

# Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance<sup>†</sup>

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## I. INTRODUCTION

In Nadine Gordimer's *The House Gun*, Harald and Claudia's son Duncan murders a close friend whom he discovers making love to his woman.<sup>1</sup> After the trial in post-apartheid South Africa, the judge, pronouncing his decision, comments in depth on the facts leading up to that fateful moment that shattered the lives of an entire family:

A new tension—hope—holds the three. Harald and Claudia stiffen, recklessly afraid to let go, in any contact. It is so unexpected, this show of understanding by one who is judging Duncan, nothing contradictory to be read from the lips—is it at all usual for such empathy with an accused to be expressed in the course of a judgment?<sup>2</sup>

What helps heal this family is the sense that the judge has heard the voice of the accused and has even expressed “empathy.”<sup>3</sup> Although Gordimer's story takes place in a trial court, the principles apply equally in the appellate context.

One of the principles of therapeutic jurisprudence<sup>4</sup> is that the law often “function[s] as a kind of therapist or therapeutic agent” and that “legal procedures . . . constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences.”<sup>5</sup> In

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1. NADINE GORDIMER, *THE HOUSE GUN* (1998).

2. *Id.* at 257.

3. *See id.* at 252-67.

4. “Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent.” Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 *PSYCHOL. PUB. POL'Y & L.* 184, 185 (1997).

5. *Id.* *See also* Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurispru-*

contrast to the therapeutic approach of Gordimer's judge, is the cold and silent *per curiam* affirmance (PCA) that abruptly terminates many appellate cases. When an appellate court issues a PCA, it simply says one word: "affirmed."

PCA decisions are generally accepted and often justified.<sup>6</sup> In cases warranting a PCA, the application of legal precedent to the facts of the case seems straightforward to the appellate court, justifying the saving of appellate resources that results from dispensing with the preparation of an appellate opinion.<sup>7</sup> In addition, because the case makes no new law, further savings can be accomplished by dispensing with the publication of a full decision, which would further clutter the already voluminous official report of decisions and risk both lawyer and judicial confusion.<sup>8</sup> Because it is generally thought that "[t]he parties themselves have no right to an opinion,"<sup>9</sup> considerations of appellate efficiency and economy are invoked to justify what appears to be an increasing practice. Since it contains no discussion of facts, no disclosure of the court's reasoning, and gives no sense of validation, the PCA is antitherapeutic. In this instance, not only has the appellant lost the appeal, but he or she is left with the feeling (correct or incorrect) that the court did not take the contentions made (at considerable expense) with any degree of seriousness. To the appellant, the contentions in the appeal deserve a reasoned response rather than a summary dismissal.

This Article will analyze the antitherapeutic impact of the PCA in two steps. First, delving into the psychology of procedural justice, this Article will explain how litigants value "voice," or the ability to tell their stories, as well as "validation," or the sense that the decision-maker has heard their words and taken them seriously.<sup>10</sup> Second, this

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*dence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17 (1997) ("Therapeutic jurisprudence is an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects."). See generally LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996).

6. See FRANK M. COFFIN, ON APPEAL 177 (1994) ("By affirming [a trial court] opinion, with or without some additional comments[,] . . . the court not only saves itself considerable time but shows the trial court that it recognizes work well done."); DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL 323 (2d ed. 1990) ("The principal reasons for dispensing with an opinion or for not publishing it are that a case involves no new questions or applications of law and the decision would have no precedential value.").

7. See Mark D. Killian, *Judicial Management Council Panel Rejects the Abolition of PCAs*, FLA. B. NEWS, July 1, 2000, at 1, 5.

