKEAT/0348/13.

[36] Sex Discrimination Act 1975.

[37] Hardman v Mallon t/a Orchard Lodge Nursing Home [2002] IRLR 516.

this is not possible suspend work for as long as is necessary to avoid such risk.[38] According to Regulation 17, which deals with 'certificate from registered medical practitioner in respect of new or expectant mothers', where there is a medical certificate exempting the mother from working nightshifts due to health and safety reasons, the mother should be temporarily suspended from work.[39] Clearly, therefore, this regulatory framework offers key rights for pregnant workers that protect both the worker and baby from health and safety risks in adherence with the principles of therapeutic jurisprudence.

The interaction between Directive 92/85/EEC as implemented by the UK Regulation and the Sex Discrimination Act was considered in the UK appeal case of Hardman v Mallon t/a Orchard Lodge Nursing Home.[40] In this case, the claimant was a pregnant employee of a nursing home whose work required her to undertake heavy lifting.[41] Her employer had failed to carry out a risk assessment for all workers, including the Claimant.[42] However, in the Claimant's case her pregnancy created a breach of the 1999 Regulation and, more broadly, the Directive, which she claimed was sex discrimination under Section 1 (3) of the 1975 Act.[43] Since no employees for the nursing home had had their risk assessments completed, the court in the first tribunal dismissed the claim that this was discrimination under the 1975 Act stating that sex discrimination could only occur if 'on the ground of her sex he treats her less favourably than he treats or would treat a man'.[44] However, in the appeal case, the court reversed this decision stating that the failure to view this as discrimination would be to failure to give effect to Council Directive 92/85 and the 1999 Regulation since pregnant workers are protected workers under s.5(3) of the 1975 Act.[45] The court argued that whilst it was the duty of every employer to carry out risk assessments on all employees, the failure to carry out a risk assessment impacted disparately on a pregnant woman, thus amounting to discrimination.[46] The Judge stated that 'it failed to construe it so as to give effect to the Pregnant Workers Directive and it failed to apply the Management Regulations to the allegation of sex discrimination the Applicant was making. In those circumstances the appeal is allowed.'[47]

This case gives an important demonstration of core rights originating from Europe and their complex expansion into and interaction with other areas of UK law, not only within the creation of UK-specific transposition laws, but also with other therapeutic jurisprudence-friendly primary acts of Parliament already on the UK statute books, in this case, the Sex Discrimination Act 1975. However, it also demonstrates the significance and profundity of these laws in protecting the health

[38] Regulation 16.

[39] Regulation 17.

[40] Hardman v Mallon.

[41] Ibid.

[42] Ibid.

[43] N. 65.

[44] Section 1 (1) (a)].

[45] Section 5(3).

[46] Hardman v Mallon.

[47] Hardman v Mallon, p. 16, Judge J McMullen.

and safety of pregnant workers and their babies is profound, and without these safeguarded by Directive 92/85/EE as reflected by the 1999 regulations, this risks dire and dangerous consequences in violation with the principles of therapeutic jurisprudence. If therapeutic jurisprudence is concerned with preventing physical, social, and psychological ('anti-therapeutic') consequences by-produced by the law, then the heavy lifting example from the Hardman[48] case exemplifies each of these anti-therapeutic outcomes engaged. On the physical side, according to the Royal College of Physicians, heavy lifting can have adverse consequences on five specific pregnancy outcomes: miscarriage, preterm delivery, small for gestational age, low birthweight, preeclampsia/gestational hypertension pregnant workers (Royal College of Physicians, undated). Notably, each of these outcomes would be in opposition to Annex I and II of Council Directive 92/85/EEC had we remained in the EU and these rights protected. These physical outcomes are confirmed by the National Institute for Occupational Health and Safety who also state that 'changes in a pregnant woman's hormones impact ligaments and joints in the spine to accommodate the developing baby who are required to carry out heavy-lifting for their role may be obliged to continue' (National Institute for Occupational Safety and Health 2023). As such, risk assessments (and more specifically avoiding heavy lifting) are core rights that require careful protection post-Brexit.

