

Therapeutic Jurisprudence on Appeal

Amy D. Ronner

The novelist, Marge Piercy, writing about the French Revolution, gave Georges-Jacques Danton a therapeutic jurisprudence epiphany that his voice and the tribunal's willingness to hear it are crucial components of justice:

Yet he was not as helpless as they thought. He was in possession of his finest weapon, his voice, his rhetoric, his ability to move crowds. He would take over the fake trial, the quick march toward death.¹

Professor Bruce J. Winick, a founder of therapeutic jurisprudence, has given the movement the expansive definition it deserves by explaining that the law can “function 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.”² There is, however, a tendency to unduly confine therapeutic jurisprudence to just situations in which the law literally grapples with a mental health problem.³ Also, much therapeutic jurisprudence analysis focuses on the trial context because an individual's involvement with the legal system typically entails direct contact with lower tribunals.⁴

Surprisingly very little has been written about therapeutic jurisprudence in appeals. Professor Nathalie Des Rosier, who has discussed appellate therapeutic jurisprudence, points out that “there is no reason why people should feel ‘worse’ after dealing with the justice system” and that “[the system] should try to minimize the damage that it does and aspire to help, not destroy, people who come in contact with it.”⁵ Because appellate courts are final decision makers that not infrequently share their reasoning, they are able to “minimize damage” and engender therapeutic consequences.⁶

As Danton implicitly believed, two main components of appellate therapeutic jurisprudence are fairness and listening. In a predominantly narrative format, I will elaborate on these and show how an appellate court served as a therapist for a client represented by a law school in-house appellate litigation clinic.

AN IN-HOUSE APPELLATE CLINIC AND THEIR INCARCERATED CLIENT

As a full-time law professor, I run an in-house appellate clinic, which has 10 to 14 third-year law students. Under the student practice rules, the Florida Supreme Court certifies these students as legal interns, which authorizes them to appear in any Florida court on behalf of an indigent party.⁷ In the 1999 Spring semester, the appellate clinic accepted a case from the public defender's office in which a Douglas Pellicane had been charged with felony driving under the influence.⁸

The charge was a felony because Pellicane allegedly had, at the time of his arrest, three prior DUI convictions.⁹ After the jury found our client guilty of DUI, the judge conducted a separate proceeding in which the onus was on the prosecution to satisfy the requisite element of felony DUI by proving the three prior convictions.¹⁰

The state, however, had a problem establishing the alleged third prior conviction: it introduced an electronic docket showing a DUI conviction for a person with the same name as our client along with a certified copy of the driving record.¹¹ While the state had offered fingerprint standards from court records in order to prove the other two priors, it did not have fingerprints for the third.¹² In the trial court, defense counsel argued that the state's omission of fingerprint standards meant that it fatal-

Footnotes

1. MARGE PIERCY, *CITY OF DARKNESS, CITY OF LIGHT* 426 (1996).
2. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 *PUB. POL'Y & LAW* 184, 185 (1977). See also Dennis P. Stolle et al., *Integrating Preventative Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 *CAL. W. L. REV.* 15, 17 (1997) (“Therapeutic jurisprudence . . . 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”).
3. See, e.g., BRUCE J. WINICK, *THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT* (1997). See also *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds. 1996) (several articles deal with mental health issues).
4. See generally *LAW IN A THERAPEUTIC KEY*, *supra* note 3 (many articles in that collection deal with trial court issues).

5. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority/Majority Conflicts*, *COURT REVIEW*, Spring 2000 at 54, 55.
6. *Id.*
7. See generally 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 (1996) (describing the in-house appellate clinic).
8. *State v. Pellicane*, 729 So.2d 534 (Fla. Dist. Ct. App. 1999).
9. *Id.* at 535. See generally Fla. Stat. § 316.193(2)(b)(1999) (“Any person who is convicted of a fourth or subsequent violation of this section is guilty of a felony of the third degree”).
10. See *State v. Rodriguez*, 575 So. 2d 1262 (Fla. 1991) (for felony DUI, the judge must hold a separate non-jury proceeding).
11. *Pellicane*, 729 So. 2d at 535.
12. *Id.*

ly failed to link our client with that conviction. The judge, agreeing with the defense, acquitted Pellicane of the felony charge.¹³

The state appealed, arguing that a preponderance of the evidence standard applied to the felony proceeding and that the driving record alone was enough to prove the third prior conviction.¹⁴ On appeal, the appellate clinic argued, among other things, that the state must prove the priors beyond a reasonable doubt and that the driving record did not meet that heightened standard.¹⁵ The appellate court found for Pellicane.¹⁶

THERAPEUTIC JURISPRUDENCE: LISTENING AND FAIRNESS

Fairness and listening are two main threads of therapeutic jurisprudence and they are crucial on appeal as well. The Pellicane appeal illustrates the therapeutic effect that an appellate court can deliver.

Some therapeutic jurisprudence scholars point out that when individuals participate in a judicial process, the actual outcome of their experiences is not what principally affects them. What influences them most is their assessment of the fairness of the process itself. As Professor Tyler 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 everyday lives.¹⁷

Similarly, Professor Gould, examining studies of people involved in felony cases, concludes that those "who have 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."¹⁸ This can in turn "lead to a 'gradual erosion of obedience to the law.'"¹⁹

Intertwined with fairness is what Professor Des Rosiers has isolated as "the need for the tribunal to listen fully to all the concerns of the participants and to recognize the value of such expression."²⁰ That is, the court must make the parties know that they have a voice, one that it is not being silenced.

