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Implications for therapeutic judging (TJ) of a psychoanalytical approach to the judicial role — Reflections on Robert Burt's contribution

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ABSTRACT

Robert Burt in, "The Yale School of Law and Psychoanalysis, from 1963 Onward", in this issue, explains and laments a decline in influence of psychoanalytic ideas in legal thinking. He notes "the fundamental similarity that both litigation and psychotherapy involve recollections of past events", buttressing his argument with eight parallels between the two. In this article we take up Burt's theme, first noting the relationship between therapeutic jurisprudence and psychoanalytic concepts before presenting an outline for a psychoanalytical understanding of the judicial role. We then consider the litigation process from the linked perspectives of therapeutic jurisprudence and psychoanalysis before closing with a reflection on the eight parallels elaborated by Burt.

1. Introduction

The emergence of therapeutic judging (TJ) can be linked to the growing acceptance of the notion that justice is a broad concept (Legg, 2013, pp. 155–166) and that it may be achieved through collaborative means rather than solely through the actions of an independent, even handed judge. The evolution of current models of judging can be linked to changing perspectives on justice as represented by justice imagery throughout the last few centuries (Resnik and Curtis, 2012, pp. 3–10); and in its current incarnation as noted by Robert Burt (in this issue), through an acceptance that the dynamics of conflict may sometimes require that all of those involved in a dispute work together to build an outcome with the support of a judge, and where the judge may engage in a more therapeutic manner.

This is not to suggest that the law is any less relevant within the justice system or that it cannot be combined with a TJ approach. Ian Craib (a sociologist who also trained as a psychoanalyst) says of psychoanalytic therapy that its aim is to help people, "contain their emotions in order to be able to think" (Craib, 2001, p. 5). In many ways the law, and the many practitioners who work within the legal system (the lawyers, judges and others), provide a similar function. Law can help us to organise our relationships, from the personal to the professional, knowing that we need not recreate many basic boundaries and rules of behaviour. It provides a framework within which we can pursue our goals. If we find ourselves in significant conflict, the legal system can be used to assist to settle or finalise the dispute.

TJ does not displace these important objectives. However, the emergence of TJ models can be linked to a partial rejection of the notion that judging must require a hierarchical response. In TJ, although substantive legal models and the rule of law are present, a focus on more therapeutic interventions that support learning and change is invoked to support outcomes that are directed at more lasting resolution. By fostering self-determination and respect, the judge, the court and all relevant participants, are directed at encouraging transformation, often over a period of time.

Whilst judicial behaviour in the context of TJ has often been explored in a theoretical sense, and there are numerous examples of successful TJ programmes, there has been little focus on the implications of psychoanalytical perspectives on judicial behaviours for TJ. As Burt has noted, there are however numerous parallels, and whilst many judicial behaviours may have resulted from frustration with the inadequacies presented by more traditional hierarchical judging models, other judges may have been influenced by an increasing emphasis on procedural justice (Lind & Tyler, 1988; Thibaut, 1978), communication skills, as well as the increasing exploration of the expansion of the judicial role to include management, conflict resolution and administration (Sourdin & Zariski, 2013). However, as Wexler (in press) has noted, TJ involves more than these expanded foci in that it has a primary goal which is "to apply and incorporate insights and findings from the psychology, criminology, and social work literature to the legal system" (Kaiser & Holtfreter, 2015, p. 4; Wexler, in press). This application requires consideration of a vast literature in each of these areas and therefore incorporates a much larger analysis of behaviours, systems, processes and people.

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In the context of judging more generally (and beyond the specialised courts where TJ flourishes) there has been limited engagement with the notion that more effective forms of judging may require both, broader understandings of literature from outside legal academic circles, as well as a judicial capacity to use more empathic connective approaches and collaborative understandings and skills.

Whilst the exploration of the evolving judicial role can be undertaken in the context of the experimentation that has emerged where TJ approaches have been utilised, a focus on TJ also supports consideration of potential changes to the judicial role and how these changes might be evaluated. At the most basic level, TJ requires a surrounding structure that supports:

> (1) ongoing judicial intervention, (2) close monitoring of and immediate response to behaviour, (3) the integration of treatment services with judicial case processing, (4) multidisciplinary involvement, and (5) collaboration with community-based and government organizations (Kaiser & Holtfreter, 2015, pp. 55–56).

Where TJ is introduced into traditional court arrangements, the psychodynamics of the traditional court room and structures can pose significant challenges for therapeutic judging (TJ), and, as we discuss below, involve modes of interaction – part-object relating – which are distinctly anti-therapeutic. In addition, another potential area of difficulty is that some of the lead legal actors, the lawyers, and judge, or judges, operate from distinct psyches which, constructed from law school onwards, embody ways of seeing the world which present a direct challenge to reshaping the therapeutic orientation of judicial processes.

