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The Judge as Healer: A Humanistic Perspective

Susan Snow

Steve Friedland

THE JUDGE AS HEALER: A HUMANISTIC PERSPECTIVE

HONORABLE SUSAN SNOW*
STEVE FRIEDLAND**

> The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. . . . Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?[1]

I. INTRODUCTION

The role played by the judge in our legal system is clearly defined by the tasks to be performed. The perception of the manner in which those tasks are to be performed, and the perception of the nature of the process and its outcome, can be reexamined by judges.

The role of the judge[2] as healer is of biblical dimensions, possessing a history at least as long.[3] Former Chief Justice of the United States Supreme Court, Warren Burger, has stated, "[t]he obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts."[4] It should not be such a difficult concept to accept: judges as actors in a process that restores people to their integrity and overcomes undesirable conditions.[5] This role or perspective is entirely consistent with a humanistic or humanitarian philosophy already held by many judges. This Article suggests that the role and the process used by judges can be reconceived as having a healing character and used to that effect in the system of justice.

A judge is charged with the responsibility of deciding conflicts between individuals, companies and even governmental entities. This re-

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* Associate Judge, Circuit Court of Cook County, Illinois, Domestic Relations Division, and President, Association of Family and Conciliation Courts (1991-92).

** Professor of Law, Nova University, Shepard Broad Law Center and Research Associate to The Center for the Study of Youth Policy, University of Michigan, School of Social Work.

This Article is dedicated to the memory of the Hon. Samuel S. Berger, whose life served as a model and an inspiration.

1. Warren E. Burger, *The State of Justice*, 70 A.B.A. J., Apr. 1984, at 62, 66.

2. Judge: an appointed person who pronounces a decision in a dispute or context; WEBSTER'S NEW COLLEGIATE DICTIONARY 626 (1977).

3. *See generally* Joseph Vining, *Legal Affinities*, 23 GA. L. REV. 1035 (1989).

4. Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J., Mar. 1982, at 274. Burger states that "[m]any thoughtful people, within and outside our profession, question whether that is being done today. They ask whether our profession is fulfilling its historical and traditional obligation of being healers of human conflicts."

5. To heal: "[T]o restore to original purity and integrity." WEBSTER'S 9TH NEW COLLEGIATE DICTIONARY 558 (9th ed. 1987).

sponsibility, besides being significant in its scope, is expected to be administered within certain constraints. One commentator suggests that judges "have a multitude of role-defined tasks that we expect them to carry out with impeccable honesty, resolute evenhandedness, conspicuous humanity, and a high degree of judicial wisdom."[6] A judge is required to be objective, and is not to let his or her personal emotions enter into the decision making process. In addition to being objective, a judge is expected to follow precedent, and to be consistent with the direction of prior authority. Yet, at the same time, a judge is expected to be compassionate, forgiving and understanding, particularly when applying judicial discretion. The perspective from which each individual judge approaches this area of jurisprudence, his or her judicial discretion, is the one area in which a judge is allowed sufficient flexibility to display a humanistic philosophy.

In many forums, and in an increasing number of substantive areas of the law, our system of justice can be found insensitive to, or unconcerned with, the effects that the process has upon those who are served by it. Judges concern themselves with the court system's negative impact before beginning an effort to use the process for a result that is positive.

This Article will first suggest some of the problems in the courts which have a dehumanizing effect on the litigants. Then, based upon the assumption that the judiciary is very much in control of the process, we will suggest how to use the judicial process to effectuate a more positive outcome. We propose that it is through process, and the conceptualization of process, that the judiciary can begin a significant shift towards a healing effect in the system of justice.

