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Elevating TJ:
Structural Suggestions for Promoting a Therapeutic Jurisprudence Perspective in the Appellate Courts

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Therapeutic Jurisprudence (TJ) has moved rather quickly from theory to practice, especially with respect to the role of the judiciary. In fact, more than a decade ago, the Journal Court Review, the official Journal of the American Judges’ Association, devoted an entire issue to the topic of therapeutic jurisprudence. There, it was noted that the bulk of “therapeutic jurisprudence analysis focuses on the trial context,” and that “surprisingly very little has been written about therapeutic jurisprudence in appeals.”

But it was noted, too, that TJ should have a prominent place in the appellate arena. After all, “because appellate courts are final decision makers that not infrequently share their reasoning, they are able to ‘minimize damage’ and engender therapeutic consequences”. Accordingly, to begin to remedy the situation, in that very issue of Court Review, Professor Amy Ronner wrote an essay, “Therapeutic Jurisprudence on Appeal”, emphasizing how appellate courts, in their opinions, can, in sensitively expressing reasons for their rulings, serve a therapeutic function. And, although dealing with an original jurisdiction case in the Supreme Court of Canada, and focusing on group relations between Quebec and the rest of Canada, Professor Nathalie Des Rosiers’ article, “From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts,” in essence launched a branch of TJ scholarship relating to therapeutic jurisprudence in the appellate courts.

For our purposes, Des Rosiers’ work suggests two avenues for TJ that can easily transcend majority–minority relations and can apply to appellate decision-making in general. First, Des Rosiers makes the very important and meaningful point that, in their use of language, appellate courts should not want to

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4 A Special Issue on TJ, Court Review, Volume 37, Issue 1 (Spring 2000)

5 Amy D. Ronner, Therapeutic Jurisprudence on Appeal, 37 Court Review 64 (2000).

6 Id

7 Id.

8 Id.

9 Nathalie Des Rosiers. From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts, 37 Court Review 54 (2000).

10 24 Seattle Univ. L Rev 217-576 (special issue on TJ in the appellate courts)

think only about “how the winner feels but also how the loser does.” So as to minimize destructive effects for the losing party, Des Rosiers suggests the best way for a court to couch its opinion is in a “letter to the loser.”

Secondly, Des Rosiers applauded the doctrinal product of the Canadian Supreme Court case: establishing simply a “duty to negotiate” in the event a clear majority eventually emerges on a clear question of Quebec separation:

(T)he “duty to negotiate “can be seen as a brilliant, process-oriented response to the quandary. Not that it solves anything. Nothing could. But it allows for the debate to continue without shutting up one participant. Quebec’s wishes may require constitutional accommodation, and the rest of Canada would have, at least, the obligation to listen and respond.

More broadly, Des Rosiers suggests an approach whereby “an inventory of process-driven solutions ought to be offered to courts.” Des Rosiers notes, too, that perhaps “lawyering will have to be done differently”, and “the implications for lawyers of a judicial therapeutic approach will have to be examined further.

For TJ purposes, the notion of “process-oriented” solutions seems most important and sensible. Indeed, process-oriented or not, there are clearly some legal doctrines that are likely to serve therapeutic ends far more than others—a point to be addressed below.

The Court Review TJ issue did lead to an immediate flurry of scholarly activity by academics and some judges, but, aside from an occasional opinion expressly acknowledging the importance of a TJ approach in appellate opinion writing, TJ has, in the last decade, not had the impact in the appellate sphere in any way comparable to its influence at the trial level. The present essay is designed to analyze the difficulty TJ has had in gaining an appellate foothold, and to propose some relatively simple

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11 Des Rosiers, supra note 9.
12 Id at 56.
13 Id at 62.
14 Id.
15 Id.
16 Id.
18 24 Seattle Univ. L. Rev 217-576 (Special issue on TJ in the appellate courts).
structural suggestions for altering the situation and for easing the way for TJ to find a prominent place in the appellate arena.