In respect of the judicial role, a fluid, responsive and dynamic approach that draws upon and reflects on psychoanalytical advances is also required in TJ. The evolving nature of this role has seldom been the subject of commentary, and the parallels with developments in more general psychotherapeutic approaches, are, as Burt has noted, significant and may suggest future areas for the development of TJ understandings. The value to TJ of engaging with a psychoanalytic perspective on the courtroom, and those within it, is that it opens up new ways to view, and considers revisions to, judicial and litigation processes. The psychoanalytical approach, *combined with* TJ principles and experience, has the potential to be used to explain, diagnose, and suggest remedies for, aspects of the orthodox judicial process which may have detrimental effects on those involved in such processes.

2. Therapeutic jurisprudence and TJ

The emergence of therapeutic jurisprudence which underpins TJ is directly linked to the establishment of problem solving courts and the development of restorative justice theory over the past three decades. Essentially, the approaches were initially directed as a law reform measure with TJ supporting an understanding that law could be used in either a therapeutic or non-therapeutic manner (Magner, 1997):

> It [therapeutic jurisprudence] is an interdisciplinary approach to legal scholarship that has a law reform agenda. Therapeutic jurisprudence seeks to assess the therapeutic and anti-therapeutic consequences of law and how it is applied. It also seeks to affect legal change designed to increase the former and diminish the latter. (Winick & Wexler, 2002, p. 479).

In addition, the growth in therapeutic jurisprudence clearly originated from a recognition that traditional court processes failed to deal with a range of behaviours. In this regard, traditional courts were perceived to be.

> … recycling problems, the reoccurrence of which traditional interventions did not succeed in bringing to a halt. The traditional judicial model addressed the symptoms, but not the underlying problem. The result was that the problem re-emerged, constantly necessitating repeated judicial intervention. (Winick, 2003, p. 1060).

Research relating to therapeutic approaches has consistently found that these approaches may not only result in reduced recidivism in respect of family, criminal and other conflicts but can also play a critical role in enhancing conflict resolution and social skills whilst addressing underlying problems through the use of collaborative approaches.

In terms of the impact on judges, this approach has required that judges change the way that they judge and operate in courts. One commentator suggested that "Therapeutic jurisprudence presents a challenge to judicial officers. From its perspective judicial officers simply should not sit back and uncritically apply court processes that have been handed down over many years." (King, 2003a, 2003b). TJ requires not just higher levels of engagement but different forms of engagement. Further, TJ presents a challenge to the classical construction of the judicial psyche (elaborated in the following section).

Initially, the broad parameters of TJ were not only intended to support interdisciplinary approaches, they were intended to foster a "mental health approach to law" that would use the "the tools of the behavioral sciences to assess law's therapeutic impact" and thereby promote psychological health and well-being (Winick & Wexler, 2002, p. 479). These approaches were directed at least initially at criminal cases (often involving young people) and family disputes. The extension of TJ through the development of specialist courts such as drug courts (Rottman, 2000), indigenous courts (Marchetti & Ransley, 2014) initially suggested that TJ approaches would be limited to those courts which required more reflexive cultural responses (which acknowledged differing values and approaches), where a rehabilitative component was present and importantly where some ongoing supervision and flexibility in approach were required to ensure that changes could be adequately supported.

The rapid growth of specialist "problem solving" courts in the United States (US), that now number more than 2500 (Wolf, 2009) was accompanied by a focus on the evaluation of outcomes (see for example, Berman, Feinblatt, & Glazer, 2005) and the development of policies, core principles and practice models. The more recent extension of TJ approaches beyond specialist courts as well as the development of more specialist courts has meant that TJ is now used in respect of a far broader spectrum of legal disputes (Wexler, 2008) and incorporates the notion that TJ may lead to better quality outcomes and higher levels of satisfaction with the justice system (Toohey & Toohey, 2011). Therapeutic judging in this respect is considered to support access to justice by enabling and supporting clearer decision making within courts and by supporting greater confidence in the justice system. In this broader articulation therapeutic jurisprudence is perceived to: "… focus[es] attention on this previously underappreciated aspect, humanising the law and concerning itself with the human, emotional and psychological side of law and the legal process." (Toohey & Toohey, 2011, p. 309).