On the psychological and mental health side, the Royal College also report that working through conditions that are unsafe in pregnancy may lead to psychological stress if a pregnant worker is required to working through these conditions (Royal College of Physicians, undated). Propounding the idea that psychological wellbeing can be enhanced or diminished by the law, any reduction to these rights would demonstrate a violation of the core principles that therapeutic jurisprudents advocate. Furthermore, forcing pregnant workers to work through these working conditions may have potential ant-therapeutic social outcomes – it might force an individual to change job or stop working altogether if there remain no rights for temporary suspension, return to work, or alternative work. This could of course have serious economic repercussions to a new parent impacting other areas such as housing, poverty, and food and money resources to support a new-born or healthy pregnancy. Heavy lifting, as demonstrated by the case of Hardman, is just one example of many potential adverse outcomes that may be captured by carrying out a risk assessment in the workplace with many other harmful outcomes to baby and pregnant worker potentially identifiable. This serves as a case in point for demonstrating how Directive 92/85/EE and the 1999 Regulations are "therapeutic-jurisprudence" friendly-laws, providing rights to people that protects physical, psychological, and social outcomes, and therefore more broadly demonstrating the fundamentally "anti-therapeutic" nature any law proposing to reduce workers' rights. Without the Directive safeguarding these rights, we have concerns about the outcomes of pregnant workers, as detailed above.

[48] Hardman v Mallon.

Maternity and Parental Leave Regulations etc. 1999

The second relevant piece of UK law transposing Directive 92/85/EEC is the Maternity and Parental Leave Regulations etc. 1999. To provide a few examples of rights derived from this statutory instrument, the UK takes maternity leave rights further than the obligations presented at EU level, similar to the holiday pay example, increasing it from the 14-weeks stipulated in the Directive[49] to 18-weeks.[50] It also puts in place a compulsory 2-week maternity leave period beginning the two-weeks that the baby arrives.[51] Implementing Article 10 of the Directive, the Regulation protects against redundancy during maternity leave due to pregnancy.[52] It states that where there is an alternative vacancy this should be offered[53] so long as this is suitable and appropriate for her to carry out[54] and not less favourable than in her previous employment.[55] The same statutory instrument also ensures that a pregnant woman's job is kept open during additional maternity leave or another suitable and appropriate job is offered if not[56] on terms and conditions with no less favourable renumeration,[57] the same pension rights[58] and with less favourable terms and conditions.[59] This means that she has the right to return the job in which she was employed before her absence and the Regulations enables her to come back to a work situation as close as possible to that which she left. Clearly, with its vast protections for pregnant workers, the 1999 Regulations provide a series of therapeutic jurisprudence friendly protections, key for the advancement of physical, psychological, and social outcomes. However, these rights are once again vulnerable in a post-Brexit climate.

There are several UK cases which show that, whilst the Regulation may have successfully transposed many elements of the Directive, a means of offered therapeutic-jurisprudence-friendly protections, these provisions do not extent wide enough still. Specifically, the UK employment tribunals have tended to take a harsher and more conservative approach to claims pertaining to have breached various aspects of the 1999 Regulations. For instance, in the appeal case of SG Petch Ltd v English-Stewart,[60] Ms English-Stewart was a part-time manager at SG Petch Ltd. She went on maternity leave for a year, following which she was told her job role had been redistributed to three other team members, thereby making her role redundant. In the first case, the courts held that Claimant had been dismissed because of her maternity

[49] Article 8.

[50] Regulation 7.

[51] Regulation 9.

[52] Regulation 10.

[53] Regulation 10 (2).

[54] Regulation 10 (3)(a).

[55] Regulation 10 (3)(b).

[56] Regulation 18 (2).

[57] Regulation 18 (5)(a)(i).

