David Wexler, Bruce Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*

Carolina Academic Press, Durham, North Carolina (1996)
ISBN 0-89089-988-6, LCCN 96-85943 (995 pp)

This is the second of two major collections of essays in therapeutic jurisprudence that have been published. The first, *Essays in Therapeutic Jurisprudence* also edited by Wexler and Winick, was published in 1991. These two books of essays and the impressive bibliography of other writings (seven books, four symposia, and over 150 articles) testify to the birth and development of a school of legal research and thought which will be virtually unknown to Australian readers. My own acquaintance with therapeutic jurisprudence dates from my attendance at a panel session in which some of the fruits of therapeutic jurisprudence were presented (VIth European Conference of Psychiatry, Psychology and Law, Siena, Italy, 22–31 August 1996). I have also read the 50 essays in this book with interest. This review offers some comments both on the book and on the school of thought.

Therapeutic jurisprudence

Therapeutic Jurisprudence is a school of legal reasoning, or a "common scholarly community" (Wexler 1995 Vol 1:814) which is still almost exclusively American. It originated in concerns about the direction of development of mental health law. Here I pause to reflect upon the traits which characterise a school of thought. The New Oxford English Dictionary's sixth definition of the noun "school" is relevant. It defines the term as a body of people who are or have been taught by a particular philosopher, scientist, artist, etc; a group of people who are disciples of the same person or who share some principle or practice as followed by such a body of people. Several instances can be found in the art world. In Australia the Heidelberg School comes to mind. This was a group of Australian painters led by Tom Roberts who met at the painting camp a Eaglemont, Heidelberg. The art of the school based on open-air Impressionist painting, also featured local subject matter and was associated with the emergence of a distinctive Australian literature. It flourished between 1888 and 1901 and has had continuing influence on Australian art (Oxford Dictionary of Art, 1988). Turning back to the world of legal theory we find another example of a school of thought in the Law and Economics movement of which Richard Posner was a leading light and which is seen as seated in Chicago.

Therapeutic jurisprudence was first introduced by Wexler in a paper written in 1987 for a workshop sponsored by the National Institute of Mental Health (Finkelman and Grisso 1991:588). It does not appear to have a home as such although Arizona and Florida may both appear to have claims to such a title. David Wexler and Bruce Winick together are the leading lights of therapeutic jurisprudence. Wexler is John D Lyons Professor of Law and Professor of Psychology at the University of Arizona and is also affiliated with the University of Puerto Rico and the Caribbean Centre for Advanced Studies in Psychology. Winick is Professor of Law and Scholar in Residence at the University of Miami School of Law in Florida. Both scholars are graduates of the New York University School of Law. Any attempt to trace the genealogy of therapeutic jurisprudence further is frustrated by the fact that no information is given about the authors of the other articles. It is of particular concern that the disciplinary background of the authors of the articles in this compendium is

not identified. Given the assurance that the movement "has generated interest among scholars from law and the social sciences" (Winick 1996:645) this information would be relevant.

Therapeutic jurisprudence is an outgrowth of modern trends in legal scholarship. It owes something to the legal realist movement of the first half of this century and shares some common ground with better known movements such as critical legal studies, feminist legal studies, and critical race theory. Like these movements it no longer focuses exclusively on the study of legal doctrine or concentrates attention exclusively on the "next generation issues" which will come before appellate courts (Wexler 1995:816). Unlike the more radical movements identified above, the great bulk of the writing of this school is "centrist" seeking to reform the law rule by rule, procedure by procedure.

The central insight of therapeutic jurisprudence is the realisation that the law itself can function as a therapeutic or antitherapeutic agent. Legal rules, legal procedures and the roles of legal actors constitute social forces that may impact on the psychological well-being of those caught up by it (Winick 1996:646; Slobogin 1995:767). It must be noted that this insight was applied before it was analysed. Although a number of writers have now devoted attention to an analysis of therapeutic jurisprudence, the first fruits of the insight were articles written by legal scholars concerning legal rules, roles and procedures.