The extension of TJ approaches beyond problem solving or specialist courts has not occurred without some criticism, with some questioning their constitutional validity (Australia, Duffy, 2011). At the same time, attempts to "mainstream" TJ have led to the development of non-adversarial law theory and educational programmes specifically oriented towards therapeutic jurisprudence (King, Freiberg, Batagol, & Hyams, 2014). These more recent developments have fostered the articulation of a broader definition of therapeutic jurisprudence that recognises that "What is important in one area of law may be less so in another area, and consequently a broad definition is required to cover the field" (King, 2008, pp. 1115–1116). It has been recently noted that:

> TJ has been applied to diverse areas of the law. While its principal applications have been in mental health law, criminal law, judging, legal practice and legal education, it has also been applied in international law, contract law, tort law, coronial law, family law, administrative law and workers compensation law. (Evans & King, 2012, p. 720).

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In general, therapeutic jurisprudence is oriented towards all of those involved in a court process and supports not only judges but also court staff, legal representatives and other key people (financial counsellors, mental health practitioners and others) to adopt both a more collaborative and holistic approach to consider the well-being of those involved in conflict. Such an approach requires not only a focus on skills and processes but also on ethical arrangements (Evans & King, 2012). In contrast, therapeutic judging (TJ), as used in this article, is focussed more on the specific role of the judge and the nature of the judicial engagement within the crucible (or perhaps more correctly in the TJ sense — the environment) of the court.

TJ in this sense is concerned not only with procedural justice approaches which can be linked to respect, dignity, explanation, voice, participation, acknowledgement and fair decision making (Greenberg, 1993; Lind & Tyler, 1988) but is also linked to an understanding of the importance of interactive and sometimes disruptive approaches within a court setting that may focus less on authority and more on recognition of the participants as whole-objects, and empowerment. It is these more therapeutic interventions that have sometimes raised concerns in respect of the judicial role where it has been suggested that there can be additional complexities raised in respect of the judicial role in that familiarity can be an issue and that open court processes can impact on people particularly in the context of public shaming and confidentiality (Lyons, 2013, p. 412).

In addition, the TJ role requires that a judge demonstrate leadership skills and role modelling in a broader sense to support a more collaborative and problem solving environment. Winick has noted that:

> Not only is the judge a leading actor in the therapeutic drama, but also the courtroom itself becomes a stage for the acting out of many crucial scenes. On this stage, the judge also assumes the role of director, coordinating the roles of many of the actors, providing a needed motivation for how they will play their parts, and inspiring them to play them well. (Winick, 2003, p. 1060).

As Burt has noted, the reimagining of the therapist role in the second half of the twentieth century involves a progression from "an authoritarian conception of the analyst's role, in which he was all-knowing and his patient was expected to defer to his superior scientific pronouncements." In a similar vein, the developments in TJ challenge the traditionally constructed judicial psyche – which we discuss next – so that more authoritarian and hierarchical styles have been consumed and overtaken by a more useful collaborative and supportive decision making approach. In this sense, therapeutic jurisprudence requires that judges when following a TJ approach, operate both within legal boundaries, but also, within the court in a non-paternalistic and non-coercive manner (King & Auty, 2005).

3. A psychoanalysis of judging

Robert Burt (in this issue) opens his discussion by considering why a wider interest in psychoanalysis ebbed and flowed, in the United States, from 1963 onwards (after an amusing account of the mesmeric certainty with which Anna Freud tranquilised the young Burt and associates). In the context of psychoanalysis and the discipline of law there has arguably been more ebb than flow. Resort to psychoanalytic concepts in relation to the law still remains a less than mainstream pursuit. The title of "Law & Psychoanalysis" is directed at a small cadre of commentators. Furthermore, with some exceptions (Aristodemou, 2014) the interdisciplinary mixing of law and psychoanalysis remains more popular in the US than say, the United Kingdom.

In his contribution to this issue, Burt lists three reasons for the general decline of psychoanalytical ideas as an influence in the United States. To them, in relation to the discipline of the law, we can add the issue noted by Sheleff, also in this journal, in 1986, and still we suspect true in large part today, that "neither lawyers nor psychoanalysts have considered themselves qualified for this task and have done little to seek cross fertilisation" ((1986), p. 154, quoting Ehrenzweig (1972, p. 157)). Burt, an early adopter, of course, was one of the exceptions.

Despite the modest resurgence in law and psychoanalytical scholarship more generally, none of it has considered directly, comprehensively, how Freud's vocabulary and grammar of the psyche might be used to explain the classic concept of the judge: what is the nature of the judicial psyche? How does it operate? Nor, with very limited exceptions, has there been detailed consideration of the psychodynamics of the judicial process (Shaibani, 1999) — a topic with self-evident potential to contribute to work on TJ.