[58] Regulation 18 (5)(b).

[59] Regulation 18 (5)(c).

[60] SG Petch Ltd v English-Stewart [2012] 10 WLUK 947.

leave, which amounted to discrimination under the Equality Act 2010 and in breach of Regulation 20 of the Maternity and Parental Leave Regulations. However, the Employment Appeal Tribunal overturned the Tribunal's decision; although they agreed that there had been a redundancy and that this was the reason for her dismissal, then if this was the given cause, this rendered the cause of maternity leave as defunct. The courts centred their judgement around was whether the other employees in the department held "positions similar" to that held by her, which they did not. This is a strange reading of these regulations – Regulation 20 does suggest that redundancy and maternity leave are mutually exclusive in context of dismissal, and yet the courts justified their outcome around this line of argument. As an aside, this shows the complex interaction between the Regulations and other aspects of similar UK law.

Elsewhere, Blundell v St Andrew's Catholic Primary School Governors heard a case brought by a primary school teacher who had taught a reception class prior to going on maternity leave.[61] Upon her return from maternity leave, she was offered a new class of older children. The claimant claimed that this was in breach of the Maternity and Parental Leave etc. Regulations 1999, specifically Regulation 18(2) because she was not returning to the same job that she left. This regulation, she claimed, gave rise to an entitlement to return to an identical post. The courts found no breach of Regulation 18(2) stating that according to her contract, she was as a teacher, not a teacher of a reception class per se. As such, Regulation 18(2) was not applicable during the Claimant's return to work. Again, the implication is a more rigid and conservative interpretation of the Regulations in which the pregnant worker loses the case.

With these cases typifying the status quo of how cases of this nature tend to be settled in the UK, it could be argued that the web of pregnancy and maternity rights derived from the law and policy in the UK as a whole does not go far enough in supporting new mothers and pregnancy, including the 1999 Regulations and interpretation of them. If the rights that are in place are themselves already weak, the fact they remain vulnerable post Brexit makes pregnancy rights more fragile than ever. Under the current 2023 rules, women on maternity leave earn 90% of their average weekly earnings (before tax) for the first 6 weeks decreasing to £172.48 or 90% of their average weekly earnings (whichever is lower) for the next 33 weeks. Though a new mother is entitled to 52-weeks off work, they will not get paid for the final 13 weeks. This is a significant pay cut and research has suggested that a third (31%) of Britons believe that the current statutory pay is 'less than adequate' (Instant Print 2022). Although an employer could at their discretion increase this amount, for most women maternity leave constitutes a significant deduction to pay at a time when new mothers are in the most need such resources. Whilst a weak set of rights is better than no rights at all, clearly, there is more support the system could offer pregnant women, originating within the relevant legal frameworks.

On this basis, UK Charity, Pregnant then Screwed argue that UK society is systemically flawed and unable to sufficiently support working rights of pregnant women and new mothers, labelling it the 'Motherhood Penalty' (Brearly, 2022). In

[61] Blundell v St Andrew's Catholic Primary School Governors [2013] 5 WLUK 262.

their research, they surveyed 1,630 women who had an abortion in the last five years finding that 60.5% report that the cost of childcare influenced their decision to have an abortion whilst 17.4% of women said that childcare costs were the main reason they chose to have an abortion (Pregnant then Screwed, 2022). In other words, inability to support a child financially is a clear factor in abortion. On their website, Pregnant then Screwed provide several case studies demonstrating that the system is unsupportive of pregnancy and new mothers, for instance, 'I was ignored and bullied by my boss and organisation for being pregnant', 'I was passed over for a promotion because I had just had a baby' and 'at 5 months pregnant I was made redundant without any warning'. These are worrying figures and stories on their own, and the fact that the rights that are now more vulnerable and could be reduced further in a post-Brexit climate due to the lack of international Directive should be of concern to the Government.

