

THERAPEUTIC JURISPRUDENCE: ISSUES, ANALYSIS, AND APPLICATIONS

Introduction Therapeutic Jurisprudence in the Appellate Arena

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As part of this Symposium, the *Seattle University Law Review* is engaging in an exciting undertaking: the beginning of a dialogue about the use of therapeutic jurisprudence in the appellate courts. Therapeutic jurisprudence is a perspective that focuses on the impact of the law on emotional life and psychological well-being.¹ It examines how the law—which consists of legal rules, legal procedures, and the behavior and roles of legal actors—often produces therapeutic or antitherapeutic outcomes.²

Therapeutic jurisprudence originated within the core content area of mental health law.³ Its broader application was apparent virtually from the beginning,⁴ and the approach quickly expanded from a

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1. See *Introduction* to LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter LAW IN A THERAPEUTIC KEY]. The website for the International Network on Therapeutic Jurisprudence, which includes a cumulative bibliography, is located at <<http://www.law.arizona.edu/upr-intj>>.

2. See *id.*

3. See THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990).

4. See DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* x (1991). It seems only natural (at least to those of us who specialize in mental health law) that initial forays into therapeutic jurisprudence took place within the core content areas of mental health law. Obviously, however, therapeutic jurisprudence also has applications in forensic psychiatry generally, in health law, in a variety of allied legal fields (criminal law, juvenile law, family law), and probably across the entire legal spectrum.

new perspective on mental health law to a mental health or therapeutic perspective on the law in general.⁵ Recently, the area of therapeutic jurisprudence has begun to reach beyond academic circles and into the world of legal practice.⁶ Of particular note has been the increasing interest of the judiciary, both as consumers and as producers of therapeutic jurisprudence literature and insights.⁷

In fact, therapeutic jurisprudence was the topic of the May 2000 midyear meeting of the American Judges Association; the association devoted a full issue of its official journal, *Court Review*, to the topic.⁸ To date, judicial interest has concentrated on courts of first impression—drug treatment courts,⁹ domestic violence courts,¹⁰ criminal courts,¹¹ and juvenile and family courts.¹² Two pieces in *Court Review*, however, raise the issue of therapeutic jurisprudence at the appellate level: an article by Professor Nathalie Des Rosiers of the law faculty of the University of Western Ontario,¹³ and a brief comment by Professor Amy Ronner, a law professor and former director of the in-house appellate clinic at St. Thomas University in Miami, Florida.¹⁴ Professor Des Rosiers launches her article with a discussion of the 1998 opinion of the Supreme Court of Canada in *Ref Re Secession of Québec*.¹⁵ (Parenthetically, it is interesting to note that the discussion of the appellate process is actually sparked by a case involving the Supreme Court of Canada's original jurisdiction.)

5. See LAW IN A THERAPEUTIC KEY, *supra* note 1, at xvii.

6. See generally PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000); Marc W. Patry et al., *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439 (1998); David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REVISTA JURIDICA U.P.R. 691 (1991); David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONT. LEGAL ISSUES 263 (1999).

7. See, e.g., Hon. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

8. See CT. REV., Spring 2000, at 4 *et. seq.*

9. See WEXLER & WINICK, *supra* note 4.

10. See Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, CT. REV., Spring 2000, at 28; Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000).

11. See Judge Robert J. Kane, *A Sentencing Model for the 21st Century*, in LAW IN A THERAPEUTIC KEY, *supra* note 1, at 203.

12. See Hon. William J. O'Neil & Hon. Barry C. Schneider, *Recommendations of the Committee to Study Family Law Issues in the Arizona Superior Court: A Family Court System*, 37 FAMILY & CONCILIATION CTS. REV. 179 (1999).

13. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, CT. REV., Spring 2000, at 54.

14. Amy D. Ronner, *Therapeutic Jurisprudence on Appeal*, CT. REV., Spring 2000, at 64.

15. *Ref. Re Secession of Québec*, 2 S.C.R. 217 (1998).

