# LAW AS A HEALING PROFESSION: THE "COMPREHENSIVE LAW MOVEMENT"

**Susan Daicoff***

## I. INTRODUCTION

Beginning in the last decade of the 20th century, partially in response to widespread dissatisfaction with and in the legal system and lawyers, a new movement in law has emerged – a movement towards law as a healing profession. This movement takes an explicitly comprehensive, integrated, humanistic, interdisciplinary, restorative, and often therapeutic approach to law and lawyering. It is the result of a synthesis of a number of new disciplines within law and legal practice that have been rapidly gaining visibility, acceptance, and popularity in the last decade and a half, representing a number of emerging, new, or alternative forms of law practice, dispute resolution, and criminal justice. The converging main "vectors" of this movement are collaborative law,[2] creative problem solving,[3] holistic justice,[4] preventive law,[5]

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* M.S., J.D., LL.M. Professor of Law, Florida Coastal School of Law. Fellow, International Centre for Healing and the Law. Some of the ideas expressed herein have been published in shorter form in the following publications, which are hereby acknowledged: Susan Daicoff, *The Comprehensive Law Movement,* 19 TOURO L. REV. 825 (2004) (speech); SUSAN DAICOFF, KNOW THYSELF (2004) (book chapter); Susan Daicoff, *Resolution Without Litigation: Are Courtrooms Battlegrounds for Losers?* GPSolo (Oct.-Nov. 2003) (available at http://www.abanet.org/genpractice/magazine/octnov2003/resolutionwithoutlit.html); and Susan Daicoff, *Afterword*, in D. STOLLE, D. WEXLER, & B. WINICK, PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (2000).

[2] *See e.g.,* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (2001) (introducing the concepts and methods of collaborative law as founded by Minnesota divorce attorney Stuart Webb and advanced by California divorce attorney Pauline Tesler). Some of the ideas expressed in this Article, namely, the "vectors" of the "comprehensive law movement," were previously published by the author in shorter forms in various book chapters and magazine articles: SUSAN SWAIM DAICOFF, LAWYER KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES (2004) [hereinafter DAICOFF, KNOW THYSELF] (final chapter devoted to the movement); Susan Daicoff, *Afterword: The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in DENNIS P. STOLLE, DAVID B. WEXLER, & BRUCE J. WINICK, EDS., PRACTICING THERAPEUTIC JURISPRUDENCE (Carolina Academic Press 2000) [hereinafter Daicoff, AFTERWORD], (describing the comprehensive law movement and its relationship to therapeutic jurisprudence generally); Susan Daicoff, *Resolution Without Litigation*: *Are Courtrooms Battlegrounds for Losers?,* GPSOLO, Oct./Nov. 2003, at 44 (summarizing the vectors of the comprehensive law movement); and in SUSAN DAICOFF, THE

problem solving courts,[6] procedural justice,[7] restorative justice,[8] therapeutic jurisprudence,[9] and transformative mediation.[10]

As early as 1997, several of these emerging disciplines had begun to merge, integrate, coalesce, or link, based on similarities in their overall purposes and goals. One of the first scholars to identify this was University of California – Santa Barbara sociology professor Thomas Scheff, who observed in 1997 that: "[i] n recent years, an alternative approach to law, a worldwide movement, has been building momentum. This movement has two vectors,

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COMPREHENSIVE LAW MOVEMENT, unpublished book chapter manuscript (2003) to be included in book forthcoming from the International Centre for Healing and the Law (also summarizing the movement).

[3] *See, e.g.,* James M. Cooper, *Toward a New Architecture: Creative Problem Solving and the Evolution of Law,* 34(2) CAL. W. L. REV. 297 (1998) (advocating creative problem solving skills in the practice of law, legal education and other professional fields); Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf,* 34(2) CAL. W. L. REV. 351 (1998)(introducing the emergence of creative problem solving as a legal discipline in response to the need for change in legal education); and Thomas D. Barton, *Conceiving the Lawyer as Creative Problem Solver,* 34(2) CAL. W. L. REV. 267 (1998) (discussing a symposium issue to educate creative problem solvers). One issue of the California Western Law Review (volume 34, issue 2) in 1998 was devoted to creative problem solving: California Western Law School houses the McGill Center for Creative Problem Solving, which sponsors a number of national and international programs implementing CPS, as well as several law school courses on CPS.

[4] *See, e.g.*, the International Alliance of Holistic Lawyers' website: www.iahl.org (visited April 11, 2005). Holistic justice is primarily a grass-roots movement among practicing attorneys in the United States and abroad. The IAHL sponsors an annual conference supporting and encouraging the holistic practice of law.

[5] *See, e.g.,* ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS (1997) (the "textbook" for preventive law; now in its second edition). Preventive law is also known as "proactive law," principally so in Finland, under the guidance and leadership of corporate attorney Helena Haapio.

[6] *E.g.*, drug treatment courts, mental health courts, domestic violence courts, and other specialized courts. These courts were formalized in 2000 by the adoption of a joint resolution of the Conferences of Chief Justices and Chief Court Administrators explicitly supporting the development of problem solving courts.

[7] This is a social science concept based on social scientist Tom Tyler's research on the factors creating satisfaction in litigants involved in legal processes. This work has informed, and altered in some cases, thoughts on how legal and judicial processes should proceed. *See* Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings,* in DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 3 (1996) [hereinafter Wexler & Winick, KEY].

[8] Restorative justice is one of the largest "vectors" and is associated with restorative criminal justice programs across the United States and in Canada, the United Kingdom, Australia, and New Zealand. Numerous articles and books have been written on RJ; its principal resource in the U.S. can be found through the Center for Restorative Justice at the University of Minnesota, directed by RJ leader and Professor Mark Umbreit (website: http://2ssw.che.umn.edu/rjp/People/Umbreit.htm) (visited April 12, 2005).

[9] Therapeutic jurisprudence is also one of the largest "vectors," if not the largest. It is represented by numerous books and hundreds of law review articles that apply TJ to all areas of the law. Its founders, law professors David Wexler and Bruce Winick, maintain an extensive set of resources at its website, www.therapeuticjurisprudence.org (visited April 11, 2005).

[10] Transformative mediation is associated with law professor R. Baruch Bush and is explicated in his book co-authored with communications professor Joseph Folger, THE PROMISE OF MEDIATION (Jossey-Bass, 1994). The vectors are listed in alphabetical order, not in order of importance, size, or seniority.

restorative justice and therapeutic jurisprudence ..."[11] The term "vectors" reflects the forward movement of the disciplines into the future and their convergence toward common goals. In 1988, I began building on Professor Scheff's insight by examining other potential "vectors" and exploring what their unifying characteristics might be. There appeared to be at least seven more and, by 2000, the similarities of the nine or so vectors were so clear that I began using the "comprehensive law movement" as a working title for the movement.[12]

The similarities coalesce into two common features, thus unifying the vectors as a "movement." First, each explicitly recognizes and values law's potential as an agent of positive interpersonal and individual change and seeks to bring about a positive result (such as healing, wholeness, harmony, or optimal human functioning) as part of the resolution of legal matters. Second, each integrates and values extralegal concerns -- factors beyond strict legal rights and

[11] Thomas J. Scheff, *Community Conferences: Shame and Anger In Therapeutic Jurisprudence,* 67(1) REV. JUR. U.P.R. 97, 97 (1998).

[12] Admittedly, the title is a rudimentary and nondescript one. However, the term "comprehensive law movement" appears at least 20 times in recent literature, as follows: Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness,* 11 CLINICAL L. REV. 369 (2005); Marjorie A. Silver, *Commitment and Responsibility: Modeling and Teaching Professionalism Pervasively*, 14 WIDENER L. J. 329 (2005); Ilhyung Lee, *In Re Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum*, 20 OHIO ST. J. DISP. RESOL. 375 (2005); David B. Wexler, *Therapeutic Jurisprudence,* 20 TOURO L. REV. 353 (2004); Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317 (2004); Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law,* 14 WASH. U.J.L. & POL'Y 133 (2004); Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79 (2004); Marjorie A. Silver, *Lawyering and Its Discontents: Reclaiming Meaning in the Practice of Law,* 19 TOURO L. REV. 773 (2004); James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235 (2003-04); James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541 (2003); Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 567 (2003); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002): Douglas A. Codiga, *Reflections on the Potential Growth of Mindfulness Meditation in the Law*, 7 HARV. NEGOT. L. REV. 109 (2002); David B. Wexler, *Lowering the Volume Through Legal Doctrine: A Promising Path for Therapeutic Jurisprudence Scholarship,* 3 FLA. COASTAL L. J. 123 (2002); David B. Wexler, *Therapeutic Jurisprudence and Legal Education: Where Do We Go From Here?* 71 REV. JUR. U.P.R. 177 (2002); Steven Keeva, *Once More, With Healing: Ex-Law Dean Heads Center Dedicated to Alternative Approaches to Practice*, 90 A.B.A.J. 74 (2004); Ellen Ostrow, *The Lawyer's Life: Clear The Obstacles to a Balanced Life,* 39 TRIAL 27 (2003); J. Kim Wright & Dolly M. Garlo , *Law As a Healing Profession*, 63 OR. ST. B. BULL. 9 (2003); Jean Hellwege, *'Comprehensive Law' Makes the Case for a Kinder, Gentler Law Practice,* 39 TRIAL 12 (2003); Carole L. Mostow, *Holistic Lawyers Hope to Transform Conflict Resolution*, 12 NO. 4 PROF. LAW. 24 (2000).

duties-- into law and legal practice. These "rights plus"[13] factors include: needs, resources, goals, morals, values, beliefs, psychological matters, personal wellbeing, human development and growth, interpersonal relations, and community wellbeing.

In recent years, a number of efforts have been made to link and disseminate the important developments represented by the "vectors."[14] This article will synthesize those efforts, explore the underpinnings of this movement, and then explore the ramifications of this exciting movement for the future of legal education and the legal profession.

Law as a healing profession has great transformational potential. It could begin to address the "tripartite crisis" in the legal profession of deprofessionalism, low public opinion of lawyers, and lawyer distress.[15] It could make the legal system a more inspiring, humane, and hospitable place for clients, lawyers, judges, and indeed society as a whole.

## II. AREAS OF CONVERGENCE -- COMMON GROUND

While intuitively the vectors of the comprehensive law movement may appear similar, it is important to examine the precise ways in which they resemble each other, as well as the ways in which they differ. Professor Bruce Winick, one of the two fathers of therapeutic jurisprudence,[16] described the vectors beautifully when he said they are like members of an extended family. He explained that some have red hair, some have brown hair and brown eyes, some have blue eyes, but when you put them all together for a group photo, a striking family resemblance is evident in each member. Yet, each member has his or her own distinctive features that are peculiar to that member only.[17] The beauty of the movement is evident not only

[13] Term attributed to Pauline H. Tesler, collaborative law co-founder and San Francisco attorney.
[14] Daicoff, AFTERWORD, *supra* note 1; *see also* J. Kim Wright & Dolly M. Garlo, *Law As A Healing Profession: New Trends Are Expanding Choices In Law Practice,* 63 OR. ST. B. BULL. 9 (2003).
[15] Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism,* 46 AM. U. L. REV. 1337 (1997) (describing and documenting this "tripartite crisis").
[16] DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1991).
[17] Personal communication with Bruce J. Winick, Redondo Beach, CA, March, 1997.

in the features that unify the vectors, but also in their distinct and individual differences; they remain separate and vibrant movements of their own, while sharing common ground.

All of the disciplines comprising the comprehensive law movement share at least two features in common: (1) a desire to maximize the emotional, psychological, and relational wellbeing of the individuals and communities involved in each legal matter, and (2) a focus on more than just strict legal rights, responsibilities, duties, obligations, and entitlements. These two features unify the vectors and distinguish them from more traditional approaches to law and lawyering.

The dominant, traditional approach found in the profession usually downplays, if not ignores these concerns. It does not value the emotional consequences of the outcomes and processes involved in resolving legal matters or factors other than legal rights. Law schools traditionally teach students to sift through facts and issues to eliminate "irrelevant" concerns and focus only on what is "relevant" to the rule of law.[18] The emotional and interpersonal dynamics of a matter are deemed irrelevant to the pure legal analysis learned in the first year of law school. Sometime during the third year of law school or first few years of practice, lawyers are left to their own to rediscover their ability to evaluate these dynamics and somehow incorporate that assessment into their work as lawyers, but this process (if it occurs) happens haphazardly and without direction. It may not happen at all. For example, empirical research on lawyers indicates that, compared to nonlawyers, lawyers tend to evaluate settlement options by focusing solely on monetary value (the "economic bottom-line"), while nonlawyers tend to be much more influenced by nonmonetary, psychological factors in their decisions to accept a settlement offer

[18] Kerper, *supra* note 2, at 369.

in a lawsuit.[19] This suggests that instead of re-incorporating nonlegal factors into our professional decisions, lawyers focus instead on pure legal analysis (who wins or loses) and the economic bottom line (how much in damages will the winner receive).

Certainly, in law school, emotional and interpersonal concerns are strongly de-emphasized, if not blatantly ignored. Empirical research indicates that law school actually fosters two shifts in values that echo this de-emphasis. The first shift is away from what Carol Gilligan calls an "ethic of care" and towards a "rights" or "justice" orientation.[20] The care ethic values interpersonal harmony, maintaining relationships, people's feelings and needs, and preventing harm.[21] In contrast, the "rights" or "justice" orientation focuses on rights, rules, standards, individuality, independence, justice, fairness, objectivity, accomplishments, ambitions, principles, personal beliefs, and freedom from the interference of others.[22] During law school, law students tend to either intensify their rights orientations or move from a care ethic to a rights orientation.[23]

The second shift that occurs during law school is away from an emphasis on "growth/self-acceptance, intimacy/emotional connection, and community/societal contribution," which have been called "'intrinsic' values," and towards an emphasis on

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[19] Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997).

[20] CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). The ethic of care typically emphasizes interpersonal concerns and is believed to be characteristic of women. Unsatisfied with the appropriateness of Lawrence Kohlberg's theory of moral development to women, Gilligan and others performed research that found that women more often make decisions out of an "ethic of care" while men more often decide on the basis of a "rights" orientation. *See also* Carol Gilligan, *Moral Orientation And Moral Development* in E. F. KITTAY & D. T. MEYERS (EDS.), WOMEN AND MORAL THEORY (New Jersey: Rowman & Littlefield, 1987); Judith White & Chris Manolis, *Individual Differences in Ethical Reasoning Among Law Students*, 25 SOC. BEHAV. & PERSONALITY 19, 33 (1997) (briefly describing the history of the debate between Kohlberg and Gilligan).

[21] Sandra Janoff, *The Influences of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 219-22 (1991).

[22] *Id*.

[23] *Id.*

"appearance/attractiveness," "money/luxuries, popularity/fame, and beauty/attractiveness," which have been called "'extrinsic' value[s]."[24]

Both shifts appear among law students as early as the first year of law school. In both shifts, a movement away from valuing interpersonal harmony, connectedness, and emotional wellbeing is evident. The comprehensive law movement values these concerns, in contrast. It asks lawyers to focus on these concerns and issues that are traditionally ignored, if not actively silenced, in law school and law practice. In this way, it differs from traditional approaches to law and lawyering. While "good," traditional lawyers may implicitly or unconsciously take these concerns into account in their representation of clients, the comprehensive law movement differs from traditional lawyering in that it *explicitly* values interpersonal, emotional, psychological, and relational concerns. It elevates the importance of these concerns in the law and seeks to consciously train lawyers to effectively deal with these concerns. The revolutionary nature of the movement is thus evident. The next two sections explore the two unifying features in more detail.

