

EDUCATING FOR THERAPEUTIC JUDGING: STRATEGIES, CONCEPTS, AND OUTCOMES

ARTICLE

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INTRODUCTION: THE COURTS AND SOCIETY

The old order changeth, yielding place
to new
And God fulfils Himself in many ways,
Lest one good custom should corrupt
the world.¹

SO WROTE THE POET TENNYSON, DESCRIBING THE FINAL REFLECTIONS OF THE legendary King Arthur as he faced his own mortality. The turbulent environment in which American society has struggled over the last half century; with the escalating abundance of technology, the rise of an interdependent global economy, the growing diversity of the social order, and the emergence of the realization that natural resources, particularly oil, are finite, leading to the sustainability movement, is increasingly reflected in the law and in the operation of the courts. The pervasiveness of these issues, together with their

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¹ ALFRED TENNYSON, MORTE D'ARTHUR IN THE WORKS OF TENNYSON 116 (1994).

resultant changes at basic levels of society, has led Francis Fukuyama to call this period the *Great Disruption*.²

The court system in the United States has seen its basic operations and structures increasingly debated and fundamental principles of law have been intensely scrutinized and challenged. The increasing politicization of the courts has spawned a debate on how judges are selected for the bench and how, when and why they should be removed. This is particularly reflected in the federal appointment and confirmation process.³ Dissatisfaction with judicial decisions has resulted in increasing challenges to traditional notions of judicial independence. Most frequently, these challenges occur in the context of retention or election contests.⁴ Court operating budgets have been reduced and court jurisdictions have been modified in an effort to eliminate or ameliorate the perceived harmful effects of judicial decision making.⁵ At the extremes, disgruntled litigants have used state initiative and referendum processes to attempt to make judges personally liable for the results of their decisions or have violently attacked judges and their family members with tragic consequences.⁶ A 2006 proposed constitutional amendment would have stripped judges, jurors, and prosecutors, to name the members of the court community involved, of their immunity from suit for the decisions they make relating to court cases.⁷ That the proposed amendment received an 89% negative vote likely has less to do with the members of the court community than it does with the members of local school boards, county commissions, and city councils whose immunity from suit would have similarly been removed.⁸

Many of these issues have always been risks of judging, or inherent in the operation of the legal system. As a reminder, former Tennessee Supreme Court Justice Penny White –her own judicial career a casualty of an unpopular decision– relates, “All judges face the likelihood of being publicly criticized, ostra-

² See generally FRANCIS FUKUYAMA, *THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER* (1999).

³ See generally STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEARING UP THE FEDERAL APPOINTMENT PROCESS* (1994).

⁴ THE AMERICAN BAR ASSOCIATION, *JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATE COMMISSION ON THE 21ST CENTURY JUDICIARY 18-22* (2003).

⁵ *Id.*

⁶ Judge Joan Lefkow, Remarks to the Chicago Rotary Club: Judicial Independence (Sept. 12, 2006).

⁷ CHRIS NELSON, 2006 BALLOT QUESTION PAMPHLET, CONSTITUTIONAL AMENDMENT E, available at <http://www.sdsos.gov/electionsvoteregistration/electvoterpdfs/2006southdakotaballotquestionpamphlet.pdf>.

⁸ *Id.* See also STATEWIDE BALLOT QUESTION COUNTY BY COUNTY RETURNS 2006, available at <http://www.sdsos.gov/results/balquest.shtml>.

cized, and attacked for decisions they must make.”⁹ However, the increasing number of these challenges; their substance, directed at fundamental notions of American jurisprudence, and the voracity with which they are pursued, suggests that the judiciary, like the executive and legislative branches of government, currently suffers from a lack of public trust and confidence. Members of the public have become increasingly skeptical of the ability of the traditional legal system to arrive at satisfactory conflict resolution.

Paradoxically, at the same time that there is increasing distrust in the courts, they are being asked to resolve new and different types of conflicts. The increasing caseload, coupled with reduced budgets and staff, hampers the courts in effectively carrying out their work.¹⁰ In the aftermath of the World Trade Center terrorist attack, new measures designed to protect national security have required scrutiny to ensure that basic civil rights are not violated. The technological revolution has expanded areas of patent and intellectual property law. Economic globalization has resulted in new forms of business enterprise and international trade regulation. The increasing divergence of society has revised the traditional definition of family, bringing a host of new issues to family court. In addition, the latest bouts of immigration have added new cultural groupings to the American scene, requiring novel levels of cultural competence and sensitivity. Furthermore, advances in knowledge have resulted in new scientific methods to analyze physical evidence.

As the debate about the proper role of the courts continues, one basic principle often remains unstated and is thereby often overlooked. The judicial branch does not exist in a vacuum, but is inextricably intertwined with the interactions and values of society. This is necessarily so, because individual judges, attorneys, court administrators, litigants, jurors, and other members of the court community, while playing their specialized and divergent roles, are at the same time members of our common society. In their roles, they are subject to the same social changes as persons who have no role in the judicial branch.