In this Introduction, I will briefly summarize Des Rosiers' *Court Review* article, entitled *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*,¹⁶ placing it in a framework that transcends minority-majority conflicts and encourages discussion regarding the use of therapeutic jurisprudence by appellate tribunals. My brief summary is followed by a series of comments that have the potential of launching a refreshing line of inquiry into the appellate process, opinion writing, and the formulation of legal doctrine.

I.

Even though there was no immediate plan for a referendum regarding the independence of Québec, the Canadian federal government, exercising its power to refer questions to the Canadian Supreme Court, asked the Court to rule on the constitutionality of a possible future unilateral Québec secession. The Court held that Québec did not have the right to unilaterally secede, but it nonetheless stated that a "clear" majority vote in Québec on a "clear" question favoring secession "would confer democratic legitimacy on the secession initiative which all of the other participants in the Confederation would have to recognize."¹⁷

Des Rosiers notes that both separatists and federalists applauded the Supreme Court decision.¹⁸ Using a therapeutic jurisprudence framework, she attempts to explain the favorable reaction. Basically, Des Rosiers claims that the members of the Canadian Supreme Court moved away from their past stance as "tellers of the truth,"¹⁹ becoming "more process-oriented listeners, translators, educators, and, if possible, facilitators."²⁰ She notes the therapeutic value of process—of telling one's story and being heard—and of a procedure that values the ongoing, continuous relationship between the parties.²¹ And, of course, she notes the sensitive use of language by the court.²² Finally, she commends the Canadian Supreme Court's doctrinal solution—the imposition of an "obligation to negotiate."²³

16. Des Rosiers, *supra* note 13.

17. Ref. Re Secession of Québec, 2 S.C.R. 217 at ¶ 150.

18. See Des Rosiers, *supra* note 10, at 54.

19. *Id.*

20. *Id.*

21. *Id.* at 57. See also Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997) (examining the conventional legal paradigm, its operation in the context of child protection and custody matters).

22. Des Rosiers, *supra* note 13, at 62.

23. *Id.*

II.

In these brief introductory remarks, I cannot even attempt to capture the nuances and texture of the case or Professor Des Rosiers' analysis. Those writings clearly deserve to be read in full.

Instead, I will race to Des Rosiers' conclusion, and, through my own italics, try to set the stage for the commentaries that follow:

It is true that it is easier for a court to be "therapeutic" when the case presented is "hypothetical", as the Secession Reference was. However, there is still a lesson to be learned in the approach adopted by the Supreme Court. Its attention to the language it used in order not to create a problem of legitimacy for itself in Québec has been fruitful. Particularly welcome is the process-driven solution it offered, which called for respect for other minorities and defined the values which had to be taken into account.

It could be that an *inventory of process-driven solutions ought to be offered to courts*. The imposition of an obligation to negotiate, as was done here, is one example. The creation of duties to consult, as was done in the Aboriginal context, may also be of value. Several mechanisms that exist in other fields, the obligation to negotiate in good faith in labor law or the obligation to inform in tort law, for example, could be explored. More must be done in this area. It could also be that *lawyering will have to be done differently*: if the process is to have the therapeutic benefits argued for, it requires that the "true" story be told, that the groups' narratives be heard. It may require that lawyers relinquish control of the story told by the group-client. Again, the implications for lawyers of a judicial therapeutic approach will have to be examined further.²⁴

Des Rosiers' first point is structural: she posits a therapeutic advantage to the "hypothetical" nature of the case.²⁵ Does the ability to issue advisory opinions enhance a court's ability to create "therapeutic" doctrines? Surely, this issue warrants discussion. Interestingly, Des Rosiers notes that asking the unilateral secession question in the absence of an immediate plan for another referendum was risky and "angered most Québécois."²⁶ Might a "reference power" judicial structure possibly have antitherapeutic *pre*-decision consequences and therapeutic *post*-decision consequences?

24. *Id.* (emphasis added).

25. *See id.* at 55.

26. *Id.* at 54.