8. See *id.*

9. KNIBB, *supra* note 6, at 323 ("A judgment entered without [an opinion] is not a denial of due process.").

10. See generally *infra* Part II.

Article, through the use of narrative, will show how a PCA had a negative psychological impact on an actual appellant in a criminal case.<sup>11</sup> The Article will conclude by proposing an alternative to the antitherapeutic PCA.<sup>12</sup>

## II. VOICE AND VALIDATION

There are quite a few empirical studies dealing with how litigants experience the litigation process. These studies essentially agree that litigants place great importance on the process itself, as well as on the dignitary value of a hearing.<sup>13</sup> When individuals feel that the system has treated them with fairness, respect, and dignity, they experience greater satisfaction. This basically boils down to the litigants' having a sense of "voice," or an opportunity to tell their story to a decision maker.<sup>14</sup> Equal with voice is "validation," or the feeling that the tribunal has really listened to, heard, and taken seriously the litigants' stories.<sup>15</sup>

When litigants emerge from a legal proceeding with a sense of voice and validation, they are often satisfied with the result—even an adverse result.<sup>16</sup> When they have voice and validation, participants tend to find the results of the proceeding noncoercive, and feel as if they voluntarily participated in the ultimate judicial pronouncement.<sup>17</sup>

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11. See generally *infra* Part III.

12. See generally *infra* Part IV.

13. See, e.g., E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 83-84, 94-95, 118 (1975); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); E. Allen Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990). For applications of these principles to the civil commitment hearing, see Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992) [hereinafter Tyler, *The Psychological Consequences of Judicial Procedures*]; Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 46-47 (1999) (discussing such principles and the role of counsel in civil commitment hearings).

14. Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1158 (1997).

15. *Id.*

16. Winick, *supra* note 13, at 48.

17. *Id.* Recent research by the MacArthur Network on Mental Health and the Law on patient perceptions of coercion found that even in coercive situations like civil commitment, people do not feel coerced when they perceive the intentions of state actors to be benevolent and when they are treated with dignity and respect, given voice and validation, and are not treated in bad faith. *Id.* at 47-50. See generally Nancy S. Bennett et al., *Inclusion, Motivation and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295 (1993); William Gardner, et al., *Two Scales for Measuring Patients' Perceptions for Coercion During Mental Hospital Admission*, 11 BEHAV. SCI. & L. 307 (1993); Steven K. Hoge et al., *Perceptions of Coercion in the Admission of Voluntary and Involuntary Psychiatric Patients*, 20 INT'L J.L. & PSY-

It is that sense of voluntariness that is paramount; it can engender healing and more effective behavior in the future.<sup>18</sup> In general, people feel better about making their own decisions rather than having requirements imposed upon them by others. In addition, exercising a degree of control and self-determination in significant aspects of one's life also may be an important component of psychological well-being.<sup>19</sup>

On appeal, as in the trial itself, the lawyer typically functions as the instrument of the client's voice.<sup>20</sup> In the context of the brief and oral argument, it is the lawyer who tells the client's story and advances the client's position.<sup>21</sup> Appellate lawyers can be more effective and can produce greater client satisfaction by making certain that they understand their clients' stories and what it is their clients wish to convey.<sup>22</sup> While the appellate process has its limitations, and is, of course, not a forum for a retrial, there are ways of integrating the client's concerns into the attorney's communication with the court.<sup>23</sup>

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CHIATRY 167 (1997); Charles W. Lidz et al., *Perceived Coercion in Mental Hospital Admission: Pressures and Process*, 52 ARCHIVE GEN. PSYCHIATRY 1034 (1995); John Monahan et al., *Coercion and Commitment: Understanding Involuntary Mental Hospital Admission*, 18 INT'L J.L. & PSYCHIATRY 249 (1995) [hereinafter Monahan et al., *Coercion and Commitment*]; John Monahan et al., *Coercion to Inpatient Treatment: Initial Results and Implications for Assertive Treatment in the Community*, in COERCION AND AGGRESSIVE COMMUNITY TREATMENT: A NEW FRONTIER IN MENTAL HEALTH LAW 13 (Deborah L. Dennis & John Monahan eds., 1996); Winick, *supra* note 14, at 1158-59. "Patients who are provided procedural justice in this sense, even if involuntarily committed or pressured by family members and clinicians to be hospitalized, reported experiencing considerably less coercion than patients who were not afforded procedural justice." Winick, *supra* note 13, at 48.

