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Book Review: The Law and the Older Persons: Is Geriatric Jurisprudence Therapeutic?

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REVIEW OF: THE LAW AND OLDER PERSONS: IS GERIATRIC JURISPRUDENCE THERAPEUTIC?, by Marshall B. Kapp. Carolina Academic Press (2003), 233 pages, \$28.00 (paperback).

Reviewed by **Jennifer Jedrzejewski***

"Every law is an experiment of sorts," says Marshall B. Kapp.¹ It is hard to know at the point a law is being proposed or enacted what that law's actual effect will be. While this is understandable, even unavoidable at times, there is also a lack of any "serious testing phase *after* legislation has been enacted, regulation promulgated, or judicial decision announced to determine the law's actual, as compared with its expected outcomes and impacts."² *THE LAW AND OLDER PERSONS: IS GERIATRIC JURISPRUDENCE THERAPEUTIC?* is concerned with this very problem and, more specifically, how it relates to older persons since they are frequently the intended beneficiaries of legal initiatives and rulings.

Therapeutic jurisprudence grew out of the mental health law research of Professors Bruce Winick and David Wexler in the 1980's.³ Therapeutic jurisprudence is the study of law's healing potential; a concept that supports "rigorous examination of the actual impact of legal rules on providers and funders of health and human services and on the real and potential persons whose quality of care and quality of life those legal rules were intended to improve."⁴ While therapeutic jurisprudence started

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1. MARSHALL B. KAPP, *THE LAW AND OLDER PERSONS: IS GERIATRIC JURISPRUDENCE THERAPEUTIC?* vii (2003) [hereinafter *THE LAW AND OLDER PERSONS*].

2. *Id.* at vii-viii (emphasis added).

3. Bruce J. Winick, *Therapeutic Jurisprudence Defined*, at <http://www.brucewinick.com/Therapeutic%20Jurisprudence.htm> (last visited April 6, 2004).

4. *THE LAW AND OLDER PERSONS*, *supra* note 1, at viii.

out in mental health law, it soon expanded into other areas of law as well.

Professor Kapp suggests that therapeutic jurisprudence (TJ) inquiries should be expanded into the areas of geriatrics and gerontology in order to ask whether legal involvement and intervention in the lives of older persons is actually having the beneficial impact that was anticipated for both the older persons as the intended beneficiaries and society as a whole. Professor Kapp advocates that:

The exact nature and extent of the regulatory and litigation climate intended to protect and promote both the rights and the well-being of older persons should be formulated and constantly fine-tuned on the basis of credible evidence about the impact of various governmental interventions on the lives of older persons and other intended beneficiaries, not as a response to political ideology, administrative convenience, or the economic interests of the professional regulators and litigators.⁵

Professor Kapp is certainly not opposed to the involvement of law, in any of its many forms; in fact, he cites throughout the book the many areas where the involvement of law has achieved its beneficial goals. However, he is concerned that, all too often, "regulation in the United States is driven by a vision that focuses on catching wrongdoers and punishing them for their transgressions—a deterrence and enforcement model—rather than a vision of law and its agencies chiefly as an instrument for solving individual and social problems."⁶ The prevalence of this "enforcement model" as Professor Kapp calls it has caused "common sense" to be sacrificed and the real and actual effects of the laws on the intended beneficiaries to be neglected. Enactment and adherence to laws reflecting this rigid ideology has been favored and in the end, the intended beneficiaries are the ones who suffer the most.

Marshall Kapp has written prodigiously on elder law and policy issues since the late 1970's when he completed his Masters in Public Health at Harvard. He graduated in 1974 from

5. *Id.* at viii-ix.

6. *Id.* at ix.

George Washington University School of Law. His eclectic early career includes commissioned officer in the Public Health Service, legislative counsel for Health Affairs for the New York Office of Federal Affairs, and licensing as a nursing home administrator. During much of his career, he has served as a professor and director of programs at Wright State University in Dayton, Ohio.

Marshall Kapp begins in chapter one by providing persuasive reasons for TJ inquiries. First, Professor Kapp explains, there exists a "realization that any benefits conveyed by legal intervention must be weighed against financial, social and emotional costs imposed by concern about legal compliance and omnipresent external oversight."⁷ For the intended beneficiary of the legal intervention, costs include higher fees for services, impaired quality of care because budgetary constraints result in staff reductions and overall limiting of individual choice and freedom. Second, Professor Kapp suggests "there is need to investigate the effectiveness and efficiency of directive legislation, regulation, and judicial lawmaking in order to evaluate this approach to public policy in comparison to alternative ways of achieving the same quality assurance and elder rights objectives."⁸

TJ inquiries do have their limitations. Effects of legal factors must be isolated from numerous other variables that may influence a particular result. Where the law seems to provide little if any tangible effect, it is essential for public policy formation to ascertain whether the problem lies in inconsistent enforcement rather than in the substance of the regulation itself. In addition, many of the relevant core concepts in a TJ analysis such as quality of life and quality of care, remain frustratingly hard to evaluate with any precision.

Despite these limitations and challenges, Professor Kapp advocates the need for a thorough TJ analysis of the laws in this area for the reasons listed above. To develop a worthwhile TJ research strategy for examining these kinds of subjects, key guidelines should be followed. The guidelines include reflection by the professional team who carries out this work that TJ research and analysis is inherently interdisciplinary and

7. *Id.* at 6.

8. *Id.* at 7.

interprofessional in nature; encouraging and facilitating more of an international TJ investigation of the law's effect on older lives; objective and honest TJ analysis; and keeping in mind the limits, as well as the strengths, of TJ analysis. The data and interpretations gathered from a TJ analysis should be used to inform, but should never be considered sufficient to conclude what the law should be.