Whilst some of the lead legal realists drew on psychoanalytic concepts – Jerome Frank wrote his *Law and the Modern Mind* (Frank, 1930) subsequent to having undergone analysis (Schauer, 2010, p. 110) – there has still been a tendency to link the rejection of formalism to an embrace of the judge as disguised active policy maker (using legal reasoning as a cloak). For realists:

> The alleged cognitive differences between judges (or lawyers) and the rest of humanity are exaggerated, with judges engaged in forms of cognition not appreciably different from those of the human species in general, a species of which judges are of course a part. (Schauer, 2010, p. 111).

Freud, and psychoanalytical concepts, whilst appearing in Realist and CLS theorising, (for e.g., Caudill, 1991), have the potential though to support a much richer understanding of the legal psyche (Klein and Mitchell (2010). Some of the psychological work on judges has started to engage with these issues (Rachlinski et al., 2009; Vidmar, 2011), suggesting that there *is* something in legal training which enables people to put aside instinctive biases, yet:

> Much of the existing research on the psychology of judging takes the Realist view of judging as axiomatic [with all its assumptions about judges as explicit – almost conscious – policy actors], but that conclusion is hardly inevitable. (Schauer, 2010, p. 113).

Arguably, psychoanalytical concepts can be used as a novel embarkation point to explaining judicial behaviour and court processes, rather than merely as additional material to add to existing legal theory.

The first stop on a psychoanalytical journey into law, and judicial processes, might begin with the psyche of the lawyer (comprising a distinct legal super-ego and legal ego), and, later in their (common law) career, with that of the judge. The judge's legal super-ego, additional to their personal super-ego, and constructed through legal training, is the repository of legal knowledge, not just learnt legal rules, but also the broader cultural experience of the law. Like the personal super-ego, the legal super-ego is built up over time by taking in the thinking and views which run through generations of legal thinkers. As Holmes (1881, p. 5) put it: "The life of the law has not been logic: it has been experience. ... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

The legal ego is the place from which lawyers and judges learn to approach and analyse the world in legal terms, obeying the commands of their legal super-egos. Like the *personal* ego it is a place from which one speaks as one's self, but in this case, one's legal self. When running in "legal mode" – in the role of lawyer, or judge – the conscious personal super-ego and ego are set aside, though that is not to say that impulses from those parts of the psyche do not play a role in legal reasoning. Their influence though comes at the level of the unconscious.

The role of the unconscious and the phantastic reasoning explains how, whilst staying true to the judicial oath – that cases are decided by the law – a judge's personal self can in fact play a role. Whilst lawyers and judges can enforce the bifurcation above the line of consciousness, the degree to which it is effective beneath the line of consciousness

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remains unknowable, and unmanageable to them. This is significant because, as Freud (1991, p. 139) said, the:

> Unconsciousness is a regular and inevitable phase in the processes constituting our psychical activity; every psychical act begins as an unconscious one, and it may either remain so or go on developing into consciousness, according to whether it meets resistance or not.

Thus, as much as a judge honestly claims to be operating consciously from their legal super-ego and ego, there will still be influences from their personal super-ego and ego beneath the membrane of consciousness. And in their unconscious another reasoning process operates: that of phantasy. Isaacs (1948, pp. 95 & 80) characterised phantasy as, "the primary content of unconscious mental processes": "Phantasy is (in the first instance) the mental corollary, the psychic representative, of instinct. There is no impulse, no instinctual urge or response which is not experienced as unconscious phantasy."

Every judge's phantasies, or in Isaac's terms, *instincts*, of justice, shaped by their life experiences, will play a role at the unconscious level, influencing how they consciously apply legal rules. Phantastic reasoning operates to meld the inclinations of the judge's legal super-ego and ego with that of their personal super-ego and ego, producing a synthesis which ultimately emerges to consciousness where it (the conclusion to the problem before the judge) is articulated consistently with learnt legal rules.

The tempering of conscious legal detachment by unconscious judicial phantasies is part of what makes legal reasoning generally acceptable. Phantastic mixing in the unconscious ensures that legal reasoning is tethered to a judge's humanity; it ensures that the "quality of mercy is not strained", and that the application of legal rules is seasoned by the judge's life experience.[1]

The final component of a psychoanalysis of judging concerns how lawyers and judges cope with the challenge posed by operating from two psyches, especially when those psyches may have conflicting reactions to the facts of a case, as for example when a defence lawyer puts the prosecution to proof, potentially securing the freedom of a client they know to have done the deed in question, or when a judge, presiding in similar circumstances, must provide a fair trial — both behaviours required by a legal system operating according to the rule of law. Two further psychoanalytical concepts are relevant here: the defences of splitting, and repression.

