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Therapeutic Jurisprudence and Cognitive Complexity: An Overview

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THERAPEUTIC JURISPRUDENCE AND COGNITIVE COMPLEXITY: AN OVERVIEW

by Philip D. Gould and Patricia H. Murrell***

INTRODUCTION

> *I have no doubt that if the records of the time of . . . Hammurabi, could be completely restored, we should learn that in the third millennium before Christ men were complaining about the inefficiency of legal procedure, and . . . if any of you are destined in the year 7000 A.D. . . . to examine and write a monograph . . . upon the condition of human law courts, you will be obliged to report . . . that mankind still exhibits the same discontentment with its methods of adjusting human differences that you know today.*[1]
>
> —Judge Learned Hand

These words of Judge Learned Hand to the New York City Bar Association resonate with increasing vigor eighty years after they were first delivered. The traditional underpinnings of the American legal system are under constant pressure to produce outcomes consistent with everyday life or "common sense."[2] The system is criticized for failing to incorporate "real world" procedures into legal education and giving slavish devotion to a set of calcified rules

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1. Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter, Address before the New York City Bar Association (Nov. 17, 1921), *in* 3 LECTURES ON LEGAL TOPICS 89 (1926).

2. *See generally* Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse*, 66 U. CIN. L. REV. 805 (discussing generally the decline of trust by the public in lawyers and the results they obtain).

that isolate the contact between the litigation participants and the legal system.[3] This perceived gap between legal conclusions and life experience has been partially attributed to a system of legal education that produces professionals prepared primarily for adversarial litigation.[4]

Some lawyers and judges remain untrained, unprepared, or unwilling to deal with litigants' life experiences. Segments of the litigants' lives not directly relevant to the litigation are excluded from consideration. Post-litigation consequences to litigants' lives are similarly omitted.[5] Also neglected are individuals who are not parties to the litigation, but who are of importance to the incident that gave rise to the litigation.[6] Therapeutic jurisprudence attempts to take all of these factors into account.

Among the many ideas that have become deeply rooted in the existing legal system is the view that a court should be a relatively passive decision maker, utilizing existing law found in statutes or case law precedent to fashion an applicable remedy. Courts are specifically discouraged from considering the emotional context of a particular case or the immediate post-decision future of the parties.[7] However, the legal system cannot afford to ignore these considerations.

The idea that the judiciary has a separate and independent role in governance has been, ab initio, part of American jurisprudential fundamentalism.[8] Alexander Hamilton, arguing for the adoption of the Federal Constitution, noted the importance of judicial independence and public support for the legal system:

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3. Michael L. Perlin, *Stepping Outside the Box: Viewing Your Client in a Whole New Light,* 37 CAL. W. L. REV. 65, 68 (2000) (positing that the current legal education method fails in training students to ignore the effects the law in question had, and the resulting litigation will have, on the litigants and others). Susan Daicoff has described the postmodern paradox of the relationship between society and the legal system, identifying a "tripartite crisis" consisting of low public opinion of legal practitioners, lawyer dissatisfaction, and deprofessionalism. Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement, in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 466 (Dennis P. Stolle et. al. eds., 2000). These all occur at a time when society is dependent on the adversarial system to resolve disputes. *Id.*

4. Perlin, *supra* note 3, at 66-67.

5. *See, e.g.*, Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches,* CT. REV., Spring 2000, at 28 (describing common results such as increased attacks suffered by domestic violence victims after they bring initial legal action).

6. Perlin, *supra* note 3, at 69.

7. Edward A. Dauer, *The Power of Myth: A Comment on Des Rosiers' Therapeutic Jurisprudence and Appellate Adjudication,* 24 SEATTLE U. L. REV. 297, 305 (2000).

8. *See generally* THE FEDERALIST NO. 81 (Alexander Hamilton).

> Considerate men of every description ought to prize whatever will tend to beget [integrity and moderation] in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by that he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.[9]

Even the decisional independence of judges—their ability to decide cases free from threats of physical violence, financial ruin, or political pressure, is today severely tested. This is evidenced by incidents involving former New York Federal District Judge Harold Baer, Jr. and former Tennessee Supreme Court Justice Penny White. Baer and White were both driven from their benches because of decisions they made in high profile criminal matters that appeared before their respective courts.[10] Following Justice White's subsequent loss in her retention election, Tennessee Governor Don Sundquist surprisingly remarked, "Should a judge look over his shoulder [in making decisions] about whether they're going to be thrown out of office? I hope so."[11]

Less common are instances of judges leaving the bench because their personal beliefs conflicted with the strictures of the law. After being required to implement a mandatory sentence that conflicted with his conscience, New Mexico Supreme Court Justice Gene Franchini resigned.[12] The contrast between an ideally independent judicial branch and the current reality is significant. Developing methods to bridge this rift concerns modern legal practitioners and judges alike. Therapeutic jurisprudence is one outcome of these efforts.