The judicial branch was designed by our nation’s founders to respond in a more reflective fashion than the two popularly-elected branches of government.¹¹ A key implication of this is the perception that often the courts are unresponsive to majority rule, as Judge Judith Kaye has noted: “[Courts] are seen as unresponsive to the needs of victims, unthinking about the impact of their decisions on communities, and yet less protective than they used to be of the rights of defendants.”¹² But it is precisely the protection of the rights of minorities, whether they be social, political, ethnic, religious, or otherwise categorized from the ty-

⁹ Penny J. White, *An America Without Judicial Independence*, in HANDBOOK FOR JUDGES 39 (K.M. Samson ed., 1984).

¹⁰ THE AMERICAN BAR ASSOCIATION, *supra* note 4, at 31-33, 39-50.

¹¹ THE FEDERALIST, NO. 78 (Alexander Hamilton).

¹² Judith Kaye, *Problem Solving Courts*, 29 FORDHAM URB. L. J. 1925, 1928 (2002).

ranny which can come from majority rule, that is at the root of American jurisprudence:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minority party in the community.¹³

Courts are responsive to change, but in a different fashion from the other branches of government. The emergence of therapeutic jurisprudence, with its counterparts of restorative justice, collaborative justice, and the holistic practice of law, together with the growth of mediation and other methods of alternative dispute resolution, the development of court administration offices to streamline court operations, the rise of judicial branch education to provide continuing professional educational opportunities that educate judges and other members of the court communities about practices and procedures that will enhance their various functions are ways in which the judicial branch has responded to the pressing need for change.

To fully explicate each of these mechanisms would require a larger venue. Consequently, this article will focus on the nexus between therapeutic jurisprudence and judicial branch education as it can inform and enhance the practices of the actors in the court community. It is divided into four major sections: First, we review the impact of therapeutic jurisprudence on court operations and legal education, including judicial branch education; second, we observe the rise of judicial branch education as a separate branch of continuing professional education; third, we analyze theoretical components of a judicial education model designed to enhance the personal and professional development of current and future practitioners of therapeutic jurisprudence; finally, we expound a conclusion which synthesizes these various theoretical streams and suggests methodologies to incorporate them into daily court practices. The structure and subject matter of this article centers on the authors' belief that the practice of therapeutic jurisprudence requires a higher level of cognitive complexity on the part of its practitioners.

I. THE IMPACT OF THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence has become an important part of the court community since its inception in 1987. Growing out of the law and psychology movement, therapeutic jurisprudence seeks to focus on outcomes to litigation or legal dispute resolution which have therapeutic effects on the participants' emo-

¹³ Hamilton, *supra* note 11.

tional or mental health.¹⁴ There are significant areas of congruence between the theories of therapeutic jurisprudence, collaborative justice, restorative justice,¹⁵ and the holistic practice of law.¹⁶ Therapeutic jurisprudence does not seek to supplant traditional legal paradigms, but rather augment them, as one of its founders, David Wexler has phrased it: “Therapeutic jurisprudence looks not merely at the law on the books, but rather at the law in action — how the law manifests itself in law offices, client behavior, and courtrooms around the world. The underlying concern is how legal systems actually function and affect people.”¹⁷ Since its inception, therapeutic jurisprudence has spread into legal education, especially in legal clinics; into various academic disciplines, to other nations, and to legal practices.¹⁸

A highly visible indicator of the pervasiveness of therapeutic jurisprudence has been the growth of problem solving courts. These specialty courts, according to Michael King, have therapeutic jurisprudence as their “underlying philosophy.”¹⁹ From their beginning in Dade County, Florida, in 1989, the number of these courts has grown to more than 1,500,²⁰ and encompasses mental health courts, domestic violence courts and community courts, to name but a few.²¹ However, this is merely the most visible manifestation of the influence of therapeutic jurisprudence. It is entirely possible to practice the principles of therapeutic jurisprudence in conventional litigation and practice settings.²²

The roles of judges and attorneys in litigation conducted according to principles of therapeutic jurisprudence are greatly expanded from their traditional models. The synchronicity between therapeutic jurisprudence and preventative justice, which requires that attorneys not only consider the potential emotional and psychological impact of various resolutions of the client’s immediate legal situation might have, but also proactively consider any potential legal issues that

¹⁴ David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 45 (Dennis P. Stolle et al. eds. 2000).

¹⁵ Cait Clark & James Neuhard, *Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, the Justice System and the Communities They Serve*, 17 *ST. THOMAS L. REV.* 781, 781-784 (2005).

¹⁶ See generally STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (1999).

¹⁷ David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 *TOURO L. REV.* 17, 20 (2008).

¹⁸ *Id.* at 17-18.