Pregnant then Screwed have been central for putting pressure onto the Government to increase free childcare arrangements for mothers going back to work pointing to their data suggesting that three-quarters of mothers who pay for childcare say that it does not make financial sense for them to work (Pregnant then Screwed, 2022). 1 in 4 parents (26%) who use formal childcare say that the cost is now more than 75% of their take home pay. 1 in 3 (32%) parents who use formal childcare say they had to rely on some form of debt to cover childcare costs. 96% of families with a child under three years old are likely to vote for the political party with the best childcare pledge in the next election (Pregnant then Screwed, 2022). The charity recently caused MPs to debate the cost of childcare leading to the Treasury considering expansion of free childcare in England to apply from when the baby is 1 year old (increased from the current 3 years) (HM Treasury 2023). This appears to be a wider acknowledgement therefore that the system needs to be reformed to make these rights, protections, and entitlements more progressive. This is despite there being huge reforms and changes in attitude over the last few decades not least due to membership of the EU and the effect of the 1992 Directive. However, the lack of obligation now in place because of withdrawal from the EU body of law puts what rights that do exist at risk and there could be even more concerning implications on the horizon if rights get chipped away under the 2023 Act.

In terms of the original version of the Retained EU Law Bill, Pregnant then Screwed has described it as 'absolute disaster' stating that it risked a 'reversal in women's rights' (Howlett 2023). Elsewhere, Trade Union, Unison, argued 'without these core protections, UK workers – especially women – will be thrown back to the 1970s.' Although some might breathe a sigh of relief at the plan to abandon the sunset clause, as the previous section showed, this does not mean workers' rights within this domain are safe. The Government have made clear their regard and attitude to these areas in the original version of the Bill and their intention to chip away at rights now that there is no longer an obligation at international level. Ministers still have huge discretion as to which rights will be continued and whilst maternity rights do not feature under the list of rights to be revoked under the Bill, this has the potential to grow and any law that was once of European origin is rendered vulnerable.

Current UK law could already be deemed as not going far enough, and the courts can apply a soft approach when applying and interpreting any rights that do exist.

Already, it could be argued that not enough support is to pregnant workers, and this already weak framework of rights could be chipped away further in a post-Brexit climate. We therefore suggest that Government reviews pregnancy rights very carefully based on the evidence, choosing a route that will increase not decrease the rights of pregnant workers.

Conclusion

The therapeutic jurisprudence literature argues that the energy and agency of the law (along with its associated legal rules, procedures, roles, actors, and institutions) can by-produce therapeutic and / or anti-therapeutic consequences (social, psychological, and physical) for those that experience it. Therapeutic jurisprudents consider therapeutic factors at 'bottle' (or the 'therapeutic design of the law') and the 'wine' (or the 'therapeutic application of the law') levels. In this paper, we used this lens to examine the Retained EU Law (Revocation and Reform) Act 2023, arguing that its regressive approach to core rights and protections renders it a therapeutic jurisprudence unfriendly bottle with the potential to for anti-therapeutic consequences.

Withdrawal from the European Union (EU) has marked one of the greatest upheavals to core UK administrative systems during contemporary times, not least in the field of law. Severing legal ties with the EU is a complex process given that the law of the EU and UK have grown together over the years. Despite this, the original version of the Bill and its sunset represented a reckless and irresponsible attempt at departing from the EU yet it made its way through most readings in the Houses of Parliament nearly reaching royal assent before the sunset was finally abandoned at the report stage in the Lords. It is of concern that this format would have been legislated if it were not for the resistance shown by the Lords, pressure groups, and lawyers, and is an expression of the Government's fundamental lack of respect for a wide arrange of core rights of the British people (in addition to representing a power grab from the executive). Ultimately, if the Bill had been legislated in original form, many rights for pregnant workers (namely the Management of Health and Safety at Work Regulations 1999 and Maternity and Parental Leave Regulations 1999) would have disappeared by the end of 2023. Though they could have been protected by a Minister, we are doubtful of this protection given the overall lack of support the system currently offers to pregnant workers. Whilst offering more certainty, the legislated version of the Act still gives wide discretion to Ministers to replace rights derived from the EU, for instance Directives, with their own provision. As such, these rights are still very much at risk in a post-Brexit climate, and we believe the original format of the Bill provides a clear statement of intention of the Government.

