

Judging for the New Millennium

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Quickly complete this sentence: "The role of the law in society is _____." If you thought "to heal," close this journal and go to your next. You won't find much here you haven't thought about. Everyone else, read on to explore an emerging role for courts and judges in this new millennium.

The topic of this special issue of *Court Review* is "Therapeutic Jurisprudence," or "TJ" as it is commonly known. No single definition of TJ captures it fully.

One author offers the following definition as best capturing the essence of TJ: "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects."¹ It is the study of the role of law as a healing agent, and it offers fresh insights into the role of law in society and those who practice it.

TJ can be thought of as a "lens" through which to view regulations and laws as well as the roles and behavior of legal actors—legislators, lawyers, judges, administrators. It may be used to identify the potential effects of proposed legal arrangements on therapeutic outcomes. It is useful to inform and shape policies and procedures in the law and the legal process. TJ posits that, when appropriate, the law apply an "ethic of care" to those affected.

TJ does not "trump" other considerations or override important societal values such as due process or the freedoms of speech and press. It suggests, rather, that mental and physical health aspects of law should be examined to inform us of potential success in achieving proposed goals. It proposes to consider possible negative psychological effects that a proposal may cause unwittingly. TJ doesn't necessarily dominate, but

rather informs and in so doing provides insight and effective results. Such considerations enter into the mix to balance when considering a law, or a legal decision, or course of legal action.

It is important for judges to practice TJ because—like it or not—the law does have therapeutic and anti-therapeutic consequences. This is empirical fact. Consider the following situations; they are familiar to judges.

In busy dockets, it is common for judges to accept "no contest" or *nolo contendere* pleas in sex offense cases in lieu of a guilty plea. TJ will not dictate whether a judge should do this or not. It will, rather, ask the judge to consider the therapeutic effects that may follow as a consequence of such a plea. They may be considerable, because in the case of sex offenders a *nolo* plea may reinforce a process of denial that will frustrate the offender's rehabilitation. If the offender does not have to admit the crime to the judge, he or she may more easily deny it later to a probation officer or sex abuse counselor. Anti-therapeutic consequences such as frustration of rehabilitation and return to abusive behavior may result from the judge's acceptance of the plea. Ironically, this process would be started by the judge—the very person society most expects to promote the rule of law.

The same may be said of criminal cases involving an addiction to alcohol or other drugs. The biggest hurdle that an addict or alcoholic usually must overcome is denial. It is difficult to admit affliction with an uncontrollable disease, especially one to which our society has attached moral overtones. Nevertheless, those experienced with recovery know that this admission is critical. If, for whatever reason, a judge accepts a *nolo* plea in such a case and does not require

the defendant to confront his or her addiction openly, the judge misses a critical "therapeutic moment." Moreover, as in the case with sex offenders, the judge may have set in motion a course of denial that will virtually guarantee the failure of subsequent rehabilitation efforts and the eventual return of the offender to the system.

Consider this final example: the role of apology in tort law. Practitioners familiar with medical malpractice cases know that many plaintiffs only want an apology from their health care provider for the adverse outcome they experienced. A lawsuit is the furthest action on their mind. And for negligent care providers, an apology for a regrettable mistake would be a therapeutic event. Unfortunately, some professional insurance practices prohibit an insured from having any contact with a patient who may file a claim. There is a good reason for this from the standpoint of the insured and the insurer: a non-privileged admission could end up in court as a *coup de grace*. The anti-therapeutic result, however, can be that the patient is deprived of what the patient may want most, and the health care provider cannot take necessary steps to cleanse his or her mind and return to productive work. Moreover, because the provider is forced by the law into a position of denial, the likelihood of reoccurrence increases.

TJ first identifies these anti-therapeutic elements that might otherwise go unexplored. Next, it asks whether an action could be taken to avoid them without "trumping" the established legal principles involved. It proposes such action and methods to evaluate it. TJ is, therefore, not merely a speculative exercise, but rather action-oriented. It seeks tangible results.