¹⁹ Michael S. King, *Problem-Solving Court Judging, Therapeutic Jurisprudence, and Transformational Leadership*, 17 *JOURNAL OF JUDICIAL ADMINISTRATION* 155, 155 (2008).

²⁰ THE AMERICAN BAR ASSOCIATION, *supra* note 4, at 49.

²¹ Susan Daicoff, *Lawyering and its Discontents: Reclaiming meaning in the Practice of Law: the Comprehensive Law Movement*, 19 *TOURO L. REV.* 825, 842-44 (2004).

²² See generally Bruce J. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, in Dennis P. Stolle et al. eds., *supra* note 14, at 309.

the client may face in the future. This calls for more thorough and comprehensive client counseling in the law office.²³ This also requires clients to consider their relationship with their attorneys as ongoing, beyond the immediate legal issue that needs resolution, and to schedule periodic consultations to seek out and address any new issues which may arise.²⁴

The role of the attorney in a therapeutic jurisprudence practice is congruent with the holistic or integrative practice of law, whose advocates practice:

An orientation toward law practice that shuns the rancor and bloodletting of litigation whenever possible; seeks to identify the roots of conflict without assigning blame, encourages clients to accept responsibility for their problems and to recognize their opponents' humanity; and sees in every conflict an opportunity for both client and lawyer to let go of judgment, anger, and bias and to grow as human beings.²⁵

The role of the judge in a court practicing therapeutic jurisprudence principles is also enhanced. As succinctly described, a judge practicing therapeutic jurisprudence –while not shedding the traditional role of courtroom manager, listener of testimony, applier of relevant precedents and statutes to the individual's case and decision-maker and judgment deliverer– may become counselor, coach, parent, and teacher as well.²⁶ In this role, the judge is required to be more interactive with the individuals who come before the court. Hearings are more numerous and case management is more intensive, which requires increased court staff. The judge becomes a supporter and promoter of positive outcomes for the individual who is participating in the therapeutic jurisprudence program.²⁷

The impact that therapeutic jurisprudence has had on the role and demeanor of judging is significant. According to a recent study, fully 70% of judges engage in some use of therapeutic jurisprudential principles.²⁸

The divergent roles played by the relatively active problem solving court judge and the traditional detached model of judging, in which the judge is seen as more removed from the immediate circumstances of cases coming before the bench has resulted in considerable tension between the two. However, problem

²³ David B. Wexler, *Therapeutic Jurisprudence and Legal Education: Where do we go from here?* 71 REV. JUR. U.P.R. 177, 182-83 (2002).

²⁴ *Id.* at 183.

²⁵ Keeva, *supra* note 16, at 139-40.

²⁶ Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, 37 COURT REVIEW 12 (2000).

²⁷ King, *supra* note 19, at 161.

²⁸ DONALD J. FAROLE, JR. ET. AL, PROBLEM-SOLVING AND THE AMERICAN BENCH: A NATIONAL SURVEY OF TRIAL COURT JUDGES (2008), available at http://www.courtinnovation.org/uploads/documents/natl_judges_survey.pdf.

solving courts have demonstrated positive results in reducing low-level crime, recidivism, costs, and even in public distrust of the courts.²⁹

To facilitate the delivery of information regarding therapeutic jurisprudence, inroads have been made into law school course offerings,³⁰ and there has been a plethora of published scholarship in the field.³¹ It is apparent that the greatest venue for education regarding therapeutic jurisprudence has been in the clinical legal education settings of many law schools.³²

Benefits to be derived from the teaching of therapeutic jurisprudence include improved interpersonal skills on the part of law students, as well as enhanced problem solving, client counseling, and self reflection skills, together with a greater awareness of professional responsibility.³³ In passing, it should be remembered that these educational opportunities are primarily directed at future members of the court community. The next section of this discussion centers on education for its current members.

II. JUDICIAL EDUCATION

This discussion now turns to an overview of the current system of judicial branch education in the United States and ways in which it can be utilized to deliver information about therapeutic jurisprudence. Developments in the growth of judicial branch education are related.

Traditionally, the United States has provided no specific educational programs for persons preparing to become judges or judicial officers, aside from the academic preparation of law school. Lincoln Armytage has noted that there is no judge school in the United States.³⁴ This stands in contrast to many other nations, where preparation for a judicial career is a separate academic endeavor, like preparation for a career in medicine, accountancy, or other professional endeavor. In fact, some state judicial officers are not required to have completed law school and must rely on continuing professional education programs to provide essential information. However, continuing judicial education for members of the court community has experienced significant growth, from a start of four (4) programs in 1961, to sixty-seven (67) by 1999.³⁵ Programs delivered by na-

²⁹ THE AMERICAN BAR ASSOCIATION, *supra* note 4, at 49.

³⁰ See generally Wexler, *supra* note 17.