First, in relation to splitting, not only are "schizoid ways of relating... never given up completely" but also they play a crucial role in enabling legal thinking (Bott Spillius et al., 2011, p. 64). For lawyers such modes of relating are implicitly encouraged as an aspect of legal training; necessary to allow a person to reason as a lawyer. Splitting buttresses the dual structure (of the legal self and personal self). It helps to control tensions which would otherwise arise (and could cripple legal thinking) by removing from the inner world objects which would attract the dismay of the personal super-ego and ego. It allows the lawyer or judge to hold within, and work with, only those aspects of the litigant which are legally relevant. Both lawyers and judges train to switch off their personal emotional responses (Klein, 1946, p. 105).

As the UK Supreme Court's first President, Lord Phillips (BBC4, 2011) has said, "you need objectivity, you can't afford to let you own feelings or emotions take charge." The splitting defence operates to allow the lawyer or judge to "both know and not know" the litigant at the same time (Bott Spillius, p. 492). In the standard clinical setting splitting in maturity is more generally associated with a pathology; "patients who split can become cut off from aspects of themselves, for example they may be unaware of their feelings and their thoughts can become disconnected from one another" (Bott Spillius, p. 74, discussing case studies in Klein, 1946). Yet, for the judge some splitting is necessary to ensure legal reasoning can be undertaken. Holding all parts of the litigant/object within, seeing litigants whole, would cause conflict in traditional court settings. Therapeutic judging approaches present a challenge to this classic model because they may require a far wider evaluation of the disputants' circumstances, than would traditionally be undertaken.

The other defence mechanism judges rely on is repression which Freud described as: "the most stable and highly developed defence", available against the "arousal of anxiety or unpleasure in the system conscious and conscious ego" (Freud, 1991, p. 521 & 519). In the topographic model repression stops ideas moving from the unconscious to the conscious; in the structural model the "dynamic interplay between the psychic agencies" achieves the same censoring, inhibiting function (Freud, 1991, p. 519). In both the purpose remains the same: "the prevention of the arousal of anxiety or unpleasure" (Freud, 1991, p. 519). There is a link between the two defences. In Klein's (1952, p. 86) view: "the mechanism of splitting underlies repression."

4. Connecting judicial and therapeutic concerns

It follows from the preceding discussion that the orthodox, non-TJ orientated, litigation process is one of part-object relations. Part-object relating is implicit in for example the splitting defence lawyers and judges rely on in order to think as lawyers and judges. A normal experience of object relating in adult life will be to people as whole objects. Even when we relate to people as part-objects (for e.g., doctor to patient, lecturer to student) an expected aspect of the interpersonal behaviour will be the recognition of the contextual relevance of each person's humanity, a preparedness to couch the part-object rationale for the interaction in terms of the wholeness of each actor (Gomez, 1997, p. 1–2).

The classic adversarial litigation model though entails stripping the parties of their whole story and setting it within the framework of a cause of action. Only those facts which are strictly relevant to the legal principles concerned will be of interest to the court. At the heart of this litigation process is the "judge", a presiding part-object comprised of legal super-ego and ego – their personal self cut off – and subject, as are all in the courtroom, to the legal social super-ego requiring the role behaviour of "judge". Clients and lawyers alike relate to the judge in part-object terms. The requirement of part-object relating, for the judge, is captured by the judicial oath, "I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will."; that is., I will deal with all before me on the basis of what the law says is relevant, not on the basis of the totality of their circumstances.

Litigation lawyers will be familiar with clients' bafflement that surrounding aspects of a disputed event which seem emotionally connected to the event, are not, in legal terms relevant to the articulation of the event in the documents launching or defending a case. For this reason, non-lawyers involved in litigation, unless experienced in the law, may find the process dehumanising, at least disconcerting, and often distressing. In fact the more a case seems to call for a "human" response (usually cases with the potential for a high emotional charge), the more likely that phrases will appear in a judgement along the lines of, "I stress that I am not concerned with the policy of X in this case; my task is solely to apply the law." Opening his discussion in *Re A*, concerning the separation of co-joined twins – an operation which will bring to one of the prospect of life, but to the other, death – Sir Alan Ward (*Re A*, 2000, p. 155) says: "This court is a court of law, not of morals, and our task has been to find, and our duty is then to apply the relevant principles of law to the situation before us - a situation which is quite unique."

The TJ approach, by contrast, *requires* empathic communication and the creation and maintenance of a connection, where possible, between all of those involved in the conflict, as whole objects with attention being given to factors that may not be "legally relevant". Whilst this involves supportive mechanisms such as a team building and collaborative approach, the use of review meetings and an emphasis of

[1] See Portia's speech on mercy in Shakespeare's, *The Merchant of Venice*, Act IV, Sc1, ll2125–46.

