Therapeutic Jurisprudence in the Appellate Arena: Judicial Notice and the Potential of the Legislative Fact Remand

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I. INTRODUCTION

Therapeutic jurisprudence, now almost reflexively defined as either the "study of the role of the law as a therapeutic agent" or the "study of the law as a therapeutic agent,"[1] has made tremendous strides in its efforts to reach across disparate fields of legal doctrine to elucidate the therapeutic aspects of various tenets of those doctrines. Similarly, the methods used to explicate the therapeutic jurisprudence (TJ) message have benefited from cross-disciplinary cross-pollination, particularly within the social sciences, and from collaboration with other legal analytical methods. However, TJ in the appellate arena remains largely unexplored. This omission is unfortunate, as TJ analysis is perhaps most conducive to policymaking tasks, for which appellate courts are best suited. Accordingly, appellate courts represent an especially fertile and appropriate forum for TJ-inspired advocacy.

This Article begins with a modest objective and ends with an ambitious one. First, it asserts that appellate courts are an appropriate forum for considering the therapeutic impact of the law strand of TJ

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1. A Westlaw search of law reviews and journals reveals 20 instances of the term therapeutic jurisprudence defined as the "study of the role of the law as a therapeutic agent," and four instances of the term defined as "study of the law as a therapeutic agent." Search of Westlaw, "jlr" database (Jan. 16, 2000). Wexler and Winick have defined the term in both fashions. *See* Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1156 (1997) ("study of the law as a therapeutic agent"); David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 761 (1993) (same); *see also* David B. Wexler, *Introduction to the Therapeutic Jurisprudence Symposium*, 41 ARIZ. L. REV. 263, 263 (1999) ("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) (same).

scholarship. TJ's character as a "field of social inquiry"[2] is especially suited to the appellate courts' task of formulating new rules of law and choosing among competing policy objectives when resolving opposing normative principles.

Because TJ faces a peculiar "empirical indeterminacy"[3]—the tendency of TJ proponents to rely on social science data requiring "painstaking"[4] construction of methodologies to evaluate its hypotheses—TJ's persuasive force remains primarily theoretical and speculative. Accordingly, presenting TJ-inspired analysis through appellate briefs may be the default mechanism for now. However, once increasingly sophisticated empirical research tools are refined or developed, or where such methods currently exist, the most appropriate forum for TJ-inspired advocacy should be the appellate arena.

Empirical research data used to support TJ propositions are properly characterized as one species of "legislative facts"—facts not only relevant to legal reasoning when formulating a legal principle, but to the lawmaking process generally—and are thus susceptible to judicial notice.[5] Although considering legislative facts is certainly an appropriate task for trial courts when resolving particular factual controversies, legislative facts are particularly conducive to the appellate courts' task of considering normative values when creating new law.

Finally, this Article suggests that if TJ ultimately embraces an ideological agenda such as the one recently recommended by Professor La Fond,[6] the intriguing notion of a legislative fact remand should be considered. Though the mechanism has rarely been used, the notion of a legislative fact remand is hardly novel, and the appellate courts' ability to resolve cases creatively has received increasing attention in recent years. In many cases, remanding to the trial court for the determination of legislative facts creates an opportunity to present empirical data in support of a TJ proposition without misrepresenting its potentially policy-oriented and normative character. Furthermore, the intriguing notion of a legislative fact remand preserves the opportunity to present empirical data to support the consideration of therapeutic

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2. Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 508 (1998).

3. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193, 204 (1995).

4. *Id.* at 207.

5. *See* Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942); Kenneth C. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955); FED. R. EVID. 201 advisory committee's note.

6. *See* John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impacts on Participants and Policy*, 41 ARIZ. L. REV. 375, 377-78 (1999).

values without misrepresenting TJ's potentially policy-oriented and normative character.

II. DISTINGUISHING THE TWO STRANDS OF THERAPEUTIC JURISPRUDENCE

TJ recognizes that rules of law, legal procedures, and legal and law-related roles, such as those played by attorneys, judges and other professionals performing quasi-legal functions, produce therapeutic or antitherapeutic consequences for those who come into contact with those rules, procedures, or roles. The TJ heuristic is typically used to draw attention to these consequences and to explore whether their desirable psychological effects may be enhanced or their undesirable effects reduced without disturbing the balance of social policy considerations already engrafted onto those rules, procedures, or roles.

A more holistic, integrative, and transformative approach to legal practice—an approach that perhaps implicitly emphasizes the salubrious effects of the legal profession on its participants' psychological well-being—has been undoubtedly embraced pell-mell by practitioners for decades.[7] However, this approach has not had the benefit of either a formalized theoretical framework or the legitimacy that inheres in express ratification by the legal academy. Since TJ's introduction on a broad scale in 1990,[8] express and deliberate delineation of the TJ method has animated a great deal of thoughtful scholarship under TJ's imprimatur.

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7. *See generally* David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U.P.R. 317, 320 (1998) ("Of course, as the previous articles have noted, many client-centered lawyers already practice with a real sensitivity to these concerns. Many regard themselves first and foremost as counselors, or even as "holistic' lawyers."); Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, 29 (1997) ("Of course, many fine lawyers already blend elements of preventive law with concerns for a client's psychological well-being."); Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17 n.14 (1997) ("Interestingly, many good lawyers practice preventive law instinctively; however, far fewer explicitly refer to their work as involving preventive law.").