### A. Optimizing Human Wellbeing

First, the vectors of the comprehensive law movement seek legal solutions that make things better, or at least not worse, for the people involved in the legal matter. They explicitly or implicitly attempt to optimize the psychological and emotional wellbeing of the individuals involved. All of the vectors seek to resolve the legal dispute or matter in a way that prevents harm to, preserves, or enhances individuals' interpersonal relationships, psychological wellbeing,

[24] Lawrence S. Krieger, *Psychological Insights: Why Our Students and Graduates Suffer, and What We Might Do About It*, 1 J. ASS'N LEG. WRITING DIRS. 259 (2002), and Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School , and Fresh Empirical Guidance for Constructively Breaking the Silence,* 52 J. LEGAL EDUC. 112 (March/June 2002).

opportunities for personal growth, mental health, or satisfaction with the process and outcome of the matter.[25]

While the vectors may initially focus on the wellbeing of the individual client at hand, they often seek to preserve or enhance the wellbeing of all of the individuals involved in the matter. They intuitively understand the well-known social science finding that positive relationships and good connections with one's family, friends, colleagues, peers, and community lead to enhanced psychological wellbeing and functioning[26] and, as a result, they often work to preserve, maintain, restore, or create good interpersonal relationships.

Because of the emotional devastation that can result from traditional adversarial litigation, many of the vectors explicitly seek nonlitigious solutions to legal problems.[27] Some vectors are explicitly therapeutic to the individuals involved[28] and some are indirectly therapeutic.[29] Many utilize collaborative methods in solving legal problems;[30] however, some explicitly acknowledge that litigation, uncompromising positions, and legal force can themselves be healing and they use these methods in achieving their goals.[31]

Social scientists might call this feature "optimizing human functioning." They might define the vectors' goal as "satisfaction with the legal process" or "good mental health." Jurisprudents might call the goal therapeutic or curative. Others might describe the goal as a search for healing or restoration. Native American tradition might call the goal "harmony" and then define harmony as three-part wholeness, meaning harmony within oneself (intrapersonal

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[25] This focus echoes the overall values embedded in the paradigm shifts and jurisprudential precursors to the movement discussed in Part IV., *infra*, such as connectedness, interpersonal harmony, and human wellbeing.
[26] *See* Richard Sheehy & John J. Horan, *Effects of Stress Inoculation Training for First-Year Law Students* (August 2000) (paper presented at annual meeting of the American Psychological Association), available at http://horan.asu.edu/d-rs-apa-y2k.htm (visited April 15, 2005).
[27] E.g., preventive law, creative problem solving, collaborative law, procedural justice, and holistic justice.
[28] Explicit: e.g., therapeutic jurisprudence, transformative mediation, and drug treatment courts.
[29] Implicit: restorative justice.
[30] *See e.g.*, Tesler, *supra* note 1.

harmony), harmony between self and a Supreme Being, if one so believes (vertical harmony), and harmony between self and others (horizontal or interpersonal harmony).[32] Whatever moniker is used, the concept is focused first on people and second on leaving people in the best possible internal, psychological, emotional, moral, relational, and spiritual state at the conclusion of their legal matter.

### B. "Rights Plus:" Considering Extra-Legal Factors

The second unifying feature is that all of the vectors take into consideration, when assessing or resolving a legal problem, more than just the strict legal rights, liabilities, obligations, duties, and entitlements presented. While law school teaches us to focus only on the law and what facts are relevant to the legal tests used in courts, the comprehensive law approaches explicitly go above and beyond the law to incorporate a consideration of one or more extra-legal factors. The factors considered include: the social, psychological, and emotional consequences of various courses of action, the communities in which the individuals involved exist, and the parties' emotions, feelings, needs, resources, goals, psychological health, relationships, values, morals, and financial concerns.[33] Pauline Tesler, one of the founders of the collaborative law movement, calls this feature "rights plus."[34]

Every traditional lawyer probably takes his or her client's financial concerns into account, so that at least one extra-legal factor is usually considered beyond the client's legal rights or duties.[35] In fact, focusing on the economic bottom line is rather characteristic of attorneys, as compared to

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[31] *See e.g.*, Daicoff, AFTERWORD*, supra* note 1, *reviewed in* 87 A.B.A. J. 79 (May 2001).
[32] Definition attributed to Dean Emeritus David Link formerly of Notre Dame Law School, now president of the International Centre for Healing and the Law, formed under the auspices of the Fetzer Institute.
[33] Daicoff, AFTERWORD, *supra* note 1, at 470-71.
[34] This term was coined by Pauline Tesler, one of the co-founders of the collaborative law movement and a collaborative divorce lawyer in the San Francisco area. Interview with Pauline H. Tesler, Esq., of Tesler, Sandmann and Fishman, Dublin, Ireland (July 8, 1999).

non-attorneys.[36] Unlike a more traditional approach, however, the comprehensive law approaches also consider the psychological, social, emotional, and relational consequences of various legal courses of action.

These two main areas of common ground appear to be the unifying characteristics of the otherwise somewhat diverse main vectors of the movement. Other features are shared by some but not all of the vectors, such as: nonlitigative or collaborative approaches to dispute resolution, a focus on spirituality and faith, explicitly therapeutic goals, interdisciplinary approaches, shared equal power instead of a hierarchical top-down power structure, a focus on interpersonal relationships, and a focus on process rather than outcome. However, the movement's greatest impact comes in its unifying features, not in its differences. The next section describes each of the vectors in detail.

## III. THE VECTORS

The vectors of the comprehensive law movement range from infinitely theoretical to highly concrete. Professor David Wexler, one of the founders of therapeutic jurisprudence, has noted that the most theoretical vectors can be thought of as "lenses" through which an attorney can view a particular legal problem.[37] These lenses help the attorney evaluate the problem as well as potential solutions. The more concrete and tangible vectors provide specific "processes" by which an attorney can resolve civil or criminal cases. The process-type vectors provide a particular method for resolving civil or criminal lawsuits, while the lens-type vectors dictate how an attorney might approach a case. For example, every legal process can be viewed from a

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[35] Most lawyers are likely to be finely attuned to the economics of a case, *see* Korobkin & Guthrie, *supra* note 74, (empirical study finding that lawyers evaluated settlement options solely on the basis of economic return, while non-lawyers were swayed by noneconomic concerns such as fault, remorse and the price of the wrongdoing driver's car).

[36] *Id.*

[37] Personal communication with David B. Wexler, John Lyons Professor of Law and Psychology, University of Arizona College of Law and University of Puerto Rico School of Law, during 1999 or 2000.

therapeutic jurisprudence perspective (Is this process therapeutic or not? How could it be made so?), a procedural justice view (How will this process affect the participants psychologically?), or a creative problem solving approach (Does this process allow for the broadest, most creative approach to solving the problem?).

Until now, the legal system offered only one "lens," the traditional approach to lawyering. This lens typically focuses on legal rights, duties, and responsibilities and on resolution of legal matters and disputes. The comprehensive law movement adds at least five more "lenses." Each of these new lenses focuses on concerns, beyond legal rights, through which to view legal matters.

Despite perhaps being limited to one "lens," the existing legal system offers a number of "processes" which can be used to carry out the goals identified by the traditional "lens." The existing processes include: litigation, mediation (facilitative and evaluative forms thereof), arbitration, private adjudications, private trials, and old-fashioned negotiation and settlement. The comprehensive law movement adds at least five more "processes" to the lawyers' toolkit, each of which is consistent with a different paradigm for resolution of legal matters. These lenses and processes will be individually examined, below.

## A. "Lenses"

### 1. Therapeutic Jurisprudence

Therapeutic jurisprudence ("TJ") emerged around 1990 and now is represented by more than five hundred and eighty one articles and eighteen books. Its cofounders, law professors David Wexler and Bruce Winick, often define it by quoting law professor Christopher Slobogin's definition of TJ: "the use of social science to study the extent to which a legal rule or practice

promotes the psychological or physical well-being of the people it affects."[38] Therapeutic jurisprudence explicitly acknowledges, like it or not, that law, legal personnel, and legal procedures have psychological effects upon the individuals and groups involved in each legal matter. According to Professors Wexler and Winick, it asks, "whether the law's antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values."[39]

Because it grew out of an interdisciplinary, law, and psychology viewpoint, they explain that TJ was first applied to traditional mental health law topics such as "the civil commitment of the mentally ill, the insanity defense, and incompetency in both civil and criminal contexts."[40] TJ has rapidly grown and spread into many other areas that include the civil commitment of sexual offenders and outpatient drug abusers. TJ has also reached sentencing and probation agreements, workers' compensation law, sexual orientation law and disability law, fault-based tort compensation schemes, domestic violence, crime victims, mandatory child abuse reporting, contract law,[41] and family law.[42] TJ has even explored the therapeutic consequences of practicing law upon lawyers.[43]

Importantly, therapeutic jurisprudence seeks to optimize the therapeutic effects of substantive rules of law, legal personnel's actions, and legal processes without elevating therapeutic concerns over traditional legal concerns such as rights or due process. It simply says,

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[38] Wexler & Winick, KEY, *supra* note 6, at xvii, in part quoting Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas To Ponder,* 1 PSYCH., PUB. POL. & L. 193 (1995) (reprinted in Wexler & Winick, KEY, *supra* note 6, at 775).

[39] Wexler & Winick, KEY, *supra* note 6, at xvii.

[40] *Id*. at xix.

[41] *Id.* at xvii, xix, and Table of Contents.

[42] Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective,* 72 IND. L. J.775 (1997) (proposing an interdisciplinary approach to resolving family law issues).

[43] Amiram Elwork, Ph.D. & G. Andrew H. Benjamin, Ph.D., J.D., *Lawyers in Distress*, 23 J. PSYCHIATRY & L. 205 (1995).

given two different options for achieving a particular legal result, if one option is more therapeutic than the other, the lawyer should attempt to pursue the more therapeutic course of action.

For example, suppose that a mental health patient is involuntarily civilly committed to a long-term treatment center for chemical dependency. Suppose also that this patient has the legal right to receive a certain standard of care[44] and is not receiving that care. The lawyer representing this patient as a client might well proceed to bring legal action against the treatment center in order to force the center to provide more appropriate care for the client. However, the lawyer could either: (1) do this with the collaboration of and input from the client's treatment team, consisting probably of a unit director, psychiatrist, psychiatric nurse, and social worker or mental health counselor, and maybe even with the involvement of and input from the client's family; or (2) do this alone with the client, following the client's wishes. The legal result may be the same in both situations; the client gets his or her legal standard of treatment care.

However, suppose that this particular client has been hospitalized many times before and is quite belligerent and resistant to treatment. The client's treatment team views the client's efforts to secure an attorney as simply more evidence of the client's resistance to treatment and, from a psychological perspective, as simply a diversion to allow the client to avoid making any real positive changes in his or her life. In the first scenario, the lawyer is more likely to accomplish the client's legal goal in a way that allows the treatment team to assist the client in gaining some psychological insights about why he or she is pursuing legal action. The lawyer and the treatment team might actually be able to collaborate to achieve the legal goal while making the process therapeutically meaningful for the client and thus enhancing his or her treatment. The lawyer in the second scenario is more likely to work at cross purposes to the

treatment, actually becoming a distracting influence on the client, and hampering any real psychological progress the client is making in treatment. Given that both options are likely to achieve the same legal result, the TJ-oriented lawyer might encourage the client to allow him or her to pursue the first approach.[45]

TJ has been applied to employment law to argue that the Americans with Disabilities Act's provision requiring confidentiality of employee claims made pursuant to the Act is countertherapeutic.[46] Confidentiality deprives the claiming employee's coworkers of an opportunity to assist and cooperate in designing and implementing reasonable accommodations for the employee's disability. Coworker assistance and participation can reduce resentment towards the accommodated employee, increase social support for the accommodation and the accommodated employee, and maintain or increase overall workplace morale.

TJ has also been applied to the United States military's policy on homosexuality of "don't ask, don't tell and don't pursue"[47] to demonstrate the policy's countertherapeutic aspects. Under this policy, the armed services do not require applicants to disclose whether they are homosexual or bisexual. The military will not discharge homosexual members unless homosexual conduct is engaged in, but making a statement that one is homosexual or bisexual constitutes "homosexual conduct." Thus, a member of the armed forces who states that he or she is gay or bisexual can be discharged from military service. However, no investigations or

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[44] Based on Wyatt v. Stickney*,* 344 F. Supp. 373 (M.D. Ala. 1972).

[45]This hypothetical is a composite of situations encountered by the author in her capacity as a former mental health therapist in a substance abuse treatment center and the "Mr. A" case study in Robert D. Miller, Gary J. Maier, Frederick W. Blancke and Dennis Doren, *Litigiousness as a Resistance to Therapy*, in DAVID WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 332-35 (Carolina Academic Press 1990).

[46] Rose Daly-Rooney, *Designing Reasonable Accommodations Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act,* 8 J.L. & HEALTH 89 (1994).

[47] Kay Kavanagh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, 1 PSYCHOL., PUB. POL'Y & L. 142 (1995) (reprinted in Wexler & Winick, KEY, *supra* note 6, at 343).

inquiries will be conducted solely to determine a member's sexual orientation.[48] From a TJ perspective, Kay Kavanagh argues that this policy is countertherapeutic for homosexual service members because, while it allows them to be homosexual, it requires them to refrain from discussing their sexual orientation. It requires deception and prevents them from talking about activities that would raise a presumption that they are engaging in homosexual acts. For example, they cannot discuss with whom they spent the weekend, from whom they are receiving a phone call, etc. This sets them apart from their colleagues and forces them to be emotionally distant and isolated from their co-workers.[49] It reduces the social support available to gay service members, causes constant strain and tension in maintaining secrecy, causes distressing isolation, and lowers self-esteem due to inauthenticity.[50]

TJ asks lawyers to beware of "psycho-legal soft spots," which are, according to Bruce Winick, areas "in which certain legal issues, procedures, or interventions may produce or reduce anxiety, distress, anger, depression, hard or hurt feelings, and other dimensions of [emotional] ... well-being."[51] For example, elderly clients may present developmental, end-of-life, health, and family relationship concerns. Clients with terminal cancer or HIV/AIDS may present needs relating to the dying process, the emotional stages of grief, and family relationships. Personal injury clients may display anger, depression, and a desire for revenge. Their anger can be misdirected onto the lawyer. They may need the opportunity to "tell their story" and be "heard." They may need to hear an apology from the defendant or need help to avoid becoming emotionally "stuck" in the grief process. Domestic violence victims may need extra understanding and support, suffer from low self-esteem, and have ambivalent feelings towards

[48] Kay Kavanagh in Wexler & Winick, KEY *supra* note 6, at 346-50.
[49] *Id.* at 352-356.
[50] *Id.*
[51] Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 Fla. Coastal Sch. L.J. 189, 195 n.15 (2002).

the offender. A lawyer or judge who insists that a domestic violence victim be completely finished with the relationship, or, at the other extreme, one who buys into the victim's denial and justification, can be countertherapeutic. For example, Kate Paradine relates a case in which the lawyer told the victim that the perpetrator was behaving poorly because he "still loves you," at a time when she said she most needed to hear, "You don't have to put up with that behavior."[52] Alcohol or drug dependent clients are likely to display denial, rationalization, and resistance and they are prone to relapse. A TJ lawyer considers the effects of these potential issues, includes them in lawyer-client discussions, and considers them in developing, with the client, a course of action that is most likely to have the desired legal *and* therapeutic outcome.

TJ recognizes the often-devastating effects of protracted, costly, and adversarial litigation as a "psycho-legal soft spot" and sometimes, therefore, seeks nonlitigation alternatives for certain clients. For example, it is a known phenomenon that doctors are more likely to either commit malpractice or have another malpractice action filed against them in the six months following the filing of a malpractice suit against them.[53] For this reason, a TJ defense lawyer might use this social science insight to recommend a nonlitigated, immediate settlement of his or her client's *first* malpractice case to minimize the effect of this phenomenon on the doctor's medical practice.