These articles are both normative (Winick 1996:649) and empirical (Finkelman and Grisso 1994:588) in orientation. The normative assumption is throughout that all other things being equal it would be preferable if the law's impact was therapeutic rather than antitherapeutic. In this context therapeutic is defined as anything that enhances the psychological or physical well being of the individual. It suggests that law should be used to promote mental health and psychological functioning (Winick 1996:653). It also assumes that hypotheses about the therapeutic or antitherapeutic effects of the law will be capable of empirical validation. Therapeutic jurisprudence is therefore an interdisciplinary enterprise which has attracted the interest primarily of legal scholars who find writings in cognitive-affective-behavioural science accessible. It hopes to prove heuristically and practically useful to professionals in mental health and forensic mental health systems (Finkelman and Grisso, 1994:592) and seems, to some extent, to have attracted the interest of such professionals.

The fact that therapeutic jurisprudence grew out of American mental health law in the late 1980s and early 1990s is significant. Up to this time the focus of scholars in this field had been largely on the significance of constitutional rights. The impetus of work in this area seemed, however, to be slowly clearing the way for the emergence of therapeutic jurisprudence. The focus of American mental health law on constitutionally based rights meant that the commentaries and writings produced by scholars in this field tended to be opaque to Australian readers. The work of the scholars of therapeutic jurisprudence is much more accessible. Bruce Winick (1996:665) addressing a largely American audience emphasised that one of the attractions of therapeutic jurisprudence was that it allowed the work to be more international and comparative in scope than American mental health law has traditionally been. This would allow greater opportunities for interchange between scholars of different nations.

The fact that this body of scholarship had its origins in American mental health law is also responsible for the value that these thinkers attribute to the value of autonomy and their sensitivity to charges of being paternalistic (Petrila 1993:877–905; Wexler and Winick 1993). Explorations of the law's value as a therapeutic agent require decisions to be made about what is therapeutic and the question then arises as to who makes these decisions. Wexler suggests that there are in fact two questions, one for the researcher-scholar and one for society and legal-political decision makers. The ultimate decision as to what is therapeutic and what the law's role in promoting therapeutic aims should be is a sociopolitical decision that

would be resolved by legal-political decision makers with, it is hoped, important input from consumers and recipients of the law's therapeutic aims (Wexler 1995:812).

There are some questions which scholars whose work is represented in this book have not yet resolved. Among the most interesting chapters in the book is that written by Christopher Slobogin in which some of these questions are identified and explored. Looming large amongst these is the perennial question of whether social science theory and research has reached the stage at which it would be appropriate to apply the knowledge in legal context. Also unresolved is the question of how, if such research as is available or suggested shows that any particular law or change to the law would have both therapeutic and antitherapeutic results, the balancing exercise is to be carried out. This problem would be exacerbated if the therapeutic and antitherapeutic effects were to be felt by different persons.

The book

The book is a collection of 50 essays written by 54 authors. All except one of the essays had previously appeared as articles or in books. The essays are arranged in three parts. The first part, entitled "The Wide-Angle Lens of Therapeutic Jurisprudence", contains 27 essays which examine substantive areas of legal doctrine from the viewpoint of therapeutic jurisprudence. The areas of substantive law range from mental health law through correctional law (one essay), criminal law and procedure (four essays), and evidence (two essays). Also of specific interest to the readers of this review might be the article on sex offenders and the law which appears under the heading of "quasi" mental health law. Other articles consider topics in such areas as torts, and contracts, sexual orientation law and labour arbitration law. Suggestions are made as to how information which could be obtained empirically should impact on the development of the law in these areas.

The second part contains 15 essays which discuss therapeutic jurisprudence as a body of scholarship, analysing its advantages and disadvantages, its potential and its limitations. The essays in the part appear under three sub-headings "Overview", "Rights/Justice Issues" and "Future Challenges and Directions". It is of particular interest to Australian readers that one of the essays in this part (Carson and Wexler:633–643) considers the question of whether the UK will follow the US lead in adopting this approach to mental health law. The authors suggest that therapeutic jurisprudence is distinctive and that it advocates interdisciplinary cooperation between lawyers and psychiatrists without requiring anyone to give up their core concerns. They observe that the relationship between lawyers and psychiatrists in Britain has 'basically been antagonistic rather than co-operative' (Carson and Wexler:641). Their conclusion is that therapeutic jurisprudence involves opening up more choices for more people to take but requires a willingness to consider different ways of working and express the fear that "we may continue with our relatively unproductive adversarial approach to mental health law" (Carson and Wexler:642).