8. The 1990 publication of David Wexler's monograph, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent*, is generally regarded as stimulating the explosion in TJ scholarship. *See* Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 811, 811 n.2 (1999). The origin of the term "therapeutic jurisprudence" itself derives from an NIMH workshop in October 1987, where David Wexler presented a paper laying out a perspective of "law as therapy," which he termed "juridical psychotherapy." David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691, 693 (1999). As recounted by Wexler, that term did not survive the feedback presented at the meeting, and the term "therapeutic jurisprudence" was substituted. *Id.*

One strand of TJ scholarship focuses on ways in which legal roles, such as those as played by attorneys and judges, and legal procedures, such as sentencing hearings, civil commitment hearings, and mediations, may be ameliorated to increase their therapeutic effects or to minimize their antitherapeutic effects without sacrificing other values actualized within those roles and procedures.

This aspect of TJ, which Professor Wexler once termed "therapeutic legal administration,"[9] is made possible through the distillation of form by extracting the substantive elements of legal content. TJ of this character is within what might be termed a "pure method" paradigm, where legal methods, practices, and procedures are sufficiently desiccated from their underlying value-laden objects of regulation and the baggage of social policy concerns to allow for evaluation of the therapeutic effects of their method *qua* method.

This endeavor, the central object of which is to examine *legal method* as a therapeutic agent, has made tremendous strides within the forum where theoretical discourse is likely to operate in practice, having forged a symbiotic relationship with the movement known as preventive law.[10] The complementary relationship between the two movements emphasizes the role of lawyer-as-counselor, and it acknowledges a perspective of TJ scholarship that is familiar, and perhaps even prosaic, to most practitioners.

This perspective should be contrasted with TJ scholarship that evaluates the therapeutic impact of particular rules of law themselves. The primary focus of that TJ scholarship is to examine *law itself* as a therapeutic agent. This second strand of TJ scholarship is founded upon the express objective of TJ to inform legal decision-making, on both a legislative and judicial level, of the therapeutic consequences of any particular decision. "The therapeutic jurisprudence approach [argues] . . . that empirical information from the social sciences can

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9. David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 220, 234 (1995). Professor Wexler notes that because the study of "therapeutic legal administration" does not focus on changes "even in a single rule of law or legal procedure," *id.*, the analysis may not "really" be legal at all. *Id.* at 225. Nonetheless, Wexler emphasizes that future research in this area is vitally important, as the success or failure of any legal rule may depend more on its method of administration than on its substantive content. *Id.*

10. *See* Thomas L. Hafemeister, *End-of-Life Decision Making, Therapeutic Jurisprudence, and Preventive Law: Hierarchical v. Consensus-Based Decision-Making Model*, 41 ARIZ. L. REV. 329 (1999); Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417 (1999); Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17 (1997); Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, 25 (1997).

inform legal decision-making and should indeed be taken into account in legal decision-making."[11] The difference between the two strands of TJ scholarship is not merely semantic; they diverge conceptually with respect to the objects of their inquiry, their catalogues of outcome measures, and, possibly, the perception of TJ by the legal profession.

Unlike TJ scholarship's "therapeutic administration"[12] strand, precious little has been written about the mechanisms through which the "therapeutic impact of law" strand may be formally introduced into legal and judicial decision-making processes. The bulk of existing discourse is primarily theoretical, though its proponents have relied on empirical behavioral science research when available. This existing discourse is designed to articulate the specific antitherapeutic effects of particular legal rules, and how legal reform may be achieved by taking those effects into account. If the therapeutic impact of law is to be an important determinant of policy in judicial decision-making processes, the question remains: How should courts, and appellate courts in particular, obtain "evidence" of this therapeutic impact?

III. THE CONSIDERATION OF THERAPEUTIC VALUES BY APPELLATE COURTS

Despite its interdisciplinary focus and heavy reliance on social science data, TJ's "therapeutic impact" strand should be distinguished from fields such as law and psychology and social science in law, which simply offer empirical methods of examining legal rules without connecting those methods to any particular normative agendas.[13] It appears settled that "therapeutic impact" embraces an agenda that is more than merely descriptive in character. Rather, TJ offers a prescriptive agenda, arguing that policymakers should incorporate knowledge of the therapeutic consequences of law into their decision-making processes. As stated by Professor Winick,

> Therapeutic jurisprudence suggests that, other things being equal, positive therapeutic effects are desirable and should generally be a proper aim of law, and that antitherapeutic effects are undesirable and should be avoided or minimized. Because this normative agenda drives therapeutic jurisprudence research, it is

11. Jeffrey A. Klotz et al., *Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process*, 15 U. PUGET SOUND L. REV. 579, 580 (1992). *See also* David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991).

12. *Supra* note 7.

13. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 188 (1997).

> not the neutral, value-free mode of scholarly inquiry that law and psychology and social science in law often try to be.[14]

Thus far, TJ's prescriptive character has been procedural in nature, limiting its emphasis to specific suggestions concerning the proper components of legal decision-making. With few exceptions,[15] it has not offered a hierarchical ordering of therapeutic concerns vis-à-vis competing normative principles. Therefore, TJ may be characterized as a "procedurally normative" enterprise rather than as a substantively normative approach, which is emblematic of other jurisprudences such as critical race theory, law and economics, and feminist jurisprudence.