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procedural justice, it also requires that the judge as the person exercising judicial authority engages and connects with people in a way that is not only less authoritarian but may also be more "democratic" (Burt, in this issue). Whilst it has been suggested that "very standing of a judicial officer as a person of authority can help promote change" (King & Auty, 2005, p. 73) there is much more required of those involved in TJ. In criminal courts, for example, not only must the process require the application of sentencing arrangements and supports that encourage treatment and growth, but such growth and compliance with outcomes is realised through judicial behaviours that are motivating and supportive of self realisation. Connecting with people is a critical component and as such more authoritative and paternalistic approaches must be used with great care.

Whilst Burt suggests that "Judges must redefine their conception of themselves as promoting free conversation, exploration and empathic identification amongst estranged adversaries rather than definitively designating winners and losers" (Burt, in this issue), in the TJ area, they must grapple with the dual role that includes "therapeutic interventions, where judges both punish participants (revoking bail) and act as their therapist (asking how they felt after a relapse)" (Lyons, 2013, p. 417). This role duality, whilst resting on similar mechanisms, is a modification of the traditional psychical bifurcation of the classic "judge" discussed above, and is made possible partly because the overriding values of TJ include a recognition that the "participation of people in all matters and decisions concerning them flows from the recognition that the principles of equality and non-discrimination are fundamental and universally applicable" (Weller, 2011, p. 93). Adjusting their behaviour in this way moves them from part-object relating with those before them towards whole-object relations.

The TJ approach requires a shift towards an interactive form of justice where respect is critical and where interactions are both empathic and supportive. Whilst this may require attention to elements of procedural justice (that promote dignified and respectful communication) and at the most basic level relates to communication arrangements: "Body language, the tone and manner of speech and how the judicial officer acts are also important. Sarcasm, for example, is unlikely to promote a therapeutic interaction" (King, 2003a, 2003b), it also requires interactions that support self-esteem.

Such interactions require understandings about self and others as well as the nature of the changed judicial role. It has been noted for example that "a judge must intelligently attend to his or her own emotions in order to maximise the chance of participant rehabilitation and positive behavioural change" (Duffy, 2011, p. 420). In addition, the questioning and interactions require that in TJ there must be acceptance and understanding of the behaviour of all of those within the court and a higher tolerance of ambiguity: "If a problem-solving court judge is prepared to address the root cause of an individual's offending, they need to figuratively enter and understand the world in which that offending has occurred" (Duffy, 2011, p. 395).

Empathic connections can arguably create some issues for those working in a therapeutic jurisprudence environment particularly if a collaborative and problem solving team arrangement is not aligned with the need for and the desirability of more supportive and less authoritarian interactions. The potential judicial difficulties in such a situation are twofold. Not only is a judge required – and psychically constructed – to be impartial and independent, a judge must also consider the institutional integrity of the court and the justice system (Duffy, 2011).

By no means are these goals irreconcilable and a number of therapeutic jurisprudence commentators would suggest that deeper and more meaningful connected interactions need not have an adverse impact on the independent and impartial role of a judge (as with a therapist) and that such a pattern of interaction may support the integrity of the system in any event by supporting a more human and humane justice approach. Achieving these goals across a broader range of courts (and beyond specialist courts) will likely require a re-appraisal of not just how judges are trained, but also lawyers, from the first year of law school onwards. The classic model of the legal/judicial psyche outlined above is not one which is naturally turned towards a TJ approach – though it clearly could be, and indeed as experience of TJ in action shows, can be. The argument for considering a wider re-appraisal of legal and judicial training is strengthened by the eight parallels which Burt carefully elaborates as existing between the roles of judge and therapist, parallels to which we now turn.

5. Reflections on Robert Burt's analysis

Robert Burt's analysis of the parallels between legal and psychoanalytical processes is especially supportive of the developments in TJ over the past two decades. It also provides support for the continuing development of therapeutic jurisprudence. His first two parallels note that both litigation and psychoanalysis entail recollections of past events, which in both cases involves deliberative re-enactments before a person who was not involved in the past events (the therapist or judge). In this regard, Burt suggests that in both contexts "the very process of recollection has the same goal." In view of the past discussion, it is suggested that the goals of psychotherapy and the *traditional model* of litigation, as well as the modes of relating between those engaged in the processes, differ perhaps more than Burt contemplates. In relation to *TJ approaches* however, the parallel is much clearer.

