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Introduction Symposium: The Varieties of Therapeutic Experience

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Introduction Symposium: The Varieties of Therapeutic Experience

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INTRODUCTION

SYMPOSIUM: THE VARIETIES OF THERAPEUTIC EXPERIENCE

A.J. Stephani¹

Any symposium that boldly borrows from such an estimable work as William James' *The Varieties of Religious Experience*² for its title shoulders a heavy burden. For many, James' monumental and elegant text epitomizes the fruits of cross-disciplinary inquiry: his pivotal synthesis of psychological insight and spiritual reflection represents perhaps the single most defining moment in the psychology of religion.

In this, the 100th anniversary of James' watershed work, it is fitting that a symposium representing the breadth of the field of legal inquiry known as "therapeutic jurisprudence" bask in its legacy. Although TJ, as it is colloquially known, is still in its relative infancy—the framework was developed by progenitors David Wexler and Bruce Winick a mere 15 years ago³—it shares many of the same characteristics as James' pluralistic exposition. However, it is critical that the analogy to James' work not be taken too literally—in no way do I want to imply that TJ necessarily has anything to do with "religion," "religious experience," or any concept of "spirituality," however construed. Instead, the relevance of James' work to TJ lies in his embrace of the importance of subjective experience in understanding what "religion" is and his concomitant rejection of the idea that a purely rational theory of scientific objectivism could monopolize religious truth.

¹ Executive Director, Glenn Weaver Institute of Law and Psychiatry, University of Cincinnati College of Law and Convenor, Second International Conference on Therapeutic Jurisprudence, Cincinnati, Ohio, 2001.

² WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* (MacMillan 1990).

³ The origin of the term "therapeutic jurisprudence" is derived from an National Institute of Mental Health workshop in October 1987, at which David Wexler presented a paper laying out a perspective of "law as therapy" that 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.*

Accordingly, James' work is seen within a tradition of pragmatism, or prudentialism as it is sometimes known in its legal form. It is within this particular tradition that I believe TJ will ultimately reside and inspire its most productive work and thus share a place with James and *The Varieties of Religious Experience*. I believe that you will find the articles presented here with characteristic Jamesian elegance and that the substance of the symposium lives up to the promise of its title.

The reference to James' classic work is not simply a clever attempt to draw attention to the diversity of therapeutic jurisprudence scholarship, though I hope it accomplishes this objective. It also represents a rather simplified attempt to place TJ within a broader jurisprudential and philosophical tradition. Although TJ is still viewed in some quarters as a strand of mental health law scholarship,⁴ there is little question that the kinds of questions TJ seek to raise have been applied in a broad range of legal settings, many of which are exemplified in this symposium.

There have been virtually no attempts to situate TJ within a particular jurisprudential tradition,⁵ and serious attention to this question requires far more space than a symposium introduction will allow and a far greater faculty and knowledge of the various jurisprudential traditions than I possess. However, I would like to offer some rather general non-footnoted observations on the subject and the possible linkages between TJ and the role of William James' text in a broader context.

What began largely as an outgrowth of mental health law discourse has blossomed, as hoped and expected by co-progenitors David Wexler and Bruce Winick, into a therapeutic perspective on the law in general. Articles incorporating therapeutic jurisprudence principles have been published on topics as diverse as the role of

⁴ See Elyn R. Saks, *Mental Health Law: Three Scholarly Traditions*, 74 S. CA. L. REV. 295, 298-300 (2000).

⁵ *Id.* at 299-300 ("And without [a] normative orientation, one wonders what is jurisprudential about therapeutic jurisprudence"); see also Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193, 219 (1995) ("These suggestions, or others like them, are needed to goad therapeutic jurisprudence into a critical self-consciousness"); *id.* at 199 ("[O]ne needs to consider the relationship of TJ to other modern jurisprudences, such as critical legal studies, the feminist movement, and critical race theory").

apology in the law,⁶ the therapeutic impact of sexual predator commitment laws,⁷ adoption alternatives,⁸ and the therapeutic role of the unconscionability doctrine in contract law.⁹ The expansion of TJ into areas outside of mental health law has raised questions concerning exactly what is meant by the term “therapeutic.”¹⁰ Thus far, however, TJ has resisted attempts to adopt a rigid formulation of the concept, opting instead for a general conception that allows “commentators to roam within the intuitive and common sense contours of the concept.”¹¹

One can see in this last quote echoes of James’ circumscription of the subject matter of his own work—“Religion, therefore, as I now ask you arbitrarily to take it, shall mean for us the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.”¹² Much in the same way that TJ has recognized that unnecessary definitional constraint may

⁶ Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000).