Next, Des Rosiers speaks of language use, and elsewhere she speaks of opinion-writing as writing a "letter to the loser."²⁷ If past opinions are read through this prism, we are likely to find admirable, abominable, and average illustrations. It may be useful to collect, classify, and use these illustrations in educational programs for judges, lawyers, and law students.

Des Rosiers is very much taken with the "obligation to negotiate" or, as she terms it, the "process-driven solution"²⁸ shaped by the Supreme Court of Canada. In fact, she cites similar doctrinal devices found in labor and tort law, and makes the intriguing suggestion that "an inventory of process-driven solutions ought to be offered to the courts."²⁹ We should indeed seek to collect examples from existing law (in various legal regimes), and perhaps begin to propose still other solutions.

In this connection, I have long been impressed with:

the Warren Court's invitation, apparently never accepted by policymakers or scholars, to think through the true bases of *Miranda* and the line-up cases. Recall that the *Miranda* Court required specific warnings and waivers, including advice regarding appointed counsel during interrogation, "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it. . . ." With lineups, the Court's right to counsel was not intended as a "constitutional straightjacket." "Legislative or other regulations . . . which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may . . . remove the basis for regarding the stage as 'critical.'"³⁰

The United States Supreme Court accomplished much in *Miranda* by not creating a constitutional straightjacket. The Court took some of the sting out of its rulings by allowing critics to consider and propose alternative options for satisfying the interests at stake and by allowing itself enough breathing space to turn back and take a different approach in the future if its ruling did not work well in the real world.

By and large, dialogue-producing doctrines are likely to be helpful. Such doctrines may, in and of themselves, actually constitute the

27. *Id.* at 56.

28. *Id.* at 62.

29. *Id.*

30. David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY*, *supra* note 1, at 713, 720.

corpus of an emerging therapeutic and preventive law.³¹ In some instances, however, courts may eventually need to call a halt to endless and unproductive dialogue. When might that be the case? How might it best be accomplished?

Des Rosiers' conclusion notes that, in some instances, perhaps "lawyering will have to be done differently,"³² perhaps by giving more room to clients or group-clients to tell their own stories. Professor Amy Ronner's *Court Review* article, *Therapeutic Jurisprudence on Appeal*,³³ a companion piece to Des Rosiers', deals in part with the potential therapeutic impact of appellate attorney/client interaction. The role of the appellate lawyer may be profitably viewed through the therapeutic jurisprudence lens.

These are some of the many issues that can be healthy and appetizing food for thought in a therapeutic jurisprudence appellate project. Such a project should, of course, be ongoing, but it will surely be given shape and direction by the rich commentary that follows.

31. In his foreword to *Lawyering Through Life: The Origin of Preventive Law*, Professor Dauer writes:

Nearly thirty years ago Hans Kelsen (the founder of the "Pure Theory of Law" school of jurisprudence) wrote to Louis Brown. "The term 'Preventive Law' is in my opinion not correct," Kelsen suggested. "It is not the law which is preventive, it is the activity of the professional lawyer who recommends to his client an action (or the abstention from an action) by which the client may avoid legal effects not in his interest." Louis Brown devoted the next three decades—in his writing, in his teaching, in his life as a professional lawyer—as if proving the truth of Kelsen's correction.

Edward Dauer, *Foreword* in LOUIS M. BROWN, *LAWYERING THROUGH LIFE: THE ORIGIN OF PREVENTIVE LAW* at xv (1986).

A corpus of process-oriented *legal doctrines* enables us to begin considering whether the law itself may indeed sometimes be preventive. The law can surely be "preventive" in a therapeutic jurisprudence sense—discouraging stressful, aggressive encounters and encouraging harmonious interactions. And to the extent that such harmony reduces the likelihood of future *legal* conflict and resort to litigation, the law would presumably operate "preventively" even in the narrower (more legally-tailored) preventive law sense of the term.

32. Des Rosiers, *supra* note 13, at 62.

33. Ronner, *supra* note 14, at 64.