The third part entitled "Empirical Explorations" is much the smallest. It contains seven essays which present the results obtained when the premises of therapeutic jurisprudence were adopted as a hypothesis for empirical work. The one essay not previously published appears in this part. It is written by Greer, O'Regan and Traverso, and concerns patients' perceptions of procedural due process in civil commitment hearings.

An examination of the individual essays shows that the editors themselves have contributed significantly to the collection. David Wexler is sole author of seven of the essays and joint author of three, Bruce Winick is sole author of five and co-author of one essay. Another significant contributor is Daniel W Shuman sole author of three and co-author of two essays.

Among the individual chapters of interest to readers of this journal, I call attention to two. A chapter by Gould (1993) entitled "Turning Rat and Doing Time for Uncharged,

Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?" raises some serious questions about sentencing practices under the *Federal Criminal Justice Act* (US). It is suggested that the current ability of prosecutors to use its provisions to force offenders to choose between a stiff sentence and "ratting" on their colleagues in crime can be demoralising. I found this article particularly disquieting because it demonstrates the consequences that can follow when a therapeutic jurisprudence approach fails to take account of all possible therapeutic and antitherapeutic results of the rule or procedure under scrutiny. Chapter 43 by Bruce Feldthusen entitled "The Civil Action for Sexual Battery: Therapeutic Jurisprudence" on the other hand I found particularly interesting because of the reflections which his study cast on the relationship between the accusing witness/victim of a sexual assault and the criminal justice system.

Therapeutic jurisprudence does not purport to be an all-consuming philosophy and those who look to it to rival utilitarianism or natural law will be disappointed. However I believe that the readers of this journal would find much to interest them not only in this book but also in the school of therapeutic jurisprudence and I recommend it to them

Eilis S Magner

Foundation Professor and Director of School of Law, University of New England

REFERENCES

Carson, D and Wexler, B, 'New Approaches to Mental Health Law: Will the UK follow the US Lead, Again?' 1 *Journal of Social Wlfare and Family Law* 79 reprinted as ch31 in Wexler and Winick (ed) 1996.

Finkelman, D and Grisso, T (1994) "Therapeutic Jurisprudence: From Idea to Application" *New England Journal on Criminal and Civil Confinement* 243 reprinted as ch28 in Wexler and Winick (ed) 1996.

Gould, K (1993) "Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?" 10 *New York Law School Journal of Human Rights* 835 reprinted in Wexler and Winick (ed) 1996.

Petrila, J (1993) "Paternalism and the Unrealised Promise of Essays in Therapeutic Jurisprudence" 10 *New York Law School Journal of Human Rights* 877 reprinted as ch34 in Wexler and Winick (ed) 1996.

Slobogin, C (1995) *Therapeutic Jurisprudence: Five Dilemmas to Ponder,* Psychology, Public Policy and Law vol 1, 193 reprinted as ch39 in Wexler and Winick (ed) 1996.

Wexler, D B (1995) "Reflections on the Scope of Therapeutic Jurisprudence" 1 *Psychology, Public Policy and Law* 220 reprinted as ch41 in Wexler and Winick (ed) 1996.

Wexler, D B and Winick, B J (ed) (1991) *Essays in Therapeutic Jurisprudence*, Carolina Academic Press, Durham.

Wexler, D B and Winick, B J (1993) "Patients, Professionals and the Path of Therapeutic Jurisprudence: A Response to Petrila" 10 *New York Law School Journal of Human Rights* 907–914 reprinted as ch35 in Wexler and Winick (ed) 1996.

Wexler, D B and Winick, B J (ed) (1996) *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, Carolina Academic Press, Durham, North Carolina.

Winick, B J (1996, "The Jurisprudence of Therapeutic Jurisprudence" 2 *Psychology, Public Policy and Law* reprinted as ch32 in Wexler and Winick (ed) 1996.