The Problem and Some Suggested Solutions

In my view, Des Rosiers’ assertion that, for TJ to flourish in the appellate courts, “lawyering will have to be done differently” is right on the money, and the lack of developing such a different type of lawyering is the reason we haven’t seen many obvious examples of TJ in the appellate judiciary. Rather, under our traditional adversary system and “argument culture,” where two sides battle it out with forceful briefs, and where the court’s opinion typically tracks the approach, analysis, and often the language of the winning brief, a judicial opinion is far more likely to constitute a congratulatory letter to the winner, rather than the Des Rosier-suggested respectful letter to the loser. Likewise, doctrinal solutions reached by courts are likely to be drawn directly from the position of the prevailing party, and, in crafting their arguments and proposed relief, the therapeutic dimension and its subtleties may not even surface.

Accordingly, the status quo is surely to be the expected result: under the conventional system, the advocates are tasked with helping the courts by marshalling and presenting the best arguments for the respective parties. It is somewhat unrealistic to expect the courts to in essence disregard much of the work presented to them and to craft opinions that depart stylistically in a major way from the briefs. Similarly, it is not to be expected that courts would fashion remedies dramatically different from those proposed by the parties, and in fact it may be regarded as inappropriate for them to do so.

Of course, we should not encourage lawyers to engage in lawyering whereby they no longer marshall and present the best arguments for the respective parties. Where, then, should the “different” lawyering so necessary to the TJ task come from? How can the courts be assisted in their own work by lawyers doing things somewhat differently than what would follow naturally from our conventional system?

My proposal is two-fold, one for each of Des Rosiers’ proposed paths (letter to loser opinions, and therapeutic doctrinal solutions). Regarding the first path, we should, in my view, alter somewhat—the role of judicial law clerks, both the ‘recent law graduate’ type, the well-credentialed graduates who spend a year or two working for the court or for a particular judge, as well as the so-called ‘career clerks’ (CC), often called Appellate Court Attorneys or Appellate Staff Attorneys-- the group of law clerks, often women, who are highly qualified, experienced, and who are sometimes seeking a

21 Luther Munford, Writing the Effective Appellate Brief, Vol.5, 5th Cir. App., Rep. 25, 26 (1987) ("...an effective brief makes it easy for the court to write an opinion deciding the case in the client’s favor. An appellee’s brief or an appellant’s reply brief that responds thoughtfully to the issues previously raised can be particularly helpful to the Court"). See also David B. Wexler, Therapeutic Jurisprudence and the Culture of Critique, supra note 20, at 264 and 266.
better work/life/family balance—a ‘saner’ (i.e., more therapeutic) career in law than is ordinarily found in typical law practice. As explained below, these court staff attorneys could be encouraged to help the courts by drafting proposed opinions more in line with the Des Rosiers “letter to the loser” proposal. Moreover, if related studies of judges are any indication, the revised role is likely to add to the professional job satisfaction of the law clerks.\(^{23}\)

Regarding the crafting of doctrinal solutions, my suggestion is that what is needed is groups of lawyers, perhaps from foundation-funded public interest law firms or affiliated with law school clinics, who would “troll” for appropriate cases and petition to participate in such cases as *amicus curiae*. The client could be an organization formed specifically for encouraging the development of a legal system—in this case especially an appellate judiciary—more attuned to helping society by formulating therapeutically viable rulings. Let us look at the two TJ appellate paths in turn.

**1. The Letter to the Loser**

In many situations, before we even reach the *form* and *tone* of an appellate “letter”, we need to face the fact that there is no letter of any kind: the summary per curiam affirmance (SPCA), a technique used for efficiency in the large number of cases, especially many criminal appeals brought by publically-paid defense lawyers, where the clear and obvious result is a simple affirmance of the conviction.

But the fact that there may be no legal merit to a party’s claim does not, in TJ terms, support the SPCA technique. In fact, in a follow-up piece to her *Court Review* article, Professor Amy Ronner, writing with her mentor, the late Bruce Winick, railed against the SPCA on TJ and procedural justice grounds: \(^{24}\) a SPCA says nothing at all to the losing party—or to his or her lawyer—to indicate that the party’s argument was heard and attended to. The highly anti-therapeutic result may be a perception by the party of unfairness or worse, an attitude not at all helpful in encouraging respect for the law and an acceptance, however reluctant, of the need to put the matter behind and to begin to look toward the future. The lawyer, too, will be left disheartened, embarrassed before his client, silenced by the court, unable to convince the client that the lawyer competently presented the client’s case. And the client—especially a client in a criminal case with an assigned public defender—may already doubt the level of representation provided by a defender instead of a “real” lawyer.