Chapter two looks specifically at guardianship reform through the therapeutic jurisprudence lens and questions whether the reform is actually providing the beneficial results hoped for. This chapter states a few problems in determining the best way to reform guardianship, including a lack of clarity about the desired goals of guardianship as well as a lack of sufficient data to allow a proper TJ inquiry. Professor Kapp suggests that better data needs to be gathered so that there can be a proper TJ analysis on the positive and negative impacts of guardianship.

Chapters three and four inquire into how effectively and efficiently current regulatory and litigation strategies surrounding long term care (LTC) are accomplishing their goals and the resulting impact these laws are having on the quality, safety and access to long term care. The TJ inquiry also looks to alternative approaches to achieving these same goals that might be more productive with fewer negative side affects. Professor Kapp explains that a proper and credible TJ inquiry should not "doubt the legitimacy or honorable motivations underlying today's LTC regulatory and litigation environment."⁹ Society contributes financially to LTC through its taxing and spending power and is responsible for using its police power wisely to protect and promote the health, safety, and welfare of the community. Society - acting through the government - has a "valid and arguably even compelling interest in assuring that LTC is provided to those in need at an acceptable level of quality."¹⁰

A proper TJ inquiry in this area ought to concern how "effectively and efficiently current regulatory and litigation strategies are accomplishing their praiseworthy goals, and the extent to which alternative approaches to achieving those same

9. *Id.* at 30.

10. *Id.*

goals might be more productive with fewer negative side effects.”¹¹ Chapter three focuses specifically on a TJ analysis of nursing homes as an important part of LTC, while chapter four looks at home and community-based long term care through the TJ lens.

One of the main problems in both of these areas is that when old laws and regulations seem to not work, the current solution is to replace them with more laws. A “we need new laws to solve current bad laws” approach is far too frequently taken with the hope that the laws will eventually work themselves out, rather than building new laws on evidence of the actual impact these laws are having on the quality of care and quality of life for older citizens. More needs to be done to shift from the current method to the method where evidence is used as the basis for building new laws to ensure that the laws are actually providing the benefits they were enacted to provide.

Chapter five examines both the criticisms and justifications of the “prevailing paradigm shift in health care and LTC financing and delivery away from traditional pervasive governmental (or private) regulation,” which Professor Kapp also refers to as the “regulatory command and control” paradigm, “toward greater consumer choice and individual control in these areas.”¹² This chapter focuses specifically on publicly financed services with a concentration on Medicare and Medicaid and on the long term care financing sector. Because of the emergence of this paradigm shift, Professor Kapp stresses that it is “essential that we compile, analyze and put to effective use in policy making and program development contexts credible, accurate information regarding the actual therapeutic impacts of consumer direction models on their intended beneficiaries.”¹³

Chapter six looks at research involving older participants through a TJ lens. Because many older persons have mental conditions that significantly impair their ability to make certain kinds of life choices, including whether to participate as human subjects or as participants in research projects, the concern is whether they can truly understand the potential risks involved as well as the benefits from participating in such projects.

11. *Id.*

12. *Id.* at 92.

13. *Id.* at 120.

Regulations have been enacted to protect the elderly from potentially being taken advantage of or abused, basically to protect their well being, as well as their rights, in these circumstances. The analysis in this chapter poses questions about the "TJ wisdom of both the regulatory confusion within which research currently occurs and various proposals made or issues raised about possible changes in this arena."¹⁴

Chapter seven concentrates on the consequences of direct end of life regulation. Society's regulation of the dying process continues to grow and this chapter examines whether this regulation has had any noticeable therapeutic effect on the older patients and their families who are the primary intended beneficiaries of this regulation. It is purported that "elder law attorneys have an interesting role in the reform movement to improve care of the seriously ill and dying by promoting palliative care . . . [and becoming] agents of change."¹⁵

In chapter eight, Professor Kapp concludes the book with an examination of "other areas of law that are consistent with the current national culture of victimhood generally, and with a prevailing public stereotype of elderly in particular as pathetic and perpetually in need of someone else's heroic interventions."¹⁶ Discussions include public benefits programs, tort litigation, and the criminal justice system. A TJ analysis asks "whether the law's special treatment of older persons in certain ways exerts the practical impact of protecting or, ironically, stigmatizing the intended beneficiaries of the legal system's benevolent intentions."¹⁷ Professor Kapp demands that:

It is long past time . . . to conduct research that questions the legal *status quo* and to formulate policy responses based on facts rather than blind ideological faith in the value of regulation, in this important arena of public concern where governmental choices have a substantial potential to provide both salvation and stigmatization for millions of older Americans."¹⁸

14. *Id.* at 124.

15. *Id.* at 156 (quoting Myra Christopher, *End-of-Life Care Reform: Is It About "Us" or "Them"?*, 14 NAELA QUARTERLY, 9-14, at 11 (Spring 2001)).

16. *Id.* at 157.

17. *Id.*

18. *Id.* at 171-172.

Professor Kapp's main goal, while certainly a difficult one, is to engage in TJ inquiries in areas of geriatrics and gerontology in the definite hope that by doing so he may help move the agenda of law and aging closer towards a positive, problem solving paradigm.

This book, at only 172 pages, not including the notes, was a very dense read. However, it provided a lot of insight to a new way of thinking about current laws and regulations and how to go about improving them in the future, thus improving the lives of the intended beneficiaries. It was very thought provoking and worthwhile to read and is a method that should be applied to more areas of the law.