Ultimately, without proper maternity rights and protections, pregnant workers and their babies risk an array of anti-therapeutic (psychological, social, and physical) impacts, but already these rights in the UK can be seen as being too weak. Research from charity, Pregnant then Screwed, demonstrates that there not enough protections for pregnant workers – the current framework leads to early abortion, discrimination at work, and redundancy. However, some rights are better than no rights at all. We

therefore suggest that Government reviews pregnancy rights very carefully, choosing a route that will increase not decrease the rights of pregnant workers in this area.

Though the sunset arrangement has now been abandoned, the Government has provided a list of all laws they wish to be revoked as part of withdrawal from the EU to be reviewed by Parliament – this indicates that already rights derived from the EU are being chipped away. We have already seen a non-favourable impact in the context of holiday pay, and there may be other rights that will be shortly suffer a similar fate. Since membership of the EU would have provided wholesale protection to these rights because they originated mostly from European Directives meaning that violation of rights would give rise to a violation of international obligations, the Act represents a TJ-unfriendly bottle for pregnant workers (and others). In particular, without the safeguards provided by membership of the EU, specifically, Directive 92/85/EEC, rights for pregnant workers remain vulnerable – this is just one example of many areas of rights that could be reformed by the Government.

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References

Adu, A., and O'Carroll, L., 2023. Labour to force Commons vote on plans to 'sunset' 4,000 EU laws, *The guardian*.

Barnard, C., 2022. Retained EU law in the UK legal orders: continuity between the old and the new. *Research handbook on legal aspects of Brexit* (Lazowski, and Cygan, Eds.) UK: Edward Elgar.

Birth Rights, 2023. Human rights in maternity care, *Birth rights*, https://birthrights.org.uk/wp-content/uploads/2019/03/Human-rights-in-maternity-care-2019.pdf.

Brearley, J. 2022. *The motherhood penalty: How to stop motherhood being the kiss of death for your career*. UK: Simon & Schuster.

Cabinet Office, and The Rt Hon Lord Frost CMG, 2021. Lord Frost statement to the House of Lords: 16 September 2021 on Brexit opportunities. *Oral statement to parliament*, https://www.gov.uk/government/speeches/lord-frost-statement-to-the-house-of-lords-16-september-2021.

Cowie, G., and Shalchi, A., 2022. Retained EU law (Revocation and Reform) Bill 2022–2023. *Research Briefing,* https://commonslibrary.parliament.uk/research-briefings/cbp-9638/.

Cowie, G., 2019. The status of "retained EU Law". *House of commons library research briefing Tuesday,* https://commonslibrary.parliament.uk/research-briefings/cbp-8375/.

de Mars, S. 2020. *EU Law in the UK*. UK: Oxford University Press.

Department for Business and Trade, 2023. Retained EU Employment Law https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1156206/retained-eu-employment-law-consultation.pdf.

Elliot, M., 2018. The European Union (Withdrawal) Act 2018, *Public law for everyone*, <https://publiclawforeveryone.com/2018/06/28/1000-words-the-european-union-withdrawal-act-2018/.

Ford, M., 2016. Workers' rights from Europe: The impact of Brexit, *TUC*, https://www.tuc.org.uk/research-analysis/reports/workers-rights-europe-impact-brexit.

Freckelton, I., 2008. Therapeutic jurisprudence misunderstood and misrepresented price and risks of influence. *T. Jefferson L. Rev.* 575–596.