II. BACKGROUND

A. *Humanism*

Humanism is defined as any system or mode of thought or action in which human and secular interests predominate.[7] A humanist, or humanitarian, is a person who promotes the welfare of others,[8] stressing an "individual's dignity and worth and capacity for self-realization through reason."[9]

Significantly, judges are expected to be humanists. Justice John Parker stated that a judge should be "honest," "absolutely courageous" and "a kindly man."[10] Numerous other qualities involving compassion and sensitivity are considered prerequisites to good judging by many lawyers and judges alike.[11]

6. Andrew S. Watson, *Some Psychological Aspects of the Trial Judge's Decision Making*, 39 MERCER L. REV. 937, 938 (1988).
7. WEBSTER'S NEW COLLEGIATE DICTIONARY 556 (1977).
8. *Id.* at 557.
9. WEBSTER'S 9TH NEW COLLEGIATE DICTIONARY 586 (9th ed. 1987).
10. Watson, *supra* note 6, at 941 (quoting D. Jackson, JUDGES 8 (1974)).
11. *Id.*

A judge's values are subject to exposure every time a decision arises. The decision making process alone is enormously important and, as such, is difficult for many. The decision making responsibility often restricts a judge's desire or ability to be humanistic at the same time. Because the decision making process is a structured task, performed within the limited context of the facts and the applicable law, it is a protective construct. With a litigant's need for the careful objectivity of an impartial decision maker, a judge might justifiably avoid exhibiting any perspective from which an observer could determine the judge's personal views or concerns. For many, the relative anonymity of the robe and the austerity of the legal structure are preferable when the alternatives include expressing or pursuing personal values in judicial philosophy or procedures that exceed the strict limits of the traditional litigation setting. One commentator has suggested that "[b]y tradition and often by temperament as well, judges usually choose to remain as close to invisible as possible. Many of them believe that their role precludes acknowledgement of their own humanity."[12]

B. *The Structure of the Current System*

The structure of the current system impedes a humanistic approach to judging.[13] Former Chief Justice Warren Burger has stated that "[o]ur system is too costly, too painful, too destructive, too inefficient for a truly civilized people."[14] Chief Justice Burger blamed, in part, the adversarial system: "Our distant forbears [sic] moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes, and we must move away from total reliance on the adversary contest for resolving all disputes."[15] Litigants in the system are assigned impersonal names like "plaintiff" and "defendant," and speak to the court through their attorneys. This formality depersonalizes the process and limits any expression of sensitivity to individual concerns.

The overwhelming number of cases on court dockets further contribute to the depersonalization and dehumanization that people experience when they enter the judicial system. "Overcrowded court dockets and increasing costs to the judicial system may be a result of the 'inherently litigious nature of Americans', but our courts have never been as heavily burdened as they are now."[16] The concern for judicial economy often interferes with efforts to avoid the perception of the system as dis-

12. Watson, *supra* note 6, at 950 (quoting D. Jackson, JUDGES 8 17 (1974)).

13. There are some exceptions, however. For example, Judge Perry Edwards of the Santa Clara County, California Juvenile Court system. Darlene Ricker, *Esq.*, 19 STUDENT LAW. 8, at 8-10 (Oct. 1990) (Judge Perry Edwards of the Santa Clara County, California, Juvenile Court system promoted change which makes the California juvenile court system more humanistic).

14. Burger, *supra* note 1, at 66.

15. *Id.*

16. Scott S. Partridge et al., *A Complaint Based on Rumors: Countering Frivolous Litigation*, 31 LOY. L. REV. 221, 227 (1985) (footnote omitted) (quoting Marc Glantor, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 10 (1983)).

pensing assembly line justice, with the litigants appearing to be no different than any mass produced product.

Richard T. Andrias, supervising judge of the Manhattan Criminal Court nightshift, noted that the 266,590 misdemeanors and felonies in the year 1985 alone was "a horror show."[17] Judge Andrias understated his point when he said that "a judge can get worn down."[18]

The movement towards automation further contributes to depersonalization, with computers reducing real life emotional tragedies to electronic data on a screen. The growing size and complexities of many court systems, moreover, aggravates the perception that one is on an assembly line, since a given judge may only handle a small aspect of the case before it moves on through the system.[19] This is less than satisfying for judges, as well, because they may never see or know the final outcome. Removed from the results of their own labors, as well as the people involved in the cases they have dealt with, it is understandable that judges come to feel disconnected from the individuals who appear in their courtroom. This disassociation helps the judge insulate him or herself from the frustration of working in a fragmented process. The net result may be a system that is judicially efficient, but one that lacks humanism.

