

# Thoughts on Some Potential Appellate and Trial Court Applications of Therapeutic Jurisprudence

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To date, the application of therapeutic jurisprudence principles has been concentrated mainly on specialized trial courts: drug treatment courts, domestic violence courts, criminal courts, and juvenile and family courts. Its application to trial courts generally, as well as its application to the appellate courts, remains largely unexplored. This Article considers three areas in which trial and appellate courts may want to consider applying therapeutic jurisprudence.

My conclusions about the application of therapeutic jurisprudence to the appellate courts are admittedly tentative ones: my day job is sitting as a state general jurisdiction trial judge, not as an appellate court judge. Although I have had the opportunity to sit by designation on my state's appellate courts, the writing of appellate opinions is not my daily fare. From my vantage point, however, both trial and appellate courts can, in many instances, do similar types of things to achieve a more therapeutic outcome.

## I. EXPLAINING THE ROLE OF THE COURTS

It is often the case that a court's potential role in resolving the disputes that come before it is much more limited than the public in general—and the litigants in particular—realize. When citizens appeal government action in the courts, for example, they rarely think in advance about the standard of review that will be used to judge that governmental action. Rather, having lost in round one, they seek a second round to press their case on the merits.

The handling of zoning appeals provides a good example. I wonder how often lawyers take the time to explain to their clients the role the court will play in resolving these disputes. I recently handled the appeal of a city's approval of a large auto mall in one of the Kansas-

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side suburbs of Kansas City.<sup>1</sup> The appeal was filed by neighboring property owners and their homeowners association, each of whom had opposed the rezoning before the city commission.<sup>2</sup> I did not think of it as therapeutic jurisprudence at the time, but, in addition to noting that I had reviewed the full 2,600-page administrative record,<sup>3</sup> I devoted a full page of the 15-page opinion to a discussion of the role of a court in zoning matters:

We live in a democracy in which many of the important decisions to be made that affect our lives are rightly to be made by our elected officials. Although the consideration by a city council of a rezoning request is deemed a quasi-judicial proceeding, the initial decision is to be made by elected officials, not judges. It is in the making of that initial decision that a great deal of discretion exists. In a given case, it might well be a reasonable decision *either* to grant *or* to deny the requested rezoning, and the decision would depend upon the elected body's preferences for its city's development.

The Kansas Supreme Court has appropriately recognized the proper role of courts in reviewing the zoning decisions made by elected officials:

Our standard of review is reasonableness. In our view cities and counties in Kansas are entitled to determine how they are to be zoned or rezoned. Elected officials are closer to the electorate than the courts and, consequently, are more reflective of the community's perception of its image. No court should substitute its judgment for the judgment of the elected governing body merely on the basis of a differing opinion as to what is a better policy in a specific zoning situation.

This Court has no doubt that the plaintiffs in this case sincerely believe that the course of action taken by the Overland Park City Council in rezoning property for an auto mall was the wrong course of action. But, the decision to allow this rezoning was well within the range of reasonable actions that can be taken by an elected body. The Overland Park City Council spent more than five hours considering this zoning request at its July 19, 1999, meeting, ultimately approving the rezoning in a unani-

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1. Lancaster Homes Ass'n v. City of Overland Park, No. 99C10769, slip op. at 1 (Johnson Co., Kan., Dist. Ct. Jan. 6, 2000).

2. *Id.*

3. *Id.*

mous vote sometime after 1:00 a.m. the next morning. There is no basis in this record for a court to second-guess that decision.<sup>4</sup>

What I did in that district court opinion—and what I think we need to do more often—was to recognize that the opinion would, as Professor Des Rosiers aptly put it, in part be a “letter to the loser.”<sup>5</sup> One item that will often be appropriate in such a letter is a statement of the role of the court in the dispute at issue, accompanied by some explanation of the reason for that role. Such an explanation should make it easier for the losing party to understand and accept the court’s decision.