Permit me to describe some personal

Footnotes

1. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL., PUB. POL. AND LAW 193, 196 (1995).

experience I have had in each of these areas to demonstrate how TJ applies. For more than five years I have refused to routinely accept *nolo* pleas in felony sexual abuse cases. Once my practice became known among local lawyers, no defendant has refused to go forward with a guilty plea. The attorneys prepare their clients for this in advance if they are in my court. (This suggests, of course, the significant role lawyers play to prepare clients for therapeutic or anti-therapeutic court experiences, but that is a separate topic I leave for another day.) Moreover, since then I have never had a sexual abuser appear at sentence and deny to me that he or she committed the crime. Nor have I received a single letter from a family member denying that the defendant was capable of such an act. These were routine when I accepted *nolo* pleas. As a result, at sentencing, I can confront defendants much more effectively with the reality of their behavior and the wrongfulness of their conduct. This result is also more therapeutic for victims of such crimes.

Beginning in 1992, I presided over a drug treatment court in my community. A drug court diverts certain non-violent, substance-abusing criminal defendants from the traditional adversarial criminal justice system into treatment and rehabilitation. Since then, more than 800 adult felony offenders addicted to alcohol or other drugs have been enrolled in this program. Fifty-five percent of women and 64% of men remain engaged in their recovery while they are in the program. The recidivism rate of participants is less than 15%. For graduates, it is less than 2%. This drug court and more than 400 others across the country apply TJ principles to criminal justice.

Recently in my court, I have experimented in medical malpractice cases

with what I call "good faith conferences." As part of the settlement of two cases, one involving a death, a meeting was held between the interested parties, including the plaintiff or the family of the deceased and the physician-defendant. Attorneys were present at both conferences. One was held in my presence; the other occurred in the office of a neutral, experienced personal injury attorney. All participants agreed that anything said could not be used for any purpose. During these conferences, each side was permitted to speak about the feelings they had experienced because of the perceived malpractice and the lawsuit. The physicians explained why they had done what they had believed to have been medically appropriate in the circumstance, yet apologized to the family or plaintiff. Patients and their families expressed frustration and anger over everything from the physician's attitude to the care administered. The results have been mixed. However, the attorneys involved—all experienced in medical malpractice—and I agree that this method of dispute resolution meets significant litigant needs and is worth further refinement. But for the Therapeutic Jurisprudence movement, this project may never have occurred.

These are not radical concepts; they are mainstream. They do give a fresh perspective on honored principles of the legal profession. Abraham Lincoln advised lawyers (and presumably judges): "Discourage litigation. Persuade your neighbor to compromise wherever you can. . . . As a peace-maker, the lawyer has a superior opportunity of being a good man."² Roscoe Pound spoke of "sociological jurisprudence," arguing that law must look to the relationship between itself and the social effects it creates.³ Oliver Wendell Holmes

said "the life of the law has not been logic: it has been experience," and he noted that the practical necessities of the times have always shaped the rules of law and the legal practices of a given age.⁴

At a presentation to the annual meeting of the National Association for Court Management in 1996, the need to become "more therapeutic" in outcome was described as one of the top ten issues facing the courts in the future.⁵ In 1996, in a cover story in the American Bar Association *Journal* entitled, "The Lawyer Turns Peacemaker," the author noted public dissatisfaction with the justice system and argued for the need to apply a more therapeutic approach to litigation so that the parties' feelings of anger, resentment, or rejection could give way to a healing process.⁶

Recently, David Rottman and Pamela Casey, staff members of the National Center for State Courts and frequent authors on this topic, observed that courts are moving towards a "problem-solving" orientation to their responsibilities and forming problem-solving partnerships to address more effectively the complex social problems that have come to dominate their dockets in recent years.⁷ The Commission on Trial Court Performance Standards also raised the level of court consciousness on these matters through its Trial Court Performance Standards. Standard 3.5 is: "The trial court takes appropriate responsibility for the enforcement of its orders. No court should be unaware of or unresponsive to realities that cause its orders to be ignored."⁸ And Standard 4.5 states:

The trial court anticipates new conditions and emergent events and adjusts its operations as necessary. Effective trial courts are responsive to emergent public

2. Abraham Lincoln, in QUOTE IT! MEMORABLE LEGAL QUOTATIONS, 429-430 (Eugene Gerhart, ed. 1987).

3. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140 (1912).