To establish that a litigant was given “voice”, and that the court attended to the litigant’s contention (“validation”), Ronner and Winick urge courts to produce a very short written statement merely reciting the salient facts, mentioning some of the arguments, and noting the authority calling for the result reached. In essence, they are urging a short (and most likely unpublished) “therapeutic” affirmance.


\(^{24}\) Amy D. Ronner & Bruce J. Winick, Silencing the Appellant’s Voice: The Antitherapeutic Per Curiam Affirmance, 24 Seattle Law Review 499 (2000). Consider the Kansas rule on summary affirmances, Kan. S. Ct. R. 7.042, which mandates specifically that “The opinion will be in the following form: ‘Affirmed under Rule 7.042(a) (b) (c) (d) (e) and/or (f).’”
The brief opinion, which might even throw a bone to the attorney (e.g., “Counsel has ably argued the search and seizure issue, but we are bound to follow the X case, which remains good law in this jurisdiction and which goes against appellant’s contention”), will give the attorney some material to use in a conversation with the client, and should convey to the client that the court understood the arguments made by the client through counsel.

Ronner and Winick note that the type of brief written affirmances they urge “would not consume considerably more time than a PCA,” and “could essentially be constructed from a law clerk’s case summary or memorandum.” It is here where I would go a simple step beyond their recommendation, and would propose that the law clerk personally prepare and append to the memorandum a proposed very short opinion evidencing the “voice” and “validation” points mentioned above.

Judges could prepare orientation memoranda for their clerks, along the lines of what judge Jack Weinstein does in the Eastern District of New York, explaining, among other matters, the importance of therapeutic jurisprudence and procedural fairness concepts and how they relate to the preparation of judicial opinions. Examples might be provided, along the lines of some suggestions given by Ronner and Winick, as well as some real-world examples. As to the latter, Judge Steve Leben, a judge of the Kansas Court of Appeal, has at least two superb illustrations, both in civil cases. Leben is well versed in TJ—in fact, he is editor of Court Review—and is co-author, together with American Judges’ Association President Minnesota judge Kevin Burke—of the Association’s impressive White Paper on Procedural Fairness.

Judge Leben has accordingly known of Ronner’s Court Review essay since its publication, and has twice cited it in concurring opinions—opinions in which he believed the majority reached the right result but where Leben believed the losing litigant deserved more of an explanation. Both concurrences occur in “unpublished” opinions, meaning they are prepared principally for the benefit of the parties and their counsel, and that there are limitations on citing them as authority.

26 Ronner & Winick, supra note 24 at 506.
27 Id
28 Jack B. Weinstein, The Roles of a Federal District Court Judge, 76 (2) Brooklyn Law Review 439 (2011), available at: http://www.brooklaw.edu/~media/PDF/LawJournals/BLR_PDF/blr_v76ii.ashx While the TJ concerns emphasized here relate to the impact on the parties, there are also obvious TJ concerns relating to how an appellate opinion treats the ruling below and the judge who made it. There is a good TJ literature on this, which can be included in a memorandum to law clerks, although this particular TJ strand is something in which appellate judges themselves should be well-versed. See generally Michael S. King, Therapeutic Jurisprudence, Leadership, and the Role of Appeal Courts, 30 Australia Bar Review 201 (2008).
29 Id
In one of those cases, Judge Leben understood why Davis, the losing party, might not understand the court’s decision. Apparently, Kansas interprets a rule regarding deference to be given a trial judge’s findings of fact differently from the interpretation given by federal courts, even though the state and federal rules are, textually, nearly identical. Leben explained the Kansas rule and noted that “Kansas has consistently applied its own standard for decades, and we have certainly not deviated from it. Under the standard of review that we must apply, the evidence is sufficient...to uphold the district court’s factual findings.” Leben concludes: “The district court’s conclusions are internally consistent based on the testimony it found credible. We have reviewed the case and considered the evidence, and we have applied the well-established standard of review. As such, I am confident that we have made a proper and fair decision under the law as it stands, and we have given careful consideration to the well-crafted arguments from both sides.”