In cases where ongoing relationships are key, a nonlitigated settlement may preserve the interpersonal relationships between the parties and lead to a better overall outcome. For example, a tenured professor who sues his or her school for gender discrimination may desire to

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[52] Kate Paradine, *The Importance of Understanding Love and Other Feelings in Survivors' Experience of Domestic Violence,* 37 CT. REV. 40 (Spring 2000).

[53] Edward A. Dauer et al., *Transformative Power: Medical Malpractice Mediations May Help Improve Patient Safety*, ABA DISPUTE RESOLUTION, Spring 1999 at 9 (reviewing successful pilot malpractice mediation programs in Massachusetts and Toronto). One wonders if perhaps the doctors' confidence is shaken and they become more prone to either mistakes or lawsuits as a result of the initial filing.

continue working there, post-lawsuit. A mediated resolution might preserve a better future working relationship for employee and employer, and thus a better outcome for all involved, in the long run.

Litigation itself, however, can at times be therapeutic. In cases that present a significant power imbalance between the parties, such as a sexual harassment suit where the employer is intractable, arrogant, and self-righteous and where the employee has a long history of victimization, litigation may be the most therapeutic process for both parties. It could allow the plaintiff to assert himself or herself, perhaps for the first time. It would also give the employer a terrific "wake up call" which might force it to reassess its treatment of its employees and make some positive changes.

TJ is probably the most visible and prolific vector, at least in academic and judicial circles. It has rapidly spread to all areas of the law and has been enthusiastically adopted by American judges in the form of "problem-solving courts." (see part II, B. 4, *infra*).

**2. Preventive Law**

Preventive law ("PL") is perhaps the oldest vector of the movement. Preventive law emerged in the 1950s, although its founder, attorney and law professor Louis Brown, conceived of it in the 1930s. Its 1978 casebook, *Planning by Lawyers*, was revised and republished as a preventive law textbook in 1997.[54] The *Preventive Law Reporter* has been published since 1982.[55]

Preventive law attempts to avoid or prevent litigation before it arises. As a lens, preventive law asks what measures can be put in place to prevent future litigation or future legal problems. It takes a proactive approach and allows the attorney to intervene in clients' lives

[54] Hardaway, *supra* note 4.

before problems arise. By anticipating disputes before they arise, planning ahead, and intervening to prevent legal problems whenever possible, the lawyer serves the client's interests in a proactive, albeit nontraditional, way. The client may be spared the traumatizing effects of a litigated confrontation with another person or legal entity. Preventive law also considers the fact that interpersonal relationships, such as husband-wife or employer-employee, may endure long after the current difficulty has passed, and a solution that irreparably ruptures the bond may lead to future legal problems and thus be really no solution at all. The emphasis in preventive law is on a good, ongoing lawyer-client relationship, open communication, and the prevention of legal disputes.

For example, a preventive employment law attorney might assess a corporate client's employee policies and procedures manual and practices in order to assess whether the corporation has any potential exposure to harassment or discrimination suits. Then, the PL lawyer would put into place policies and procedures, perhaps including some in-service training, if any "legal soft spots" emerged as a result of the lawyer's "audit." Periodic check ups would be performed with the client to intervene proactively with any troubled employee/employer situations.

Dean emeritus Edward Dauer gives this example:[56] Suppose a mature gentleman comes to see a lawyer about issuing some new shares of stock in the family corporation to his son-in-law. It turns out that the amount of stock involved would allow the son-in-law to exercise some influence over the direction of the business. In discussing the client's intentions, the lawyer realizes there are numerous risks the client may not have considered. Any competent lawyer would investigate the statutory, regulatory, and tax liability implications of the transaction, as

[55] The first volume of the PREVENTIVE LAW REPORTER was published in July 1982 (Butterworth Legal Publishers) by the National Center for Preventive Law (U.S.), University of Denver, College of Law.

well as issues of voting control, percentage ownership, and buy-sell agreements. Preventive law would take the additional steps of anticipating and pre-empting opportunities for conflict, dashed hopes, unfulfilled assumptions and damaged relationships. If, for example, the client and his son-in law fail to get along after the stock is issued, their disagreements, frustrated expectations, and conflicting interests may result in shareholder deadlock or even civil litigation, impacting the family as well as the business.

Preventive law was recently integrated with therapeutic jurisprudence, melding its processes and concepts with TJ's therapeutic goals, in order to provide a richer approach to practicing law.[57] The integration of TJ and PL, collectively referred to as therapeutically-oriented preventive law ("TOPL" or "TJ/PL"), merges the well-developed lawyering skills of PL with the psychological sophistication of TJ. From this integration developed the concept of lawyers foreseeing not just legal soft spots, but also "psycho-legal soft spots," and acting to prevent situations from occurring that were troublesome both legally and psychologically.[58] To effectively practice TJ/PL, a lawyer must employ excellent communications skills and interpersonal sensitivity, as well as a familiarity with psychology.

### 3. Procedural Justice

In 1990, social scientist Tom Tyler published an empirical study finding that litigants' satisfaction with judicial processes depended more on three psychological factors than on the actual win-lose outcome of the process.[59] These three factors were: being given an opportunity to speak and be heard; being treated with dignity and respect by the judge and the other legal personnel; and how trustworthy those in authority appeared and behaved. Being allowed to

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[56] Stolle, et al., *supra* note 34, at 34-35.
[57] Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence*, 34 CAL. W. L. REV. 15 (1997).
[58] *Id.*

participate in the decision-making process and having the judge explain his or her reasons for making his or her decision were also relevant to these factors and thus to litigants' satisfaction. In other words, whether these factors were present dictated how satisfied one was with a legal process, regardless of whether one won or lost. Tyler concluded: "People's evaluations of the fairness of judicial hearings are affected by the opportunities which those procedures provide for people to participate, by the degree to which people judge that they are treated with dignity and respect, and by judgments about the trustworthiness of authorities. Each of these three factors has more influence on judgments of procedural justice than do either evaluation of neutrality or evaluations of the favorableness of the outcome of the hearing."[60] Procedural justice ("PJ") suggests that litigation in itself is not necessarily what people want from the law; they want a voice, an opportunity to tell their story, to be treated with respect by the authority figures, and to have the decision (if made by a third party) explained to them.

I typically use the following scenario to illustrate procedural justice concepts: If a sexual harassment plaintiff brings a lawsuit against her former employer and ultimately receives back pay and a fair damage award but is poorly treated by the judge, the attorneys, and the employer's representatives throughout the proceeding, the glow of the "win" is likely to fade substantially. If she feels as if she was not given an opportunity to tell her story because of the restrictions placed on witness' testimony or if her credibility and character are impugned during cross-examination in a way that leaves her feeling decimated afterward, and if she gets the impression that the judge does not want her to speak freely, then she may feel violated by the process rather

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[59] Tyler in Wexler & Winick, KEY, *supra* note 6, at 6-7.
[60] *Id*. at 12.

than vindicated. Tyler's work would suggest that she would feel less satisfied, or even be unhappy, with the outcome under these circumstances. [61]

Another example can be seen in the treatment of a chronic substance-dependent man who is facing sentencing for a minor, drug-related criminal offense. The sentence is likely to consist of a multitude of measures, including mandatory inpatient and outpatient substance abuse treatment, jail time, house arrest, community service, and community restitutionary measures. It will likely take 18 months to complete. Wexler has applied Meichenbaum and Turk's empirical research on factors enhancing patients' compliance with health care professionals' directions (i.e., "doctor's orders") to situations like this and concluded that this man will be more likely to comply with the terms of his sentence if he is given a chance to participate with the judge in the formulation of its terms, among other things.[62] If he is given a voice in the decisional process, is treated with dignity and respect by the judge and the other legal personnel, and is given an explanation by the judge as to how he came to his decision, he is more likely to "buy in" to the program and follow it. In the long run, this approach will be more likely to facilitate this man's successful recovery from substance abuse.

Another example can be found in corporate hierarchical decision-making. Suppose that a medium-sized corporation (without unionized employees) has just revised its employment contracts with its employees, because it just concluded an expensive and painful lawsuit with an ex-employee over the terms of her contract. In an effort to prevent future lawsuits, the corporation unilaterally amends its annual employment contracts and policies and procedures manual in order to minimize future disputes over its employment-related

[61] DAICOFF, KNOW THYSELF, *supra* note 1, at 179-80.
[62] David Wexler, *Inducing Therapeutic Compliance Through the Criminal Law*, 14 L. & PSYCHOL. REV. 43 (1990).

decisions, acting on the advice of its lawyer (who may even be practicing preventive law). The employees receive the new contracts in the mail, with no explanation as to the changes. They are furious, feel betrayed by the corporation, and perceive the new contracts as undercutting their legal rights, to their detriment and to the corporation's unilateral benefit. Now the corporation has to engage in "damage control" to preserve the morale of its employees. Procedural justice would have dictated that the corporation should have included its employees or a representative group thereof in the process of revising the standard employment contracts. If they had been involved in the process, understood the reasons for the changes, were given a voice and an opportunity to be heard and to participate in revising the contracts, they would have been more likely to accept the new contracts without question. Morale and favorable employer-employee relations would have been preserved. Future employee lawsuits might have been prevented.

Procedural justice alone is not a way of practicing law or administering justice, but its insights have weighty consequences for lawyers, clients, and judges. It applies to and can inform all of the approaches, traditional or comprehensive, to legal practice and the administration of laws.

**4. Creative Problem Solving**

Creative Problem Solving ("CPS") refers to a broad approach to lawyering and legal problems that takes into account a wide variety of non-legal issues and concerns and then seeks creative, win-win solutions to otherwise win-lose scenarios. Its website explains that, "clients and society are increasingly asking lawyers to approach problems [not always as fighters, but] more creatively. The Center develops curriculum, research, and projects to educate students and lawyers in methods for preventing problems where possible, and creatively solving those

problems that do exist. The Center focuses both on using the traditional analytical process more creatively and on using nontraditional problem solving processes, drawn from business, psychology, economics, neuroscience, and sociology among others."[63]

Law professor Linda Morton gives an example of how the principles of CPS can be applied to and reinforced in other areas of the law school curriculum.[64] She starts with the common example given in Property class of the client who has been sued by a neighbor who is claiming adverse possession:

> The students' initial reaction might be to examine legal doctrine learned through the study of appellate cases (e.g., Was there sufficient use of the premises? Was the use permissive?). In teaching substantive law, this process must be undertaken in order to learn both content and legal analysis. However, analysis of the issue should not end there. A creative problem solving paradigm can teach other methods that lawyers might use to resolve the issue. In doing so, students would inevitably incorporate more humanistic and creative concepts in their thinking. In using the model offered, students would first have to identify the problem, taking into account interests and needs of those involved (e.g., Is this a case of neighborhood hostility? Land acquisition? What does the client want to happen? What can she afford? How do her values and interests compete with others involved?). Understanding the problem is the next step (e.g., What further research would have to be undertaken? What other disciplines should be consulted? How could the problem have been prevented?). Once the problem is thoroughly understood, solutions, in addition to that of litigation, are posed (e.g., Can this be resolved through a negotiation, mediation, or neighborhood coffee? Or should the client simply sell the property? What are the possible results of each?). After a full range of solutions is offered, the next step is to choose among them, keeping in mind the effects of implementing each one (e.g., Who decides? And, according to whose values? Who might be harmed?). Ultimately, an analysis is required as to whether the "best" solution has been chosen (e.g., Will such choice prevent future problems?). By framing class discussion in a creative problem solving context, the student is exposed to a much richer variety of approaches to the issue that legal analysis alone can offer.[65]

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[63] CPS is associated with the McGill Center for Creative Problem Solving at California Western School of Law (website: go to http://cwsl.edu/main/home.asp , select Creative Problem Solving) (visited April 11, 2005), which sponsors a number of law school courses on CPS, national and international projects, and periodic convergences.

[64] Example and questions from Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375, 386-87 (1998).

[65] *Id.*

Law professor Janeen Kerper in her 1997 article on CPS and the famous Palsgraf explosion-on-the-railroad-platform case gives the most vivid example of creative problem solving.[66] She asserts that in most first-year torts classes across the country, Cardozo's opinion in this case is analyzed as a "brilliant piece of legal reasoning,"[67] deciding just how far liability extends. In contrast, Kerper points out that the ultimate result of this famous torts case for Helen Palsgraf was dismal if not devastating. From a CPS perspective, it is "an example of particularly bad lawyering."[68] Not only did Mrs. Palsgraf lose the case on appeal, but she also had to pay her own and the railroad's attorneys' fees. A single mother, struggling to provide for her children by working two menial jobs, and suffering from a speech impediment as an after effect of the incident that impaired her ability to work and communicate with her children, Mrs. Palsgraf was ultimately held liable for costs roughly equivalent to a year's earnings. Financially, she ended up poorer as a result of the lawsuit and she achieved none of her nonlegal goals. Anecdotal evidence suggests that she even became mute as a result of the lawsuit's eventual outcome.[69]

Kerper re-evaluates Mrs. Palsgraf's case from a creative problem solving standpoint and contrasts what the CPS lawyer might do, with what her lawyer, Matthew Wood, did. For example, solutions that would have addressed Mrs. Palsgraf's physical problems, medical expenses, limited employment opportunities, and childcare obligations might well have been fashioned with the railroad's concurrence. By "brainstorming" to identify mutually acceptable alternatives to litigation, Mrs. Palsgraf's attorney may have better served her needs. Indeed, Kerper suggests, had Mrs. Palsgraf been afforded the opportunity to thoroughly explore her

[66] Kerper, *supra* note 2.
[67] *Id.* at 365.
[68] *Id*.
[69] *Id*.

options and acknowledge her needs, she might have avoided the risks of a lengthy lawsuit that ultimately left her worse, physically and financially, than when she started.[70]

**5. Holistic Justice**

Holistic lawyering encompasses many forms of practice that would easily fit within some of the other vectors, such as TJ or CPS. Holistic law or holistic justice ("HJ") is hard to define because it refers to a loose coalition of practicing lawyers in the United States and world who embody a rather diverse set of approaches. Most see themselves as healers and peacemakers; some focus more expressly on spiritual principles. HJ explicitly seeks to: "promote peaceful advocacy and holistic legal principles; encourage compassion, reconciliation, forgiveness, and healing; advocate the need for a humane legal process; contribute to peace building at all levels; enjoy the practice of law; listen intentionally and deeply in order to gain complete understanding; acknowledge the opportunity in conflict; and wholly honor and respect the dignity and integrity of each individual."[71]

Holistic lawyers often view the client's situation as an opportunity for growth for both the client and the lawyer, although they might be inclined to define growth along spiritual lines rather than along psychological lines. Some explicitly hold that "everything happens for a reason" and seek to find a greater purpose for or meaning in the legal problem or the interaction of the lawyer and client. Some explicitly follow their own personal values in their professional work and refuse to take actions that conflict with those personal values, always of course discussing those actions and values with the client. Some try to elicit from their clients their deepest desires, use the client's heartfelt goal as the goal of the lawyer-client relation, and view their role as helping the client achieve that deeper goal. Wall Street attorney Arnie Herz, who

[70] *Id*. at 368-70
[71] Website: http://iahl.org (visited April 11, 2005).

was profiled in the American Bar Association Journal in 2001[72], describes holistic practice well when he gives this example of his lawyering work:

> Attorney Arnie Herz, for example, represented an imposing ex-football player we shall call John Smalls, in a dispute with the new owners of the company Smalls had just sold, after ten years of successful solo ownership. Smalls was furious with the new owners' treatment of him as employee post-sale and with their mismanagement of the company. Unfortunately, he had signed a noncompete agreement as part of the sale and felt bound by it, despite his frustration. Determined to sue the new owners for mistreatment and mismanagement, he approached Herz, who opined that a lawsuit might succeed but would cost well over $100, 000 in fees and costs to litigate. Smalls was ready to move, but Herz decided to slow him down a bit and asked, "If you could have anything you wanted in your life, what would you want your life to look like six months from now?" Smalls said more than anything, he wanted to be free of the new owners and wanted to make more money. He thought he could make a lot more money without them but didn't want to "let them off the hook." Frustrated that Herz was trying to talk him out of suing, Smalls commented, "You're too nice- I need a tough litigator," packed up, and started to walk out the office. Talking a big risk, Herz responded, "I know you think I'm not tough, but in all my years of experience, I think you may be the weakest person I've worked with. You set out a vision that was to be free of these people—you didn't mention that you wanted to punish them, teach them a lesson, or spend $100,000 of your own money and five years of your life doing so. What I see is that you don't have the strength to hold on to your own vision and deal effectively with your own anger. And I'll bet you've been doing this all your life." At first Smalls flushed with anger. But something in what Herz said rang true. He sat down and began listening and discussing; together, they agreed on a plan of action that involved a more collaborative, nonlitigious approach to resolving the matter. Smalls was freed from his noncompete clause three months later. The new owners teetered on the edge of bankruptcy for years—as Herz had predicted; even had Smalls sued, he would not have been able to collect a dime. Freed of the new owners, Smalls was in fact able to make a lot more money. Financially, the plan was a huge success. Personally, Smalls later said, the process of resolving this legal matter had allowed him to learn how his anger had been controlling his life, affecting his relationship with his wife and his kids, and blocking him from his full potential. Herz's approach to representing Smalls is one illustration of how a comprehensive lawyer might conduct such a law practice. Herz went beyond the law to ask about the client's deepest needs, goals, and desires and then used that information to create, with the client, the best strategy. Admittedly, he took a major risk early in the lawyer-client relationship, and not all comprehensive lawyers would be comfortable doing so. Using excellent interpersonal skills, though, Herz assessed that Smalls was a no-nonsense person who would respond

[72] Steven Keeva, *What Clients Want: People Who Come to Arnie Herz Seeking Legal Help Leave With Some Unexpected Solutions*, 87 A.B.A.J. 48 (June 2001).