This article will first examine the beginnings of the therapeutic jurisprudence movement, its extension through various areas of the legal system, and its limitations. Following this discussion, the role of judges in courts embracing therapeutic jurisprudence will be examined. This examination will focus on aspects of cognitive theory developed by William Perry and expanded by Charles Claxton and Patricia Murrell. Finally, the paper will discuss outcomes resulting

9. THE FEDERALIST NO. 78 (Alexander Hamilton).

10. Shirley S. Abrahamson, *Courtroom with a View: Building Judicial Independence with Public Participation*, 8 WILLAMETTE J. INT'L L. & DISPUTE RES. 13, 17-19 (2000).

11. *Id.* at 20.

12. Gene Franchini, *Conscience, Judging and Conscientious Judging,* 2 J. APP. PRAC. & PROCESS 19, 20-21 (2000).

from the application of educational theories designed to prepare judges to assume their roles.

I. DEVELOPMENT OF THERAPEUTIC JURISPRUDENCE

Notions of therapeutic jurisprudence originally arose in the mental health law context, focusing on the rights of persons exposed to the civil commitment aspect of legal practice. It gradually expanded to incorporate a therapeutic view of the law.[13] As such, therapeutic jurisprudence has served as a catalyst for interdisciplinary outreach, synthesizing the work of lawyers and judges with that of criminologists, sociologists, psychologists, philosophers, educators, and law professors.[14] The expanded role of legal dispute resolution through the use of problem-solving techniques is one strength of the movement, resulting in an increased number of individuals who possess sufficient skills to engage in the resolution of those disputes.[15]

The term "therapeutic jurisprudence" is defined as "the study of the role of law as a therapeutic agent, exploring the extent to which substantive rules, legal procedures and the role of judges and lawyers produce therapeutic or anti-therapeutic consequences."[16] Therapeutic jurisprudence recognizes the limitations on existing legal practice, in which over-reliance on stare decisis and the other traditions of normative litigation lead to an unsatisfactory result. Advocates of therapeutic jurisprudence believe that the emotional context of the case is not only real, but important. In order for a satisfying resolution to occur the emotional context must be considered.[17] Failing to take these issues into account leaves only a partial resolution.

Therefore, the purpose of therapeutic jurisprudence is to augment current rigid legal processes by taking into account the intangible, emotional states of the parties to the litigation. Therapeutic jurisprudence seeks to resolve disputes in a manner that addresses

13. David B. Wexler, *Therapeutic Jurisprudence in the Appellate Arena,* 24 SEATTLE U. L. REV. 217, 217-18 (2000).

14. Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering, in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 3, at 8.

15. David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique, in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 3, at 451.

16. Thomas T. Merrigan, *Law in a Therapeutic Key: A Resource for Judges,* CT. REV., Spring 2000, at 8.

17. Daicoff, *supra* note 3, at 471-72.

the totality of the parties' needs.[18] The traditional impartiality of the judge is made more complex by the addition of subjective empathy to the tools the judge may employ in fashioning decisions.[19]

Preventive law, originally a separate theoretical discipline, has allowed both lawyers and judges to put therapeutic principles into practice.[20] By focusing on the needs and interests of the parties, not just their respective rights, the various sides of the controversy are aligned. Using existing legal principles and practices as a beginning point, rather than as an end in itself allows the most comprehensive solution for the needs of all parties to be constructed.[21]

However, there are limitations on the role that therapeutic jurisprudence can play in dispute resolution. A court's empathy is of little use in the fact-finding process of the litigation. Determining whether parties have met the appropriate burden of proof has significant consequences for the outcome of the case, but has little to do with structuring a therapeutic outcome.[22]