> By suggesting the need to identify the therapeutic and antitherapeutic consequences of legal rules and practices, we do not necessarily suggest that such rules and practices be recast to accomplish therapeutic ends or to avoid antitherapeutic results. Whether they should is, of course, a normative question that calls for a weighing of other potentially relevant normative values as well, such as patient autonomy, constitutional rights, and community safety.[16]

Professor La Fond recently challenged TJ's willingness to straddle the normative fence of competing ideological values, articulating the question as whether "the antitherapeutic impact of law in a particular case [may be] so severe that TJ must insist . . . that other values and consequences are paramount."[17] Arguing that TJ must emerge from its backdrop of relative normative neutrality and cast its

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14. *Id.* *See also* Slobogin, *supra* note 3, at 198 ("In short, TJ can be distinguished from social science in law, despite the reliance of both on social science research, because the latter is a technological means of answering questions posed by the law, whereas the former is a prescriptive jurisprudence that happens to rely on that technology.").

15. *See, e.g.*, La Fond, *supra* note 6; *see also* Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 161 (1995).

16. David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL AND PHYSICAL DISABILITY L. REP. 225, 226 (1992). *See also* Winick, *supra* note 13, at 191 ("Therapeutic jurisprudence therefore does not suggest that therapeutic considerations should outweigh other normative values that law may properly seek to further.").

Wexler has elaborated on this point:

> Therapeutic jurisprudence does not suggest that therapeutic considerations should trump other considerations. Therapeutic considerations are but one category of important considerations, as are autonomy, integrity of the factfinding process, and community safety. Therapeutic jurisprudence does not itself purport to resolve the value questions; instead, it sets the stage for their sharp articulation.

David B. Wexler, *An Orientation to Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 259, 259-60 (1994).

17. La Fond, *supra* note 6, at 377.

lot with the policy objective of promoting positive therapeutic consequences, La Fond forcefully states that "TJ must take a normative stance and assert that the law should be repealed or substantially changed."[18]

The primary distinction between TJ within a "substantively normative" framework, such as the one recommended by La Fond, and the "procedurally normative" framework thus far espoused by TJ proponents, concerns the extent to which one is willing to take a position on the relative importance of therapeutic values vis-à-vis other policy considerations. However, for purposes of this Article, it should be clear that whether or not TJ accepts La Fond's invitation or chooses to remain normatively neutral with respect to competing ideologies, appellate courts will remain the appropriate arena for considering therapeutic values.

One of the fundamental insights of legal realism was the recognition that courts "must sometimes stray from the traditional role of applying previously existing law and venture into the realm of creating new law."[19] In general, courts will be called upon to "create new law" in three distinct situations: (1) cases raising novel issues of fact for which the application of any existing rule of law is inapposite; (2) cases requiring the application of existing rules of law which are vague or ambiguous; and (3) cases requiring a hierarchical ordering of competing rules of law.[20]

In the first and third situations, "judges must move beyond the most typical forms of reasoning—rule-based and analogical reasoning—and employ other methods, such as normative and policy-based reasoning."[21] Rule-based and analogical reasoning methods are not particularly conducive to the consideration of therapeutic effects, because, as TJ scholarship often emphasizes, little attention was paid to such effects when current rules of law were formulated.[22] In contrast, the components of normative and policy-based reasoning methods typical of appellate courts, such as "aesthetic principles, scientific models, social organization, economic analysis, efficiency

18. *Id.* at 378.

19. Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 197 (2000).

20. *See id. See also* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058-59 (1975).

21. Margolis, *supra* note 19, at 197-98.

22. *See* Hafemeister, *supra* note 10, at 331 ("However, the therapeutic or anti-therapeutic impact of the law is often overlooked."); Winick, *supra* note 13, at 188 ("A sensitive policy analysis of law should seek to measure and weigh all of the various costs and benefits of legal rules. One important but previously neglected aspect of this policy calculus is the therapeutic impact of law.").

concerns, political realities, and predictable psychological reactions,"[23] are well-suited to TJ-inspired argumentation. In short, TJ's character as "a field of social inquiry designed to produce law reform that will enhance the law's potential as a healing and health-promoting force"[24] demonstrates that, whether or not one ranks therapeutic values alongside other normative values, TJ scholarship is likely to receive its greatest audience in the appellate arena.

IV. THERAPEUTIC VALUES AS LEGISLATIVE FACTS

TJ's "therapeutic impact" strand suffers from what Slobogin refers to as "the dilemma of empirical indeterminacy"[25]—the predicament that the "types of empirical questions TJ asks may be particularly difficult to answer."[26] Answering many of these empirical questions requires the development of sophisticated research tools and methodologies with which to test the hypotheses generated by TJ analysis. Until this occurs, and unless TJ is supported by empirical data, the enterprise's persuasive force will be primarily theoretical and speculative. As Slobogin states,

> the indeterminacy of the empirical information on which therapeutic jurisprudence relies may be exacerbated by the definitional dilemma [inherent in the term "therapeutic"]. The typical uncertainty of social science, although frustrating, does not vitiate its usefulness to the law. But the social science generated by TJ may be unusually uncertain. If so, TJ will be relatively more speculative, for a longer period of time. In the meantime, its proposals may be hard to take seriously.[27]

When this is the case, the only formal means of presenting a TJ-inspired argument is through briefs, and the legal puissance of the method is thus constrained.