The other Leben concurrence involved the application of the *res judicata* rule in an adoption and parental rights case in which a father, *pro se*, filed multiple pleadings and lengthy briefs attempting to re-gain his rights with respect to his son, now living for many years with adoptive parents. To give a feel for how a respectful letter to the loser might be written, I think it is well worth presenting Judge Leben’s six paragraph opinion in full:

“The history of N.M.’s sporadic appearances in the Kansas court system to reassert claims that he previously had abandoned suggests that he may not understand some of the overriding legal principles we must follow. I offer this concurring opinion in the hope that he may yet understand them. See Ronner, Therapeutic Jurisprudence on Appeal, 37 Ct. Rev. 64 (Spring 2000).

The American court system works hard to ensure that court proceedings involving children are resolved in as short a time frame as possible. We recognize that children deserve an answer to the most basic questions about their lives--like, who are my parents? Where will I live?--within a time frame that is reasonable as judged from a child's viewpoint.

The ultimate need for legal disputes to be resolved, so that people may get on with their lives and business affairs, is also the driving force behind the legal doctrine called *res judicata*. Under *res judicata*, when a dispute has been decided in a final court judgment, the same issues may not be relitigated in a later suit. That allows parties to go on about their business based on the court's final judgment without worrying that some later court action might yet revisit the same issues.
The court's opinion has correctly held that res judicata applies here. N.M.'s parental rights were terminated by the district court in its January 2003 ruling. N.M. appealed, but when he dismissed that appeal, the district court's ruling terminating his parental rights became a final judgment. And after that, the proposed adoptive parents proceeded with their adoption of B.M.J.F. based upon the final judgment, which terminated N.M.'s parental rights. So res judicata prevents further litigation over the matter.

Even if some exception to the res judicata rule were available—and I am not aware of one—this is exactly the sort of case in which we would be reluctant to apply it. This child has lived with the adoptive family from a few days after his birth in 2002 until now. From the time the adoption was finalized in October 2004 until N.M. filed pleadings in April 2009 seeking to reopen the case, the child's family knew that there was a final judgment terminating N.M.'s parental rights and an order of adoption in place. When we look at this situation from the standpoint of the child, he has had only one home and one family. He and his family have a right to rely upon the finality of the 2003 ruling terminating N.M.'s parental rights, a judgment that became final when N.M. voluntarily dismissed his appeal in 2004.

N.M.'s continued interest in his biological son is understandable, perhaps even laudable. But no matter its sincerity, it is no longer an interest that Kansas law can force this 8-year-old boy's adoptive parents to respond to.”

Judge Leben's concurrences are wonderful models—whether we are dealing with a very short opinion that is an alternative to a summary per curiam affirmance, or even with a full-blown opinion on a controversial issue, such as the Quebec secession example that served as a springboard for Professor Des Rosiers’ article. Implementing the respectful letter to the loser technique in opinion writing would take us a long way towards improving appellate courts—and their image.

But note that Judge Leben’s writing required some extra effort; his remarks couldn’t flow easily from the written briefs. Perhaps, following Judge Leben’s lead, more appellate judges will undertake the extra effort to better explain their rulings. And here is an area where law clerks—and especially experienced career clerks(CCs)—can perform an important function, taking the extra effort and drafting proposed opinions using TJ and procedural justice insights. Many methods can be explored—whether the clerk’s opinion is the original effort or, instead, whether a judge-drafted opinion could be referred to a CC for suggested re-casting. Similarly, the opinion could be a proposed opinion for the court or it could take the form of a proposed concurring opinion. If some job openings exist or can be created, the work could be sufficiently rewarding to attract legal writing instructors who might wish to spend a sabbatical year in such a setting.36 Others will have additional ideas. The important point at this stage is for us simply to recognize the importance of recasting appellate opinions and of exploring a “different kind of lawyering”

to bring TJ to the appellate bench. Let us now proceed to the second branch of that lawyering—the proposing of legal doctrines and remedies that may serve a therapeutic function.