> only to straight talk—which he did. Litigation in this case only would have wasted time and money and fueled the client's excessive anger. The final process and outcome were not only financially successful but also personally and emotionally beneficial for Smalls.[73]

## B. Processes: The Process-Type Vectors

Approximately four of the vectors consist of concrete processes for lawyering or dispute resolution, rather than the broad, general, approaches to law and law practice embodied by the lens-type vectors. These are collaborative law, transformative mediation, restorative justice, and problem-solving courts. Each is examined in turn, below.

### 1. Collaborative Law

Collaborative law ("CL") is a non-litigative method for resolving divorce and custody actions that allows the clients and their attorneys control over the resolution, without a third-party decision-maker.[74] It originated among practicing family lawyers who were seeking a better, less emotionally damaging, more economical way for divorcing spouses to resolve their differences. The theory is that the traditional methods of resolving family law disputes often create more animosity between the divorcing spouses and harm family relationships. This is in part because the traditional approach takes people whose behavior and emotional state are at their worst and then engages them in an adversarial process. If the clients' attitudes indicate that they are appropriate for a collaborative process, collaborative law allows the ex- or divorcing

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[73] Susan Daicoff, *Resolution Without Litigation: Are Courtrooms Battleground For Losers?,* GP SOLO, Oct./Nov. 2003 at 45-46.

[74] Tesler, *supra* note 1; see also Pauline H. Tesler & Peter B. Sandmann, Ten Questions For Clients Weighing Litigation v. Collaborative Law, 21 ALTERNATIVES HIGH COST LITIG. 11 (2003); Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation, 40 FAM. CT. REV. 403 (2002); Pauline H. Tesler, The Basic Elements of Collaborative Law, 21 ALTERNATIVES HIGH COST LITIG. 9 (2003); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCH. PUB. POL'Y & LAW 967 (1999); Pauline H. Tesler, *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 AM. J. FAM. L. 215 (1999); Pauline H. Tesler, *Collaborative Law: A New Approach to Family Law ADR*, 2 CONFLICT MGMT. 12 (1996); Pauline H. Tesler, *Collaborative Law Neutrals Produce Better Resolutions*, 21 ALTERNATIVES HIGH COST LITIG. 1 (2003); Pauline H. Tesler, *Client Relations: Tips From a Collaborative Practitioner*, 21 ALTERNATIVES HIGH COST LITIG. 13 (2003).

spouses and their attorneys to meet in a series of four-way conferences outside of court to resolve the issues in divorce and custody cases. The attorneys and clients work together in a collaborative atmosphere with a foundation of mutual, contractual agreement to the process and a commitment to participate in good faith. CL offers the opportunity for divorcing spouses to dissolve their marriages with less anger, hostility, cost, time, and negative emotion than result from most litigation processes. Through the CL process, they can also begin to develop a workable, cooperative post-divorce relationship that may be useful if they must continue to co-parent children in the future.

The main features distinguishing CL from simple mediation or negotiation are the six-way communication (among and between the two spouses and two lawyers), the parties' commitment to the CL process, and the binding agreement of the attorneys to withdraw if the parties go to court. No formal litigation is usually instituted until settlement is reached. There is a strong psychological component to the lawyer-client relationship in that emotions, needs, transference, etc. are openly acknowledged and dealt with in order to maximize the results of the 4-way conferences. According to one of the two co-founders, attorney Pauline Tesler, one of the most important features of CL is the fact that the attorneys are contractually forbidden from representing their clients in court should the collaborative process break down. This feature aligns the attorneys' financial interests with that of their clients' and greatly incentivizes the attorneys to work towards creative solutions to the outstanding issues. Without this, the attorneys can easily lapse into, "Why worry if my client is misbehaving or the clients aren't agreeing? I get paid either way." Attorney Tesler maintains that this feature produces unprecedented creativity and resolutionary energy in both attorneys and clients.[75] This contrasts

[75] Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers,* 5 PSYCH. PUB. POL'Y & LAW 967 (1999).

with the usual process, where the lawyers simply litigate if negotiations break down, thus they collect a fee and thereby "win," whether or not the clients settle.

In a collaborative divorce process, the lawyer first assesses, with the client, the appropriateness of the client for a collaborative process. The client must be able to deal effectively with his or her negative emotions (what Tesler calls the client's "shadow self") and must be able to negotiate with honesty and in good faith with his or her spouse. Second, the lawyers create in the four-way conferences what psychologists might recognize as a container, or safe space, within which conflicts and issues between the spouses can be aired and resolved. Establishing ground rules, guidelines, boundaries, and consequences of inappropriate behavior by a participant creates this "container."[76]

One example that founders and attorneys Pauline Tesler and Stewart Webb have used in their trainings is the hypothetical "Henry/Ruth" divorce. In this case, Henry has a Type "A" personality and is very organized and conscientious, but a bit controlling. Ruth has been a homemaker for years but is now living on her own and making her way, financially. Henry and Ruth have been married for 20 years and have one 17-year-old son, Justin, who is currently being treated in-patient for drug and alcohol abuse. Ruth has moved out of the house into her own apartment and begun working part-time. Henry is providing her with spousal support that is inadequate, as it is below the statutory guidelines in amount. Because they have seen so many of their friends go through agonizing, lengthy, costly divorces, they elect to use collaborative law attorneys for theirs. Henry and Ruth, despite their differences, some distrust, and a bit of hostility, both agree that for Justin's sake, this process needs to be as amicable and cooperative as possible. They agree that they need to resolve their differences and come to agreement on property division, child and spousal support, and custody in an amicable fashion, in order to

maximize their son's chances of success in his treatment program and in the future. However, they are not in agreement on all of the financial issues. Despite their disputes over money, they are ultimately able to resolve the issues, divide their property, develop a plan for Justin, and agree on spousal and child support, in a series of four-way conferences involving Henry, Ruth, and their respective attorneys. The process takes four months and costs about a fourth of what a traditional uncontested divorce would cost in legal fees and costs. At the end of the process, the parties attach their signed agreement to their petition for dissolution, file it, and are promptly divorced. The attorneys and the spouses agree at the outset to honor the specific guidelines of the CL process, which includes a contractual undertaking by the attorneys to withdraw from representation if the process breaks down and the parties end up litigating the issues. Neutral third-party evaluators are agreed to, engaged, and used to explore and help resolve the psychological and financial issues involved in Henry and Ruth's lives. Full and honest disclosure of assets and financial matters is required. In the four-ways, communication flows in six directions, between all members of the four-party conference. Between the four-ways, the attorneys and their clients talk, the two clients may talk, and the two attorneys talk.

CL has spread rapidly to many metropolitan areas in the United States.[77] Groups of specially trained lawyers in these areas offer CL processes to divorcing spouses, as long as the opposing side's attorney is also trained in the CL process. In 1997, Pauline Tesler conducted a training session at the annual meeting of the American Bar Association and, in 2001, the American Bar Association published her practice-oriented book, Collaborative Law.[78] CL may eventually be expanded into other areas of law, such as employment law disputes.

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[76] *Id.*

[77] See, e.g., http://www.collaborativefamilylawfl.com/index.html and http://www.collaborativelawsf.com/ (regional CL websites for South Florida and San Francisco).

[78] Tesler, *supra* note 53.

**2. Transformative Mediation**

Transformative mediation ("TM") is a form of mediation that emerged in the 1990s. Its founder, law professor R. Baruch Bush, co-authored a 1994 book[79] with communications professor Joseph Folger, in which they explain that transformative mediation differs substantially from traditional mediation (both the facilitative and evaluative forms) in both its goals and process. Unlike traditional mediation, which focuses on dispute resolution, transformative mediation focuses less on the outcome of the mediation or the solution to which the parties agree, and more on how the process of mediation might change the individuals involved. Specifically, transformative mediation seeks to foster a sense of "empowerment" and the experience of "recognition" in each of the parties. Empowerment, as defined by Bush and Folger, means the parties grew in maturity by developing and owning their own solution. It does not refer to the experience of having a third party enforce one's rights; instead, it refers to an internal condition in which the person feels more capable of solving his or her problems.[80]

Recognition, as defined by Bush and Folger, means that it resembles a feeling of empathy for another person, in which one person is able to "stand in the shoes" of the other and see the matter from another's perspective.[81] It often results in feelings of compassion for the other and in its finest form, culminates in forgiveness. Once a party can experience recognition, the next goal is for that party to communicate those insights or feelings to the other party. This is called "giving recognition."[82] Bush and Folger explain that the ability to see a matter from the other person's standpoint is a mark of personal growth, just as rigid egocentrism is a measure of

[79] ROBERT BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).
[80] *Id.* at 89-94.
[81] *Id.*
[82] *Id.* at 96.

emotional immaturity.[83] Transformative mediation thus explicitly seeks to foster personal and moral growth in the parties as its goal, rather than the resolution of the dispute, which is secondary in importance to growth.[84]

TM views conflict as a destabilizing "crisis in human interaction"[85] rather than a violation of rights or conflict of individual interests. Its three-person mediations seek to restore balance between self and other, transform conflict into a positive, constructive process, and encourage parties to do two things: (1) regain their sense of strength and self-confidence (the "empowerment" shift); and (2) expand their responsiveness to each other (the "recognition" shift). By focusing on these goals, the parties are moved towards increased personal development and enhanced personal and interpersonal skills.[86]

Bush and Folger use the example of the "Sensitive Bully" to illustrate TM.[87] In this case, Charles, a young man, is charged with assault and battery of an adolescent, Jerome. Jerome's father, Regis, an imposing, stern African-American man, who enters mediation visibly angry, accompanies Jerome to the mediation. Charles, in contrast, appears undefensive, quiet, and even cowed. Charles is contrite and ashamed of what he has done. However, Regis begins with a very aggressive and unforgiving attitude towards what Charles has done to his son. The mediator asks Regis and Charles to take turns describing what happened. Charles is a young, slight, African American man who walks with a limp. Charles routinely cut through Jerome's neighborhood on his way from the bus stop to see his girlfriend, and Jerome and his friends routinely "razzed" Charles as he passed. The two had had verbal altercations before the incident. On this occasion,

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[83] *Id.* at 92.
[84] *Id.* at 81-84, 87.
[85] Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 72 (2002).
[86] *Id*. at 82-83.
[87] Bush & Folger, *supra* note 52, at 5-11.

Jerome was with a group of his friends when the dispute arose. On this day, Jerome took it a bit far with his verbal insults and Charles physically assaulted Jerome. Charles finally snapped and retaliated, albeit inappropriately. Through this mediation, Regis realizes that his son, Jerome, and his friends had been making fun of Charles' physical disability and that, finally, Charles couldn't take it anymore. Once Regis realizes this, he scolds his son for making fun of Charles. He gives "recognition" by telling Charles he understands "how cruel kids can be." Charles explains that all he wants to do is see his girlfriend and he is happy to walk a different route through the neighborhood. By subtly focusing on Charles' physical condition, the content of the verbal interactions between Charles and Jerome pre-assault, and how each party's comments in the mediation had affected the other, the mediator was able to elicit what TM calls "recognition," a sort of empathy or standing in the other's shoes, from both Charles and Regis. Each was able to appreciate the other's feelings and motivations. Then, by having the parties jointly develop the solution to the problem, the mediator facilitated what TM calls "empowerment." The parties worked together to develop a way that Charles can walk through Jerome's neighborhood without encountering Jerome and his friends. The mediator does not offer or impose a solution for the future, but encourages the parties to work it out themselves.

TM has been a bit controversial in its explicit goals and methods. It is part of the CL movement because it seeks to improve the relational, moral, and personal functioning of the parties involved, in the resolution of legal disputes. It focuses explicitly on processes that can foster growth in the parties' ability to communicate, understand each other, solve their own problems, resolve conflicts, and interact with other people.

**3. Restorative Justice**

Restorative justice ("RJ") is a widespread movement in the criminal justice area that has been steadily growing since the mid-1980s. RJ seeks to restore the relationship between the criminal offender and his or her community and seeks to restore harmony. It does this through dialogue, negotiation, problem solving for the future, and an emphasis on the offender's acceptance of accountability to his or her victim and to the community. RJ is seen in almost every jurisdiction in the United States, in many forms, such as: teen court, victim-offender mediation, reparative probation programs, and community parole boards. RJ is particularly popular for use in the U. S. with juvenile offenders, due to its reliance on the pressure brought to bear on the offender by peers, family, and community members and its resultant potential for rehabilitating juvenile offenders. However, it is even more widely used in Australia, Canada, and the United Kingdom, extending even to use in sentencing adult offenders. Outside the American criminal justice system, RJ forms include collaborative forms of adjudication and sentencing, such as circle sentencing and family group conferences, that actually substitute for prosecution, trial, and sentencing.