Consider Professor La Fond's recent contention that sexual predator laws are "so destructive of the human psyche"[28] that they should be overturned on public policy grounds. He constructs his argument, in part, by examining how Washington State has implemented its sexual predator statute.[29] He relies heavily on anecdotal evidence, noting

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23. Margolis, *supra* note 19, at 213 (citing LINDA H. EDWARDS, LEGAL WRITING—PROCESS, ANALYSIS, AND ORGANIZATION 25 (2d ed. 1999).

24. Winick, *supra* note 2, at 508.

25. Slobogin, *supra* note 3, at 204.

26. *Id.*

27. *Id.* at 208.

28. La Fond, *supra* note 6, at 378.

29. *Id.* at 382-401.

the conditions inside the "Special Commitment Center,"[30] the secure wing of a maximum-security prison where persons committed under the Washington statute are housed, and the responses of various personnel and public officials to the law's implementation.[31]

La Fond then turns to Winick's predominantly theoretical TJ critique of sexual predator laws to suggest that the anecdotal evidence La Fond has presented may illustrate the kinds of unanticipated antitherapeutic effects that may result from such laws.[32] For example, he relies on Winick's theory that sexual predator laws may have a negative impact on the individuals committed under those laws by labeling them as "predators," thus diminishing their own sense of responsibility for their actions.[33] Accordingly, he suggests, among other things, that TJ research:

> might demonstrate that the costs of enacting and implementing a predator law are enormous and divert scarce resources away from more effective crime control strategies. It might demonstrate that the predator law inhibits treatment for other sex offenders. Perhaps studies would show that these laws create excessive fear and anxiety in the community at large, generating a sort of sex offender paranoia that inhibits a sense of community and freedom.[34]

In his conclusion, La Fond recommends that "TJ must develop a normative philosophy [as well as] rhetorical strategies for responding to a law whose goal is expressly antitherapeutic. TJ must move beyond simply contributing a perspective from which public-policy analysis can evaluate such a law and its impact on intended and unintended targets."[35]

What happens when and if, through the contraction of "painstaking"[36] methodologies, TJ research actually produces empirical results supporting La Fond's argument? How should those empirical results be presented in the legal arena? If TJ scholars accept La Fond's invitation and develop a "normative philosophy [as well as] rhetorical strategies for responding to [antitherapeutic] law[s],"[37] should it be presented to appellate courts through the same mechanisms as its supporting empirical data?

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30. *Id.* at 386.
31. *Id.* at 386-401.
32. *Id.* at 401-05 (citing Winick, *supra* note 2).
33. *Id.* at 401.
34. *Id.* at 413.
35. *Id.*
36. Slobogin, *supra* note 3, at 207.
37. La Fond, *supra* note 6, at 413.

This Article argues that appellate briefs remain the appropriate means through which empirical data used to support TJ-inspired propositions are presented. Although the opportunity to present empirical data supporting one's legal argument through the accredited mechanism of expert witnesses is tantalizing for advocates who have recently come into possession of "hard" evidence as part of their tactical arsenals, the introduction of nonlegal materials, such as social science data, is particularly suited to supporting policy-based arguments in the appellate arena.

A significant outgrowth of legal realism was the refinement of the doctrine of judicial notice. Until Professor Davis' exposition of the concept of legislative fact in an influential 1942 article in the *Harvard Law Review*, the use of judicial notice had been limited to the relatively sterile evidentiary mechanism of admitting factual evidence without the necessity of formal proof. Professor Davis distinguished between adjudicative facts—facts about "what the parties did, what the circumstances were, what the background conditions were"[38]—and legislative facts—facts that are used for all other purposes.[39] Although it was well-accepted that adjudicative facts could be judicially noticed by courts, that is, received into evidence without resorting to formal proof,

> [I]t is plain that in common usage the term ["judicial notice"] embraces even more than this, including much that is neither indisputable nor easily verifiable. Thus, it is said that courts judicially notice so-called "legislative fact"—information about social, economic, and political matters that goes into the making of law or policy. Though rarely questioned, this practice is sometimes explained in terms of the court's untrammeled freedom in the law-ascertaining process and sometimes on the ground that a requirement of indisputability seems inappropriate . . . where the facts are often generalized and statistical and where their use is more nearly argumentative, or as a help to value-judgments, than conclusive or demonstrative.[40]

In coining the term "legislative facts," Davis included both those nonadjudicative facts that are used as part of the judicial reasoning process and those nonadjudicative facts that are used to formulate new

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38. Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

39. Adjudicative facts are those facts that are ordinarily within the exclusive province of the jury, whereas legislative facts are those properly considered by courts as part of their function in interpreting and making new law. *See id.* at 402-23.

40. Harold L. Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1089 (1966).

legal rules and principles. An example of the former are those assumptions "imputed to judges and juries as part of their necessary mental outfit" to engage in convenient forms of reasoning.[41] Despite their appellation as "legislative," the myriad of "nonevidence" facts used in this fashion play an adjudicatory role, aiding in the comprehension of "evidentiary" facts by supplying necessary assumptions about the ordinary use of language.