The zoning appeal case is another form of the majority/minority conflict that Professor Des Rosiers has noted.<sup>6</sup> The majority has acted through its elected representatives on the city commission to allow the rezoning request. A minority group, which may include an entire neighborhood or subset of the community, is upset. The traditional legal rules do impose, as Professor Des Rosiers suggests, a process-oriented solution. Since the elected officials have the ability to take any action, so long as it is reasonable, the best course of action is either to make a better case to those local officials or to make a case for different local officials at the next election. When the courts take the opportunity to explain that this is the case—as well as why it is so—the losing side should both understand and accept the decision more easily and be able to handle such situations more productively in the future.

Judge Deanell Tacha, among others, has noted the role judges and lawyers can play in fostering public understanding of the basic concepts of our judicial system.<sup>7</sup> Although community involvement and public education by judges is one way to do it, we should not overlook the opportunity to do so in our opinions as well.

## II. FRANKLY DISCUSSING THE COURT’S LIMITATIONS

Sometimes, courts are not the best place to resolve a problem. Whether in the Elian Gonzalez case,<sup>8</sup> or in a case in which the rights of adoptive and biological parents are in opposition, courts have limi-

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4. *Id.* (quoting *Landau v. City Council of Overland Park*, 767 P.2d 1290, 1301 (Kan. 1989)).

5. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of the Courts in Minority-Majority Conflicts*, CT. REV., Spring 2000, at 56.

6. *See id.* at 57.

7. *See generally* Deanell Reece Tacha, *Renewing Our Civic Commitment: Lawyers and Judges as Painters of the “Big Picture,”* 41 KAN. L. REV. 481 (1993).

8. *See Gonzalez v. Reno*, 215 F.3d 1243 (11th Cir. 2000); *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

tations. When considering time from the vantage point of a child, one of the most significant limitations is that things simply take too long. There are other limitations, too, of course. Judges are usually neither psychologists nor social workers and will—even at the end of the hearing—have far less information about the family than it has about itself.<sup>9</sup> Would families try a little harder to resolve these cases on their own, based on their knowledge and their mutual love for the child, if they had a better understanding of the limitations of the courts? Should appellate courts, as well as trial courts, help to spread that message?

There is another limitation that courts usually avoid mentioning: sometimes, we are just plain wrong on the facts or on the law. Judges generally have no special training in discerning truth-tellers from storytellers at trial.<sup>10</sup> I have, on several occasions, had situations in which it was very difficult to determine what the facts of a case really were. In such cases, it is quite possible that justice will not be done because, lacking omniscience or a time-travel machine, I cannot absolutely know the truth. In those cases, I devote some extra time to explaining the burden of proof and to discussing the possibility that I have gotten the facts wrong.<sup>11</sup> From a therapeutic jurisprudence standpoint, such explanations should help the inevitable, occasional

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9. An excellent summary of the many reasons courts should be the choice of last resort for resolving family disputes can be found in chapter 11 of M. SUE TALIA, *HOW TO AVOID THE DIVORCE FROM HELL AND DANCE TOGETHER AT YOUR DAUGHTER'S WEDDING* (1997). In my view, that chapter would make a great hand-out, a good message from the judge at the first conference with the parties, or the basis for a good civic club speech.

10. In a controlled study in which a group of 110 judges with an average of 11.5 years on the bench attempted to tell which of 10 individuals were telling the truth and which were lying, the judges did no better than chance in their judgments. Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?* 46 AM. PSYCHOLOGIST 913 (1991). Judges need not feel too bad, however. In the same study, FBI polygraph agents, police robbery investigators, and psychiatrists also failed to do better than chance. Only Secret Service agents scored well at being able to detect deception among groups tested. *Id.* at 913-16. A recent study suggests that training in deception detection may not be of any help for most people, anyway. See Saul M. Kassin & Christina T. Fong, "I'm Innocent!": *Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUMAN BEHAV. 499 (1999) (observers who received training in deception detection scored lower in their ability to distinguish between truthful and deceptive subjects).