In RJ, the community, victim, and offender, in a collaborative process, participate in some form in criminal adjudications or criminal sentencing. It may be as simple as post-sentencing victim-offender mediation or as complicated as sentencing that is done in a community, "circle" conference with all parties present. It usually relies on some sort of conference, which can be as small as a three-person mediation between the victim and the offender, or as large as a community-wide circle sentencing process that utilizes community or peer pressure brought to bear on the offender. This interpersonal or public pressure is designed to produce 'therapeutic shame," which facilitates responsibility-taking, accountability, and personal growth and development in the offender. It emphasizes restitution and relationships

between the offender, victim, and community instead of a top-down, hierarchical system focused on imposing punishment. The website for The Center for Restorative Justice & Peacemaking at the University of Minnesota School of Social Work explains that:

> [t]hrough restorative justice, victims, communities, and offenders are placed in active roles to work together to. . . Empower victims in their search of closure; Impress upon offenders the real human impact of their behavior; Promote restitution to victims and communities. Dialogue and negotiation are central to restorative justice, and problem solving for the future is seen as more important than simply establishing blame for past behavior. Balance is sought between the legitimate needs of the victim, the community, and the offender that enhances community protection, competency development in the offender, and direct accountability of the offender to the victim and victimized community."[88]

In the United States in particular, RJ principles have been added to traditional criminal justice processes as an enhancement, rather than as a substitute for existing criminal law procedures. This allows for full preservation of the constitutional rights of the accused and procedural due process, which are particularly important in U.S. criminal law. For example, in the domestic violence area, restorative justice principles might dictate that domestic violence victims should have more input into the proceedings, that the state should attempt to restore victims to their former state through compensation and economic and social support, that victims need varied support to become independent, that offenders should be held accountable, required to make amends, required to participate in rehabilitation programs and reintegrated into the community, and that the community should be more involved and responsible for assisting the victim, the offender, and their family through the process of solving the problem.[89]

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[88] The website is http://ssw.che.umn.edu/rjp/ (visited April 11, 2005).

[89] Randall B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 CT. REV. 28, 35-36 (Spring 2000) (discussing the creation of specialized domestic violence courts employing a therapeutic or restorative approach).

Victim-offender mediation is a specific, direct RJ "process." Writer Barbara Stahura relates this story:[90]

> One evening in July, 1998, Terri Carlson and her husband were walking home along the side of the road from the annual community festival in Byron, Minnesota, when a four-wheel-drive pickup truck going about 55 swerved, hitting and killing Terri's husband and injuring Terri. The 25-year-old driver, Eric, was a deputy county sheriff, whose blood alcohol level was 50% over the minimum for drunk driving. Yet Terri felt badly for him. She herself had occasionally driven drunk. She said, "He was only 25. … just a baby. He had lost everything he'd committed to in his profession." When he received a 44-month sentence, despite her request to give him 10 years' probation and community outreach, she felt "further violated." She packed up her three children and moved to Oregon, but upon finding out about restorative justice, she and Eric began a process designed to reconcile and resolve what had happened. It took a year of preparation and individual meetings with the mediator before they were ready to meet together with the mediator. In that meeting, "they had a warm and honest talk, even laced with laughter, and reached an agreement." Terri promised to help Eric reintegrate himself back into the Byron community. They agreed to speak jointly to schools, community groups, and the city council about how to prevent what happened. And they agreed that Eric should speak to Terri's three children about the death of their father.[91]

This is a vibrant and stirring example of restorative justice at work. In the United States, as this story illustrates, restorative justice is most often a post-sentencing process designed to bring about reconciliation between the victim, offender, and community, resolution for all, and reintegration of the offender into the community. With teenage offenders, it is often used for sentencing of minor crimes. However, it is equally useful to bring healing to victims of serious crimes, their offenders, and the communities in which they live. In other legal systems, such as in Native American and aboriginal settings, restorative justice is used even for sentencing of adult crimes. These "circle sentencing conferences" are used to discuss the event, air feelings,

[90] Barbara Stahura, *Trail 'Em, Nail 'Em, and Jail 'Em: Restorative Justice*, SPIRITUALITY & HEALTH, Spring, 2001 at 43.

and sentence the offender via a collaborative, community-wide process including the offender, victim, their friends and families, and their surrounding communities. RJ allows the victim to ask questions, express feelings, and reach resolution about the event. It also allows the offender to experience "therapeutic shame,"[92] accept appropriate personal responsibility for his or her actions, and perhaps even apologize, thus possibly leading to changed behavior.

**4. Problem Solving Courts**

A parallel shift has occurred in the court system, mainly due to judges' interest in therapeutic jurisprudence. A number of specialized, "problem solving" courts ("PSCs") have been established, based on TJ principles.[93] Their approach to judging is long-term, relational, interdisciplinary, and focused on healing. Examples of these courts are drug treatment courts, mental health courts, domestic violence courts, and unified family courts, which focus on treating and resolving the interpersonal and psychological issues underlying the legal problems rather than on punishing defendants or assigning fault. The following chart compares traditional adjudication with the general approach taken by these problem solving courts:

**A COMPARISON OF TRANSFORMED AND TRADITIONAL COURT PROCESSES[94]**

| **Traditional Process** | **Transformed Process** |
|---|---|
| Dispute resolution | Problem-solving dispute avoidance |
| Legal outcome | Therapeutic outcome |
| Adversarial process | Collaborative process |

[91] *Id.*
[92] Scheff, *supra* note 10.
[93] Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055 (2003).
[94] Roger K. Warren, *Reengineering the Court Process*, Madison, WI, Presentation to Great Lakes Court Summit, September 24-25, 1998.

| | |
|---|---|
| Claim- or case-oriented | People-oriented |
| Rights-based | Interest- or needs-based |
| Emphasis placed on adjudication | Emphasis placed on post-adjudication and alternative dispute resolution |
| Interpretation and application of law | Interpretation and application of social science |
| Judge as arbiter | Judge as coach |
| Backward looking | Forward looking |
| Precedent-based | Planning-based |
| Few participants and stakeholders | Wide range of participants and stakeholders |
| Individualistic | Interdependent |
| Legalistic | Common-sensical |
| Formal | Informal |
| Efficient | Effective |

Drug treatment courts have rapidly proliferated throughout the United States since the first one was implemented in Miami, Florida, in 1989. Their success rates have drawn attention and propelled their implementation in other jurisdictions across the country.[95] Statistics show

[95] Alex Segura, Jr., "Alumni's return shows success of drug court," South Florida Sun-Sentinel, Thursday, August 9, 2001 at 10B (noting that the Fort Lauderdale, Florida court was the third in the nation, established in 1991, after those in Miami and Las Vegas). In 2001, it was estimated that there were 660 drug courts "in 48 states, as well as the District of Columbia, Puerto Rico, Guam, a number of Native American Tribal Courts, and one federal district court, according to the Drug Courts Program Office of the U.S. Department of Justice," according to Jan Pudlow, "Palm Beach County opens its drug court," The Florida Bar News, April 15, 2001 at 14 (noting also that Miami (Dade County)'s drug court opened in 1989). Pudlow also reported a 70% success rate. *Id.*

that up to 80% of incarcerated individuals may be suffering from substance abuse.[96] Where substance abuse is involved, courts may offer an offender a choice of traditional criminal prosecution or participation in a drug treatment court ("DTC"). The goals of drug treatment court are to reduce repeated criminal behavior, avoid the costs of incarceration, and rehabilitate the offender, thereby ultimately benefiting the community. DTCs can be implemented either pre-plea or post-plea. An offender must voluntarily enter into a formal contract that explains the conditions of DTC participation, which typically include frequent court appearances, participation in a drug rehabilitation program, close supervision, and drug screens. If the offender is a juvenile, then the offender's parents must sign the contract as well.

Treatment is monitored by regular appearances before a DTC judge. Mandatory court appearances are weekly, then fortnightly, and finally monthly. The treatment "team" usually consists of the judge, prosecutor, defense attorney, probation officer, drug treatment court coordinator, treatment provider, and community-policing officer. Typical terms of a contract include regular attendance at recovery fellowship meetings, interactions with a mentor already in the recovery program, participation in the recovery program with the mentor, compliance with routine check-ins with the DTC coordinator or case manager, random urine tests, and perfect attendance at court appearances. If an offender fails to comply with the terms of the contract, the offender faces a number of graduated, intermediate sanctions. Repeated failures can eventually lead to explusion from the DTC and a return to traditional court for prosecution, trial, or sentencing (depending on whether the diversion to DTC occurred pre- or post-plea). Program completion depends on individual progress, usually between 14 and 24 months, after which a

[96] Judge William G. Schma, *Alternatives for the Common Good*, 85 A.B.A. J. 103, 103 (June 1999) (according to statistics from the National Center on Addiction and Substance Abuse at Columbia University, alcohol and drugs

joyous "graduation ceremony" is held and the originating charges are dismissed. Offenders sometimes ask that the arresting officer be present at graduation, out of gratitude for the officer's intervention in their lives.[97]

The DTC approach to adjudication modifies judicial rules, procedures, and communication postures. DTC team members attempt to collaborate with their clients to develop a flexible and realistic treatment strategy and a changed lifestyle for the client. The offender is recast into the role of a client, a term of respect and equanimity. The judge is required to have the temperament and technique to serve as a team player or coach, mediating differences, coordinating styles, and encouraging the client to recover. The judge no longer needs to referee the attorneys who collaborate for the client's benefit and accountability. The judge's role shifts from a neutral arbiter to that of the central figure in the team, a "cheerleader," and a "stern parent."[98] The attorneys cease gamesmanship and behave like partners for a common client, tailoring remarks and input to support the client's adherence to a treatment plan. Treatment professionals report on the client's recovery progress, not the need for perfection. Emphasis is placed on positive behavior change by confirming client strengths. Sanctions for non-compliance are imposed to obtain compliance for treatment and recovery, not for punishment reasons. When intermediate sanctions are necessary, the entire team evaluates what needs immediate attention, discusses the best way to accomplish the goals, and then comes to a collaborative resolution. In the case of

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are implicated in 80 percent of incarcerations). On one criminal docket in Judge Schma's court, 24 out of 27 felony defendants had a history of addiction to alcohol or drugs, or mental illness or both.

97 David S. Hobler, Drug Treatment Court: The Making of Judicial Capital – Collaborative, Therapeutic, and Preventive Practices (unpublished manuscript, 2001); *see also* National Drug Court Institute, Ethical Considerations for Judges and Attorneys in Drug Court (May, 2001), published with the cooperation of the Drug Courts Program Office of the United States Department of Justice (setting forth an interpretation of the American Bar Association Model Code of Judicial Conduct, the Model Rules of Professional Conduct, and the ABA Standards for Criminal Justice, for those attorneys and judges practicing in drug court).

juvenile offenders, parents, school representatives, and concerned significant adults attend court and contribute to the solution as team members. The future of drug treatment courts appears sound; their reported success rates are impressive[99] and their effect on judges' satisfaction has been remarkable.[100]

Other problem solving courts, such as mental health courts,[101] domestic violence courts, and unified family courts,[102] have processes similar to the drug treatment court procedures. Domestic violence courts ("DVC") have had mixed success.[103] DVCs place the offender into a treatment program much like a DTC, but also combine the criminal domestic violence action with a civil protective order for the victim, and can address other legal needs of the family, such as those involving family law, custody, visitation, and child support. It consolidates the court interaction for the victim and family, providing one-stop shopping rather than several trips to more than one court and related offices. Overall, there appear to be mixed results. Even though the focus is on the victim, the process has been described as being time-consuming and inefficient and often not well-received by judges, prosecutors, and the existing system.[104]

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[98]Peggy Fulton Hora, William G. Schma, & John T. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 477-83 (1999).

[99] Jan Pudlow, "Palm Beach County opens its drug court," The Florida Bar News, April 15, 2001 at 14, reporting that, of the 100,000 drug dependent criminal offenders who have entered drug court, 70% were either still enrolled or had graduated, which was, according to Pudlow, "more than double the rate of traditional treatment programs retention rates," citing statistics from the Drug Courts Program Office of the U.S. Department of Justice. *Id.*

[100] Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, 37 CT. REV. 12 (2000) (reporting the results of an empirical study on the positive effects on judges of judging in problem solving courts).

101Justice Evelyn Lundberg Stratton, *Solutions for the Mentally Ill in the Criminal Justice System: A Symposium Introduction (National Symposium on Mental Illness and the Criminal Justice System),* 32 CAP. U. L. REV. 901 (2004). This entire symposium issue is devoted to articles on mental health courts.

[102] Michael A. Town, *The Unified Family Court: Preventive, Therapeutic, and Restorative Justice for America's Families*, NCJFCJ (Winter, 2002), at 14-17.

[103] Fritzler and Simon, *supra* note 61.

[104] Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements On An Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000).

Judge William Schma, of Michigan's Ninth Judicial Circuit, provides two examples of the effectiveness of drug treatment courts and mental health courts in criminal cases involving drug addiction and mental illness, respectively:

> Mark, a drug addict, was arrested for selling crack cocaine. He was placed on lifetime probation but kept using. Besides facing 20 years in prison (at a cost of $20,000 to $25,000 per year), he was dying from kidney failure but could not stay clean long enough to undergo a transplant procedure. Despite these obstacles, Mark was enrolled in a drug court program. A team I supervised directed his recovery through regular court visits, treatment and case management. Now, for the first time in a life of substance abuse, Mark is clean and crime-free. And he is ready for his transplant.
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> . . . .
>
> When Melvin came to court he was out of control. A paranoid schizophrenic on lifetime probation for delivery of cocaine, he had stopped taking his medication and had been arrested. As deputies led him out of the courtroom, he shouted to me, "You're a white-scum son of a bitch. You haven't heard the last of this." The exasperated probation agent was prepared to recommend prison. But when Melvin's attorney, family and probation agent agreed to cooperate, I delayed disposition of the violation. Melvin was released to the custody and supervision of family and the probation department. He resumed treatment, counseling and his medication, and he was placed on electronic monitoring. Today Melvin is stabilized and has a standing, informal visit with me every other Tuesday. The last time he brought along his toddler son and spoke enthusiastically of his hopes for the boy's future. When Melvin leaves, we shake hands.[105]

Among practicing attorneys, problem solving courts, restorative justice, and collaborative law have perhaps been the most visible vectors to date. The next section explores why comprehensive approaches are rapidly growing at this particular time. It examines developments within the legal profession, society in general, and the world that may be precursors of the comprehensive law movement.

[105] Schma, *supra* note 67.

## IV. JURISPRUDENTIAL UNDERPINNINGS, PHILOSOPHICAL PRECURSORS AND PROPELLERS, AND HISTORICAL CONTEXT

Several philosophical shifts have occurred in recent decades, perhaps paving the way for the emergence of comprehensive law approaches within the legal profession. Some of these are global and societal in nature and not limited to law. Others exist entirely within the legal profession. This Section will explore what led up to the comprehensive law movement and why it developed now.

### A. Philosophical Shifts in Society

First, the globalization of the world, hastened by technological advances and worldwide environmental concerns, has made the world smaller. Other cultures and countries have become more accessible and "real." Environmental problems have made us more dependent upon other countries and have forced us to collaborate with them in order to solve imminent global environmental concerns that threaten our way of life. For example, once we realized that toxic dumping in the United States creates a hole in the ozone layer over another country that in turn affects our supply of a particular good produced elsewhere, we began to realize that we were not and could not remain isolated from the rest of the world. In turn, we have gained an awareness that "we are all in this together" and that cooperation is necessary in order for us to thrive and prosper in the future. Also, in the last decade of the 1990s, partly as a result of the end of the Cold War, there may have been a decline in the prominence of a polarized, adversarial, "us and them" mentality in which we viewed other people, other countries, and other cultures as enemies to be feared and avoided.[106] We found ourselves collaborating with countries and people we formerly viewed as hostile and intractable. These developments, then, may have contributed to a

growing societal awareness of our "connectedness" to, and an openmindedness towards, all people, all countries, and all cultures in the world.