Sometimes the issues presented in a case are difficult, troubling, far beyond a court's expertise, or so influenced by external forces that the courtroom may be an inappropriate place to resolve the dispute. The Elian Gonzalez case, stripped of its international political features and treated as a case involving the custody of a minor child, is a pertinent example.[23] The Gonzalez case involved a minor's father, the only surviving biological parent, seeking custody from his ex-wife's family following her demise.[24] The court held that a parent's residence in a communist-totalitarian state was not a special circumstance to substantiate consideration of an asylum claim by a six-year-old child, presented by the child's relative in this country, against the wishes of his parent.[25] The case presents an instance in which a therapeutic outcome would have been superior to a legally imposed one. While the end result of the case continues to have many national and international political repercussions, and while portions of the case had serious short-term anti-therapeutic effects (such as the methodology used to

18. Wexler, *supra* note 15, at 455.

19. Nathalie Des Rosiers, *The Mythical Power of Myth? A Response to Professor Dauer,* 24 SEATTLE U. L. REV. 307, 307-08 (2000).

20. Daicoff, *supra* note 3, at 474-75.

21. Shirley S. Abrahamson, *The Appeal of Therapeutic Jurisprudence,* 24 SEATTLE U. L. REV. 223, 223 (2000).

22. Merrigan, *supra* note 16, at 9.

23. Gonzalez v. Reno, 212 F.3d 1338 (2000), *cert. denied,* 530 U.S. 1270 (2000).

24. Steve Leben, *Thoughts on Some Potential Appellate and Trial Court Applications of Therapeutic Jurisprudence,* 24 SEATTLE U. L. REV. 467, 469-70 (2000).

25. *Gonzalez,* 212 F.3d at 1356.

transfer physical custody of the child) the reunification of father and son may, in the long run, turn out to have superior therapeutic effects on the child.

In other cases, parties refuse to acknowledge the psychological impact of the litigation on themselves or the opposing party; attorneys are not comfortable working in a non-adversarial environment; or one of the parties is so intractable that the struggle of contemporary litigation is the only conceivable type of resolution possible.[26] Under these circumstances, the therapeutic jurisprudential approach is of little value because cooperation between the parties and their legal representatives is not possible.

II. THE ROLE OF THE JUDGE

> *As a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death.*[27]
>
> —Judge Learned Hand

The role of the judge in a therapeutic context is more complex than mere fact-finding and applying relevant statutes and/or precedents. The judge is often burdened with dealing with the emotional dimensions of the hearing on the litigants and their attorneys. Parties influenced by the stress of litigation have reacted in a primitive "fight or flight" mode.[28] Stress hormones are released throughout the body and the ability to process or recall information, key functions of all witnesses who testify under oath, is diminished.[29] While an attorney, as the "champion" of the litigant, can help diffuse the stress of the courtroom proceeding, the role of the other actors, including the judge, is also relevant.[30]

Judges can help diffuse the stress on the litigants by listening to the narratives on both sides of the dispute.[31] Indeed, the simple act of uncritical, attentive listening by the judge can set the timbre of

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26. Daicoff, *supra* note 3, at 491.

27. This statement by Learned Hand was made well before the advent of contemporary law practice. HAND, *supra* note 1, at 491.

28. Bruce J. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 3, at 314.

29. *Id.* at 309, 312-14.

30. *Id.*

31. Many psychologists have noted the importance of narrative in human existence. Robert A. Neimeyer has noted that narrative construction is an archetypal human activity that "represents ways of seeking continuity of meaning in our lived experience." Robert A. Neimeyer & Finn Tschudi, *Community and Coherence: Narrative Contributions to the Psychology of Conflict and Loss* 3, *in* NARRATIVE AND CONSCIOUSNESS LITERATURE, PSYCHOLOGY AND THE BRAIN (G. Fireman et. al. eds., 2002)(unpublished manuscript on file with the authors). In the context of the criminal

the courtroom proceeding, encouraging both parties to listen to one another and smoothing the courtroom environment. The trial itself is almost always the first occasion that either side has had the opportunity to hear the opposing viewpoint in its entirety. Furthermore, it is not inconceivable that the parties may, upon reflection, devise their own remedies to the issues involved in the litigation during the course of the proceeding, thus sparing the finality of an externally imposed solution.[32] By engaging in active listening, a judge may choose his or her language with greater sensitivity to the essence of the dispute and may select the most appropriate remedy under the circumstances.[33]

It is important that litigants feel not only that their voices are heard, but also that the trier of fact actually considers their stories. After the parties recite their stories, the participants often feel validated. The process then seems voluntary and noncoercive.[34] The perception of voluntariness is important in obtaining a therapeutic outcome. It allows the parties to feel that they maintained a measure of control over their own actions and diminishes the perceptions of powerlessness at the hands of a coercive tribunal.[35]

