

REVIEW SECTION

Book Review

Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts, edited by Bruce J. Winick and David B. Wexler. Durham, NC: Carolina Academic Press, 2003.

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Professors Bruce Winick and David Wexler have provided the intellectual framework for problem-solving courts with what they have termed “therapeutic jurisprudence.” Their latest book, which collects several new essays and edited versions of recently published articles in the area, explores how the principles of therapeutic jurisprudence actually have been applied in the courts.

The book effectively gathers what’s currently available about therapeutic jurisprudence—“TJ” to its friends and supporters. And what’s available is generally supportive of an ever-expanding use of TJ concepts in the courts. What is lacking in the book, however, are data to support the effectiveness of TJ over alternative procedures and concepts, as well as discussion of several conceptual challenges to TJ.

Before turning to those problems, however, we should review what therapeutic jurisprudence is and how this book delves into it. Winick and Wexler explain the concept of TJ this way: “Its essential premise is a simple one: that the law is a social force that can produce therapeutic or antitherapeutic consequences.” These impacts occur through the application of legal rules and procedures, as well as by the conduct of legal actors, like lawyers and judges. “Therapeutic jurisprudence proposes,” Winick and Wexler say, “that we use the tools of the behavioral sciences to study the therapeutic and antitherapeutic impact of the law, and that we think creatively about improving the therapeutic functioning of the law without violating other important values, such as . . . due process concerns” (p. 7).

For a simple example, take the case of a criminal defendant at various stages of passage through the court system. If the defendant is arraigned in a mass docket, appearing by video from the jail with audio he cannot understand, one might expect his opening view of the court system to be low. If that is followed by a plea hearing in which the judge shows no real interest in making sure the defendant understands the consequences of what he is doing, and a perfunctory sentencing, one would expect his dissatisfaction or disaffection or both to have grown. Winick and Wexler would call this an *antitherapeutic* outcome. Drawing on substantial data regarding procedural justice, multiple articles in the book explain how taking time to make sure the defendant truly understands the process from start to finish—and treating all court participants with fairness and respect—has a *therapeutic* effect, leading to greater satisfaction with the process regardless of the outcome.

Though initially developed independently, TJ concepts have become the theoretical framework for problem-solving courts, now called collaborative-justice courts in California. Problem-solving courts are generally ones with specialized dockets, like domestic-violence courts or drug-treatment courts. They also seek to integrate treatment services with judicial case monitoring, with close supervision and immediate response to unwanted behavior such as violation of domestic no-contact orders or renewed drug use. Judges handling these specialized dockets generally try to get some additional education relevant to the docket through reading or seminars. Drug-treatment-court judges learn about the nature of drug addiction and treatment; domestic-violence-court judges learn about the causes of domestic violence. The expectation, of course, is that the judge will be able to handle these cases more effectively with better background knowledge about the people and problems confronting the court.

The Conference of Chief Justices (CCJ) and Conference of State Court Administrators (COSCA)—effectively the leadership of the state courts throughout the United States—in 2000 adopted a resolution, included in the book, endorsing “broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims and the community.” The resolution, which came after a task force examined the use of therapeutic jurisprudence in specialized courts, concluded that the use of therapeutic jurisprudence principles, including “ongoing judicial intervention, close monitoring of and immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and government organizations,” would enhance court processes and improve public confidence in the courts (pp. 112-14).

The broad collection of essays found in this book provides a helpful and reasonably thorough introduction to the breadth of TJ applications so heartily endorsed by the leadership of the state courts. Separate articles examine TJ’s application in drug-treatment courts, mental-health courts, domestic-violence courts, reentry courts (courts that monitor offenders rejoining society following incarceration), and appellate courts. Other articles examine its application in nonspecialized court calendars or look into the underlying principles of TJ, such as how best to encourage offenders to change their behavior through their interaction with the court system.

The book is divided into two parts. The first provides brief descriptions, often from newspaper articles, about various types of problem-solving courts. These pieces, devoid of jargon and focused on the big picture, provide a quick entry into the subject. The second part adds both theory and detail to the discussion. Winick, Wexler, and Michael Clark all provide excellent discussions of the extensive research that is available from the mental-health field about what works in achieving long-term behavior change, which is an obvious key to reducing recidivism and improving the lives of many who come through the court system. Many of the concepts do appear to have applications in court procedures and orders.

The book's major shortcoming is that it is constructed almost entirely from *within* the therapeutic jurisprudence community. Because it is primarily a collection of already published articles with only a few invited essays, this is understandable, but regrettable. The book would have benefited had essays been included raising and addressing some of the significant questions that can and should be raised. Among the areas not sufficiently addressed are these:

Effectiveness. Winick and Wexler note that "therapeutic jurisprudence specifically asks *what* legal arrangements work and *why*" (p. 7, emphasis in original). Yet, aside from the drug-court arena, on which the book includes some preliminary data showing effectiveness, there is virtually no data to show that the application of TJ principles in specific types of court proceedings results in less recidivism or other measurably improved outcomes as compared to traditional proceedings. There is ample, interesting, and highly suggestive discussion of the "what works" literature from the mental-health field. But there is scant evidence to show that these best practices by therapists will yield equivalent results when wielded by judges in court proceedings.

This is not to suggest that TJ methods necessarily are ineffective, just that proof is lacking. Still, there will no doubt be situations in which the helpfulness of the TJ viewpoint is clear. Research in the area of procedural justice, which shows public satisfaction with judicial proceedings is related more to a fair process than to outcome (Tyler, 1990; Tyler, 2003), already provides a basis to know that treating all who come through the courtroom doors with respect, while giving them a fair opportunity to be heard, will have a therapeutic impact. One may assume that properly explaining the role of the court when announcing a decision, whether civil or criminal, will, too (Leben, 2000). Since TJ is premised on the application of social-science principles, however, one may hope that its continued maturation will include greater attempts at verification of its benefits.