In this context, the fourth parallel that is noted must also be considered: "both litigative and psychotherapeutic processes do not focus on the past for its own sake but for the purpose of charting a course for future conduct." A crucial difference between psychoanalysis and litigation, concerns which aspects of the past are permitted into the present. A psychotherapist – pitted against the analysand's resistance – seeks as much of the past as is possible, making no judgement as to relevancy (indeed, that which the analysand perceives as *irrelevant* is quite likely to be anything but, and to be settled on with interest by their therapist). In the traditional litigation setting a judge seeks, and is presented with by the parties' lawyers, only that which is *legally* relevant, according to the rules evidence. This will often deliver a quite partial picture (the one apt to baffle the non-legally trained layperson). Certain matters which they will likely view is necessarily relevant – prior allegations (not proven) of for example criminal conduct, or indeed actual convictions for other types of crime than that which brings an accused before court today – will be excluded from consideration. Indeed, quite often, aspects of the history of a case which a psychotherapist might find of particular explanatory interest, will not, from the point of view of the law, be matters for the court.

In contrast, a TJ approach to judging brings the court room far closer to the therapist's consultation room, valuing inputs and views which would not previously have been admitted. It does this in part because it seeks to do more than simply settle a case, but to achieve, as the approaches' title suggests, a therapeutic outcome. Even so, a difference remains in that the goal of any litigation event will involve judgement and the consideration of outcomes according to law. Whereas some analyses may last for years, a tenet of the legal system is that delayed justice, delayed resolutions, may amount to a denial of justice.

Burt notes a third parallel in that:

> On some occasions in therapy the patients do not acknowledge the depth or even existence of inner conflict. The safe space provided by the therapist and adroit, carefully timed interpretations offered by the therapist as she listens to the patient's narrative can promote conscious reflection on conflicted matters that the patient might prefer to keep away from attention.

In respect of TJ, this analysis can provide recognition of and development of the "court" as a safe place and the interactions within it as supportive of conscious, structured, reflection. It is perhaps this parallel that has the most profound implications for more traditional courts where

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judges may seek to practice TJ. More conventional courtrooms may not appear to be "safe" and the complex and extensive interactions with those involved with the court may not necessarily support conscious reflection (and may even prevent it). If a characteristic of TJ relates to this feature then planning for and introducing TJ in more mainstream courts requires both recognition, and consideration, of the public nature of court processes, the environment within which interactions take place, and importantly the way that all those involved in the court process interact so that "buried" conflict can be considered, and addressed appropriately.

The fifth parallel Burt notes as "at first glance appear[ing] to be a fundamental difference between judging and psychotherapy." It is the, "fearless willingness to listen to and to discuss anything, no matter how aversive … often described as a nonjudgmental attitude on the part of the therapist toward the patient." In the judicial setting this is a challenging and complex matter. Exposition of various matters might involve self-incrimination (and could potentially for example result in additional criminal charges). Burt's discussion is however more oriented towards civil disputes, where such behaviours may carry less risk (though risk of admissions against interest will remain). Burt suggests that what is critical is that.

> In the same way that a psychotherapist assists the patient in coming to recognize without fear or hostility the previously warring portions of his mind, so too a judge can self-consciously attempt to lead the warring litigants to recognize one another without fear or hostility.

In the TJ setting, the judge plays a critical role in supporting recognition where possible. This involves direct discussion with disputants, rather than interactions that are more directed at representatives. The interactions of the entire team in a therapeutic court are also critical, and recognition of the limitations of a court environment may assist to ensure that the court remains a safe place in which such listening and discussions can take place. From the perspective of TJ, the critical features of this approach involve the judge carefully listening (with respect and empathy) and being able to suspend judgement to support greater recognition. Understanding this feature from a psychoanalytical perspective may again support, foster, and justify the expansion of TJ approaches.

The sixth parallel Burt notes he also acknowledges might appear,

> [At] first glance to be a difference: The judge makes verbal interpretations of the law; on its face, this is different from the psychotherapist's appeal to the patient's agreement as the path toward resolution of conflict in the patient's divided mind. It might appear by contrast that the judge simply announces the law and imposes it on the losing parties without regard to their agreement.

Burt characterises such a view as "conventional." One can go further: this may even misrepresent the judicial process. As many judges will admit, a primary audience for their judgement will be the losing party and a potential appeal court. They are the audiences which the judge must persuade. If there were a widespread view, on the part of losing litigants that a decision did not accord with a fair interpretation of the law there would be a decline in public confidence in the judicial system. In a sense litigants allow their super-egos to suppress the rage of their wronged id and ego, and to place their troubles in the hands of the judge. As Burt notes, the conventional view ignores "a deeper sense that the judge is… committed to soliciting the agreement of the losing litigant."