Second, some assert that our society has witnessed the decline of a philosophy focused on individual rights, logic, and reason and the concomitant rise of a counterbalancing ethos, focused on compassion, care, relationships, and connectedness.[107] Perhaps our societal values have begun to shift and change as a result of growing diversity in our power structure, governments, corporations, schools, and other institutions. The ethics and values of previously disempowered individuals may have begun to seep into our collective consciousness.[108] The increasing influence of a "feminine ethic" or "ethic of care" may have led to a greater emphasis on interpersonal relationships, emotional wellbeing, and interpersonal harmony.[109]

For example, in 1988, Anne Wilson Schaef and Diane Fassel argued that our entire society is undergoing a paradigm shift, from the predominance of what they call the "White Male System/Reactive Female System," which values logic, rationality, objectivity, superiority, individuality, detachment, and correctness, to the rise of an alternative system, the "Emerging Female System."[110] They described this paradigm shift as a move from a closed, static, objective worldview to one valuing wholeness, reconciliation, vulnerability, holism, health, cooperation, ecology, spirituality, and transformation. They describe it as a shift from positivism, empiricism,

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[106] This particular shift, however, appears to have reversed as a result of the events of September 11, 2001.
[107] ANNE WILSON SCHAEF, WHEN SOCIETY BECOMES AN ADDICT 5-18 (1987) (controversially describing the rights-based philosophy as the "White Male System;" noting that it is the same as the Addictive System, using the addictions model of human behavior); ANNE WILSON SCHAEF & DIANE FASSEL, THE ADDICTIVE ORGANIZATION 33-46 (1988) (tracking this paradigm shift through the work of (among many others) Thomas Kuhn in 1970, Marilyn Ferguson in 1980, Morris Berman in 1984, and Carol Gilligan in 1979).
[108] See AMY HILSMAN KASTLEY ET AL., CONTRACTING LAW (Carolina Academic Press 2000).
[109] Carrie Menkel-Meadow, *Review Essay, What's Gender Got to Do With It?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265 (1996).
[110] Schaef and Fassel, *supra* note 91.

and the certainty of right answers to the uncertainty of the unknown.[111] They track this paradigm shift from science to business, education, religion, and medicine and note the contribution of feminist thought and alternative perspectives to the shift.[112]

**B. Post-Enlightenment Values**

Law professor Thomas Barton brilliantly puts this philosophical shift in historical perspective when he identifies that our society is moving into a "Post-Enlightenment" phase, complete with a new set of values. He explains that the current American legal system has idealized Enlightenment values such as personal freedom, independence, autonomy, will, and individual liberty for years, but these values are now giving way to a Post-Enlightenment period, in which "the concepts of separation -- both intellectual and social – are eroding in favor of the long-subordinated notions of [human] connection."[113] Professor Barton points to an "emerging culture of connectedness" as evidence of the rise of Post-Enlightenment values such as belongingness, loyalty, community, cultural identity, and people's relationships to each other and to their communities. For example, Professor Barton notes a growing concern in the law for issues of inequality of power in human relationships (e.g., domestic violence law) and stronger recognition and protection of one's cultural identity or membership in a particular ethnic group (e.g., Native American law, recognition of specific cultural beliefs as exonerating or mitigating

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[111] ANNE WILSON SCHAEF, WHEN SOCIETY BECOMES AN ADDICT 8-9 (1987) (quoting Morris Berman's insight that this shift is towards "participatory consciousness").

[112] *Id.*

[113] Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47 EMORY L. J. 163, 163-64 (1998). Barton explains that Enlightenment values are associated with the Enlightenment period, which has predominated for the past 300 or so years, and with 18th century writers such as Voltaire, Kant, Montesquieu, and Bentham. Interestingly, the period before the Enlightenment is typically thought of as the Renaissance, which is associated with humanism and humanistic values (the pendulum swings, yet again!). And, interestingly, a group of lawyers associated with one of the vectors of the comprehensive law movement, holistic justice, has formed a lawyer group, website, and support mechanism named Renaissance Lawyer (http://www.renaissancelawyer.com) (visited April 14, 2005).

factors, and legal respect for cultural differences). These developments evidence the growth of Post-Enlightenment values.

Professor Barton goes on to argue that law based on Enlightenment values functions well when a decision as to right or wrong, black or white, must be made. However, it is ineffective in other situations, because it does not easily accommodate or honor the fact that the parties may have an ongoing relationship with each other or with their communities. Professor Barton says:

> ...in a given case the law may oscillate between either separationist functions or connectedness values. This is because the desired outcomes often involve both protection and the building of a stronger relationship. In many instances of domestic violence, for example, the victim certainly wants and needs protection. The victim, however, may not want or may not be able to afford for the underlying relationship to be terminated. Instead, the victim desires the underlying relationship to be made more healthy and respectful. Yet this is precisely the sort of solution for which the Enlightenment legal process is poorly equipped.... Cases involving communities which are hostile to racial, ethnic, or sexual orientation minorities, cases involving unruly children, and even cases involving noisy neighbors may present the same challenges--to build stronger relationships among the parties while simultaneously stopping whatever immediately threatening behaviors escalated the problem to the legal domain. The fundamental need is for an integrative solution that works with, rather than ignores, the given social context.[114]

Perhaps in response to the shortcomings of Enlightenment law, various alternative ways of handling legal problems have developed, such as creative problem solving, transformative mediation, victim-offender mediation in criminal law, community-based sentencing of criminals, teen court, and collaborative approaches to divorce and child custody matters. All of these approaches, which are part of the comprehensive law movement, explicitly honor people's relationships with each other instead of focusing solely on individual rights. Because they seek to maintain and preserve those connected relationships instead of sacrificing or destroying them in the name of individuality and separateness, they are consistent with Professor Barton's Post-Enlightenment values.

## C. Jurisprudential Propellers

For years, legal realism was the predominant jurisprudential school of thought in the United States. The pessimism of legal realism and its critical legal studies offspring may have created a longing for solutions and hope. The certainty of realism's predecessors, natural law and legal positivism, probably fostered a reassuring sense of order, predictability, and rationality in the law, but this predictability disintegrated in the last 40 or 50 years. Cynicism and discouragement may have grown, when legal realism emerged in the 1930s to debunk the neat universe of legal positivism and point out that law, as made by legislators and judges, was much more capricious and biased than positivism made it appear. Realism may have helped us lose faith in the justice meted out by the legal system.[115]

After realism, jurisprudential thought Balkanized[116] into various movements that understand law from the lens of a particular viewpoint, including critical legal studies, feminist theory, and the "law and" movements.[117] Most of these newer schools of thought expand upon the basic concept of legal realism by viewing law as a product of deep and pervasive societal biases.

All of these schools of thought, however, leave us with a terrific explication of a problem but without a solution. If law is indeed arbitrary and capricious, what then? What approach does

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[114] *Id*. at 214-15.

[115] David M. Hunsaker, *Law, Humanism and Communication: Suggestions for Limited Curricular Reform*, 30 J. LEGAL EDUC. 417, 419 (1979-80) (describing the relationship between legal realism, legal positivism, and Langdell's case method approach to legal education). Originally, natural law predominated, with its idea that laws were simply reflections of preexisting, divine laws that existed independent of man. Then, legal positivism emerged, with its idea that laws were simply black and white rules that conformed to rules of logic and analysis; if one could find the proper rule or exception, and precedent, one could generate the proper rule of law to fit any particular legal problem. Cases were viewed as "the embodiment of legal principles." *Id.* In contrast, realism suggested that judges and juries decided legal cases based on their moods, their biases, their predilections, and a million other unspoken criteria. Cases were viewed as "in fact the rationalizations for values choices made by judges."

[116] I am indebted to Professor Ellen Waldman of Thomas Jefferson School of Law for this outline of the development of the newer jurisprudential schools of thought and for the term, "Balkanized."

[117] *See e.g*., law and economics, law and literature, law and psychology, law and sociology, law and socioeconomics.

one then take to practicing law, judging cases, or making law? Further, once we accept that law and our legal system are not necessarily rational or logical, the question becomes "why use it at all?" In fact, some sectors of American society have abandoned formal legal courts, either resorting to self-help methods, private judges, mediation, or private courts to settle their legal problems. Therapeutic jurisprudence in particular and the comprehensive law movement in general may have developed in response to the lack of hope and direction we are left with, once we accept the major premise of legal realism and these newer schools of thought. The idea of recognizing law's potential to have a positive impact on people's lives and of creating alternative means of resolving legal problems may provide hope during a time when the reliability, utility, or rationality of law and legal procedures are in question.

Viewing law as a healing profession is a natural outgrowth of feminist jurisprudence. Focusing on the healing, restorative, curative functions of law is entirely consistent with feminine and feminist values,[118] which have mainstreamed into current legal thought through feminist jurisprudence. The comprehensive law movement is also a natural product of the law and psychology movement, which looks at law, lawyering, and legal processes from a psychological perspective. Once one begins to examine the psychological aspects of law, or even the psychological aspects of legal problems or clients, the therapeutic potential of law and legal processes becomes apparent. It is natural, then, to propose ways to maximize this potential and minimize any detrimental psychological effects. This is precisely what one of the most vibrant vectors of the movement, therapeutic jurisprudence, seeks to do.

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[118] For example, a more "feminine" approach to establishing criminal culpability for someone who is mentally disordered is taken by Lady Wooton, as quoted in RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM 589-91 (3d ed. 1999). There, she argues for bifurcating guilt and sentencing and then explains that the distinction between hospitalization and incarceration becomes unnecessary. Her idea is that the offender simply serves a custodial sentence, with the line between prisons and mental health treatment being blurred. Barbara Wooton, *Book Review of A. Goldstein, The Insanity Defense,* 77 YALE L.J. 1019, 1028-32 (1968), *quoted by* Reisner et al., *supra*, at 589-91.

Since at least 1980, commentators within the legal profession have bemoaned the state of the profession. Commentary on our lack of professionalism, rampant immorality, malfeasance, malpractice, client neglect, overly aggressive natures, greed, and unethical behavior, as well as the lack of attorney discipline and oversight, has been prolific.[119] Individuals inside and outside the legal profession alike have been dissatisfied with the law, the American legal system, and lawyers. The situation has been described as a professionalism crisis. Society's opinion of lawyers is depressingly low. The public sees lawyers as makers of conflict and dissension rather than as positive forces in people's lives or work. Alcoholism, depression, and other psychological problems exist in the legal profession at least twice as frequently as they appear in the general population. These problems comprise a "tripartite crisis" in the legal profession, consisting of deprofessionalism, low public opinion of lawyers, and lawyer distress and dissatisfaction.[120]

In response to this tripartite crisis, many well-seasoned practicing lawyers have sought alternative forms of law practice, often saying something like, "If I can't find another way to practice law, one that I find satisfying and fulfilling, then I am quitting law entirely." The search for alternatives has led many practicing lawyers to develop the forms of practice that comprise the comprehensive law movement. Many of the vectors emerged because of lawyers', clients', and society's deep dissatisfaction with existing models for handling legal matters.

Academic commentators have responded to this tripartite crisis by proposing solutions such as more pro bono and public service, returning to the roots of our profession as counselors and advisors, viewing law as a "calling" rather than as a business, and taking different

[119] Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney attributes Beaming on Professionalism*, 46 AM. U.L.REV. 1337 (1997) [hereinafter Daicoff, *Review*].

approaches to lawyering, such as lawyering with an "ethic of care"[121] and "moral lawyering."[122] Despite the lack of an explicit link between these proposals and the emergence of the vectors of the comprehensive law movement, it is clear that the approaches embodied in the comprehensive law movement are consistent with the call of these commentators for value-laden approaches. [123]

### D. Parallel Developments in Psychology

In addition, the comprehensive law movement may reflect a parallel progression within social science and science in general, from a more analytical, scientific approach to a more humanistic, relativistic, and individualized approach. In social science, for example, psychology has undergone several phases, beginning with the analytic approach of Sigmund Freud and Carl Jung and psychodynamic theory. It then progressed from this past-oriented and sometimes elusive approach to a more scientific, logical, tangible, almost mechanical approach, in B. F. Skinner's behaviorism. Then, in response perhaps to the black-and-whiteness of behaviorism, Carl Rogers' humanistic psychology emerged, with its focus on optimizing human potential, on client-centered, individualized treatment, and on the interpersonal relationships involved in therapy.

Similarly, law was first seen as a somewhat undisciplined liberal "art," until Christopher Langdell of Harvard proposed a more "scientific" approach to law through the study of cases. Since then, law has been viewed as something that can be studied via a rational, logical

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[120] Susan Daicoff, *Asking Leopards To Change Their Spots: Can Lawyers Change? A Critique of Solutions to Professionalism by Reference to Empirically-Derived Attributes*, 11 GEO. J. LEGAL ETHICS 547 (1998); DAICOFF, KNOW THYSELF, *supra* note 1.

[121] Menkel-Meadow, *supra* note 93.

[122] Robert M. Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97, 97-99 (1985).

[123] *See* Marc W. Patry, David B. Wexler, Dennis P. Stolle, & Alan J. Tomkins, *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439, 441 (1998) (suggesting a strong possibility for therapeutic jurisprudence to incorporate an ethic of care in preventive law).

approach. Now, like psychology, law may be moving into a more humanistic mode, focused more on human wellbeing and interpersonal relationships.

### E. Humanism and Law in the 1970's; Neo-Humanism in the 2000's

Finally, the comprehensive law movement may reflect a resurgence of a humanistic movement in law that occurred in the 1960's and 1970's. This earlier humanism-in-law effort may have gone "underground" during the materialistic and prosperous 1980's, but be resurfacing today in a sort of "neo-humanism" evidenced by the popularity of the vectors of the comprehensive law movement.

In 1980, Chief Justice Warren Burger called for lawyers to return to their roles as healers, foreshadowing the comprehensive law movement by a decade or more. He said:

> [Lawyers] must be legal architects, engineers, builders, and from time to time, inventors as well. We have served, and must continue to see our role, as problem-solvers, harmonizers, and peacemakers, the healers – not the promoters – of conflict.[124]

As early as 1955, Dean Griswold argued for "the inclusion of human relations and communications training in the law school curriculum."[125] He pointed out that:

> [L]awyers deal with people. They deal with people far more than they do with appellate courts. They deal with clients; they deal with witnesses; they deal with persons against whom demands are made; they carry on negotiations; they are constantly endeavoring to come to agreements of one sort or another with people, to persuade people, sometimes when they are reluctant to be persuaded. Lawyers are constantly dealing with people who are under stress or strain of one sort or another. [126]

Robert Redmount in 1968 charged that legal education emphasized "a cohering framework and system of rules and reason … in which the data of experience are

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[124] Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 5 (1993) *citing* Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 378 (1980).

[125] Hunsaker, *supra* note 98, at 421 *citing* Dean Griswold, 37 CHICAGO B. RECORD 199, 203 (1956), *cited in* Howard Sacks, *Human Relations Training for Law Students and Lawyers*, 11 J. LEGAL EDUC. 316, 317 (1959).