While voice and validation are important to litigants, the perception of fairness in the process is also important to achieving a therapeutic outcome. The process itself should leave the participants believing they were treated with fairness, dignity, and respect. Without this perception of fairness, litigants may feel frustrated, powerless, or angry. They may even reject the process or the legal system itself. This rejection can have particularly negative social consequences, especially in the criminal court setting, where the failure to achieve a therapeutic outcome may result in the inability of an individual defendant to reintegrate with society in a meaningful and productive manner.[36] On the other hand, it has been shown that when parties believe the process is fair, they are more likely to

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justice system, however, the system often denies the narrative voice of the victim, whose courthouse role is supplanted by that of the state. *Id.* at 7-8.

32. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts,* CT. REV., Spring 2000, at 56.

33. Luis Muniz Arguelles, *Yelling Not Telling: An Antitherapeutic Approach Promoting Conflict,* 24 SEATTLE U. L. REV. 237, 243-44 (2000).

34. Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance,* 24 SEATTLE U. L. REV 499, 501-03 (2000).

35. *Id.*

36. *Id.* at 504-05.

accept adverse legal decisions.[37] Belief in fairness leads to enhanced confidence in the judiciary and a willingness to cooperate with civil court orders even though they are perceived to be restrictive.[38]

Courts providing important information to parties in a timely fashion may also provide litigants with additional therapeutic benefits. Typically, each party's lawyer is the conduit through which information is relayed from bench to litigant, and the judge fulfills his or her role by providing accurate information. However, that is not the only communication channel available to judges. During the courtroom proceeding, the judge has the opportunity to communicate directly with both parties about basic nonlegal issues surrounding the proceeding, without damaging his or her role as an impartial arbiter. By providing this practical information, such as the daily schedule or availability of parking, and understanding that parties to the litigation are likely neophytes to the courtroom, the court can perform a therapeutic function by reducing stress caused by the uncertainty of the proceeding.[39]

Judges should not overlook the therapeutic value of simultaneous multiparty communication.[40] In many cases, the court is the only entity with sufficient ability to fashion a resolution to outstanding issues and convince or coerce parties to change.[41] In a court seeking therapeutic outcomes, the final judgment of the case is not intended to be a static one. Instead, it is process-oriented, intending to resolve the dispute between parties over time. The court builds the framework for a continued relationship between the parties.[42] A highly desirable therapeutic outcome is one in which the parties learn how to preserve their existing relationship while also learning how to resolve their future conflicts without repetitive judicial intervention.[43] As a result of the creation of specialty courts that apply principles of the new therapeutic jurisprudence, judges become more acquainted with the persons who come before them than judges in conventional courts. The

37. David B. Rottman, *Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?*, CT. REV., Spring 2000, at 26.

38. *Id.*

39. Winick, *supra* note 28, at 313.

40. Des Rosiers, *supra* note 32, at 56.

41. Roberto P. Aponte Toro, Noriega v. Hernandez Colon: *Political Persecution Under Therapeutic Scrutiny,* 24 SEATTLE U. L. REV 555, 564-65 (2000).

42. Dauer, *supra* note 7, at 303.

43. Des Rosiers, *supra* note 32, at 56.

judge becomes teacher, counselor, parent, cheerleader, and coach.[44] In these roles, it is easy for the court to be uncharacteristically paternalistic. To avoid this type of judicial overreaching, the structures of the existing legal system must be relied on to limit the powers of the courts.[45]

III. COGNITIVE DEVELOPMENT AND THE JURIST

With this new, greatly expanded role for the judge, the levels of cognitive functioning that would characterize the ideal therapeutic judge should be given some consideration. Stage development theories offer a lens through which this can be accomplished. These theories attempt to explain how people cope with the challenges of their lives. Each stage presents particular intellectual tasks a person must master before moving to the next stage. Issues, however, are not resolved "once and for all," but must be revisited as life circumstances change. In fact, as persons mature, they discover their way of thinking may be at odds with experience and the lessons derived from it. The resulting disequilibrium and dissonance require a transition to the next stage.[46]

William Perry's scheme of intellectual and ethical development offers one description of the stages through which people move as their ways of thinking change.[47] His scheme describes the way individuals process information and interpret the world outside of themselves—including peers, knowledge, the environment, and authority—in addition to addressing the processes used in decision-making. Each stage represents a qualitatively more complex way of thinking.[48]

Perry's work is beginning to influence decisions regarding legal education. Paul Wangerin, associate professor of law at John Marshall Law School, stated that: "William Perry . . . describes a cognitive development sequence in the intellectual abilities of young adults that can readily be used to catalogue the various developmental phases through which many law students seem to pass," and links Perry's ideas to law school students anecdotally and, indi-

44. Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction,* CT. REV., Spring 2000, at 12.