III. THE JUDGE AS HEALER

A. *History*

In many an historical setting, the court's role was viewed as that of a healer. In the Bible, for example, judges were temporary and special deliverers, sent by God to deliver the Israelites from their oppressors.[20]

Throughout the Old Testament, there are references to judges. These judges were originally "appointed" by Moses to be leaders and caretakers for the Israelites. The direction to the judges was to administer the Law of God in an impartial and fair manner. These laws were those originally given to Moses by God.[21]

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17. John A. Jenkins, *The Lobster Shift*, 72 A.B.A. J. (Nov. 1, 1986), at 56 (profile of Richard T. Andrias).

18. *Id.*

19. Though many court systems continue to use a vertical prosecution system of administration, in which one judge handles each case from commencement to conclusion, larger court systems, such as that in which the author, Snow, works in Cook County, Illinois, have adopted administrative patterns which subdivide cases in procedural sections. Judges are assigned the responsibility for cases at certain stages of their passage; for instance, preliminary motions, pre-trials and trials. Some judges are assigned cases for specific substantive subparts of cases, such as parentage determination, child support enforcement or orders of protection.

20. WILLIAM SMITH, A DICTIONARY OF THE BIBLE (Zondervan Publishing House, 1948).

21. 'The people come to me', Moses answered, 'to seek God's guidance. Whenever there is a dispute among them, they come to me, and I decided between man and man. I declare the statues and laws of God.' But his father-in-law said to Moses,' [i]t is for you to be the people's representative before God, and bring their disputes to him. You must instruct them in the statues and laws, and teach them how they must behave and what they must do. But you must yourself search for capable, God-fearing men among all the people, honest and incorruptible

The Bible also expresses the mandates which Moses gave the judges he appointed. Explaining how he instructed them, Moses is quoted from one of his several public addresses:

> I gave your judges this command: 'You are to hear the cases that arise among your kinsmen and judge fairly between man and man, whether fellow-countryman or resident alien. You must be impartial and listen to high and low alike: have no fear of man, for judgment belongs to God. . . .'[22]
>
> [T]hey shall dispense true justice to the people. You shall not pervert the course of justice or show favour, nor shall you accept a bribe; for bribery makes the wise man blind and the just man give a crooked answer. Justice, and justice alone, you shall pursue . . . .[23]
>
> When the issue in any lawsuit is beyond your competence, whether it be a case of blood against blood, plea against plea, or blow against blow, that is disputed in your courts, then go up without delay to the place which the Lord your God will choose. There you must go to the levitical priests or to the judge then in office; seek their guidance, and they will pronounce the sentence.[24]

Also, in the Bible, mention is made of other leaders giving the same type of mandate to their judges. For example, King Jehosphahat of Judah (king during Solomon's reign) gave the following instructions to his appointed judges:

> Be careful what you do; you are there as judges, to please not man but the Lord, who is with you when you pass sentence. Let the dread of the Lord be upon you, then; take care what you do, for the Lord our God will not tolerate injustice, partiality, or bribery.[25]

B. *The Judge as Healer*

Although it is frequently the administrative direction to judges that they concern themselves with managerial skills, efficiency and the availability of support services, there is still room to consider the humanistic perspective as one of the judge's most important tools.

In his commentary on Jewish Law, Moses Maimonides examined the philosophy of judging therein espoused. Maimonides was himself a judge and a physician. His commentary admonished judges to attempt less radical procedures first, just as a doctor should in attempting to

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men, and appoint them over the people as officers over units of a thousand, of a hundred, of fifty or of ten. They shall sit as a permanent court for the people; they must refer difficult cases to you but decide simple cases themselves. . . .'

Exodus 18:15-22 (The New English Bible). The Bible contains the instructions given to Moses as to what God's Laws are and how to apply them. *See Exodus* 20:1-22, *Exodus* 22; *Leviticus* 19:1-18.