Gentile, G., 2023. Will the EU retained law bill lead to legal chaos?, *LSE Law Blog,* https://blogs.lse.ac.uk/politicsandpolicy/will-the-eu-retained-law-bill-lead-to-legal-chaos/.

Green, D.A., 2020. Opinion: David Allen Green's guided tour of UK stop and search law, *Financial Times,* https://www-ft-com.ezp-prod1.hul.harvard.edu/video/8aa052ee-cbb9-467b-81c8-8a1e154eeae9?playlist-name=latest&playlist-offset=254.

Green, D.A., 2020. Sovereignty and 'Sovereignty!', *The law and policy blog*, https://davidallengreen.com/2020/12/sovereignty-and-sovereignty/.

Green, D.A., 2022. How the constitution of the United Kingdom has been tested continuously for over seven years, *The law and policy blog,* https://davidallengreen.com/2022/10/how-the-constitution-of-the-united-kingdom-has-been-tested-continuously-for-over-seven-years/.

HM Treasury, 2023. Chancellor unveils a budget for growth', *Gov UK*, https://www.gov.uk/government/news/chancellor-unveils-a-budget-for-growth.

Howlett, E., 2023. Retained EU law reform could be an 'absolute disaster' for working women, charity warns' https://www.peoplemanagement.co.uk/article/1810294/retained-eu-law-reform-absolute-disaster-working-women-charity-warns Accessed 16 May 2023.

Instant Print, 2022. What is the best country for working parents? https://www.instantprint.co.uk/print spiration/be-inspired/best-country-for-working-parents.

Law Society, The, 2023. Retained EU law https://www.lawsociety.org.uk/topics/brexit/retained-eu-law.

McCulloch, A., 2022. New EU law bill could lead to bonfire of workers' rights in UK, *PersonnelToday*, https://www.personneltoday.com/hr/retained-eu-law-bill-workers-rights-uk/.

National Institute for Occupational Safety and Health, The, 2023. Physical Job Demands–Reproductive Health, *centres for disease control and prevention*, https://www.cdc.gov/niosh/topics/repro/physicaldemands.html.

Pregnant then Screwed, 2023. Press releases and research: new pregnant then screwed data shows three-quarters of mothers who pay for childcare say that it does not make financial sense for them to work, *Pregnant then screwed*, https://pregnantthenscrewed.com/three-quarters-of-mothers-who-pay-for-childcare-say-that-it-does-not-make-financial-sense-for-them-to-work/

Pregnant then Screwed, 2023. *Pregnant then Screwed*, 6 in 10 women who have had an abortion claim childcare costs influenced their decision, https://pregnantthenscrewed.com/6-in-10-women-who-have-had-an-abortion-claim-childcare-costs-influenced-their-decision/.

Wexler, D.B., and Winick, B.J., 1991, Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research, *U. Miami L. Rev. 45*, http://repository.law.miami.edu/umlr/vol45/iss5/3.

Wexler, D.B., and B.J. Winick. 2003. *Judging in a therapeutic key: Therapeutic jurisprudence and the courts*. Durham, N.C: Carolina Academic Press.

Wexler, D.B., 2000. Therapeutic jurisprudence: An overview' *Thomas M. Cooley law review*.

Wexler, D.B., 2014. New wine in new bottles: The need to sketch a therapeutic jurisprudence 'code' of proposed criminal processes and practices, *Arizona summit law review 463, Arizona legal studies discussion 12–16*, https://ssrn.com/abstract=2065454 or https://doi.org/10.2139/ssrn.2065454.

Wexler, D.B., 2015, Wine & Bottles: A metaphor & a methodology for mainstreaming therapeutic jurisprudence, *Arizona Legal Studies discussion 15–05*, https://ssrn.com/abstract=2553868.

Wexler, D.B., 2018, Mental health law and the seeds of therapeutic jurisprudence, *The Roots of Modern Psychology and Law: A Narrative History*, https://ssrn.com/abstract=3129093.