11. The explanation might go something like this:

Before I tell you what I think happened here, I want to talk with you about the burden of proof in civil cases like this one. In a criminal case, the prosecutor has to prove guilt beyond a reasonable doubt, which is a very hard standard to meet. In civil cases, the burden of proof is simply what's "more likely than not." So, on contested issues, I simply have to determine what I think is the more probable way things happened. I may be wrong, as I'm sure happens sometimes. But I've listened to each of you and it's my job to make findings of fact, indicating to you what I think "more probably than not" happened here.

truthful-but-losing party to recognize that I have listened carefully to the testimony and that I have tried my best to get it right.

Appellate courts seem to make such comments quite rarely. A LEXIS search turned up only a handful of state or federal appellate cases in which a court conceded that resolution of the factual issues was a "close question." Although searches for other words or phrases likely would produce some additional cases, such an admission from the courts appears to be an infrequent event. One of the best I found came from the Court of Appeals of Kentucky:

The trial court heard the evidence and saw the witnesses. It is in a better position than the appellate court to evaluate the situation. The court below made findings of fact which may be set aside only if clearly erroneous. We do not find that they are. They are not "manifestly against the weight of the evidence." A reversal may not be predicated on mere doubt as to the correctness of the decision. When the evidence is conflicting, as here, we cannot and will not substitute our decision for the judgment of the chancellor. We do not doubt that the chancellor was correct, however, we recognize the very close question which was presented. We hope that wisdom has been provided so that the decision reached will prove to be correct.<sup>12</sup>

In one short paragraph, the court not only stated the applicable standard of review for trial court fact findings, it also gave the parties the rationale for that rule (that the trial court has the most direct contact with the witnesses and evidence), recognized that the evidence was conflicting, and acknowledged that a "very close question" was presented.

Such comments are at least as valuable on appeal as they are at the trial court level. Judges certainly know that a case that has been appealed is one in which the losing side has a strong emotional or financial interest in the dispute. If the parties to that case have continued dealings with each other, it could be helpful for them to realize that their appeal has been taken seriously—that even though the appellant believes the district court got it wrong, it was a close call and, in such cases, the appellate court must defer to the judge who heard them most directly. The Kentucky case quoted above was a custody case in which future contact between the parties would be inevitable.<sup>13</sup> The losing party would, I think, have been somewhat more likely to feel that he had been taken seriously, and that he had done everything he could have done to achieve what he thought was

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12. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. Ct. App. 1967) (citations omitted).

13. *Id.* at 569.

right, all of which could leave him feeling better with the result than he might have otherwise. Even if the parties to the case do not have continued dealings, acknowledging that the trial judge's factual findings are not sacred and are just the best one impartial person hearing the evidence could do should be helpful in making the losing party realize that the justice system took its concerns seriously.

### III. OVERCOMING CYNICISM IN THE CRIMINAL COURTS

I was in the chambers of a criminal court judge recently on a day that the prosecutor was dismissing charges against an individual because the necessary witnesses were not available. Someone noted that the defendant had spent some time in jail awaiting trial. The judge made a comment such as, "I don't really feel too sorry for the criminals who come through here."

"Don't you mean *alleged* criminals?" I asked.

He looked at me and took a moment before he replied. As best I can recall, he said, "Usually, if they didn't do the crime they are charged with, they're mixed up in something else for which they could have been charged or punished."

I know that judge well and, in my opinion, he is a good judge and a decent person. I suspect his attitude is fairly typical among judges, both trial and appellate. When I sat on our state's appellate court, we heard about 30 cases on a docket. When the judges receive cases on appeal, do they start out with the view that reversals are highly unlikely in criminal cases in which the appellate public defender is representing the person convicted? Most of the time, I suspect they do. I am *not* saying that appellate court judges fail to review these cases carefully. Most of the time, I suspect that they do engage in careful review. What I wonder is how this cynicism plays itself out, in trial and appellate courts, in the appearance and reality of fairness from the perspective of the criminal defendant.