18. See generally Winick, *supra* note 14, at 1158-66.

19. BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAWS 68-83 (1997); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1755-68 (1992).

20. See Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U. L. REV. 859, 875-76 (1996).

21. See *id.* at 875. (Explaining how "storytelling and appellate practice are yoked mates on several planes" and that "[i]n every appeal, there is, of course, the client's story."). In order for appellate attorneys to understand their clients' stories, they must develop listening skills. See Steven Keeva, *Beyond the Words: Understanding What Your Client Is Really Saying Makes for Successful Lawyering*, 85 A.B.A. J. 60, 61 (1999). They must spend time with their clients and create a comfortable psychological environment in which the client can "open up" to the lawyer about what happened and how he or she feels about it. See *id.* at 63. Such "opening up" can itself be therapeutic for the client. See generally JOHN W. PENNEBAKER, OPENING UP (1990).

22. See Ronner, *supra* note 20, at 875-76 (discussing how storytelling can "serve to penetrate bias and foster empathy in what is typical—a conservative bench, sometimes one with an extreme pro-government and law enforcement perspective. The omnipresent appellate problem of how to release the client's story from what is often the bastille of the record compounds an already difficult task.").

23. See *id.* at 873 (discussing the "disquieting mission of making [a] client grasp that retrying his case in the appellate court is a literal impossibility and not some covertly hostile

Appellate courts can also be more effective by being good listeners. Even if they must, due to the constraints of the law, issue a decision adverse to a litigant, there are still ways to express empathy, let individuals know that they have been heard, and let individuals know that their arguments have been fairly and fully considered. The PCA does not accomplish this.

### III. BEING WITHOUT VOICE AND VALIDATION

One of this Article's authors ran an in-house appellate clinic at her university in which third-year law students represented indigent clients on appeal.<sup>24</sup> One such client, Ralph Walker, was convicted of conspiring to murder a South Florida trial judge. The appellate clinic, however, was not retained until after the conviction was affirmed and Walker had lodged an unsuccessful motion for a new trial based on ineffective assistance of counsel. Convinced that Mr. Walker had not received a fair trial, the clinic supervisor and the student team appointed to handle the appeal following the denial of the ineffectiveness of counsel motion spent numerous hours drafting a brief that told Mr. Walker's story. In this context, his story was that which happened to him at the trial itself.

The case against Mr. Walker ostensibly began when he befriended a cocaine-addicted felon with multiple convictions.<sup>25</sup> This felon, who became the heart of the prosecution's case against Mr. Walker, testified at trial that Walker planned to murder a judge.<sup>26</sup> Law enforcement had outfitted this informant with transmitting devices to obtain evidence of the supposed murder plans.<sup>27</sup> Although the tapes were mostly inaudible and the police had erased the back-up set, the State introduced them into evidence; Walker's trial counsel failed to move to suppress them.<sup>28</sup> Walker asserted that had the tapes been intelligible, the unredacted conversations between him and the informant would have established his innocence.<sup>29</sup>

Further, Walker's defense counsel failed to call several exculpatory witnesses.<sup>30</sup> Walker asserted that these individuals would have

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unwillingness on our part to help"); *id.* at 876 ("[T]he appellate scop must balance the desire to sing the client's story with the necessity of not doing what dehors the record, which is the product of the story that trial counsel has already told or imposed on the client.").

24. *Id.* at 868-74 (describing the in-house appellate clinic and how it operates).

25. Brief of Appellant at 2-3, *Walker v. State of Florida* (Fla. Dist. Ct. App. 1993) (No. 93-00248) (on file with the authors).

26. *Id.* at 3.

27. *Id.*

28. *Id.* at 9-11.

29. *Id.* at 10.