³¹ *Id.*

³² See generally Leslie Larkin Cooney, *Heart and Soul for a New Rhythm for Clinical Externships*, 17 ST. THOMAS L. REV. 407, 417 (2005).

³³ *Id.*

³⁴ See generally LINCOLN ARMYTAGE, *EDUCATING JUDGES: TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING* (1997).

³⁵ *Id.* See also JUDICIAL EDUCATION REFERENCE, INFORMATION AND TECHNICAL TRANSFER PROJECT, *THE COURTS AND JUDICIAL BRANCH EDUCATION: CREATING THEIR FUTURE IN THE NEW MILLENNIUM*. (Maureen Conner ed., 1999).

tional organizations including, but not limited to, the Federal Judicial Center, the National Judicial College, the National Center for State Courts, the National Council of Juvenile and Family Court Judges, and the Judicial Division of the American Bar Association, have also provided essential educational opportunities.

The Leadership Institute in Judicial Education (LIJE) and the Institute for Faculty Excellence in Judicial Education (IFEJE) at the University of Memphis have provided educational opportunities of a different nature to judges and members of the court community since 1990. LIJE is not based in providing knowledge of substantive law, but rather provides a structure and knowledge of human development which is essential to learning. Its participants are encouraged to apply this information to developing educational materials to meet a self-identified need in their home jurisdictions.³⁶

Owing to the wide diversity of state laws and the differing structures of state legal systems, there is little uniformity among continuing education requirements and among state judicial education systems. There has been little agreement about appropriate educational methodologies and subject matters to educate judges and others in the court community. This heterogeneity stems from the structural organization of the United States into a federal system of member states, and also from the fact that court administrative offices and judicial education systems are relatively recent arrivals to the field of continuing professional education. To address the diversity of state judicial branch education systems, a set of core competencies and principles and standards for judicial branch education has been promulgated by the National Association of State Judicial Educators (NASJE).³⁷ The foregoing discussion has revealed the salience of two key points. The first is that judicial branch education for current members of the court community is primarily delivered in the context of continuing professional education. The second is that whatever curriculum is devised must be flexible enough to take into account the variability of state court systems. The model proposed in the following section of this article takes into account these two considerations.

III. THEORETICAL COMPONENTS OF A MODEL FOR EDUCATION FOR DEVELOPMENT OF THERAPEUTIC JURISPRUDENCE PRACTITIONERS

In this section, theoretical components of education for therapeutic jurisprudence will be discussed. While these components can apply with equal validity to education in a law school setting designed to enlighten the practice of future members of the court community, the focus of this section is on the con-

³⁶ See generally Patricia H. Murrell, *Continuing Judicial Education: Cognitive Development as Content Process and Outcome*, 11 JOURNAL OF ADULT DEVELOPMENT 151, 151-61 (2004).

³⁷ NATIONAL ASSOCIATION OF STATE JUDICIAL EDUCATORS, PRINCIPLES AND STANDARDS FOR JUDICIAL BRANCH EDUCATION (2001), available at <http://nasje.org/resources/principles.pdf>.

text of continuing professional education for current practitioners of therapeutic jurisprudence.

At the outset, a basic inquiry should be, “*Who learns in the process of therapeutically conducted litigation?*” Every participant in the litigation environment—regardless of their relationship to the case—is a learner, whether their role is as judge, attorney, plaintiff, defendant, witness, court staff, or service provider. While the same can be said for traditional litigation models, the increased contact with individuals as well as its more intensive nature suggests that learning assumes a more prominent place in the therapeutic jurisprudence paradigm. The process of litigation is, essentially, an educational one. So the theoretical components discussed in this section grow out of the areas of experiential learning, emotional intelligence, adult development and cognitive development. These four theoretical components intertwine and help to maximize the learning that takes place. This section concludes with a look at broad curricular areas that may be used to provide educational programming, which enhances therapeutic jurisprudence and therapeutic judging.

A. *Experiential Learning Theory*

The first of these theoretical components, experiential learning theory, is not a new concept in Western thought. The Experiential Learning Model of David Kolb³⁸ denotes the preferences each learner has for taking in and processing information.³⁹ It rests on several propositions, mainly that learning is a process which includes re-learning; that learning is adaptive, requiring individual conflict resolution between dialectally opposing learning modes; that learning results from transactions between the person and the environment; and that learning is the process of creating knowledge.⁴⁰

Kolb distinguishes two (2) intersecting continua, one based on individual preferences for how information is taken in (prehended) and the other for the way in which new learning is processed and integrated into the learner’s existing knowledge base (transformed).⁴¹ These continua intersect, providing for four (4) learning modes.⁴² Kolb conceives of learning as a circular process, beginning with the learner having an immediate concrete experience (the first learning mode), such as participating in a therapeutically conducted court proceeding. Following the court proceeding, the learners reflect on their concrete experience,

³⁸ See generally DAVID A. KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING (1984).