[126] Hunsaker, *supra* note 98, at 421 *citing* Dean Griswold, 37 CHICAGO B. RECORD 199, 203 (1956), *cited in* Howard Sacks, *Human Relations Training for Law Students and Lawyers*, 11 J. LEGAL EDUC. 316, 317 (1959).

subordinate."[127] He argued for explicitly using psychology in law school to teach law students greater psychological sophistication and asserted that "continuing social change and the lack of good attunement to personal and social experience jeopardize law's standing and competence to deal effectively with social and personal problems."[128]

Shaffer and Redmount in 1975 condemned legal education for lacking "mental, moral, emotional, and social development and therefore … not serv[ing]… the best interests of society, or for that matter, the best interests of the legal profession. It lacks humanistic concern…"[129] Hunsaker in 1979 agreed and said: "[w]hile the law school may develop skills in analysis, issue spotting, fact-principle discrimination, and logical deduction, it has neglected and ignored the teaching of *humanistic* values and the development of human relations skills [*emphasis in original*]."[130] These authors went on to advocate additional communication skills training, human relations training, and infusion of social science knowledge in legal education.[131]

These pleas were echoed in a 1978 book by clinical psychiatrist Andrew Watson. In this book, Watson integrated law and psychology and advocated a psychological approach to legal counseling.[132] A number of articles and commentary followed from 1965 to 1980, proposing a greater emphasis in the law on psychological knowledge, human experience, interpersonal skills, and humanistic values.[133] These efforts culminated in a 1981 book by lawyers and law

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[127] Robert S. Redmount, *Humanistic Law Through Legal Education*, 1 CONN. L. REV. 201, 210 (1968) (emphasizing the value of human experience in law, which is pragmatic to the individual) [Redmount I].
[128] *Id*. at 211.
[129] Hunsaker, *supra* note 98, at 419-20, *quoting* THOMAS L. SHAFFER & ROBERT S. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE, chapter 2 at 24 (1977).
[130] Hunsaker, *supra* note 98, at 419.
[131] *See generally* Charles A. Reich, *Toward the Humanistic Study of Law,* 74 YALE L. J. 1402 (1965) (advocating for greater emphasis on social science, interdisciplinary approaches, and moral and psychological knowledge in legal education); Hunsaker, *supra* note 98, and Redmount I, *supra* note 110 (all arguing for curricular reform in law school).
[132] ANDREW S. WATSON, THE LAWYER IN THE INTERVIEWING & COUNSELING PROCESS (Bobbs-Merrill 1975).
[133] *See* ) Peter D'Errico, Stephen Arons, & Janet Rifkin, *Humanistic Legal Studies at the University of Massachusetts at Amherst,* 28 J. LEGAL EDUC. 18 (1976-77)(predicting a sustained national interest in humanist analysis in the law in spite of pressure for formal legal techniques); Robert S. Redmount, *Humanistic Law Through*

professors Dvorkin, Himmelstein, and Lesnick titled "Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism."[134]

Most of this early humanism-in-law commentary noted that law and legal education focused almost exclusively on logical, rational analysis of cases and legal problems. Perhaps this was originally appropriate, as Charles Reich in 1965 noted that, before the 1960s, lawyers usually concerned themselves chiefly what law dealt with: commerce and business. However, he argued that the role of law in society in the 1960s began to change, as law became a "primary instrument … for fundamental social change."[135] Law began to permeate every activity. Social problems, such as poverty, civil unrest, unemployment, and mental illness, increasingly became legal problems. As law became more and more intertwined with social and human problems, Reich says, law had to look to social science for assistance and become "the queen of the humanities."[136] Lawyers and legal education needed to focus on developing interpersonal skills, psychological sophistication, and a more humanistic orientation.[137]

However, the ideas espoused in this earlier psychology in law movement did not entirely become mainstream in legal education, nor did they appear in law practice. What did occur was a greater emphasis on clinical training and clinical programs, including lawyering skills training, in law school. Interviewing, counseling and negotiating courses and clinical opportunities are now available and encouraged in practically every American law school. Thus, this earlier

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*Legal Counseling*, 2 CONN. L. REV. 98 (1969-70) [Redmount II]; Redmount I, *supra* note 110; Reich, *supra* note 114; and Hunsaker, *supra* note 98 (proposing greater emphasis on interpersonal skills, communications skills, and people skills training in legal education). Other individuals associated with this earlier humanism and law movement include Paul Brest (now dean of Stanford Law School), Columbia University law professor Peter Straus, Charlie Halpert (former dean at CUNY-Queens), Professor Howard Lesnick, and Jack Himmelstein.

[134] ELIZABETH DVORKIN, JACK HIMMELSTEIN, & HOWARD LESNICK, BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM (1981). This book was in fact specifically influenced by Carl Rogers' work on humanistic psychology, thus strengthening the link between various movements in psychology and law. For a critique of this book, *see* Walter Gellhorn, "*Humanistic Perspective:" A Critique*, 32 J. LEGAL EDUC. 99 (1982).

[135] Reich, *supra* note 114, at 1407.

humanistic movement did have an effect. However, the hoped-for wholesale infusion of psychology into legal training and law practice did not occur.

However, the integration of law and psychology, or humanism and law, may have emerged in the 1990s in the vectors of the comprehensive law movement. The approaches to law and lawyering embodied by the various vectors of the comprehensive law movement are consistent with the humanistic approach advocated in the 1981 book, "Becoming A Lawyer,"[138] yet they did not develop as a direct result of this early humanistic movement. Instead, they developed mostly from the practicing bar and from a different law and psychology movement known as therapeutic jurisprudence. If these earlier law professors' efforts to bring humanistic psychology into law have had an effect, the effect appears to have been indirect: skipping over legal education, skipping over a few decades, and emerging now from the "trenches."

Dean emeritus Edward Dauer, who is one of the leaders of preventive law, suggests that perhaps the idealism of this earlier humanism-in-the-law movement crumbled under the strain of the Vietnam War and Watergate, two events that fostered massive cynicism towards law and lawyers.[139] The cynicism and disappointment felt by society after these two events may have quashed burgeoning idealism in the 1960s and 1970s and then paved the way for the materialism and self-centeredness found in the profession (and society) in the 1980s. If so, the comprehensive law movement may reflect a concrete response to growing societal disillusionment with the materialism and cynicism of the 1980s.

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[136] *Id.* at 1408.
[137] Hunsaker, *supra* note 98, at 420.
[138] ELIZABETH DVORKIN, JACK HIMMELSTEIN, & HOWARD LESNICK, BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM (1981).
[139] Personal communication (e-mail) with Edward Dauer, Dean Emeritus at Denver University College of Law, August 5, 2002.

In short, a number of philosophical shifts in the last century and particularly in the last decade have paved the way for the comprehensive law movement in the 21st century. Perhaps we have become sated with our own thirst for individual freedom, with our promotion of personal good at the expense of others, and with our worship of individual rights. Maximizing our legal rights and our clients' has not brought us emotional wellbeing, harmony, peace, joy, or even happiness. Many litigation-experienced clients and lawyers are searching, saying, "there must be a better way" to resolve legal disputes, to handle legal matters, and to practice law. Focusing on the human element in law and on how law can serve as a positive force in the lives of individuals, families, groups, and communities could be a natural product of this discomfort with and within the law -- and of shifts in attitude occurring within and without the legal profession.

## V. TEACHING COMPREHENSIVE LAW APPROACHES

As the comprehensive law movement develops, other questions and concerns have emerged. First, there are a number of contemporary movements in legal education, such as efforts to humanize legal education, mindfulness meditation, and the infusion of spirituality into law school, that may be related to the movement. Second, there may be additional skills that attorneys and law students will require in order to successfully practice comprehensive law. Finally, the relationship of the comprehensive law movement to the psychology of lawyers should be explored. This section will explore each of these concerns, in turn.

### A. Parallel Developments in Legal Education

While many of the vectors of the comprehensive law movement have been developed by practicing lawyers and judges, some parallel developments have emerged in legal education, primarily through the work of various like-minded law professors. These academic

developments are related to the comprehensive law movement because of their emphasis on humanism, values, and enhanced interpersonal and intrapersonal sensitivity. They also assist law students to develop or preserve core skills and attributes necessary to effectively practice law comprehensively.

### 1. The Humanizing Legal Education Movement

Energized by the leadership and enthusiasm of law professor Lawrence Krieger,[140] a group of law professors have banded together to make law school and legal education a more humane environment. Aware of common complaints about the competitive and intimidating nature of the law school environment[141] and painfully aware of the empirical data demonstrating that law students are "normal" before they enter law school but rapidly develop depression and other psychiatric distress thereafter, which does not abate after graduation,[142] these professors began sharing information, teaching techniques, and research on how to humanize legal education.[143] While the thrust of this movement has focused on humanizing the experience of law school for law students, its values are consistent with comprehensive law's intention of humanizing legal process for participants. The humanizing movement also encourages law students to identify, evaluate, and maintain their own personal morals, values, beliefs, and standards during law school. This exploration of values may prepare or propel some students to practice law

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[140] Clinical law professor at Florida State University Law School.

[141] Lawrence S. Krieger, Psychological Insights: *Why Our Students and Graduates Suffer, And What We Might Do About It*, 1 J. ASS'N LEG. WRITING DIRECTORS 259, 262 (2002).

[142] Connie J. A. Beck & Bruce D. Sales, *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 2 (1996).

[143] Their first formal program was presented at the 2001 annual Association of American Law Schools conference. Currently this group's listserve has 250 subscribers. *Humanizing Legal Education,* at the annual meeting of the Association of American Law Schools jointly sponsored by the Sections on Clinical Legal Education, Law, & Mental Disability, and Law & Religion, in San Francisco, CA, January 2001; at www.law.fsu.edu/academic_programs/humanizing_lawschool.php (quoting website, "Humanizing legal education is an initiative shared by legal educators seeking to maximize the overall health, well being, and career satisfaction of

comprehensively rather than traditionally.

### 2. Mindfulness Meditation

Law professor Leonard Riskin, author and legal commentator Steven Keeva, and others have written about the importance of the lawyer's mental state to the efficacy of his or her work.[144] One strategy that many attorneys and law students are experimenting with, to improve their professional efficacy, is "mindfulness meditation." Some have incorporated the principles and insights of mindfulness meditation into their preparation for professional practice. These concepts have been introduced to law students through such avenues as the Yale Law School project for Meditation and the Law and programs sponsored by the Fetzer Institute.[145] Being more aware of and able to manage and monitor one's mental state, emotions, and reactions can assist lawyers in their daily work, particularly if they are practicing comprehensive law, due to its emphasis on the ability to identify and cope with the emotions and mental states of others.

### 3. Law and Spirituality

Law and religion is a familiar topic, but some recent commentary has focused on the concept that one's spiritual beliefs, values, and practices are relevant to law, legal education, and law practice.[146] Specifically, they are important for preparing one's mental state for legal work,

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law students and lawyers."); listserve at www.law.fsu.edu/academic_programs/humanizing_lawschool/listserve.php (sites visited on April 11, 2005).

[144] Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Mediation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002); Douglas A. Codiga, *Reflection on the Potential Growth of Mindfulness Mediation in the Law*, 7 HARV. NEGOT. L. REV. 109 (2002); *see also* STEVEN KEEVA, TRANSFORMING PRACTICES, FINDING JOY AND SATISFACTION IN THE LEGAL LIFE (Contemporary Books 1999).

[145] *See* Steven W. Keeva, *Practicing From the Inside Out*, 7 HARV. NEGOT. L. REV. 97 (2002); Codiga, *supra* note 122.

[146] *See* Calvin G. C. Pang, *Eyeing the Circle: Finding a Place for Spirituality in Law School Clinic*, 35 WILLIAMETTE L. REV. 241 (1999); Charles Senger, *Spirituality in Law School*, 81 MICH. B.J. 44 (Dec. 2002). Professor Calvin Pang, who infuses spirituality into his law school clinical courses, has written at length about how to incorporate spirituality into a clinical course and the benefits of doing so. Calvin G. C. Pang, *Eyeing the Circle:*

maintaining the lawyer's mental health, the professional choices one makes as a lawyer, and the way in which one interacts with clients. Lawyers who have personal spiritual practices or who are explicitly faith-based themselves may be drawn to comprehensive law practice, due to the easy interface of the goals of comprehensive law with their personal values.

**B. Teaching Comprehensive Law Practice Skills**

Mindfulness meditation and personal spiritual practices may be skills helpful to the comprehensive practice of law. In addition to these, there are a number of other skills that lawyers may need in order to practice law comprehensively. This section outlines and describes these skills.

Law professor Leonard Riskin provides a terrific football analogy to understand the relevance of these skills to the comprehensive law movement. He reminds us that a football coach teaches his players the overall philosophy of football as well as how to throw, block, and tackle. The players learn the game and then practice the moves on the field. However, if the players do not actually go to the gym and become stronger through weight lifting, they do not become strong, effective football players. Just as strength training prepares football players to play football, the comprehensive law skills, outlined below, prepare comprehensive lawyers to

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*Finding a Place for Spirituality in Law School Clinic*, 35 WILLIAMETTE L. REV. 241 (1999); and 20 R. HAW.L.REV. 1; 1995-JUN HAW. B.J. 28; 1993-SEP HAW. B.J. 24. Professor Charles Senger teaches a law school course devoted entirely to law and spirituality; he presented a talk on his course at the second international conference on therapeutic jurisprudence, May 2001, in Cincinnati, Ohio. In that panel on law and spirituality, Professor Pang of the University of Hawaii Law School spoke, as well as Professor Daisy Floyd of Texas Tech. Professor Tim Floyd of Texas Tech noted the importance of concepts such as forgiveness, prayer, and priority-setting to lawyers seeking to incorporate their spiritual values into their law practices.[146] According to Professor Floyd, small groups of practicing lawyers discussing law and spirituality have sprung up around the country. Talk given by Professor Tim Floyd of Texas Tech University School of Law, April 7, 2003, at Touro College, Jacob D. Fuchsberg Law Center, Huntington, New York, at the symposium titled: "Lawyering and Its Discontents: Reclaiming Meaning in the Practice of Law" [hereinafter "Discontents"]. Practicing lawyer Arnie Herz has, on occasion, introduced a client to nonreligious, nondenominational spiritual practices because he thought it would improve the client's mental state and assist the client in visualizing a positive future for himself of herself after the legal dispute's resolution. Talk given by Arnie Herz at Florida Coastal School of Law, Jacksonville, Florida, on October 22, 2003.

perform their work.[147] These skills include: excellent interpersonal, human relations skills; self-knowledge (or intrapersonal skills); and rudimentary psychological sophistication, or emotional intelligence.[148]

**1. Interpersonal Skills**

First, there are communications and relational skills that attorneys need in order to form and maintain working relationships with their clients, opponents, judges, and other legal personnel. These skills include empathy, advanced empathy, reflective listening, and questioning skills. Empathy is often defined as the ability to stand in another's shoes and express an understanding of the other's thoughts and feelings. Advanced empathy refers to the ability to express the implicit thoughts and feelings under the surface of the other's actions and words. For example, a person facing major surgery might express anger, frustration, and irritation with the doctors but underneath might feel afraid, worried, and mistrustful of the surgeons. Basic empathy would reflect the person's anger; advanced empathy would recognize and acknowledge the underlying fear. Advanced empathy always runs the risk of being inaccurate, as the hearer must guess at the implicit or submerged feelings of the other. Reflective listening, or active listening, refers to the ability to hear and paraphrase the facts of the other's words as well as the thoughts and feelings expressed by the other. It usually employs paraphrasing of the events as well as basic empathy (in the form of restatements of the explicit feelings expressed); it tends to result in the other feeling "heard" and understood. Questioning skills refer to the ability to distinguish between closed-ended questions (those requiring only a

[147] Personal communication with University of Missouri-Columbia law professor Leonard L. Riskin, April 6, 2003, at "Discontents," *supra* note 131.

[148] Marjorie A Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999) (providing an excellent and exhaustive review of the skills needed to practice law comprehensively); *see also* Kerper, *supra* note 2, at 371-72 (noting the importance of the theories of multiple intelligences to learning to creatively problem solve as a lawyer).

yes or no answer) and open-ended questions (those requiring an answer other than yes or no) and the ability to know when to use each type. Closed ended questions tend to focus and direct the speaker, often closing down the flow of information; open-ended questions, particularly when combined with basic empathy, tend to encourage the flow of information and elicit more from the speaker. These basic communications skills are useful in creating trusting relationships with clients, witnesses, and other lawyers or when negotiating with other parties or lawyers.

Second, to practice law comprehensively, attorneys need a minimal amount of psychological sophistication and an ability to contain and help clients maintain their emotions. They also need to know when they are in over their heads. When it is appropriate to refer a client to professional therapy or counseling, the lawyer should be prepared to make the referral and perhaps offer to personally make the call to a suitable professional (and let the client know that the professional is expecting his or her call). Therapeutically-oriented lawyers might view these situations as a psycholegal soft spot that needs to be properly addressed by the referral to professional psychological help. A second, conflicting psycholegal soft spot may then arise if the referral to therapy in some way prejudices the client's legal case, for example, by raising doubt as to the client's mental state.