22. *Deuteronomy* 1:16-17 (The New English Bible).
23. *Deuteronomy* 16:18-20 (The New English Bible).
24. *Deuteronomy* 17:8-9 (The New English Bible).
25. *Chronicles* 19:6-8 (The New English Bible).

treat a patient. For judges, this means striving to effect a settlement before taking over the decision making process.[26]

The effort to provide an alternative to the traditional litigation process for the resolution of disputes is particularly relevant in courts where the parties would benefit greatly from judicial sensitivity, compassion and individual attention. The courts where family matters are heard, such as divorce and child related concerns, and the juvenile jurisdictions, are natural arenas for a more humanistic approach. The specially established juvenile court law and procedures suggest by definition the incorporation of humanism in the judicial process. In practice, however, the intended results may not have been accomplished.

IV. TECHNIQUES

Humanism does not require great deviation from a judge's approach to the actual task of decision making. Humanism focuses more on the choice of process and the use of this process. In practice, it is an attitudinal enhancement. A humanistic approach includes such techniques as the way the judge speaks and acts in the courtroom, the application of the procedures used, the kind and amount of education the judge seeks or obtains and the decisions ultimately made when applying the law. These various techniques might be useful as tools for a healer/judge.

Research done by Professor Tom R. Tyler into the concerns of disputants and the ways in which disputants utilize dispute resolution procedures, has underscored the benefits of applying common standards of interpersonal interactions to traditional judicial processes and other alternative processes. Professor Tyler reminds us that "litigants are more willing to comply voluntarily with decisions reached in ways that they believe are fair."[27] Professor Tyler summarized the responses of those surveyed about the nature of fair process. Representation (participation) in the process, the ethical appropriateness of the behaviors involved, the honesty of the third parties involved in their process, or the perception that the third parties have not been dishonest, and the consistency of outcomes (relative to others'), are the common elements that affect litigant or disputant satisfaction with a process.[28] Though there is a danger of diminishing the importance of these humanistic standards in complex and serious litigation, Professor Tyler found that the value placed upon these elements in the process did not decrease with the relative increase of the importance of the issues. Clearly, these are elements judges should include in any healing approach to a given process.

26. Baruch Bush, *Traditional Jewish Ethics and Modern Dispute Resolution Choices*, Remarks at Siyam Harambam Celebration, Madison, Wisconsin, 1986 (on file with the *Denver University Law Review*) (referring to *Introduction to the Talmud*, 122-23 (Judaica Press 1975)).

27. Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, NEGOTIATION J., Oct. 1987, at 368 (citations omitted).

28. *Id.*

A. *Respect for the People*

The essence of humanistic interaction is respect. The establishment of a set of procedural tasks and rules for courtroom process has created a context in which a judge can actually choose whether or not to show respect for others in the courtroom. The established courtroom hierarchy requires respect to be shown to the court. The judge is in a position to review that conduct on the spot. Those who have the authority to review a judge's conduct and temperament are not usually present in the courtroom. The judge must, therefore, be self-monitoring. It is there, in the courtroom, that a judge should begin to concern him or herself with the effect of his or her behavior on the resolution of the issues and his or her effect on the parties themselves.

Professor Tyler's study referred to this area of judicial behavior as "ethical appropriateness."[29] The disputants surveyed in Professor Tyler's study were concerned with the "degree to which the behavior of third parties accorded with general standards of ethically appropriate behavior. This included the interpersonal dimensions of the interaction, such as rudeness or unneeded deprecation and disparagement, and the more general comportment of third parties following standards of appropriate interpersonal behavior."[30] Disputants' sensitivities to the relationship between their personal dignity and feelings of self-worth and the behavior of public officials towards them, is guidance for our achievement of the goal of a more healing judicial process.[31]

Respect for other people, litigants in particular, can be affirmatively displayed in a number of ways. The words chosen and the tenor of their delivery are obvious ways in which a judge can communicate respect for those being served by the process. The atmosphere created by the judge's treatment of all involved in the courtroom, including staff, lawyers and witnesses, as well as litigants, is a good foundation from which to demonstrate a further concern over individual human needs. The generality of this standard can be converted to an individual judicial reality by employing a self-checking technique such as the following: Imagine that a loved/honored one is seated in the back of the courtroom. What would that person (about whom the judge cares greatly or for whom the judge has great respect) think of the manner in which the judge is treating the people in the courtroom? Further, imagine that the same loved one is before the bench of another judge: How would the judge want that person treated by any judge, vis-a-vis the questions of human dignity and respect?