³⁹ Patricia H. Murrell, *Competence and Character: The Heart of CLE for the Profession’s Gatekeepers*, 40 VAL. L. REV. 485, 486 (2006).

⁴⁰ Alice Y. Kolb & David A. Kolb, *Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education*, 4 ACADEMY OF MANAGEMENT LEARNING & EDUCATION 193, 194 (2005).

⁴¹ Murrell, *supra* note 39, at 485.

⁴² See generally KOLB, *supra* note 38.

attempting to integrate it into their prior experiences.⁴³ This reflective observation (the second learning mode) will be different depending on the individual's role in the court proceeding.⁴⁴ The learners then weigh the new learning they have just acquired and compare it to their prior knowledge. In this process, they develop new insights as the new learning is integrated with their existing learning and develop new thoughts or plans of action based on this integrative process. In the context of a therapeutically conducted litigation, this abstract conceptualization (the third learning mode)⁴⁵ may occur as a case plan to deal with the issues of individuals who are parties to the litigation. The final learning mode, active experimentation, may occur when the case plan is put into action.⁴⁶ The implementation of the case plan creates a new concrete experience, and so the learning circle begins all over again at a more complex level.⁴⁷ All learners possess the capability to use each of the four (4) modes.

The experiential learning model contains four (4) individual learning style preferences based on learner's self-selections on the prehending and transforming continua. An individual's learning style is not an immutable personality trait, but is dynamic, depending on the circumstances present in one's individual environment.⁴⁸ Recent advances in neurophysiology have suggested that the Kolb learning circle may have a biological basis in structures in the brain, with concrete experience occurring in the sensory/post-sensory posterior section of the brain; reflective observation occurring in the temporal integrative cortex in the base of the brain; abstract conceptualization in the frontal integrative cortex, and active experimentation in the pre motor and motor cortex located at the top of the brain.⁴⁹

While this is a model for learning, it is also a model for teaching.⁵⁰ The implications for this theory in the context of therapeutic judging are clear. Educational programming must take into account that individuals possessing all learning modes and their resultant learning styles will be present in judicial branch education sessions. To maximize learning, programs must be sensitive to each learning style.

43 *Id.*

44 Murrell, *supra* note 39, at 489.

45 *See generally* KOLB, *supra* note 38.

46 *Id.*

47 Murrell, *supra* note 39, at 487.

48 *See generally* Kolb, *supra* note 38; Kolb & Kolb, *supra* note 40.

49 JAMES E. ZULL, THE ART OF CHANGING THE BRAIN: ENRICHING THE PRACTICE OF TEACHING BY EXPLORING THE BIOLOGY OF LEARNING 18 (2002).

50 CHARLES S. CLAXTON & PATRICIA H. MURRELL, EDUCATION FOR DEVELOPMENT: PRINCIPLES AND PRACTICES 3 (1992).

B. Emotional Intelligence

The Kolb Experiential Learning Model, together with the other remaining theoretical components, adult development, and cognitive development, apply to the cognitive functioning of the brain. But, beginning in the early 1990s, a realization emerged that the brain contained structures dedicated to another method of perception: emotional intelligence.⁵¹ Emotional intelligence consists of the abilities to accurately perceive emotions (in one's self and in others), to use emotions to enhance cognitive abilities, and understanding and managing emotions.⁵² This curricular area occasionally is regarded as too "soft" but failure to take the emotional part of the brain into account may be partially responsible for dissatisfaction within the legal profession.⁵³

The areas of the brain that have been identified as important for the optimal functioning of emotional intelligence include the amygdala, the insular/somatosensory cortex, the orbitofrontal/ventromedial prefrontal cortex and the anterior cingulate cortex.⁵⁴

The emotional mind is characterized by quickness of response to perceived potential threats owing to an absence of reflection. The brain reacts in a slightly slower fashion when the sensory input is routed to the cognitive areas of the brain where reflection and processing occurs.⁵⁵ The emotional functions of the brain may cause the mind to define objects as what they *seem to be* rather than what they *are*, and react to current situations as if they were identical to one's prior experience.⁵⁶

Knowledge of, and sensitivity to, the workings of the emotional mind are part of the sum and substance of the therapeutic jurisprudence.⁵⁷ Knowledge about the workings of the emotional mind and processes for increasing emotional intelligence should therefore be incorporated into education for therapeutic judging.⁵⁸ In the law school context, the environment of the clinical legal program could be an appropriate context for this information to be delivered. With continuing professional education, informational sessions, setting out the

⁵¹ JEANNE SEGAL, *RAISING YOUR EMOTIONAL INTELLIGENCE: A PRACTICAL GUIDE* 3 (1997).

⁵² Charles J. Wolfe, *The Practice of Emotional Intelligence Coaching in Organizations: A Hands-On Guide to Successful Outcomes*, in *EDUCATING PEOPLE TO BE EMOTIONALLY INTELLIGENT* 170 (Bar-On et al. eds., 2007).