(2) Proposing Legal Doctrines

The second prong of Des Rosiers’ proposal was to offer up to the courts an inventory of devices—such as the “duty to negotiate”—that would serve as “process-oriented solutions.” And I believe a doctrine need not necessarily be “process-oriented” in order to function in a therapeutic way. In fact, inspired by Des Rosiers’ work, I wrote a paper in 2002 entitled *Lowering the Volume through Legal Doctrine: A Promising Path for Therapeutic Jurisprudence Scholarship.*

It is my thesis that therapeutic jurisprudence scholarship can contribute to the formulation of legal doctrine—process-driven solutions or otherwise—that can contribute to preserving relationships, to promoting dialogue rather than debate, and, in general, to diffusing anger, to curtailing contentiousness, and to turning down the volume so that creative problem-solving might ensue.

In the article, I gave a number of examples—some of which worked in practice better than others—one of which was the “default” rule component of *Miranda,* which specified the warnings and waivers required by the Court will apply “unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it.”

There has been some more recent work that can be conceptualized as falling within this broad area of creating preventive and therapeutic legal doctrines. One important and interesting contribution is attorney Luther Munford’s *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare.* In it, and in a follow-up article a few years later, Munford proposes a peacemaker test against which to gauge legislation and also court-created doctrine. He asks specific questions about proposed rules (such as whether they promote the finality of decisions and whether they help the parties reconcile and form more cooperative relationships), and applies his so-called “peacemaker test” to various legal

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38 *Id* at 125.
39 *Id* at 128.
40 *Id* at 127.
43 The components of the peacemaker test are: control over who participates in the dispute, respect for both parties, respect for the court, finality and reconciliation. In a private communication, Munford noted that this essay’s earlier discussion of a respectful letter to the loser would, in his scheme, fall under the category of respect for the parties. He further noted that it is important for appellate courts to show respect for lower courts, including when the appellate court is reversing a court below. That observation would fall into Munford’s category of showing respect for the court. Although not a focus of the essay at hand, I have noted earlier, supra n. 3, the TJ importance and implications of appellate judges being attuned to the reaction of lower court judges and judicial
doctrines, such as the “lost value of life”\textsuperscript{44} and the “vacatur of court decisions to facilitate settlement.”\textsuperscript{45}

We need not go into details about the operation of the peacemaker test, nor even attempt to evaluate its conclusions, to know at least that Munford is more or less on the same wavelength as others who seek to create therapeutic/preventive legal doctrines. In his words\textsuperscript{46}:

\begin{quote}
(T)his article speaks…..to legislatures and courts who write substantive and procedural law. .....(T)hose who make laws should craft them so that the laws help the parties resolve the disputes the laws will create....(L)aws should not only create rights but should also make it as easy as possible for adversarial parties to resolve the conflicts those rights beget......The law itself will then either eliminate disputes or make them easier to resolve. ...((T)his process might be called “preventive” dispute resolution.
\end{quote}

Australia has long been a leading force in therapeutic jurisprudence\textsuperscript{47} and non-adversarial justice, \textsuperscript{48} and, in a recent symposium issue of the Monash University Law Review, Robyn Carroll and Normann Witzleb wrote an on-point article about the “vindicatory” effect of private law remedies.\textsuperscript{49} They, too, are on the TJ doctrinal wavelength.

In contrast to the “letter to the loser” strand of appellate court TJ, where, apart from Judge Leben’s work, we have not seen obvious examples of TJ at work, the doctrinal strand, at least through the work of Munford and Carroll and Witzleb, has shown some recent, up-to-date activity. But, again, for the work to really reach the appellate courts, lawyering will need to be done differently. Surely, some lawyers will advocate for therapeutic remedies, devices, and doctrines, but, without a conscious lawyerly effort to explore, for example, whether a rule does or does not meet the “peacemaker test”, courts are unlikely on their own to venture into that exercise. More than a decade ago, in the “Lowering the Volume” article, I suggested the \textit{amicus curiae} idea\textsuperscript{50}.