A second category of legislative facts is used to set forth an epistemological framework within which to view the "evidentiary" or adjudicated facts of a case. This species of legislative facts also plays an adjudicatory function in that it assists in the process of judicial reasoning at the trial court level. Social science data used to support TJ-inspired scholarship will often fall into this category.[42]

The final category of legislative facts, which might be "pure" legislative facts, are those facts that "inform[ ] a court's legislative judgment on questions of law and policy"[43] and "help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take."[44] Indeed, it has been stated that, "[a] paradigmatic legislative fact is one that shows the general effect a legal rule will have, and is presented to

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41. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 279-80 (1898). As the Advisory Committee Note to Federal Rule of Evidence 201 notes,

> [E]very case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says "car," everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the "car" is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum.*

FED. R. EVID. 201, advisory committee's note.

42. The empirical research suggested by Professor La Fond with respect to sexual predator statutes is most appropriately viewed as falling within this category, as La Fond anticipates that it will be useful for establishing a background against which to evaluate evidence that a sexual predator law was actually enacted for treatment purposes: "[The research] might, in the future, persuade Justice Kennedy, other Justices in the Hendricks majority, or perhaps other courts considering constitutional challenges to other predator laws, that a particular predator law had become a retributive mechanism and should be struck down on Constitutional grounds." La Fond, *supra* note 6, at 411.

Professor David Faigman has proposed that legislative facts used for purposes such as this be called "constitutional review" facts. David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 553 (1991). The original "Brandeis brief," in which future Justice Brandeis presented extensive social science research to demonstrate that Oregon had a rational basis for restricting women's work hours on public safety grounds, among others, is an example of "legislative fact" used in this fashion. *See* Muller v. Oregon, 208 U.S. 412 (1908).

43. Davis, *supra* note 38, at 404.

44. Kenneth C. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

encourage the decisionmaker to make a particular legal rule."[45] Accordingly, they are appropriate for the policy-based reasoning processes, as they provide the basis for predicting what effects a particular rule will have.[46] In explaining how policy-based reasoning can best be supported using extra-legal materials, such as social science data, in the appellate arena, Professor Margolis states:

> Policy-based reasoning involves an assessment of whether a proposed legal rule will benefit society, or advance a particular social goal. In making this determination, courts are required to identify a desirable result, and then consider whether the operation of the proposed rule will encourage that result, as well as discourage undesirable results. Because a new rule will likely be of general applicability, courts must consider how a proposed rule will work for future litigants, as well as for society as a whole.[47]

In their seminal article on the reception of social science research by courts, Professors Monahan and Walker critique Professor Kenneth Davis' widely-accepted distinction between "adjudicative" and "legislative" facts, stating that it fails to provide a sound basis upon which courts should treat social science data.[48] However, they appear to concede that social science data is properly characterized as legislative fact when used for the purpose of evaluating policy considerations in the creation of new law.[49]

On the other hand, Walker and Monahan imply that empirical research should not really be considered legislative fact when it is case-specific or used for the narrow purpose of "adjudicat[ing] an issue within a settled legal context."[50] Because such research "has generality" and "bears . . . no substantive implications beyond the specific

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45. Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 114 (1988).

46. Margolis, *supra* note 19, at 213.

47. *Id.* at 211 (citations omitted).

48. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 485 (1986) [hereinafter Monahan & Walker, *Social Authority*]. *See also* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987) [hereinafter Walker & Monahan, *Social Frameworks*]. *See generally* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES & MATERIALS (1985).

49. Monahan & Walker, *Social Authority*, *supra* note 48, at 485. ("We accept Davis's insight that empirical information can play two distinctly different roles in legal decision-making.").

50. *Id.* at 491. As an example of social science data used in this manner, Monahan mentions the use of surveys in a trademark case to demonstrate the prevalence of customer confusion. *Id.* at 517 n.40.

case in which it is introduced,"[51] it is appropriate to present such research to the trial court resolving the specific case in the usual manner of presenting evidence—in this case, through expert witnesses.

In a follow-up article, Monahan and Walker specify yet another function for social science data: its use in creating a background context for understanding the adjudicative facts of a case.[52] This kind of data, which they call "social framework"[53] data, is quite similar, and perhaps identical, to the second category of legislative facts described above.

TJ-inspired research will often be used to create a social framework.[54] For example, in a study conducted before the advent of the TJ framework, but one in which the principles now espoused by TJ proponents figure prominently, Professor Peggy Cooper Davis noted the frequency with which courts take judicial notice of psychological parent theories in deciding child custody cases.[55] Accordingly, she recommended the development of formal mechanisms for the judicial reception of legislative facts when used in this fashion.[56] However, as noted by Professor Margolis, such theories, despite their characterization as legislative facts, nonetheless perform an adjudicatory function.[57] Accordingly, the use of such evidence in evaluating the factual context of the case militates in favor of its consideration at the trial court level:

> Whether called social framework or legislative fact, it is clear that non-legal information introduced for the purpose of assessing adjudicative facts should be presented to the trial court, and not on appeal. Social science used in this way does not, or at least not directly, influence the court's selection of a rule of law. Instead, social framework evidence influences a judge or jury's view of the facts. The use of legislative facts for this purpose is very different than their use to support policy arguments.[58]

Monahan and Walker, however, were not concerned as much with the proper arena in which to present social science data as they were with the appropriate mechanisms through which the data was

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51. *Id.* at 491.