45. Sol Gothard, *Therapeutic Jurisprudence in the Appellate Arena—A Louisiana Jurist's Response,* 24 SEATTLE U. L. REV. 335, 338 (2000).

46. *See generally* WILLIAM G. PERRY, JR., FORMS OF ETHICAL AND INTELLECTUAL DEVELOPMENT IN THE COLLEGE YEARS: A SCHEME (1999).

47. *Id.*

48. *Id.*

rectly, empirically.[49] More recently, Carnegie Scholar Jane H. Aiken, a law professor at Washington University School of Law, utilized Perry's work to help law students develop higher order thinking skills in order to arrive at what she terms "justice readiness."[50] Perry's work also has been used extensively with state judges in the Leadership Institute in Judicial Education, a State Justice Institute-funded program conducted at the University of Memphis.[51]

Thinkers in the first stage of Perry's model tend to see the world from two diametrically opposing perspectives: good/bad or right/wrong.[52] In the dualistic thinker's mind, there exists a definitive resolution to every situation, and the job of the judge is to discover and apply this resolution, leading to a winner-take-all mindset. The judge applies existing law to determine the future of the parties in a sterile, objective fashion.[53] Aiken assumes that most of her learners are beyond this dichotomous stage. She observes, however, that the shock of law school and its traditional teaching methods often drive students to embrace this dualistic thinking at the start of law school,[54] and Wangerin acknowledges the frequency of dualism observed in first year law school students.[55] Judges, particularly those who are new on the bench, may also initially revert to dualistic thinking as they struggle to master the competencies needed for their role.

In the second stage of the Perry scheme, the multiplistic thinking stage, judges recognize that there may be several divergent "right" alternatives and that they must pick among several competing options. This selection process is relatively uncritical, with all the right answers seen as being of equal value.[56] As Aiken observes, multiplistic thinkers come to appreciate that awareness is constructed, but believe that no ethical or moral principles exist within such constructions.[57] Judges in this developmental stage have diffi-

49. *See generally* Paul Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education,* 62 TUL. L. REV. 1237 (1988).

50. Jane Aiken, *Teaching "Justice Readiness:" A Developmental Approach to Legal Education*, 10 NAT. TEACHING AND LEARNING F. 1, 1-3 (2001).

51. *See generally* Charles S. Claxton & Patricia H. Murrell, *Education for Development: Principles and Practices in Judicial Education*, The Judicial Education Reference, Information and Technical Transfer Project Monograph Three, 1992.

52. *See generally* PERRY, *supra* note 46.

53. *See generally* Daicoff, *supra* note 3, at 473.

54. Aiken, *supra* note 50, at 1-5.

55. *See generally* Wangerin, *supra* note 49, at 1247.

56. *See generally* PERRY *supra* note 46.

57. *See* Aiken, *supra* note 50, at 1-5.

culty formulating therapeutic outcomes because instead of merely picking a single option from equal competing alternatives, therapeutic jurisprudence requires an analysis of the alternatives to determine which is best, considering all the elements parties bring to the litigation. The best solution may not be a single option, but rather multiple options or a blending of options. In addition, the facts may be relatively unimportant to the multiplistic thinkers because of the perception that all options are equally valid. In contrast, the therapeutic jurist must engage in intense fact-finding to insure that the remedy formed is the best in this context.

The major changes in individual development in the Perry framework occur between these initial stages and the final two stages when the locus of authority as perceived by the individual shifts from external entities to oneself.[58] From the perspective of therapeutic jurisprudence, the locus of judging authority, as perceived by the judge, would shift from the law books, regulation manuals, and volumes of decisions, to his or her court and the specific case to be decided. This developmental shift may occur when the judge encounters complex problems where the law and justice do not seem in accord.