30. *Id.* at 12.

rebutted portions of the informant's testimony and shown that several of the alleged conversations between Walker and the informant simply did not occur.<sup>31</sup>

Finally, Walker challenged both the failure of defense counsel to file a motion to disqualify the allegedly biased presiding judge and the exclusion of African Americans from the jury.<sup>32</sup>

In the initial and reply briefs, the clinic students told Mr. Walker's story and gave him a voice. The court conducted an oral argument and shortly thereafter issued a decision. The opinion merely said, "per curiam affirmed."<sup>33</sup>

Several scholars writing in the area of therapeutic jurisprudence have pointed out that when individuals participate in a judicial process, what influences them most is not the result, but their evaluation of the fairness of the process itself.<sup>34</sup> As Tom Tyler, a social psychologist and one of the principal architects of the psychology of procedural justice, explains:

Studies suggest that if the socializing influence of experience is the issue of concern (i.e., the impact of participating in a judicial hearing on a person's respect for the law and legal authorities), then the primary influence is the person's evaluation of the fairness of the judicial procedure itself, not their evaluations of the outcome. Such respect is important because it has been found to influence everyday behavior toward the law. When people believe that legal authorities are less legitimate, they are less likely to be law-abiding citizens in their everyday lives.<sup>35</sup>

Professor Gould applies these insights to the process of criminal sentencing.<sup>36</sup> Analyzing individuals involved in felony cases, she concludes that those who "experienced a legal procedure that they judged to be unfair . . . had less respect for the law and legal authorities and are less likely to accept judicial decisions."<sup>37</sup> These feelings can seri-

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31. *Id.* at 12-13.

32. *Id.* at 4, 7.

33. *Walker*, No. 93-00248 (decision filed Mar. 16, 1994) (unpublished decision) (on file with the authors).

34. See, e.g., Winick, *supra* note 13, at 44.

35. Tyler, *The Psychological Consequences of Judicial Procedures*, *supra* note 13, at 437. See also Amy D. Ronner, *Punishment Meted Out for Acquittals: An Antitherapeutic Jurisprudence Atrocity*, 41 ARIZ. L. REV. 459, 481 (1999) (discussing how unfair procedures engender disrespect for the law, disregard for human life, rage and a sense of helplessness).

36. See generally Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835 (1993).

37. *Id.* at 865.

ously diminish the potential for rehabilitation.<sup>38</sup> When litigants perceive the process as unfair, they do not feel like voluntary participants in it.<sup>39</sup> Rather than being a part of a process that brings healing, they feel unfairly treated, ignored, powerless, and angry.<sup>40</sup>

These therapeutic jurisprudence principles are illustrated by Mr. Walker's case. What struck Mr. Walker as unfair was that the appellate court had not given him any form of validation. For him, the court neither heard his story nor acknowledged his points. He essentially emerged from the experience feeling that the system was coercive and that he was not a voluntary participant in it. As such, the PCA diminished his respect for both the legal process and the law.

#### IV. CONCLUSION

If the court had at least written a real decision, the outcome would have been therapeutic for Mr. Walker. The decision would have sent him a message that the court heard his voice, giving him a form of validation. A written decision would have made him feel that he had voluntarily participated in the process, increasing the likelihood that he would be able to accept a result that was insulated from further appellate review and helping him move on with his life. Further, it would have instilled in Mr. Walker a greater respect for the law, as well as an incentive to move forward and improve his own situation rather than stand still, mired in anger and resentment. It could have allowed Mr. Walker to give up these strong emotions and experience a degree of peace, relaxation, and joy in life that might otherwise be impossible.<sup>41</sup>

What could replace the cold and silent *per curiam* affirmance is an order essentially reciting the salient facts of the case and mentioning some of the arguments. Even if the court feels bound by authority to decide a case adversely to a litigant, it could communicate this and still send out a message that the participants in the process have been

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38. See *id.* at 874. Gould points out that "the psychological constructs with which an inmate enters the facility may have implications for behavior within the correctional institution as well as future behavior when the inmate is released from incarceration." *Id.* at 864-65. She states that "at least one study has found that persons involved in felony cases, who may be unfairly characterized as marginal adherents to society's value system (the poor, the poorly educated, minorities, or the unemployed) are most influenced by procedural fairness rather than the leniency of the sentence they receive." *Id.* at 865. As Gould states, there are also similar findings with respect to others who experience the legal system. *Id.*

39. See Tyler, *The Psychological Consequences of Judicial Procedures*, *supra* note 13, at 439-42.

40. See *id.*

41. See PHILLIP C. MCGRAW, *LIFE STRATEGIES: DOING WHAT WORKS, DOING WHAT MATTERS* 201 (1999).

heard. Such speaking (or therapeutic) affirmances would not consume considerably more time than a PCA, and could essentially be constructed from a law clerk's case summary or memorandum.