52. See Walker & Monahan, *Social Frameworks*, supra note 48.

53. *Id.* at 560-61.

54. See David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations*, 7 BEHAV. SCI. & L. 485 (1989).

55. *See* Peggy C. Davis, *"There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1589, 1547-48 (1987).

56. *Id.* at 1599-1600.

57. Margolis, *supra* note 19, at 216.

58. *Id.* (citation omitted).

presented. In this regard, they advocate the introduction of social science research through written briefs rather than through strictures of formal proof.[59] They argue that social science research should be treated in the same manner as prior judicial precedent, *i.e.*, that social science "knowledge" has the necessary attributes of legal "knowledge," to warrant its consideration by courts in similar fashion.

For Monahan and Walker, the crucial conjunction between social science data and law is their generality: "[B]oth produce principles applicable beyond particular instances."[60] Elaborating on this common feature, they state:

> An important aspect of the generality that social science and law share is that they both typically address future, as-yet-unknown contingencies. Scientific findings are evaluated in part by their heuristic value—by their ability to order and make understandable new phenomena. Likewise, a court decision comes to be accorded the status of precedent when it is found to embody a principle that assists in the resolution of a subsequent conflict.[61]

Furthermore, it is clear that the appellate arena will most often benefit from the results of social science research when it is used to support policy-based argumentation:

> It is also the predictive nature of the policy argument that makes the appellate brief the appropriate medium in which to cite nonlegal material. The purpose of the policy argument is to persuade the court to adopt (or refuse to adopt) a new legal rule, and facts are used to help the court determine the content of the law. Because it will be the appellate court, not the trial court, that ultimately makes the decision about the content of the law, it is not only appropriate, but [also] logical, to introduce nonlegal material in support of policy arguments at the appellate stage.[62]

Although, as Slobogin noted, the development of methodologies to confirm the hypotheses suggested by TJ scholars may be "painstaking"[63] work, the relative empirical uncertainty characteristic of therapeutic jurisprudence work will not render it meaningless in the appellate arena. As Winick has stated, "The perhaps inevitable indeterminacy of such research does not vitiate its usefulness; it merely

59. Monahan & Walker, *Social Authority*, *supra* note 48, at 496-97.
60. *Id.* at 490.
61. *Id.* at 491.
62. Margolis, *supra* note 19, at 214 (citation omitted).
63. Slobogin, *supra* note 3, at 207.

requires caution in its use."[64] As the enterprise develops, however, it is clear that empirical social science research supporting TJ propositions recommending a hierarchical reordering of competing legal principles should be considered by appellate courts in their role of creating new law. Because these extra-legal materials "serve a unique function in supporting policy arguments [that] are different from other uses of legislative facts[, . . .] the appellate court is the appropriate forum in which to use them."[65]

V. THE POTENTIAL OF A LEGISLATIVE FACT REMAND FOR THERAPEUTIC JURISPRUDENCE

Accordingly, we have seen that it is appropriate for appellate courts to consider the "therapeutic impact of law" strand of TJ scholarship; furthermore, appellate briefs are the most likely mechanisms through which to present TJ propositions. In addition, empirical research marshaled in support of TJ propositions is properly characterized as legislative fact that is also appropriately presented through appellate briefs. As long as TJ maintains that therapeutic values are but a single consideration for appellate courts in the task of weighing competing normative values, the appellate brief appears adequate.

However, if TJ embraces a normative ideological framework, such as the one urged by La Fond, the TJ enterprise would take on a character not unlike that of the mixed questions of law and fact that often pose so much difficulty to appellate courts.[66] Accordingly, the presentation of empirical research, a course of action that La Fond would presumably continue to endorse, and the underlying ideology poses, through the same mechanism, a potentially disturbing prospect: that the force of the normative argument depends on what amounts to an appellate referendum on the persuasiveness of the social science research.[67] As Korn has so eloquently put it: "Sometimes the law's

64. Winick, *supra* note 13, at 196.

65. Margolis, *supra* note 19, at 211.

66. *See* Pullman-Standard v. Swint, 456 U.S. 273 (1982); Miller v. Fenton, 474 U.S. 104 (1985). One scholar has referred to the category of mixed questions of law and fact as "a wonderfully mushy classification." Stuart M. Benjamin, *Stepping Into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 360 (1999).

67. This prospect, of course, exists for traditional TJ analysis as well. However, in this regard, the difference between the ideologically-neutral enterprise currently embraced by most TJ proponents and the one recommended by La Fond is really a question of whether or not the argument survives to persuade another day if social science data is not considered persuasive. The "traditional" TJ appellate advocate asserts simply that the therapeutic effects of a law are important; *see* Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249, 253 (1996) ("Among the many public policy considerations that might enter into this determination, the Court should examine closely the therapeutic or antitherapeutic consequences of its decision."), whereas the "ideological" TJ advocate asserts

reference to science may merely provide a veneer of scientific determinism to decisions that really turn on policy considerations to which the scientific referent bears little relation."[68] The trick will be to preserve the opportunity to present empirical data to support the consideration of therapeutic values without misrepresenting its policy-oriented and normative character.