⁵³ See generally THE AMERICAN BAR ASSOCIATION, *supra* note 4; See also Daicoff, *supra* note 21.

⁵⁴ Antoine Bechara et al., *The Anatomy of Emotional Intelligence and Implications for Educating People to be Emotionally Intelligent*, in Bar-On et al. eds., *supra* note 52.

⁵⁵ DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* 291-93 (1995).

⁵⁶ *Id.*

⁵⁷ See generally Stolle et al. eds., *supra* note 14. See also King, *supra* note 19, at 164.

⁵⁸ See generally King, *supra* note 19.

basics of emotional intelligence theory, combined with ongoing mentoring are possibly the most appropriate format for this to occur.⁵⁹

C. Adult Development Theory

Adult development theory, particularly the life cycle work of Erik Erikson, focuses on how individuals develop over time. He proposed, based on the epigenetic principle of biology, that humans were born with their capabilities for psychosocial development intact, awaiting the proper interaction of psyche (mind), soma (body), and ethos (social interaction) to allow for the proper developmental stage to occur, in much the same fashion as an acorn contains all the necessary genetic material to grow into a mature oak tree, but awaits conducive environmental conditions.⁶⁰ His life's work led him to devise a developmental scheme allowing for eight (8) stages in a human lifespan.⁶¹ They are not navigated by fixed chronological age. The work of George Vaillant⁶² and Gail Sheehy⁶³ have confirmed the importance of social changes in the period of the *Great Disruption*, by noting changes in individual's chronological ages at which Erikson's developmental changes occur. In the adult years of the lifespan, Erikson's developmental phases have been reduced to three: intimacy, relationships, and generativity.⁶⁴

Erikson notes that identity reaches a crisis point as an individual reaches late adolescence.⁶⁵ It is at this time that individuals attempt to define their personal values, career choices, life partners, and procreative choices.⁶⁶ It is a recurring theme of adulthood, revisited throughout the adult life span, as one's identity is redefined because one's social situation, employment environment, personal relationships or other defining characteristics change.⁶⁷

Relationships –the second theme of adulthood— are defined by Erikson as, “the capacity to commit oneself to concrete affiliations which may call for signif-

⁵⁹ See generally Richard E. Boyatzis, *Developing Emotional Intelligence Through Coaching for Leadership, Professional and Occupational Excellence*, in Bar-On et al. eds., *supra* note 52.

⁶⁰ See generally ERIK ERIKSON, *CHILDHOOD AND SOCIETY* (1963).

⁶¹ See generally ERIK ERIKSON, *THE LIFE CYCLE COMPLETED* (1997).

⁶² See generally GEORGE VAILLIANT, *AGING WELL: SURPRISING GUIDEPOSTS TO A HAPPIER LIFE FROM THE LANDMARK HARVARD STUDY OF ADULT DEVELOPMENT* (2002).

⁶³ See generally GAIL SHEEHY, *NEW PASSAGES: MAPPING YOUR LIFE ACROSS TIME* (1995).

⁶⁴ See generally NANCY K. SCHLOSSBERG ET AL., *IMPROVING HIGHER EDUCATION ENVIRONMENTS FOR ADULTS: RESPONSIVE PROGRAMS AND SERVICES FROM ENTRY TO DEPARTURE* (1987).

⁶⁵ See ERIKSON, *supra* note 61.

⁶⁶ *Id.*

⁶⁷ *Id.* See also CAROLE H. HOARE, *ERIKSON ON DEVELOPMENT IN ADULTHOOD: NEW INSIGHTS FROM THE UNPUBLISHED PAPERS* (2002).

icant sacrifices and compromises.”⁶⁸ During this period, career paths begin to appear and long-term relationships in one’s working and personal life are formed. The ultimate relationship, according to Erikson, was love with one cherished other person.⁶⁹ This is also a recurring theme of adulthood, as persons and working environments frequently change. Even Erikson’s ultimate relationship is subject to change by death or divorce.

The final recurring theme of adulthood, generativity, consumes the largest share of the adult life cycle. It is characterized by “giving back” or sharing of oneself and one’s abilities to the individuals and causes that one cares about. It is a time when one’s previous life experiences are integrated with the present and shared with the future.⁷⁰

These recurring themes of adulthood have many implications for the practice of therapeutic judging and jurisprudence. Each individual in the legal environment experiences these developmental issues. By taking into account the status of an individual’s current developmental needs through the lenses of identity, relationships, and generativity, an appropriate legal resolution can be crafted; which not only takes into account the individual’s mind and body, but her/his relationship to society as well. As Michael King has noted in the context of problem-solving courts:

Problem-solving courts also seek to promote high levels of performance and achievement. Commonly, those who enter these courts have entrenched dysfunctional lifestyles of many years of duration that they seek to transcend and replace with constructive, happy and law-abiding lives. Reaching important milestones along the way, and ultimately attaining their goals, represents significant life achievements for such people.⁷¹

From a judicial education perspective, it is similarly important to be aware of these recurring themes. Participants’ completion of a Milestone Exercise, in which the individual recalls significant life events, the concrete experiences, that they regard as significant to their development is a way to surface these recurring themes. These may be personal achievements, professional or a combination of both. During this process, participants are asked to think of tasks they had to complete or competencies they had to acquire in order to move to the next stage of their development.⁷² As with any educational activity of intensely personal nature, modeling of a completed life cycle by an experienced judicial educator and processing of the results of the Milestone Exercise should occur.