It seems to me that therapeutic jurisprudence might have something to offer here, and not just in drug courts. Professor Tom Tyler argues convincingly that the perception of fairness of the process is the key to confidence in our justice system:

When we look at what people really care about, that is, what drives their confidence, what leads them to be willing to accept decisions, we usually find that the key factors are issues of process, what people experience in the manner in which their cases are resolved. . . . Studies consistently find that the most important factor in determining whether people accept court decisions is whether they trust the authorities who made those deci-

sions. . . . What leads authorities to be trusted? The key factor seems to be hearing some explanation or account for decisions that are made.<sup>14</sup>

At the trial and appellate levels, a sense of cynicism about the presumption of the defendant's innocence or the prospect that his rights may have been ignored in a fundamental way can lead to the appearance of the courts as an assembly line, both from the public's outside perspective and the judiciary's internal one.

An extensive 1999 national survey found that almost 70% of African-Americans believe that African-Americans, as a group, get "somewhat worse" or "far worse" treatment from the courts than do whites or Hispanics.<sup>15</sup> According to the survey, African-Americans also believe that "wealthy people" receive "better treatment" from the courts, and they feel this way at a rate that is higher than whites or Hispanics.<sup>16</sup> Given the statistics we read from time to time about the high percentages of young African-Americans involved in our criminal courts,<sup>17</sup> I would think that this view of the world might be shaped in large part by the way criminal defendants are, in their experience, treated. If we step back for a moment and try to look at our criminal justice system without cynicism, conceding that it is possible that innocent people are caught up in this process from time to time and that even the guilty may one day return to society, we must also concede, I think, that there are parts of the system that would lead criminal defendants to believe it does not give them a fair hearing.

At the trial level, the assembly-line process involved in the various pre-trial proceedings is hard to avoid. Substantively, it is hard to contend that our system can achieve "equal justice under law" when, in many cases, the disparity between the resources of the prosecutor and those of an appointed or public defense counsel are so large. When I was in private law practice, I represented the owner of a leaking hazardous waste site. Our client had been sued by neighbors of the site, who claimed that small quantities of toxic contaminants had been found in blood samples taken from them. We promptly issued a subpoena to the lab, located several hundred miles away, and went

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14. Tom Tyler et al., *Public Opinion of the Courts: How It Has Been Formed and How We May Reshape It*, CT. REV., Fall 1999, at 48-49. For a more detailed discussion of his views, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

15. David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, CT. REV., Fall 1999, at 26.

16. *Id.*

17. One of the most frequently cited statistics, from a 1995 report, is that nearly one in three (32.2%) African-American men aged 20-29 is under criminal justice supervision (prison, jail, probation, or parole) on any given day. MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* (1995).

there for a deposition. We learned that the lab's procedures had a number of problems and that the mayor of the nearby city, who did not live anywhere near the hazardous waste site, had been shown to have the same chemicals in his blood sample when tested at the same lab. All of that information would be important to someone actually trying to find the truth. It is a rare case, however, in which a criminal defendant is able to marshal such resources to challenge a test result offered by a prosecutor.

I wonder whether more could be done, at both the trial and appellate levels, to give observers a clear sense that the court has provided the defendant a fair hearing.<sup>18</sup> In their new book, *Actual Innocence*, Jim Dwyer, Peter Neufeld, and Barry Scheck present data on 62 cases nationwide in which convictions have been overturned because DNA evidence proved that the convicted defendant had not committed the crime.<sup>19</sup> With the benefit of hindsight, knowing that these were, in fact, innocent men, it is interesting to go back and look at some of the appellate decisions in their unsuccessful criminal appeals. The decisions are fairly typical, giving no explicit concession to the possibility of error.<sup>20</sup> In the case of Kerry Kotler, wrongly convicted of rape, robbery, and burglary, the court modified his sentence slightly based on a miscalculation by the trial judge.<sup>21</sup> The entire statement of the appellate court about the merits of his case on direct appeal was this: "In considering the defendant's other claims on appeal, we find that any errors that occurred were unpreserved for appellate review, and we decline to exercise our interest of justice jurisdiction to review

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18. Therapeutic jurisprudence principles could also be applied to insure that victims of crime would be more likely to perceive that their interests had received a fair hearing. In the limited space available here, I am not able to separately develop that related topic.

19. JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

20. In one of these cases, Calvin Johnson, Jr. was wrongly convicted of rape, aggravated sodomy, and burglary. *Johnson v. State*, 388 S.E.2d 866, 867 (Ga. Ct. App. 1989). Evidence was presented at trial purporting to connect him not only to the crime for which he was charged, but also to two similar crimes in the same area. On appeal, the Georgia Court of Appeals said: "We are satisfied that sufficient evidence was adduced at trial to establish that appellant was in fact the perpetrator of the three incidents presented by the State." *Id.* at 868 (emphasis added). In another case, the wrongful convictions of Billy Wardell and Donald Reynolds for aggravated criminal sexual assault and other charges were affirmed. *People v. Wardell*, 595 N.E. 2d 1148, 1150 (Ill. App. 1992). The court stated: "We affirm Wardell's conviction *beyond a reasonable doubt* and the trial court's decision to refuse to order the DNA tests requested by Reynolds." *Id.* at 1150 (emphasis added). Of course, when DNA testing was finally obtained several years later, it proved that the defendants could not have committed the crime. *DNA Tests Free 2 Imprisoned 11 Years*, *THE WASHINGTON POST*, Nov. 19, 1997, at A4. While the language cited in this footnote tidied up both appeals quite nicely, one wonders whether it might not have been better to have acknowledged the possibility of error, even while finding that sufficient evidence was present to allow each judge and jury to reach the conclusions they did.

21. *People v. Kotler*, 118 A.D.2d 592, 592-93 (N.Y. App. Div. 1986).



such errors.”<sup>22</sup> A lay person would naturally wonder why the appellate court was so unwilling to consider the “interest[s] of justice.” Reading that statement from the court, it would have been hard for Mr. Kotler to believe that anyone had listened to or cared about his situation.<sup>23</sup>

#### IV. CONCLUSION

Therapeutic jurisprudence offers a new vantage point from which to view some old problems. At first glance, its premise is simple: things done in court will affect the psychological well-being of the participants; if courts can do things to help parties feel a bit better at the end of the process while still accomplishing the other goals of the justice system, courts should. The applications of that guiding principle can have effects in many types of proceedings, including proceedings at the appellate level.

To date, no appellate court has even mentioned the concept of therapeutic jurisprudence in an opinion. Of course, the key to its use is not in direct discussion in opinions. Rather, it is a lens with which to see other, sometimes overlooked effects of what we do, and to consider whether changes we could make would produce even better results for those touched by our work.

I have noted three areas in which therapeutic jurisprudence concepts could play a role in the appellate courts. First, zoning appeals are an example of a majority/minority conflict that is resolved both within and without the court system; in those cases, many of Professor Des Rosiers’ suggestions are directly applicable. Second, in quite a few cases, I wonder whether lawyers and judges might improve the parties’ long-term well-being by being more frank about the limitations of the judicial system itself. Third, in the criminal area, the application of therapeutic jurisprudence principles might help to counteract the cynicism that quite naturally tends to become a part of the process. In each of these areas, therapeutic jurisprudence principles appear to add something to the consideration of these cases, while in no way mandating any substantive difference in the decisions rendered by the courts.

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22. *Id.* at 593.

23. Kotler recovered a judgment for \$1.51 million against the State of New York for his 10 years of wrongful imprisonment. *See Kotler v. State*, 255 A.D.2d 429 (N.Y. App. 1998). It may have been of little use to him, however. Mr. Kotler actually committed a rape after his release, for which he was convicted in October 1997. *See People v. Kotler*, 705 N.Y.S.2d 900 (N.Y. App. 2000).