Values. From a values and policy perspective, Winick and Wexler premise their views on the assumption that the "people appearing in problem-solving courts . . . are there because they have problems that they have not recognized or had the ability to deal with effectively" (p. 8). They suggest that problem-solving judges "master the techniques of motivational interviewing," beginning with expressing empathy toward the criminal defendant (pp. 186-87). While there is much more to TJ than is summarized in the preceding two sentences, it may be argued that these concepts are so at odds with a "get tough on crime" public attitude that the movement may have fatal problems of political legitimacy, notwithstanding its CCJ/COSCA endorsement.

To be sure, the book catalogs some significant public support for TJ: the CCJ/COSCA resolution, a Florida statute requiring application of TJ principles in drug courts, and several favorable local newspaper articles garnered by some problem-solving judges are highlighted. Nonetheless, TJ advocates will have to explain clearly how their approach fits in with the prevailing attitudes of the electorate or risk having further development halted by political forces. Such forces can change the laws

governing these courts and proceedings, of course, but they can also be more directly aimed at individual judges: in the state courts, 87 percent of trial judges must stand for some sort of election and 77 percent stand for a contestable election, in which another candidate can oppose them (Schotland, 2002).

We have been told that “moral values” was the top issue for voters in the 2004 U.S. presidential election. These issues of public values are touched upon in a thoughtful article by Shadd Maruna and Thomas LeBel involving reentry courts. While they argue from a social-science viewpoint that reentry programs should focus primarily on the strengths of the post-release inmate, not risks and needs, they also note that U.S. Senator Joe Biden’s news release announcing the first-ever reentry court had this headline: “Biden Introduces Tough New Court Program for Released Inmates.” They also note that the Bush Administration in 2001 revised a Clinton Administration reentry program from a “Youth Offender Reentry Initiative” to the “Serious and Violent Offender Reentry Initiative” (Bush), focusing on minimizing the risks posed by the “most predatory” ex-convicts rather than focusing, as the Clinton Administration had, on problems of substance abuse, mental illness, and stigmatization (p. 260).

The judiciary, as a branch of government, must be accountable to the people. TJ proponents and judges must be ready to convince the public of the value of their methods.

Constitutional Questions. Therapeutic jurisprudence teaches that its usefulness is to be evaluated based on its effectiveness. But there may also be an issue as to whether the new role of the judge in TJ courts is a *constitutional* one. The predecessor to today’s problem-solving courts was the juvenile court, started in Chicago in 1899 to provide a more rehabilitative approach to juvenile delinquency. Integrating social-service providers with the court process for juveniles may have different constitutional implications from doing so in other types of cases. Though Winick and Wexler note the U.S. Supreme Court decision of *In re Gault* (1967), which required that juvenile courts afford due process in juvenile delinquency adjudications, and caution that “*Gault* is a message that modern problem solving courts and judges must always heed” (p. 4), there is no significant review of potential challenges to the role of the new problem-solving judge.

The discussion of constitutional challenges is limited to two pages in an overview of problem-solving courts by Greg Berman and John Feinblatt. They note that some have asked whether problem-solving courts “inappropriately blur the lines between the branches of government” (pp. 82-83), but they do not seek to provide any comprehensive discussion of the issue. While all can agree with them that some of the perceived problems with problem-solving courts may be due simply to shoddy practice by some practitioners, legitimate questions about the structure and function of a problem-solving court judge remain. Winick himself refers to the ability of a domestic-violence court judge to be more than “merely adjudicatory” and argues that these judges “can function as an advocate for victims” (pp. 288-89). Others suggest

roles such as cheerleader or coach in the drug-treatment court. Careful exploration of the constitutionality of these new approaches, by someone familiar with the realities of processing cases in the trial courts, is needed.

Ethics. Canon 3 of the Model Code of Judicial Conduct forbids ex parte contact by judges with parties before the court except “when expressly authorized by law.” This may limit the extent to which a judge may have contact with the defendant as a “cheerleader” or “coach,” a role advocated by some of the drug-treatment-court judges. It may also limit the ability to have community groups provide additional staff assistance to the court, as in group staffing of a domestic-violence case in which both court staff members and members of an advocacy group might be involved. Canon 1 requires that a judge “uphold the integrity and independence of the judiciary.” That might limit the ability of the judge of a community court in coordinating with various public or private agencies, depending on the context. Ethics questions have been addressed elsewhere with respect to drug courts (Freeman-Wilson, Tuttle, and Weinstein, 2001), but judges attempting to apply TJ concepts in a variety of contexts would have been aided by a comprehensive discussion in this book.

CONCLUSION

The widespread development of problem-solving courts, especially drug-treatment and domestic-violence courts, was among the major changes in state courts in the past decade. The CCJ/COSCA resolution in 2000 endorsing continued development of problem-solving courts—and broader application of therapeutic jurisprudence methods “where appropriate”—makes the careful study of therapeutic jurisprudence important. Those who want to stay current in the area may wish to subscribe to the *Problem-Solving Reporter*, the National Center for State Courts’ new e-newsletter on problem-solving courts (NCSC, 2004). As for the book, despite its incomplete treatment of some aspects, Winick and Wexler have gathered an impressive collection that both introduces the topic to newcomers and provides additional depth for those already generally aware of the concepts.

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