⁶⁸ ERIKSON, *supra* note 61, at 70.

⁶⁹ HOARE, *supra* note 67, at 188.

⁷⁰ ERIKSON, *supra* note 61.

⁷¹ King, *supra* note 19, at 156.

⁷² Murrell, *supra* note 36, at 153.

Participants should be asked to share their individual experiences, but owing to their personal nature, they should do so only to the limit of their comfort level.

D. Cognitive Development Theory

The final theoretical component of educating for therapeutic judging is cognitive development theory. In a previous article, we suggested that the practice of therapeutic jurisprudence requires a greater degree of cognitive complexity than traditional jurisprudence. Evidence of cognitive complexity included the practice of metacognition—the thinking about one’s thinking—high levels of competence, personal authenticity, accepting the responsibility for, and the consequences of, their own actions, and committing to transcendent long term goals.⁷³ Utilizing William Perry’s scheme of Intellectual and Ethical Development, we suggested that judges and members of the court community who wished to pursue the practice of therapeutic jurisprudence operated at its higher stages of relativism and commitment, which required a shift in the individual’s thinking from externals to a more internalized evaluative process.⁷⁴ We also noted that this developmental scheme has already been introduced into the curriculum at some law schools.⁷⁵

Our intention in this article is not to back away from our previous position, but to expand it with support from another cognitive development theorist, Robert Kegan. Focusing on the way individuals make meaning or create knowledge, Kegan’s theory of cognitive complexity encompasses five dimensions (in his words, “Orders of Consciousness”) of increasing cognitive complexity through which individuals may grow.⁷⁶ The first two of these orders of consciousness are generally assigned to pre-adulthood and are beyond the scope of this discussion. The remaining three orders of consciousness—the socialized mind, the self-authoring mind, and the self-transforming mind—apply in the context of adult development.⁷⁷ Kegan would suggest that the orders of consciousness are more important as indicators of the overall process of adult development than they are as developmental periods.⁷⁸ Each order of consciousness represents an evolutionary truce, a pause, in the progression of an adult’s devel-

⁷³ Philip D. Gould & Patricia H. Murrell, *Therapeutic Jurisprudence and Cognitive Complexity: An Overview*, 29 *FORDHAM URB. L. REV.* 2117, 2127-29 (2002).

⁷⁴ *Id.* See also Murrell, *supra* note 36, at 156-58.

⁷⁵ *Id.* See generally Paul Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 *TUL. L. REV.* 1237 (1988). See also Jane H. Aiken, *Provocateurs for Justice*, 7 *CLINICAL L. REV.* 289, 291 (2001).

⁷⁶ See generally ROBERT KEGAN, *IN OVER OUR HEADS: THE MENTAL DEMANDS OF MODERN LIFE* (1994).

⁷⁷ *Id.* See also ROBERT KEGAN, *THE EVOLVING SELF: PROBLEM AND PROCESS IN HUMAN DEVELOPMENT* (1982).

⁷⁸ KEGAN, *supra* note 76, at 265.

opment where balances between forces of development, which tend to slow down or diminish adult development, an achievement of a dynamic equilibrium with forces of development, which tend to encourage its progression.⁷⁹

The third order of consciousness, the one at which most adults operate, Kegan has called the socialized mind. Occurring sometime after the first twenty (20) years of the human life span, the third order is characterized by connection of the self with society through shared values and beliefs. Persons reaching this order of consciousness are able to think long term and abstractly, and preserve their connections to their part of society.⁸⁰

Up to 21% of adults may operate at or above the level of the fourth order of consciousness, possessing what Kegan calls the self-authoring mind.⁸¹ At this order of consciousness, individuals are shaped less by their surrounding society than they are by an internal authority which determines the course that adults choose to follow. Kegan suggests that this transformation occurs at some point between the chronological ages of twenty-five to fifty (25-50), if it does, in fact, occur at all.⁸²

The fifth order of consciousness, called by Kegan the self-transforming mind, is reached by less than 10% of adults.⁸³ Adults who reach this level of consciousness:

start to build a way of constructing the world that is much more friendly to contradiction, to oppositeness, to being able to hold on to multiple systems of thinking. [They] begin to see that the life project is not about continuing to defend one formation of the self but about the ability to have the self literally be transformative.⁸⁴