Moreover, speaking or therapeutic affirmances would not need to be published in the law books. They could simply be sent to the parties and their counsel. Therapeutic affirmances could be short documents that demonstrate the appellate court's understanding of the basic facts of the controversy and the contentions made by the appellant. After reciting the facts and summarizing the arguments, a therapeutic affirmance could simply conclude with a one-sentence statement enunciating the reasons why the judgment must be affirmed. For example, the court could say: "While we understand the contentions made by the appellant and that he or she feels that the decision below was erroneous, under our law we must defer to the discretion of the trial judge in matters such as these, and therefore, for the reasons set forth in the appellee's brief, we must affirm." The second portion of this sentence, explaining the basis for the affirmance, of course, could vary based upon the appellate issues presented.

While drafting a brief therapeutic affirmance would involve time and effort by an appellate court that a *per curiam* affirmance would render unnecessary, the therapeutic value of trying to satisfy the appellant's need for procedural justice more than justifies these additional expenses. Moreover, these expenses may also be justified by an additional consideration—increased accuracy in the appellate process. The possibility always exists that the appellate court has misunderstood the issues or facts: indeed, this is the usual basis for a motion for rehearing sometimes filed by a losing party on appeal. If this possibility has occurred, a *per curiam* affirmance will prevent anyone from knowing about it and also will frustrate the losing party's opportunity to seek rehearing in order to correct it. The speaking affirmance minimizes the possibility of such an error.<sup>42</sup>

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42. In Florida, the state where both authors reside, a Judicial Management Council set up a PCA Committee to consider whether to abolish *per curiam* affirmances. See Killian, *supra* note 7, at 1. After two years of study, the Committee concluded that while there was some merit to requiring written explanations of every decision, there were also some practical countervailing reasons. *Id.* The PCA Committee did, however, issue a set of recommendations to limit the use of the PCA. These included "[a]mending [the] Florida Rule of Appellate Procedure . . . to allow, after a PCA, a motion to request an opinion." *Id.* at 5. Also, the Committee suggested developing an opinion writing curriculum for judges, "[d]iscouraging the use of PCAs when there is a dissent in a case," and encouraging citations to authority in what would otherwise be a PCA. *Id.* Several Committee members, however, were not satisfied with the majority recommendations, and one member, Nancy Daniels, public defender for the Second Circuit in Florida, stated: "We think that PCAs in Florida's appellate court system thwart the confidence of the public." *Id.*

Even if insufficient to change the result reached by the trial court, the therapeutic value of providing the appellant with the assurance that his or her story was heard and understood can be significant. It can help a criminal offender accept the court's conclusion that he has violated the law and is deserving of punishment, thereby increasing the potential for successful rehabilitation and reintegration into the community. It can help parties in civil disputes get past the bad feelings that such disputes inevitably inspire and that lawsuits frequently exacerbate; such resolution will ease the transition to post-litigation circumstances. It can enable parties who have experienced the physical or emotional trauma of an accident, an intentional tort, or a divorce, to begin the healing process. While these emotional and therapeutic dimensions of an appeal have not been regarded as a proper concern of an appellate court, they should be.

Our hope is that the next time Gordimer asks, "[I]s it at all usual for such empathy with an accused to be expressed in the course of a judgment?"<sup>43</sup> we, as appellate therapeutic jurisprudence lawyers, can say, "No, not at all."

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43. GORDIMER, *supra* note 1, at 257.