When Pellicane first contacted the appellate clinic, his message was essentially twofold: the system is unfair and I have no voice. In the opening paragraph of his long letter to the clinic, Pellicane, writing from a work camp, said that he had "given up hope in lawyers and the judicial system" and asked us to make sure "that the procedures and laws of the judicial system are followed and obeyed."²¹ He also, expressing dismay at the fact that the judge that had tried his case was up on charges before the Judicial Qualifications Committee, feared that the state's appeal was part of a "crusade" against a liberal judge and that the appellate court would not really hear his arguments, but would reverse just to endorse the judge's unfitness.²² Further, Pellicane's letter contained a litany of injustices that he felt the system had heaped on him.²³

Without commenting on the legitimacy of his grievances, what stood out most about our client's letter was his perception of himself as a silenced, abandoned victim of a lawless system. What was noticeably absent from that letter was any real acknowledgment of his alcohol problem or acceptance of responsibility for anything that had transpired. He also did not mention the future or convey any feeling that he had power to change his own life. In short, Mr. Pellicane seemed mute and helpless.²⁴

Pellicane's letter, the one written after the appellate court

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13. *Id.* The judge sentenced Pellicane to a year's probation with the special condition that he serve 364 days in county jail. The court also ordered, among other things, that Pellicane be placed in an inpatient alcohol treatment center for at least 28 days and that he only be held in jail until a bed in such a facility became available. An adjudication of guilt for felony DUI, however, could have exposed Pellicane to steeper penalties and a five-year term of imprisonment. See generally Fla. Stat. §§ 775.082 and 775.083 (1999) (describing punishment for felony of the third degree).

14. *Pellicane*, 729 So. 2d at 535.

15. *Id.*

16. *Id.* at 535-56.

17. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 437 (1992). See also Amy D. Ronner, *Punishment Meted out for Acquittals: An Antitherapeutic Jurisprudence Atrocity*, 41 ARIZ. L. REV. 459, 472-77 (1999).

18. 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, 865 (1993)

19. *Id.* (quoting Daniel W. Shuman & Jean A. Hamilton, *Jury*

Service—It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors, 46 SMU L. REV. 449, 451 (1992)).

20. Des Rosiers, *supra* note 5.

21. Letter from Douglas Pellicane (January 22, 1999) (on file with the author).

22. *Id.*

23. His numerous complaints included the following: court unfairly failed to notify him that his case had been transferred to the felony division; the blood alcohol level tests were unfair; jury selection had been unfair because it eliminated anyone who knew the public defender or the state attorney; the court unfairly allowed an officer who wasn't present during his arrest or blood alcohol test to be a witness; the prosecution witness unfairly talked to two jurors in the parking lot, which resulted in a mistrial but not in a dismissal; he had to endure the whole ordeal again, which unfairly gave the state time to "choreograph [its] testimony and change [its] approach"; it was unfair that his counsel and the state attorney were "very good friends"; and the state purposely lost him in the system. *Id.*

24. See Ronner, *supra* note 17 at 476-80 (discussing how the legal system can spawn a sense of helplessness).

decision, was markedly different from the first. In expressing his appreciation to the appellate clinic, what emerged was a rejuvenated faith in the legal system:

I believe God allowed all of you the ability and the inner urge to fight to get into the court room to stand up for due process of the laws this land is governed by. And also the determination to see to it that people's rights to Justice, Liberty and Freedom are honored and respected as the Constitution of the United States of America requires.²⁵

Something else came across in that letter, however: our client saw that he had a future and power to direct it. For example, he expressed a desire for treatment and explained that he had been doing "a little work on [his] own to get [himself] to a Work Release Center and [had] prevailed."²⁶ Significantly, Pellicane assumed responsibility for his own predicament, stating, "I'm not a hard core criminal. The people I have hurt are my family, friends and my self respect."²⁷

CONCLUSION

In the course of the appellate process, Pellicane had changed and it was not just because he won. While the clinic took pains to answer Pellicane's letters, the appellate court also heard his voice. The court did not merely recite "per curiam affirm," but

instead authored a short, but fairly substantial decision that acknowledged and responded to Pellicane's position.

The court also did not ignore precedent, but applied it honestly, explaining why Pellicane was entitled to the heightened, reasonable doubt rule. For Pellicane, the court helped him by listening and being fair. It gave him the assurance that Danton so much desired, that the proceeding was neither "fake" nor a "quick march toward death."²⁸ In short, the court became a kind of therapist, releasing our client from his bastille of voiceless, self-perceived helplessness.



Amy D. Ronner is a professor of law at St. Thomas University School of Law in Miami. She earned her J.D. in 1985 from the University of Miami; her Ph.D. in 1980 from the University of Michigan; her M.A. from the University of Michigan in 1976; and her B.A. from Beloit College in 1975. She would like to dedicate this article to Arthur J. England, former Chief Justice of the Florida Supreme Court, because he is fair and such a good listener.

25. Letter from Douglas Pellicane (April 21, 1999) (on file with author).

26. *Id.* A therapeutic approach for an attorney representing a client like Pellicane would of course emphasize that he or she has a substantial prior record of DUIs and that further arrest can result in

conviction as a felony and suggest treatment options. It is, of course, basic that a client's acknowledgment of a problem and the need for treatment is a beginning for potential recovery.

27. *Id.* (emphasis added).

28. Piercy, *supra* note 1.

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