Given the relatively short history of therapeutic jurisprudence and the challenges surrounding its acceptance by the traditional legal community, practitioners of therapeutic jurisprudence should be functioning at either the self-authoring or the self-transforming levels of cognitive complexity in the Kegan scheme. The pressure of society exerted on the individual is designed to greatly increase the conformity to traditional ways of thinking and methods of jurisprudence. In addition, the relative cognitive complexity of the parties involved in litigation based in the principles of therapeutic jurisprudence should be taken into account. The use of literature pieces in a seminar type roundtable discus-

⁷⁹ KEGAN, *supra* note 77. See also, ROBERT KEGAN & LISA LAHEY, HOW THE WAY WE TALK CAN CHANGE THE WAY WE WORK 3-5 (2001).

⁸⁰ ELIZABETH DEBOLD, EPISTEMOLOGY, FOURTH ORDER CONSCIOUSNESS, AND THE SUBJECT-OBJECT RELATIONSHIP OR HOW THE SELF EVOLVES WITH ROBERT KEGAN. WHAT IS ENLIGHTENMENT? 148-49 (2002).

⁸¹ *Id.* at 149-51.

⁸² DEBOLD, *supra* note 80, at 150.

⁸³ *Id.* at 148.

⁸⁴ *Id.* at 151.

sion format provides an educational opportunity for the discussion of these issues.⁸⁵

E. A Model for Curriculum Content

Curriculum content for educational programming that enhances therapeutic judging is grounded in four (4) major areas, the first two (2) of which are reasonably common in traditional judicial branch education. The first of these deals with substantive law issues, including areas such as legislative updates and procedural and evidentiary rules. The second, judicial and technical skills are often found in judicial orientation programs in addition to general programming. The third area of curriculum content concerns authenticity and demeanor and is occasionally noted as civility. The final area of curriculum content for therapeutic judging is the one most rarely found, personal growth and development.⁸⁶

CONCLUSION

This article has attempted to show ways in which therapeutic justice is changing the old order of traditional jurisprudence. While it is not the intention of therapeutic jurisprudence to supplant the old order, it is designed to augment traditional notions of court operations and traditional functions of judges and members of the court community in order to better serve the needs of the general public. It does so by focusing on therapeutic outcomes to litigation, which lead to greater satisfaction among litigants, judges and members of the court community. It has been noted that therapeutic jurisprudence is showing promise even in reducing the seemingly intractable problem of the loss of public trust and confidence of the court.

The current state of the national judiciary and state judicial systems has been surveyed and many of the contemporary issues have been discussed to provide appropriate context for the discussion of therapeutic jurisprudential concepts and the impact that judicial branch education may have on increasing the capacity of judges to practice therapeutic jurisprudence.

The current state of judicial branch education in the states has been reviewed and strategies to implement curricular items based in therapeutic jurisprudence have been discussed. The areas of experiential learning, emotional intelligence, adult development, and cognitive development appear to provide the best curricular background for education for therapeutic judging in the continuing professional education setting. In the law school setting, these theoretical concepts are best applied, and are being applied in a limited fashion in clinical education programs.

⁸⁵ Murrell, *supra* note 36, at 156.

⁸⁶ See generally Dennis W. Catlin, *An Empirical Study of Judges' Reasons for Participating in Continuing Professional Education*, 7 JUST. SYS. J. 236 (1982).

The impact of educational programming based on the theoretical concepts set forth in this article is profound. As one judge of a limited jurisdiction court revealed:

I had an epiphany that my role as a judge is actually that of an educator. I've discovered . . . that it's a lot easier for me to deal with defendants by trying to educate them and explain to them the basis for a ruling or a law or why one behavior is unacceptable and another is more appropriate.⁸⁷

There is no question that education for therapeutic judging is possible given the current state of state and federal judicial branch education systems. Such education would provide not only valuable information regarding the tenets of therapeutic jurisprudence, but would also be delivered in a way that transforms the learners, ensuring the greater "staying power" of the message, at least if the education programming is designed in accordance with the theoretical concepts discussed in this article.

Therapeutic jurisprudence demands higher levels of cognitive complexity from its practitioners, judges, and members of the court community. It provides a partial solution to the problems which have put American Justice in jeopardy. Educational programming can disseminate the concepts of therapeutic jurisprudence to a larger audience, increasing the benefits to be had by their practice. Education for therapeutic judging can assist in improving the quality of justice provided in American courts and thereby improve the quality of life for all.

⁸⁷ Philip D. Gould, *Creating a Learning Organization in Utah's Judicial Branch: The Impact of Experiential Learning, Adult Development, and Cognitive Development Theories on Practice and Change in Judicial Branch Education* 153 (2008) (unpublished Ph.D. dissertation, The University of Memphis).