

Rehabilitating Lawyers:

Principles of Therapeutic Jurisprudence for Criminal Law Practice

by David Wexler (editor)

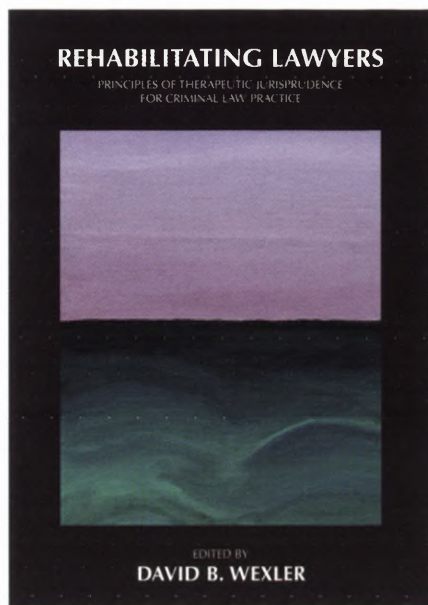
By Rob Guthrie

David Wexler has written extensively on therapeutic jurisprudence (TJ) since his seminal essay, 'Therapeutic Jurisprudence in A Comparative Law Context', in which he noted that 'legal rules, legal procedures, and the roles of legal actors (such as lawyers, judges and often therapists) constitute social forces that like it or not, often produce therapeutic and anti-therapeutic consequences'.¹ He has also written that 'therapeutic jurisprudence focuses our attention on ... humanising the law and concerning itself with the human emotion, psychological side of the law'.²

In some cases, therapeutic approaches may involve the client conceding ground in order to resolve conflicts and allow a process of healing to take place. In the criminal context, TJ requires an accused person to accept responsibility – and therefore guilt – for their actions in order to enter into a rehabilitative phase. TJ can include a range of options, including apologies to the victims, and rehabilitation, counselling and various forms of conditional probation for the perpetrator.

Given his recommendations, it is not surprising that Wexler has drawn fire from some US criminal lawyers who maintain that a therapeutic approach to criminal law in that country would strip their clients of their only ace – the ability to plea bargain before conviction.

Some of this controversy is played out in Wexler's latest offering: an edited collection of essays on various aspects and applications of TJ. Wexler includes not only his own essays, but also strident criticism of it from Professor Mae Quinn. This academic stoush is refreshing and appropriate, and is not limited to the US bun-fight. Quality Australian offerings include a piece by Judge Hampel QC, describing some of the limitations of the TJ model in Australia (for example, detailing



the obligations under the cab-rank rule which might preclude a brief being refused on the grounds that a client did not agree to be involved in rehabilitation programs). On the other hand, former magistrate, Michael King (a pioneer of the Western Australian drug courts) received funding from Safer WA (administered by the Department of Premier and Cabinet) to include Transcendental Meditation programs as part of his pre-sentencing regime. King notes that good outcomes can be achieved through TJ without compromising a client's rights or integrity. Australian barrister, Patrick Mugliston, takes issue with Judge Hampel QC, asserting that adopting a TJ approach can enhance negotiations by encouraging a focus on the parties' continuing relationship and how best to maintain it. These Australian contributions are consistent with the themes of this volume, which courageously debates the issues in the TJ movement which, while contentious, nevertheless appears to be gaining ground.

Ultimately, Wexler is about empowerment in a different way. He recognises

that the law can be disempowering to both perpetrator and victim alike, and that by advocating a TJ approach, actors in the legal system can do more to restore the imbalances caused by the commission of crimes.

Some might argue that the book is limited in scope, given its criminal law focus. Wexler, however, has been urging the wider adoption of the TJ approach in other areas of law. A number of writers have now taken up the cause, and it might be that the biggest impact of the TJ approach is in areas such as personal injuries, workers' compensation, mental health and tenancy matters, where client empowerment is a key element in the dispute process.³

Wexler's collection is a balanced, well-referenced source, and a great primer for this area of theory and practice. It is recommended to academics, interested in TJ from a legal education perspective, as well as others such as court administrators, judges and attorneys-general, who have the clout to implement some of these suggestions. ■

Notes: 1 D B Wexler, 'Therapeutic Jurisprudence in A Comparative Law Context' (1997) 15 *Behavioural Science Law* 233 at 233. 2 D B Wexler, 'Therapeutic Jurisprudence: An Overview' (1999) *Thomas Cooley Law Review Disabilities Law Symposium*, 29 October, available at <http://www.law.arizona.edu/depts/upr-intj/intj-o.html>. 3 K Lippel, 'Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation' (1999) 22(5-6) *International Journal of Law and Psychiatry* 521.

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