For his penultimate parallel Burt suggests that, "it is equally difficult for a therapist to distinguish between her personal psychological struggles and the conflicts experienced by her patient" as it is for the judge to distinguish between their personal views, and those of the wider community. This parallel deserves amplification. An important part of the training of both psychotherapists and judges is concerned with learning to identify the distinct influence of the therapist or judge's *personal* as opposed to their *professional* persona. Psychoanalysts themselves undergo analysis as part of their training, and as Burt notes, they have the concepts of transference and countertransference to assist in explaining the themes and dynamics which emerge in their interactions with analysands. Judges have the distinct legal psyche and defences of splitting and repression to rely on to help maintain, at least consciously, a perspective based on the law (embodying as it does the "communal standards" to which Burt refers). A difference remains though. Unlike psychoanalysts, judges traditionally have been much less interested in self-reflection on this point, perhaps perceiving it to be beyond what is required of the judicial role. It may also be that such self reflection is even inconsistent with views relating to judicial independence or notions of impartiality. Arguably though, a TJ approach requires judges to reflect more on the social, as well as legal, dynamics of litigation events, and further, on their own role within the litigation process.

Burt's final parallel is that "whatever is said [by litigants, or analysands] is important, but it is more important that the conflicts (between the litigants or within the patient's divided mind) are expressed in hostile words rather than angry actions." The courtroom, or therapist's office, provides a "holding" space within which, as we suggested above, disputing parties may "contain their emotions in order to be able to think" (Craib, 2001, p. 5). A TJ approach to court processes will be a much closer parallel given that it seeks not only to address legal concerns, but also the wider issues which may be provoking or sustaining the conflict before the court.

6. Conclusions

Psychoanalytical concepts should not be left, as Burt laments, to departments of literary studies. These concepts have much to offer in developing contemporary techniques of justice. As he and others who did not sound the retreat have shown, the concepts which began life with Sigmund Freud in Vienna at the end of the 1800s have the potential to stimulate debate and provide fresh points of embarkation for thinking about such challenges as: "what are judges, and courts, for? – and are they trained, and designed appropriately for their roles?" –and "how best should judicial operations be organised for the good of society?"

The three factors Burt notes, at the outset of his discussion, as behind the declining wider influence of psychoanalysis are now themselves under challenge. Psychoactive drugs, whilst having efficacy, and certainly being invaluable in many settings, are even now still often relatively crude responses to "troubles of the mind." Second, whilst psychoanalytical concepts may still provoke debate, the high octane antagonisms of the "controversial discussions" between the Anna Freudians and Kleinians, whilst recalled and studied, are more a matter for the history of psychoanalysis, than its current politics (see King & Steiner, 1992). Those early dogmatic, at times antagonistic, positions arose in part because the new field of psychoanalysis was one which often perceived itself as being under siege. In the early twenty first century Freud's concepts have proven their longevity, partly by preserving their potential to cause controversy.

Of the third weakness Burt notes – psychoanalysis' inability to show itself subject to scientific proof – we now have the burgeoning field of neuropsychoanalysis, pioneered by dual qualified pioneers such as the South African, Mark Solms (see for e.g., Solms, 2015). This last development, together with returning psychoanalytical ideas to, amongst other places in the broader academy, including law schools, has great potential for future work.

Therapeutic jurisprudence is an obvious area for greater use of psychoanalytical concepts. Viewing TJ approaches from a psychoanalytical perspective may suggest ways TJ concepts can be expanded from the arenas it has already reached, or within arenas it has reached, where it might still be improved. Importantly, much can also be gained from

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Burt's examination of the approach used in the earlier incarnations of psychoanalysis. In this regard, the shift of the therapist from a more authoritarian figure who holds the answers, to a more collaborative practitioner who values not only input but engagement at a deeper level, enables us also to consider how judges and judicial processes have changed over the same time period.

The pioneering work of those engaged in TJ, when considered in the context of the parallels between judges and therapists, reveals that TJ also requires similar shifts in thinking and action. In addition, the thoughtful comparative analysis by Burt suggests areas of focus and potential concern, particularly where TJ is developed in mainstream courts, and where the environment or "safe place" may be sub optimal. Interactions required, by open justice principles, to take place in public arguably require more connective approaches and additional "safe" supports if TJ is to be therapeutic and this requires judges to do and be engaged in ground breaking work.

In another area of parallel, pioneering scholars such as Robert Burt, who was prepared from his early days in the academy to venture into and engage with novel interdisciplinary adventures are to be applauded. Such voyages can enrich both us and the discipline involved. Scholars such as Burt help remind us that there is more than one perspective on any event. They can disrupt, confound, and inspire. They remind us that "there are more things in heaven and earth… than are dreamt of in [our] philosophies."[2]

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[2] *Hamlet*, Act 1, Scene 5, ll167–8.

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