4. Oliver Wendell Holmes, in THE SOCIOLOGY OF LAW 4 (James Simon, ed. 1968).

5. Francis Gavin and James Thomas, *The Top Ten Issues Facing State Courts in 1996 and What You Can Do About Them*, Workshop at Eleventh Annual Conference, National Association for Court Management, Albuquerque, New Mexico, July 18, 1996.

6. Richard Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J.,

August 1996 at 54.

7. David Rottman & Pamela Casey, *A New Role for Courts?*, NAT'L INST. JUST. J., July 1999 at 12.

8. TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 16 (Bureau of Justice Assistance, 1997). For more information about the Trial Court Performance Standards, see Pamela Casey, *Defining Optimal Court Performance: The Trial Court Performance Standards*, COURT REVIEW, Winter 1998 at 24 [available on the Web at <http://aja.ncsc.dni.us/courtrv/cr35-4/CR35-4Casey.pdf> (last visited March 26, 2000)].

issues such as drug abuse, child and spousal abuse, AIDS, drunken driving, child support enforcement, crime and public safety, consumer rights, gender bias, and the more efficient use of fewer resources. A trial court that moves deliberately in response to emergent issues is a stabilizing force in society and acts consistently with its role of maintaining the rule of law.⁹

There is already significant judicial leadership in this movement. Judith S. Kaye, Chief Judge of New York, wrote recently about the emergence of what she called “hands-on courts.” She made these useful observations:

In these new courts, judges are active participants in a problem-solving process What’s so different about this approach? First is the court’s belief that we can and should play a role in trying to solve the problems that are fueling our caseloads. Second is the belief that outcomes—not just process and precedents—matter.¹⁰

In a speech at the Holocaust Museum in 1997, Justice Richard J. Goldstone of the Constitutional Court in South Africa described this same role this way: “One thinks of justice in the context of deterrents, of retribution. But too infrequently is justice looked at as a form of heal-

ing.”¹¹ That healing role is at the heart of TJ, as noted by Michael D. Zimmerman, a member of the Utah Supreme Court and its former chief justice.¹² He called for “involved judging” in which “judges and courts assume a stronger administrative, protective, or rehabilitative role toward those appearing before them, that they become more involved in what some have termed ‘therapeutic jurisprudence.’”¹³ He recognized that this was a “new cultural reality” for most judges.¹⁴ Yet he pointed out that it will not go away, and, unless we craft our own response, it will be thrust upon us by society.¹⁵

TJ acknowledges that the healing roots of the legal profession can be in tension with our highly developed adversarial system and with our emphasis on process. As David Wexler, co-founder with Bruce Winick of the school of TJ, has pointed out, the adversarial nature of our system has legitimate and crucial value for critical thinking. However, the legal system suffers from a culture of adversarial representation and relationships, in which argument rises to the level of a privileged status.¹⁶ This can obscure many important societal values that the legal system need not and should not ignore, such as outcome, social harmony, and the ethic of care. TJ is receiving attention precisely because it requires that we recognize such values, balance them with others, and make choices. Practitioners are discovering

that TJ strikes a resonant chord in the legal system and community for beneficial and sensible outcomes of problems that come to light in legal trappings.

Judges must take the lead and assume appropriate responsibility for these issues. If we do not, as Justice Zimmerman observed, they may be resolved without us.¹⁷ More important, we will have failed in our responsibility as leaders. We will reap the resulting public disaffection with us and the system we supervise. We’ll deserve it.



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9. TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY, *supra* note 8, at 20.
10. Judith S. Kaye, *Making the Case for Hands On Courts*, NEWSWEEK, Oct. 11, 1999, at 13 [available on the Web at http://www.newsweek.com/nw-srv/printed/us/dept/my/my0115_1.htm (last visited March 26, 2000)].
11. Richard Goldston, speech given at the Holocaust Museum, Washington, D.C. (Jan. 27, 1997).
12. Michael Zimmerman, *A New Approach to Court Reform*, 82

- JUDICATURE 108 (1998).
13. *Id.* at 109.
14. *Id.* at 109-10.
15. *Id.* at 110.
16. David Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263 (1999).
17. Zimmerman, *supra* note 12, at 110 (“We can choose to be the agents of innovation, or the subjects of innovation.”).

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