At the next level of the Perry scheme, the relativistic stage of development, the self assumes legitimacy.[59] Here therapeutic jurists can begin to explore their judging options. In fact, judges at this stage of development begin to analyze critically, not only the multiple alternatives facing them, but their own conflicting thoughts as well. Relativistic thinkers are capable of metacognition, the process of thinking about one's thinking.[60] Judges at this stage of cognitive development use the parties' courtroom presentations as a form of dialogue to assist them in clarifying their own mental processes. The parameters of an appropriate remedy can then be shaped. All choices are not equally valid to relativistic thinkers and context assumes a more prominent role. At this level of the Perry scheme, the ability to empathize with the plight of others is realized.[61] Since empathy is an essential component of therapeutic jurisprudence, it is critical for judges to achieve this stage of development.

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58. *See generally* PERRY *supra* note 46.

59. *Id.*

60. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 237 (2000).

61. *See generally* PERRY *supra* note 46.

Ideally, however, the therapeutic judge will reach the highest stage of the Perry scheme, the level of commitment.[62] At this level, the judge can most effectively balance the requirements of the legal system with the needs of the parties before him or her. A therapeutic court will know more about the individuals before it than other courts, because the knowledge of the individual parties is essential to crafting an appropriate remedy. That knowledge, however, will never be complete or perfect. A therapeutic judge operating at the level of commitment is able to accept this imperfect knowledge, with its ambiguities and paradoxes, and cautiously proceed toward the goal of achieving the best possible resolution of the matter.[63] This issue presents an imperfect, but workable resolution, that over time will improve as the therapeutic court continues its monitoring function and becomes more familiar with all involved parties. The judge's level of commitment may be the result of his or her recognition that the "law is not neutral and the playing field is not level."[64] At the stage of commitment a judge is able to identify assumptions and the effect of those assumptions on choices and behavior.

Moreover, Claxton and Murrell have developed several attributes of "highly developed people," based on the Perry scheme and other models, which may be applied to the desired profile of the therapeutic judge.[65] These attributes are thinking in complex ways; possessing a high level of competence; accepting responsibility for themselves, including accepting the consequences of their own actions; accepting their own experience as the best guide for their actions; being consistently and tenaciously authentic; and committing to goals that transcend their own immediate needs and situations.[66] All of these attributes are consistent with the level that judges need to reach to successfully implement therapeutic jurisprudential principles in their courtrooms.

IV. PROGRESS TOWARD THERAPEUTIC JUDICIAL RESOLUTIONS

Changes have occurred in the way that courts hear cases and the way that solutions are crafted. This change is driven by increasing caseloads, dissatisfied judges and lawyers, and alienated members of the general public. Therapeutic jurisprudence provides a theo-

62. *Id.*
63. *Id.*
64. *See* Aiken, *supra* note 50, at 1-5.
65. *See generally* Claxton & Murrell, *supra* note 51.
66. *Id.*

retical underpinning that allows decisions to be constructed on a case-by-case basis, while using the existing legal parameters of precedent and statute as guides and limitations on court paternalism. Increasingly, therapeutic jurisprudence is a topic of judicial education programs.[67]

Judicial satisfaction surveys similarly reveal that judges are more satisfied with process outcomes when therapeutic approaches are applied.[68] By seeking to include the community, judges are able to build bridges to the public by acting as educators and showing how the judicial system is an effective part of government. As a result of these outreach efforts, there is increased public support.[69]

Attorneys who encourage their clients to adapt to the litigation process and who actively assist the court in fashioning a suitable remedy appear to have higher levels of satisfaction with the process. These attorneys are freed from the winner-take-all mentality of conventional litigation.[70]

There are limitations on the effective use of therapeutic jurisprudence, as the foregoing discussion has shown, and more limitations will appear as the approach is applied more frequently to litigation. Nonetheless, therapeutic jurisprudence can provide effective dispute resolution and, in the future, may help reduce the alienation between the system and the public, while reducing the burgeoning caseload of the courts. Therapeutic jurisprudence is an idea whose time has come.