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\textsuperscript{44} Id at 398.
\textsuperscript{45} Id at 402.
\textsuperscript{46} Id at 379.
\textsuperscript{47} E.g., Michael S. King, Solution Focused Judging Book, note 3.
\textsuperscript{50} David B. Wexler, supra note 17 at 133.
It is not clear at the moment how traditional appellate advocates can best propose these therapeutic and preventive doctrines. Of course, courts could create and shape these doctrines on their own, even if the doctrines are not served up to them in the briefs of the appellate advocates. Such a course of action is, however, both burdensome and a bit risky. Perhaps issues and proposals of the type suggested here might best be presented to courts by *amicus curiae*, prepared by lawyers and scholars attached to various emerging law school centers relating to therapeutic jurisprudence, preventive law, creative problem-solving, and the like. Such centers would be ideally suited to generating legal and interdisciplinary scholarship regarding therapeutic and preventive legal doctrine, and to introducing law students to professional roles as peacemakers and creative problem-solvers.

I think it is time to dust off the *amicus* proposal, update it, think through its logistics, and seek to implement it. In the more than a decade since the early literature on TJ and appellate courts, TJ and related perspectives have matured significantly. Academically, interest has developed in a number of law schools, from Monash Law School in Victoria, Australia to the International Network on Therapeutic Jurisprudence at the University of Puerto Rico, and to the new Phoenix School of Law in Arizona, which plans to have an annual issue devoted to TJ and related comprehensive law topics. Outside of academia, groups like the Center for Court Innovation have been extremely influential in the creation of new and exciting judicial programs, many of them closely connected to TJ ideas.

Perhaps a number of institutions—the above and many others—can join forces to think through and create one or more public interest law firms dedicated to bringing therapeutic/preventive doctrines to the appellate courts, and organizations can be formed to promote these goals and to serve as *amici*. We now have the raw material for creating important doctrines, but we need also to create the lawyering essential to carry the proposals to the courts. And we will need to develop methods for “trolling” for appropriate cases. Perhaps an organization dedicated to the promotion of peacemaking and therapeutic solutions in law could be formed, with an interdisciplinary membership of practitioners, scholars, and thoughtful citizens. Such a group could discuss the kinds of cases that could be enriched by a TJ/peacemaker input—by a new type of lawyering—and could decide in which cases a public interest law firm could propose to file a brief on behalf of the organization.

Some cases (like those involving psychotherapist-patient privilege) will call out for TJ *amicus* intervention, but others—such as some of the rules discussed by Munford and by Carroll and Witzleb—

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51 Consider how the psychotherapist-patient privilege case, *Jaffee v. Redmond*, 116 S. Ct. 1923(1996) could have been influenced had Bruce Winick, in addition to preparing a law review article proposing the Court’s adoption of the privilege in federal cases, assisted in the preparation of an *amicus* brief containing some of his excellent therapeutic jurisprudence insights, such as the following one:

The important question (left unanswered by recent empirical research) is whether a Supreme Court opinion on this question will significantly increase awareness of the privilege, and whether such awareness will affect patient decisionmaking concerning whether to seek therapy. A new state statutory enactment of a psychotherapist-patient privilege is unlikely to make the front pages or the evening news, while a Supreme Court decision *denying* such a privilege will.
may be much less obvious, and will require highly capable attorneys “thinking” TJ, thinking peacemaker test, thinking appropriate default doctrines, thinking process-oriented solutions, and the like. Moreover, many of those cases may, on their surface, seem rather “routine”, not the stuff of typical amici briefs—which deal with hot-button human rights issues and the like. Here, an important task is to change judicial and juridical consciousness: many so-called “ordinary” cases, when finally looked at through the important TJ/peacemaker lens, should no longer be deemed “ordinary.” Only with the efforts and changes noted here can we really hope to “elevate” TJ so that it is felt in the appellate courts.