⁷ Sarah E. Spierling, *Lock Them Up and Throw Away the Key: How Washington’s Violent Sexual Predator Law Will Shape the Future Balance Between Punishment and Prevention*, 9 J.L. & POL’Y 879 (2001); Keri A. Gould, *If It’s a Duck and Dangerous--Permanently Clip Its Wings or Treat it Till it Can Fly?: A Therapeutic Perspective on Difficult Decisions, Short Sighted Solutions and Violent Sexual Predators After Kansas v. Hendricks*, 31 LOY. L.A. L. REV. 859 (1998); Robert F. Schopp, *Civil Commitment and Sexual Predators: Competence and Condemnation*, 4 PSYCH. PUB. POL’Y & L. 323 (1998); Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCH. PUB. POL’Y & L. 161-92 (1995); John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375 (1999).

⁸ Susan L. Brooks, *The Case for Adoption Alternatives*, 39 FAM. & CONCILIATION CTS. REV. 43 (2001).

⁹ Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445-501 (1994).

¹⁰ See *Slobogin*, *supra* note 5, at 200-204; *id.* at 201 (“Whereas the words therapeutic and well-being may be specific enough to help differentiate TJ from other perspectives, they are still extremely vague. At least some effort must be made to identify the meaning of these terms if this jurisprudence is to be critically evaluated.”).

¹¹ David Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCH. PUB. POL’Y & L. 220, 221 (1995).

¹² JAMES, *supra* note 1, at 36.

imperil its greatest promise—particular TJ-inspired insights into how the law may maximize psychological well-being across all legal doctrines—James understood that “the oversimplification of [theoretical] materials . . . is the root of all that absolutism and one-sided dogmatism by which both philosophy and religion have been infected.”¹³ A rigid definition of “therapeutic” may be useful in determining what TJ is not, much like a tighter definition of “religion” may have allowed James to escape some of the trickier features of his theory, but it would neither accurately describe the uniqueness and complexity of any endeavor involving human interaction nor permit its greatest possible application across all areas of legal study.

James’ most significant contribution to a phenomenology of religion, however, is his rejection of a rationalist objectivist philosophy to explain the nature of religious objects or states of mind. To James, “[k]nowledge about a thing is not the thing itself.”¹⁴ Religion is not defined by, nor does it take place in, churches, synagogues, or other houses of worship, but felt and experienced in everyday life. One can no more understand religion by looking at specific doctrines or observing religious rituals than one can understand what it is like to be drunk by knowing the causes of drunkenness, to borrow James’ own analogy.¹⁵

A science might come to understand everything about the causes and elements of religion, and might even decide which elements were qualified, by their general harmony with other branches of knowledge, to be considered true; and yet the best man at this science might be the man who found it hardest to be personally devout Knowledge about life is one thing; effective occupation of a place in life, with its dynamic currents passing through your being, is another.¹⁶

James’ embrace of pragmatism, a non-abstract method of deriving truth from actual experience, is central to his

¹³ *Id.* at 32.

¹⁴ *Id.* at 438.

¹⁵ *Id.*

¹⁶ *Id.*

understanding of religion. The legal branch of that philosophical tradition, sometimes called prudentialism, is the tradition within which some of the greatest 20th century jurists and legal thinkers—Oliver Wendell Holmes, Jeromè Frank, Karl Llewelyn, Alexander Bickel—have been historically placed, and the tradition that acts as a counterpoint to logical positivism and legal scientific realism.

I believe that it is within this pragmatic, prudentialist tradition that any “grand theory” of TJ ultimately lies. Through its virtual insistence that it maintain a neutral stance within any particular doctrinal framework, TJ scholarship forces itself to evaluate the experiential aspects of legal practice within that framework. By remaining normatively agnostic, it requires its proponents to explore the ways in which a thoroughgoing understanding of the values and social policies underlying a particular legal doctrine are, in fact, *not* the legal doctrine itself, but merely the object of the doctrine. TJ, with its insights into how the doctrine is experienced and perceived in real life, is needed to complete the picture.

Most of the articles in this symposium were originally presented at the Second International Conference on Therapeutic Jurisprudence, hosted by the Glenn Weaver Institute of Law and Psychiatry and the University of Cincinnati College of Law in May 2001, and the works by Nathalie Des Rosiers and Jim Zion were initially presented as keynote presentations. The Conference, which was attended by almost 200 participants, followed up on the First International Conference on Therapeutic Jurisprudence, which was held at the University of Southampton in Winchester, England, in July 1998. The Conference continued the interdisciplinary and international interest in the area, as it featured nearly 70 presentations by speakers from all over the world from the disciplines of social work, nursing, counseling, criminology and criminal justice, psychology, psychiatry, and law. In addition to the articles presented here, four other symposia of papers presented at the Conference are being published in the Criminal Law Bulletin, the University of Cincinnati Law Review, the Journal of Nursing and Law, and the Florida Coastal Law Journal.