In distinguishing between adjudicative facts and legislative facts, Davis believed that formal restraints on the judicial notice of most categories of legislative facts were inappropriate. Because the weighing of policy considerations entails the consideration of generalizable facts—the accuracy of many of which are disputable—Davis believed that it was unwise to constrain the courts' pursuit of these facts to unduly restrictive standards. Arguing that the legislative fact-finding function of the courts is not suitable to the formal procedures applicable to the judicial notice of adjudicative facts, Davis noted, "[w]hat the law needs at its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be."[69]

The advisory committee's comment to Federal Rule of Evidence 201, which governs the judicial notice of adjudicative facts, embraced Professor Davis's view. Accordingly, the Federal Rules of Evidence do not contain a rule regulating the reception of legislative facts, stating that "any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level . . . [are inappropriate]".[70] However, the committee made the intriguing and somewhat cryptic suggestion that "[judicial access to legislative facts] should, however leave open the possibility of introducing evidence through regular channels in appropriate situations."[71] As a clue to what these "regular channels" might be, the committee cited with approval the United States Supreme Court's remand in *Borden's Farm Products Co. v. Baldwin*[72] to the trial court "for the taking of evidence as to the economic

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that the therapeutic effects of a law have but a supporting role within a larger normative framework.

68. Korn, *supra* note 40, at 1098; *see also* Winick, *supra* note 13, at 190 ("Any form of consequentialism must be careful to avoid equating a description of a rule's consequences with a normative conclusion about the rule's value.").

69. Kenneth C. Davis, *A System of Judicial Notice Based on Fairness and Convenience*, *in* PERSPECTIVES OF LAW 69, 83 (1964).

70. *See* FED. R. EVID. 201, advisory committee's note.

71. *Id.*

72. 293 U.S. 194 (1934).

conditions and trade practices underlying the New York Milk Control Law."[73]

The advisory committee's suggestion of a legislative fact remand has not caught on, though it has received the attention of several scholars over the years.[74] In a 1975 article examining the flow of information to the United States Supreme Court, Professors Miller and Barron concluded that "[r]emand to the trial court for findings of legislative fact is within the power of the Supreme Court . . . If routinely done, it would go far toward obviating the disquietude expressed by those who feel that a freewheeling employment of judicial notice at the Supreme Court level leaves much to be desired."[75]

In many ways, a remand to the trial court for the reception of empirical research in support of a TJ-inspired argument would be more desirable than the presentation of such research through an appellate brief. Professor Karst has noted that trial courts are the more appropriate forum for the presentation of legislative facts because they are more familiar with the fact-finding process than appellate courts, the parties are more likely to play a more active role in the introduction of the legislative facts, the facts are more likely to be subject to scrutiny, and trial judges will be less likely to seek out information on their own.[76] Similarly, Miller and Barron cite an excerpt from a constitutional law scholar, whose findings they reported in their 1975 article:

> If [the consideration of social science data] is appropriate, it deserves to be introduced in the trial court record and subject to scrutiny, criticism, challenge, *etc.* To be sure, cross-examination and the adversary system won't determine scientific validity, but

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73. FED. R. EVID. 201, advisory committee's note.

74. *See* John F. Jackson, *The Brandeis Brief—Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1, 2 (1993); David L. Suggs, *The Use of Psychological Research by the Judiciary*, 3 LAW AND HUMAN BEHAV. 135, 144 (1979); Kenneth C. Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 940 (1980); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 98.

Professor Benjamin recently examined the entire landscape of appellate fact finding in an exhaustive article. *See* Benjamin, *supra* note 66 (concluding that appellate courts, when faced with the prospect of facts that have changed since their determination by the trial court, should update the facts on their own rather than remand the case to the trial court or issue an opinion based on stale facts). *See also* John C. Godbold, *Fact Finding by Appellate Courts—An Available and Appropriate Power*, 12 CUMB. L. REV. 365, 366 (1982) (supporting the power of appellate courts' to review facts). On the issue of fact-finding by appellate courts in civil law systems, *see* COMPARATIVE LAW 456-57 (Rudolph B. Schlesinger et al. eds., 5th ed. 1988).

75. Arthur S. Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1236 (1975).

76. See Jackson, *supra* note 74, at 3, 41.

> they seem preferable to casual introduction of such evidence on appeal without opportunity to examine it.[77]

Professor Margolis has criticized this reasoning, arguing that appellate briefs remain the superior method of introducing legislative facts.[78] She notes that appellate courts do not rely exclusively of pragmatic balancing—the form of reasoning for which the introduction of legislative facts is most useful—in reaching their decisions, and instead use a variety of reasoning methods. However, because a legislative fact remand is entirely within the discretion of the appellate court, it would appear that the cases in which the device would actually be used would be those in which the appellate judges believe that a balancing of the pertinent empirical data is appropriate. Although the introduction of legislative facts to the trial court in all cases would certainly constitute a waste of resources in some instances, the actuation of the device at the appellate level would seem to self-select those cases in which it would be most useful.