V. PARTIES AND COGNITIVE DEVELOPMENT

Obviously, the judge is not the only one in the courtroom to whom this description of cognitive development applies. The parties involved in court proceedings are also at different levels in their own cognitive development. The party to litigation is a relatively passive participant, who depends on the court for instruction in what to do. There is little chance to assume responsibility, and a successful therapeutic solution will need to include opportunities for the party to develop a more internal locus of control. A drug court participant, for example, may begin to rebuild his or her own life, given encouragement and support by the court, while continuing to be aware of the court's sanctioning power. An ideal out-

67. Abrahamson, *supra* note 21, at 223-24.

68. Chase & Hora, *supra* note 44, at 13.

69. Linda M. McGee, *Therapeutic Jurisprudence and the Appellate Courts,* 24 SEATTLE U. L. REV. 477, 478 (2000).

70. Winick, *supra* note 28, at 324.

come of the proceeding would be that parties begin to similarly internalize their own loci of authority and proceed in such a manner as to minimize further legal intervention. Note that the court does not relieve the parties of the burden of solving their own problem. It becomes an active participant in the resolution process, directing the scope of the resolution. By requiring the parties to take a hand in the resolution of their difficulties, the court encourages them to reach higher levels of cognitive development.[71] The parties, in reaching this higher stage of development, would hopefully see the court not as an arbiter of rules, but as an engineer of suitable remedies for their particular situation. Decisions reached through a therapeutic jurisprudence process have a better chance of encouraging cognitive development on the part of litigants if they see the court modeling a problem-solving method.

VI. COGNITIVE DEVELOPMENT AS AN OUTCOME FOR JUDICIAL EDUCATION

Assuming that judges who function at the stage of relativism or commitment will experience greater satisfaction and greater success in courts with a therapeutic orientation, the question is whether judicial education can be designed in such a way as to promote the cognitive and intellectual development of judges. A curriculum that attends to the following four areas offers a starting place:

1. Substantive content—legal material or information in areas such as substance abuse.
2. Skills— application of technology in the judge's work or skills in interviewing.
3. Personal authenticity—judicial philosophy such as therapeutic jurisprudence or an area such as ethics or emotional intelligence.
4. Personal growth—stress management, wellness, retirement planning, or diversity.

A program that balances these four areas recognizes that judicial education should address the needs of the organization—in this case the courts—as well as the needs of the individual judge.

In addition to program content, the processes by which the material is presented can also be utilized to promote cognitive development along a scheme such as Perry's. Both curricular content and teaching processes can provide sources of challenge and support

71. *See* Neimeyer & Tschudi, *supra* note 31, at 6-8.

for learners. Challenge is essential to create the dissonance and disequilibrium necessary for growth; support is necessary to prevent disengaging.[72]

Learning processes can be designed that encourage cognitive complexity. Demonstrations, simulations, and activities such as role playing, case studies, films, or guest speakers that address personal experiences can provide the judges with *concrete experiences.* Small group discussions, journal writing, asking for judges' reactions, and formulating questions gives learners the opportunity to engage in *reflection.* Lectures that present concepts or authoritative information, research presentations, and print sources encourage *abstract conceptualization.* Hypothetical or "what if" situations, devising plans of action, practice sessions, or problem-solving activities afford the judge opportunities for *active experimentation.* Combining activities from each of these four categories has the power to promote more complex thinking and higher levels of cognitive development.[73]

Making cognitive development an explicit outcome of judicial education demands that we create a trusting environment where participants feel safe to engage in reflection and introspection. The authors of *Common Fire* describe such an environment as a "clear space, contemplative time, and good conversation to engage and understand complex problems."[74]

CONCLUSION

> *No problem can be solved from the same consciousness that created it. We must learn to see the world anew.*
>
> —Albert Einstein

If we are to solve the problems facing the courts today, a new level of consciousness must be developed. If the law is truly "culturally constructed,"[75] then the methodologies of the past must change, perhaps even beyond the vision of distinguished jurists of the past. Therapeutic jurisprudence provides a rubric that allows principles and disciplines outside the legal profession to augment the way courts resolve disputes. Current issues reflect the extreme complexity of our world, with its nanosecond-based technology and

72. *See generally* ROBERT KEGAN, IN OVER OUR HEADS: THE MENTAL DEMANDS OF MODERN LIFE 42 (1994).

73. *See generally* DAVID A. KOLB, EXPERIENTIAL LEARNING (1984).

74. LAURENT A. PARKS DALOZ ET AL., COMMON FIRE: LEADING LIVES OF COMMITMENT IN A COMPLEX WORLD (1996).

75. AMSTERDAM & BRUNER, *supra* note 60, at 226.

global outlook. An array of specialized, problem-solving courts most effectively address these issues. In order for the courts to work effectively, they must be presided over by judges whose cognitive capability is equally complex. Cognitive development becomes not only a positive thing to strive for, but also something on which the health and survival of our legal system depends.