An important skill in interpersonal relations of any kind is the ability to listen. One of the essential components of communication is to listen to the message the other party seeks to deliver. One may disagree with the content of the message, but it is a demonstration of respect to

29. *Id.* at 371.
30. *Id.*
31. *Id.*

the speaker to allow him or her to participate in the process. The listener can imply that the speaker is valued simply by listening to what he or she has to say. This suggestion does not require that a judge ignore the appropriate procedures and forms for hearing, but only suggests that when it is time for a litigant to speak, the judge endeavors to listen. A judge who is actively listening can demonstrate that in many ways. One can simply display quiet and full attention. Frequently, a judge can demonstrate that he or she has listened by reiterating, in the ruling or decision given, what the litigant has said. Professor Tyler concludes that people experience a degree of satisfaction based upon the nature of their participation in the decision making process.[32] By acknowledging their thoughts and words, the judge can contribute to that satisfaction.

B. *Empathy*

The logical companion to a respect for the human beings served by the court is the understanding of that which one observes in those human beings. Rollo May defines empathy as the "experience of understanding that takes place between two human beings."[33] It is his view that empathy is the fundamental element of all healing.[34] Empathy is both an active pursuit and a passive opportunity to be in touch with a litigant's response to the facts, the process and the outcomes of judicial proceeding. It is the additional element in a judge's choice of words, gestures, process or decisions that, again, communicates that the other person has worth in the eyes of the court. To be empathic is for some, instinctive, natural. For others, the desire to operate from a base of understanding may require a determined effort to "put themselves in the other man's shoes." May suggests that the very sharing of the feeling is a part of the effective healing process.[35]

Empathy is a particularly important quality for a judge who comes in contact with children during the court process or whose decisions affect children. Though it would be best to have a knowledge of child development when assessing a child's status and the consequences of the contemplated court actions on it, the empathic judge goes a long way towards sensitive results by endeavoring to understand what the child is feeling. Empathy for the child's parents will enhance the judge's ability to estimate the complex family dynamics acting on the child as well. The instinctive empathies many judges experience in family court matters should be thought of as the basic tools, but are capable of being sharpened by education, training and experience so that the effect on children is optimal.

32. *Id.* at 370.

33. Rollo May, *The Empathic Relationship: A Foundation of Healing*, *in* HEALERS ON HEALING 108 (R. Carlson & B. Shield eds., 1989).

34. *Id.* at 108-10.

35. *Id.* at 109.

C. *Process Selection*

The current trend in our courts, to shift away from traditional courtroom adjudication and adopt alternative dispute resolution techniques, offers judges the opportunity to demonstrate a healing attitude towards the subjects before them by selection of process. Professor Tyler's research and conclusions suggest that a more participatory, more empowering format, such as mediation, is more satisfying to disputants.[36] Our own experience supports Tyler's conclusion. In addition, it is our observation that mediation helps disputants return to more normal problem solving functions and restores to them some degree of personal integrity. This is consistent with the definition of healing we adopted earlier.

Some courts are experimenting with other techniques away from the traditional litigation process for cases involving children and families, in an effort to sensitize the process. For some that may mean eliminating some or all of the formal rules of procedure to maximize the litigant's participation and comfort.[37] For example, the Family Court of New Zealand created its own unique, but less formal, set of rules to accomplish the goal of making the process more sensitive to people, where disputes focused on family matters and children.[38] Other procedural modifications might include rewriting court rules to embrace more of the human needs and taking some proceedings out of the courtroom.

One procedure already established out of the courtroom is the settlement conference, involving both the parties and a judge. The judge's ability to participate in such a conference with litigants is clearly impacted by the local legal culture and court rules. There is also concern about the integrity of such a process when objection to the judge's bias is made. Yet, there is so much to be gained and so much apparent satisfaction as a result of the settlement conference, that it is worth the effort to make them happen.

The opportunity for litigants to see for themselves the benefits of compromise is perhaps the most prevalent result of the settlement conference. Maimonides wrote: "It is the positive obligation for the judge to say to the parties at the beginning of the case, 'Do you really want to litigate this case, or wouldn't you prefer to work out a pshora.' "[39] Mai-

36. *See supra* notes 28-33 and accompanying text.