In the first piece, Nathalie Des Rosiers discusses the possible ways in which the therapeutic jurisprudence enterprise may be significant in law reform generally. The essence of her

argument—that the “‘law as lived’ must be the focus of the law reform inquiry”¹⁷—stands squarely in the pragmatist and prudentialist tradition of Jerome Frank, Karl Llewellyn, and more remotely, William James. Her insight that the business of law reform must look beyond a simple rights-based approach and involve a broader spectrum of participants provides a brilliant example of the future of therapeutic jurisprudence within a prudentialist tradition and its impact on legal practice and scholarship.

In the next article, Marla Kahn draws upon her background as a psychotherapist and a lawyer to discuss the ways in which role-interest conflicts, relational dynamics, and intrapsychic dynamics by lawyers, judges, and other law-related personnel may affect their legal practice and the emotional impact on their clients and other persons involved in the legal system. By drawing analogies to professional psychology, Kahn’s work echoes James’ by emphasizing the need to minimize the distortions produced by a lack of self-awareness and understanding of the experiential nature of lawyer-client relations.

I am very grateful to TJ progenitors David Wexler and Bruce Winick for providing the next article in the symposium. In the article, Wexler and Winick discuss the growing symbiosis between TJ and the drug court movement and the possibilities for facilitating the rehabilitative process for drug and alcohol offenders. An understanding of the ways in which TJ may enhance the therapeutic potential of drug courts provides a perfect illustration of the doctrinal normative-neutrality of therapeutic jurisprudence. By focusing on the “experiential” aspects of drug court programs—the judge-defendant interaction, the effect of legal coercion on treatment effectiveness, the participation of defense counsel within an overall “team” approach—Wexler and Winick implicitly note the limitations of viewing drug court exclusively through a political or doctrinal lens.

In the next piece, Robert Madden and Raymie Wayne take up the task, only hinted at in this introduction, of attempting to place TJ within a normative framework. Arguing that a structure similar to the one developed in social work would meet TJ’s needs,

¹⁷ Nathalie Des Rosiers, *Using Therapeutic Jurisprudence in Law Reform*, *infra* at 446.

the authors describe how such a framework could provide the adaptability seemingly required by the movement. Although many of the values espoused by the field of social work and described in the article are non-experiential in nature, Madden and Wayne create an implicit link with James' non-rational approach by noting the relational and sometimes transformative nature of social work: "To achieve these benefits the social worker must attend to the process, not merely the outcome."¹⁸ This is a characteristic insight found throughout TJ-inspired scholarship and James' work.

Yuval Feldman continues the symposium by taking up the daunting task of describing TJ's potential significance in the law and economics movement by examining the concept of personal control as it relates to the freedom of contract. His insight that "every discipline within the law should receive distinct treatment, which takes into account the normative assumptions of the specific doctrines"¹⁹ and subsequent critique that TJ, as it currently stands, "does not consider situational constraints, and therefore does not account for the uniqueness of every legal doctrine,"²⁰ should be considered carefully not only for TJ's potential applicability to contract law, but across all legal domains. Nonetheless, Feldman's primary contention, as I understand it, is that under whatever rubric it is explicated, the emotional and cognitive aspects of contract formation, such as emotional control, sense of security, and the subjective experience of contract formation in and of itself, are crucial considerations in resolving the narrow question of the freedom to contract and the broader question of the role of law and economics generally.

The final piece in the symposium is a challenging and fascinating work by Jim Zion entitled *Navajo Therapeutic Jurisprudence*. Zion leads us on a journey through indigenous legal and cultural practices in an attempt to relate the therapeutic jurisprudence movement to a variety of Navajo traditions and practices. Although the work deserves far more serious

¹⁸ Robert Madden & Raymie Wayne, *Constructing a Normative Framework for Therapeutic Jurisprudence Using Social Work Principles as a Model*, *infra* at 497-98.

¹⁹ Yuval Feldman, *Control or Security: A Therapeutic Approach to the Freedom of Contract*, *infra* at 545.

²⁰ *Id.* at 546.

contemplation by scholars more versed in Native American practices, I was fascinated by the recurring themes of relationship, narrative, and context—ideas that play a critical role both in William James' work on spiritual phenomenology and in a legal prudentialist tradition. Hopefully, we can use Zion's work as an invitation to explore Native American ideas such as *k'e*²¹ and their potential impact on legal practice.

I hope you enjoy the articles presented here—they truly reflect the breadth and diversity of the therapeutic jurisprudence enterprise. On behalf of the Steering Committee for the Conference, I would like to thank the several boards of the Touro Law Review for their enduring patience, cooperation, and enthusiasm in publishing these articles.

²¹ See James W. Zion, *Navajo Therapeutic Jurisprudence*, *infra* at 604-06.