Margolis also contends that appellate courts do not confer upon lower courts' findings of legislative facts any additional deference beyond that given to factual findings, citing studies which bear this proposition out.[79] Again, however, the actuation of the legislative fact remand at the request of the appellate court in the first instance would appear to resolve the problem. Because the technique would not be used until after the appellate court has received the full trial record, it allows for the conceptual separation of the trial court's factual findings, which would be used for the purpose of applying existing law, and the trial court's legislative fact findings, which would be used for the purpose of creating new law. This would avoid what one scholar

77. Miller & Barron, *supra* note 75, at 1236 (citing survey response).

78. Margolis, *supra* note 19, at 200-03.

79. *Id.* at 217 (citing Faigman, *supra* note 42, at 553). It is well-accepted that the factual findings of a trial court are subject to the "clearly erroneous" standard. Federal Rule of Civil Procedure 52(a) is usually cited for this proposition. It provides in part, "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a).

However, it is curious that neither Federal Civil Procedure Rule 1 nor Rule 81, the two rules governing the applicability and scope of the Rules, provides for the applicability of the Rules to courts of appeals. *See* FED R. CIV. P. 1; FED. R. CIV. P. 81. Furthermore, the argument that rules of court are presumptively applicable to courts of appeals absent express indication to the contrary appears to be refuted by the provision in Federal Rule of Evidence 1101(a), which provides explicitly that "[t]hese rules apply to the United States district courts, . . . [and] the United States courts of appeals." FED. R. EVID. 1101(a). Furthermore, a number of federal courts have specifically held that the Rules of Civil Procedure do not apply to courts of appeals. Hines v. Royal Indemnity Co., 253 F.2d 111, (6th Cir. 1958); Nachod v. Engineering & Research Corp., 108 F.2d 594 (2d Cir. 1939); Stewart Die Casting Corp. v. N.L.R.B., 129 F.2d 481, 484 (7th Cir. 1942).

has referred to as the "indeterminate" standard governing mixed questions of fact and law: "[the] deferential review of mixed questions of law and fact is warranted when it appears that the district court is better positioned than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[80]

There is an additional reason why a legislative fact remand might be suitable for the introduction of empirical research of the therapeutic impact of law. TJ proponents often press for the reconsideration of an existing law based on its antitherapeutic impact on persons other than those who are likely to litigate the law. For example, Winick has forcefully argued that sexual predator statutes may have an antitherapeutic impact on treatment providers[81] and La Fond has noted the antitherapeutic impact of sexual predator statutes on the public officials participating in the process. These public officials are perhaps one of the least likely classes to bring a constitutional challenge to such statutes.[82] Consider further La Fond's speculation that "studies [might] show that these laws create excessive fear and anxiety *in the community at large*, generating a sort of sex offender paranoia that inhibits a sense of community and freedom."[83] A trial court may simply be less inclined to consider evidence of a statute's antitherapeutic impact when the evidence does not involve one of the parties immediately before it.

Although trial courts are better positioned than appellate courts to scrutinize empirical evidence on this issue, appellate courts are better suited to the task of weighing the force of those studies against other normative values. Remanding the case to the trial court for the consideration of the full panoply of empirical research bearing on the issue resolves the problem engendered by the unrestricted access to the research by appellate courts due to its unsuitability to formal proof or judicial notice. The technique allows for the consideration of concerns that TJ is well-positioned to answer: "The freedom of inquiry that judicial notice offers may entail its own problems of assuring accuracy, fairness, and notice to the parties, and—when the decision has significance for future cases as well as for the one at hand—*due attention to the public interest.*"[84]

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80. Benjamin, *supra* note 66, at 360 (citing Salve Regina College v. Russell, 499 U.S. 225, 233 (1991) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).

81. See Winick, *supra* note 2, at 544-45.

82. See La Fond, *supra* note 6, at 406-08.

83. *Id.* at 413.

84. Korn, *supra* note 40, at 1090 (emphasis added).

Perhaps the development of TJ-inspired appellate advocacy will inspire an interest in resurrecting the legislative fact remand device. Any use of the device is sure to stimulate additional research on the therapeutic consequences of laws being challenged. Most importantly, however, it will allow appellate courts to engage in pragmatic balancing of legitimate therapeutic effects while preserving their ability to consider the policy-based force of future TJ arguments.

VI. CONCLUSION

As a practical matter, the notion that a legislative fact remand will acquire a following in the appellate arena is remote, at least in the near future. However, the potential for TJ-inspired creative techniques at the appellate level is considerable, as appellate courts reprsent an especially fertile and appropriate forum for TJ-inspired appelate advocacy.

Furthermore, the concept of the legislative fact remand can operate as a device used simply to differentiate the "therapeutic administration" and "therapeutic impact of law" strands of TJ scholarship through a comparison of the evidentiary mechanisms through which arguments under those different strands should be made to appellate courts. Although trial courts are perhaps best suited to the task of determining, as a factual matter, the antitherapeutic effects of particular laws, appellate courts are the more appropriate judicial forum for the consideration of how they should be weighed vis-à-vis other normative values. At the very least, then, the legislative fact remand should, as a conceptual construct, serve as but one way to preserve the distinction between the two very different strands of therapeutic jurisprudence.