37. Judge Anne Kass, District Judge, 2d Judicial District, New Mexico. Judge Kass is currently using an innovative trial format when consented to by the participants. Rules of evidence are somewhat relaxed and the parties have more informal opportunities to speak and participate, particularly in matters relating to their children.

38. The New Zealand Family Court Act 1980 states: "10. Avoidance of unnecessary formality—(1)Family Court proceedings shall be conducted in such a way as to avoid unnecessary formality[.] (2)Neither judges sitting in Family Courts, nor counsel appearing in such Courts, shall wear wigs or gowns." S. R. Cartwright, *The New Zealand Family Court—An Overview*, 25 CONCILIATION CTS. REV. June, 1987, at 29. The author, Snow, had the opportunity to observe New Zealand's family court facilities during a tour conducted by the Association of Family and Conciliation Courts. The court buildings housing family courts are frequently in separate and informal settings away from the other court buildings.

39. Bush, *supra* note 26 (quoting Moses Maimonides, CODE OF JEWISH LAW (commen-

monides spoke of the preference for compromise because its results exceeded those of strict adjudication. In the adjudication of rights, each party gets strictly what he or she is entitled to. In compromise, each side becomes involved in the process of giving the other person more than they perceive they are entitled to. In this way, compromise incorporates the values of charity and righteousness.[40] Compromise would indeed enhance the attitude of all disputants and is thus a worthy judicial goal.

D. *Benefits to Judges*

We have thus far focused on the values a healing judicial process affords litigants. It is important, however, to consider the value of doing healing work for the benefit of the judges themselves.

First, the attitude of the judge, who wishes to have a healing impact on the disputes brought to court, is a self-fulfilling prophecy. Wanting to heal is itself such a philosophical shift that this alone creates a new direction for the judge's energies and a new environment in the court.

Second, a shift of emphasis from outcome to process, as we have described here, has a healing effect on the judge. The pressures imposed on a judge by the notion that the court's only product is a "right decision" can become an enormous burden in the reality of judicial life. To distance oneself from the value of the decision by increasing the value of the process brings an unexpected relief to judges who relentlessly pursue the perfect solution in cases presented with very imperfect possibilities. "The true healer merely gives the gift of healing but does not watch over the patient to say in what form it is to be received."[41]

There is new self-esteem to be had for judges who shift to a healing attitude and then observe the litigants' satisfaction with the results of their efforts. For judges who have spent months or years in frustrating and unsatisfying court situations, this might be just the surprising and refreshing reward that they need to continue on. In addition, there is Maimonides' notion that, to add the elements of charity and righteousness to the act of giving, to give the other person more than just the minimum of his or her rights, is a healing experience.[42]

Finally, sharing in the healing experience, with or without the achievement of another goal, is itself healing:

> The mind that sees itself as whole and another as sick unquestionably requires healing. True healing is thus expressed within the mind of the healer and not within the body of the patient. When a healer sees that he or she is not separate from the patient—and only love holds this vision—healing is already accomplished. The mind that no longer struggles to contrast itself with another, but looks happily upon its oneness with all

tary on the Mishneh Torah, Sefer Shoftim, Hilchos Sanhedrin, Ch. 22, Halacha 4)). A pshora is a settlement by concessions on all sides.

40. *Id.*

41. Hugh Prather, *What is Healing?*, *in* HEALERS ON HEALING 14-15 (R. Carlson & B. Shield eds., 1989).

42. Bush, *supra* note 26.

> living things, has moved into that level of reality where healing is constant. The healer has now received and accepted the only thing that can be given away.[43]

V. CONCLUSION

In today's court system, it seems difficult for judges to create and practice the role of a healer. The overwhelming numbers and difficulties of the cases, and the pressure to capitulate to a total depersonalization of the process, threaten to deprive the judges' work of any humanistic orientation. Yet, with a deliberate shift in attitude, individually or collectively, judges can establish, or hold on to, the humanistic principles that people still value. To take on the role of healer is to elevate the work of "judging" so that it generates satisfaction for all involved in the judicial process.

43. Prather, *supra* note 41, at 16.