One skill that lawyers particularly need is the ability to recognize and deal with individuals going through the grief process.[149] Every litigant engaging an attorney has suffered a loss of some sort. Thus, each litigant is likely to be experiencing one or more of Elizabeth Kubler-Ross' famous five stages of grief: denial, anger, bargaining, depression, and

[149] Clinical psychologist Sanford Portnoy claims that over 40% of attorney-client communications involve the clients' emotions and yet attorneys routinely dismiss the need to address clients' emotions. For example, he says there are more complaints against attorneys brought by divorce clients and personal injury clients, probably because those clients' emotions generally run high and they may displace anger onto the attorneys. Talk given by Dr. Portnoy at Touro College Law Center, April 7, 2003, "Discontents," *supra* note 131. Dr. Portnoy published these ideas in his book, SANFORD M. PORTNOY, THE FAMILY LAWYER'S GUIDE TO BUILDING SUCCESSFUL RELATIONSHIPS (2000).

acceptance.[150] Litigation can facilitate or suspend the grief process – the process of dealing with and resolving the loss that resulted in the legal problem. For example, in wrongful death actions, litigation can interrupt the process of grieving if it focuses too long on the cause of or responsibility for the death. On the other hand, litigation facilitates the grief process when it helps the survivors sort out the events leading to the death or fulfills their sense of duty to the deceased person, and is begun and concluded quickly after the death.[151]

Lawyers working with traumatized clients can help reverse the effects of trauma, using excellent interpersonal skills. For example, if the client was raped and experienced degradation and humiliation, the lawyer can provide the client with an additional measure of respect, autonomy, and control. The attorney can ask the client when and for how long she wants to talk about the event, listen well, and treat her with respect.[152] Therapeutically-oriented lawyers might well view this as a psycholegal soft spot that the lawyer can address with these restorative, relational measures.[153]

**2. Intrapersonal Skills**

In addition to the above human relations skills, lawyers also need intrapersonal skills, meaning the ability to know themselves well enough to determine when they are over- or under-reacting to a particular client, cause, or party. This is sometimes referred to as "countertransference," meaning when the lawyer's own internal feelings, experiences, biases, fears, frustrations, likes, or dislikes unduly influence or interfere with his or her work and the lawyer loses his or her ability to react neutrally and objectively to the client, cause, or party.

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[150] ELIZABETH KUBLER-ROSS, ON DEATH AND DYING 34-99 (1969) (discussing the five stages of coping in terminally ill patients).
[151] Wexler & Winick, KEY, *supra* note 6, at 452-453.
[152] *Id.*
[153] Ideas paraphrased from comments by University of Miami law professor Bruce Winick, April 7, 2003, "Discontents," *supra* note 131.

This can only be detected if the lawyer is adept at knowing himself or herself and his or her strengths and weaknesses, and can effectively evaluate and monitor his or her emotions, thoughts, and actions.

In addition, lawyers need the ability to deal effectively with such countertransference,[154] including the ability to maintain personal boundaries. Lawyers, particularly those who feel compassion and empathy for their clients, can become enmeshed with clients and their emotions. Inappropriate attachment or involvement can cause the lawyer stress, derail the lawyer-client relationship, distort the legal representation, distract the client from seeking professional psychological help, and give rise to ethical dilemmas.[155]

For example, lawyers working with clients who were sexually assaulted or abused, or clients fighting human rights violations, can be vicariously traumatized by this exposure.[156] Comprehensive lawyers may be particularly vulnerable to this secondary trauma, because they are likely to respond to these clients with understanding and empathy. Coping strategies therefore need to go beyond simple stress management; lawyers need the ability to identify, manage, and contain their own distressing emotions.[157]

### C. Implications of the Movement for Law Student and Lawyer Distress

Lawyers experience alcoholism, depression, and other forms of psychological distress and dissatisfaction at a rate of about 20%, or one in five, which is about twice the levels found in the

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[154] Marjorie A. Silver, *Love, Hate & Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 261-66 (1999).

[155] Ideas paraphrased from talk given by Yale University law professor Jean Koh Peters, April 7, 2003, "Discontents," *supra* note 131; *see also* Marjorie A. Silver et al., *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship*, 19 TOURO L. REV. 847 (2004) (detailing a panel discussion that broadly looked at the emotional competence and intelligence of lawyers and the possibilities for positive intervention in legal education).

[156] *Id.*

[157] *See* Riskin and Codiga, both *supra* note 126, and Keeva, *supra* note 127.

general population.[158] Reasons for this unduly high level of psychological distress within the legal profession are unclear. Most commentators have pointed to the long hours, the pressures of private practice, competition in the profession, and deprofessionalism. However, until 2001, the empirical research linked lawyer distress not to these factors, but instead only to feelings of hostility, marital distress, job dissatisfaction, and a lack of social support.[159]

In 2001, in a groundbreaking empirical study, Lawrence Krieger and Kannon Sheldon discovered that law student (and, presumably, lawyer) distress is associated with certain shifts in one's value system during law school. Specifically, law students were more likely to be distressed as they became progressively less oriented toward personal "growth/self acceptance, intimacy/emotional connection and community/societal contribution." Distress was also increased as students became less likely to act for interest or inherent satisfaction and "more oriented toward appearance/attractiveness" and "money/luxuries, popularity/fame" as well as more motivated to please others.[160] Thus, as law students focused less on intrinsic satisfactions and more on extrinsic rewards, they were more likely to experience a decline in their emotional wellbeing.[161] This suggests that lawyers who focus on external rewards such as money, prestige, Martindale-Hubbell ratings, and even win-loss records, may be at risk for developing distress.

The vectors of the comprehensive law movement explicitly allow lawyers to infuse a set of values into their law practice that may provide intrinsic rewards. For example, the therapeutically-oriented lawyer may feel inherent satisfaction from legal work if he or she values "doing good" for others and defines "good" as enhancing others' psychological wellbeing. The

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[158] DAICOFF, KNOW THYSELF, *supra* note 1.
[159] Beck & Sales, *supra* note 124.
[160] Lawrence S. Krieger & Kannon M. Sheldon, *Does Law School Change Law Students? Values, Motives, and Well-being in a First Year Class* (unpublished manuscript, 2001) (studying the emotional wellbeing of Florida State University law students and comparing it to that of advanced undergraduate students at the University of Missouri).
[161] *Id*. This values shift and decline in wellbeing occurred as early as the first year of law school.

collaborative lawyer may obtain inherent satisfaction from doing work that preserves and fosters harmonious relationships between divorcing spouses, knowing that those relationships will lead to a better life and better mental health for the children of the divorce. Restorative justice practitioners may experience satisfaction in seeing victims of crime achieve "closure," reconciliation, and come to terms with the crime and its effects, in seeing victims and offenders receive apology and forgiveness, respectively, and in seeing offenders experience "therapeutic shame" that effectively motivates them not to recidivate. Preventive lawyers may experience satisfaction in knowing their legal efforts helped avoid the economic and temporal waste of a lawsuit. Lawyers and judges employing the wisdom of procedural justice may appreciate the enhanced satisfaction their clients and litigants gain from a legal process that allows for voice and participation. Lawyers, judges, and other legal personnel involved in drug treatment courts have reported personal satisfaction from the success of the court's graduates in staying free from drugs and crime.[162]

Empirical research indicates that individuals who prefer the "Feeling" mode of decision-making as measured by the Myers-Briggs Type Indicator[163] are in the minority in the legal profession,[164] tend to drop out of law school,[165] and may be more prone to experience job

[162] *See* Chase & Hora, *supra* note 99.

[163] The Myers-Briggs Type Indicator is a counseling instrument used to categorize individuals into one of 16 "types," based on their preferences on four continua: Extraversion/Introversion; Sensing/Intuiting; Thinking/Feeling; and Judging/Perceiving. It was developed by Katharine Briggs and Isabel Myers and is widely used in corporate and academic settings to help people better understand the preferred approaches to life of themselves and others. There are approximately four published studies of the Myers-Briggs "types" preferred by lawyers and law students. S*ee also* Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV 201 (1999); Eric Y. Drogin, *Jurisprudent Therapy and Competency*, 28 LAW & PSYCHOL. REV. 41 (2004); Lawrence R. Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States*, 29 CAP. U. L. REV. 979 (2002); MARY H. MCCAULLEY & FRANK L. NATTER, PSYCHOLOGICAL (MYERS-BRIGGS) TYPE DIFFERENCES IN EDUCATION (1974).

[164] Daicoff, *Review, supra* note 110, at 1391-92.

[165] Paul Van R. Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460-67 (1967) (defining "Feeling" type in 1967 study and finding that almost twice as many "Feeling" types dropped out of law school as compared to "Thinking" types).

dissatisfaction as lawyers.[166] Feelers prefer "harmonizing, building relationships, pleasing people, making decisions on the basis of [their own] ... personal likes and dislikes, and being attentive to the personal needs of others" and like to avoid conflict and criticism.[167] The opposite of Feeling is Thinking; Thinkers prefer "logical analysis, principles, cool and impersonal reasoning and cost/benefit analyses" and are "more tolerant of conflict and criticism." Psychologist and lawyer Dr. Lawrence Richard, one of the leading researchers on the Myers-Briggs type of lawyers, says that the dimensions of Thinking and Feeling both represent:

> rational, valid decision-making methods. Both involve thought, and neither process is related to emotions. ...
>
> Those who prefer to make decisions on the basis of Thinking prefer to come to closure in a logical, orderly manner. They can readily discern inaccuracies and are often critical. They can easily hurt others' feelings without knowing it. They are excellent problem-solvers. They review the cause and effect of potential actions before deciding. Thinkers are often accused of being cold and somewhat calculating because their decisions do not reflect their own personal values. They focus on discovering truth, and they seek justice.
>
> Those who prefer to make decisions on the basis of Feeling apply their own personal values to make choices. They seek harmony and, therefore, are sensitive to the effect of their decisions on others. They need, and are adept at giving, praise. They are interested in the person behind the idea or the job. They seek to do what is right for themselves and other people and are interested in mercy.[168]

Feeling-type individuals are very likely to be attracted to comprehensive law approaches, because they encourage the lawyer to focus on interpersonal harmony, do what is right for others, avoid conflict and harm to others, and therapeutic, humanistic, or sanative values into his or her work. These approaches allow a Feeling-oriented lawyer to infuse his or her own personal morals and values into his or her work, assuming that the lawyer values enhanced mental wellbeing and improved interpersonal relationships. For example, restorative justice and

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[166] Richard, *supra* note 149, (Thinkers more plentiful in law; Thinking lawyers more satisfied with their jobs than Feeling lawyers).
[167] *Id.* at 1394.
[168] SUSAN J. BELL & LAWRENCE R. RICHARD, ANATOMY OF A LAWYER: PERSONALITY AND LONG-TERM CAREER SATISFACTION, IN FULL DISCLOSURE: DO YOU REALLY WANT TO BE A LAWYER? 149, 152 (Susan J. Bell ed., 2d ed.

collaborative law explicitly focus on interpersonal and relational harmony; transformative mediation may indirectly foster it as well. All three tend to avoid interpersonal conflict. Holistic justice explicitly encourages lawyers to follow their own values in determining whether to take a case and what courses of action to take in representing the client. Creative problem solving and therapeutic jurisprudence allow the lawyer to feel as if he or she is "doing good," to the extent that good is defined as optimizing one's total life situation or maximizing others' psychological wellbeing, respectively.

To the extent that Feeling-oriented lawyers and law students are likely to drop out of law, or are simply dissatisfied with their work, the comprehensive law approaches offer great promise and hope. They offer an appealing alternative to traditional law practice that does not require the lawyer to leave the profession. Instead, they actually utilize the lawyers' Feeling preference as an asset to his or her professional life, rather than marginalizing it as a detrimental or neutral feature.

## CONCLUSION

The curative potential of the comprehensive law movement for lawyers, the legal profession, clients, and society is undeniable. Despite this potential, however, there are a number of unanswered questions. For example, the typical adversarial, competitive lawyer personality may impede lawyers' efforts to practice law more comprehensively. They may resist retooling and change, feel as if they are being asked to practice psychology without the appropriate training and credentials, and worry about committing malpractice. Alternatively, they may worry that comprehensive law practice will increase the standard of care so that if they fail to practice comprehensively they will commit malpractice. Their general preference for the

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1992). Richard also notes that the Thinking/Feeling scale is the most significant personality trait for predicting

Myers-Briggs dimension of Thinking may hamper their efforts to be more empathetic, compassionate, relational, and harm-avoidant. However, research suggests that many lawyers may have had Feeling and care-oriented preferences that were silenced in law school. Comprehensive law approaches may actually encourage some lawyers to rediscover the values and preferences with which they entered law school, rather than asking them to become something they are not. Legal education must, however, retool a bit in order to effectively teach the skills, underlying theories, and approaches contained in the comprehensive law movement. A handful of law schools teach courses on comprehensive law approaches or therapeutic jurisprudence; many law schools are teaching the skills necessary for practicing comprehensive law in their clinical courses.[169]

Another concern is that comprehensive law practice may conflict with the rules of professional responsibility. A close reading of ABA Model Rules 1.2, 1.3, 1.4, and 2.1 reveals that comprehensive law practice need not violate the ethics code, as long as an open and trusting lawyer-client relationship is formed, clients are given full informed consent, the scope of representation is fully disclosed and agreed upon, and the lawyer's role as a comprehensive advisor is agreed upon. Model Rule 2.1 explicitly encourages lawyers to include extra-legal factors in their advice to clients, blessing the "rights plus" approach of the comprehensive law vectors. Lawyer must, however, be careful not to oversell comprehensive law approaches to clients simply because the lawyers themselves prefer to practice law this way. They must be sure to present fairly the traditional approaches, alongside the comprehensive law approaches, without bias, and allow the client to decide. Clients must still determine the ultimate goals of

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lawyer satisfaction, stating, "those with a preference for Feeling are swimming against the tide." Id. at 153.

representation. Lawyers and judges must also be careful not to use comprehensive law approaches paternalistically in cases where they feel that the client "really needs" psychological treatment or help but the client simply refuses it, even after full informed consent and candid advice from the lawyer. Lawyers and judges must also, as therapeutic jurisprudence directs, not allow comprehensive concerns to "trump" traditional values of due process and civil rights.

Finally, it will be interesting to see how the comprehensive law vectors will be incorporated into the existing law firm and legal profession culture. One option might be for lawyers to incorporate parts of the movement into traditional practice. They may view the comprehensive law movement as a smorgasbord of lenses and processes from which they will pick and choose, incorporating comprehensive concepts in part or in whole as additions to their existing repertoire of legal moves. This is the "toolkit" idea: that comprehensive law approaches simply add to the lawyer's existing toolkit to make the lawyer a more competitive and well-rounded professional. Another option might be for firms to create entire departments devoted to comprehensive law approaches, so that lawyers who excel at comprehensive law practice (and clients appropriate for that kind of legal work) might be funneled to those separate departments. This would allow traditional firms to retain clients that might otherwise depart for comprehensive "boutique" practices and would allow lawyers within existing firms to create forms of law practice that might be more creative and satisfying for them, without leaving the firm. Or, the comprehensive law movement's popularity might wane and it might turn out to be an experiment in the law that we as a society ultimately abandon.

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[169] For example, the author teaches Comprehensive Law Practice course at Florida Coastal School of Law, Bruce Winick teaches a similar course at the University of Miami Law School, David Wexler teaches a course on therapeutic jurisprudence at the University of Arizona School of Law.

More likely, the comprehensive law movement will remain, to color and add to our understanding of what clients and society need and require from lawyers. It will become incorporated into mainstream legal practice as part of the usual work that lawyers provide for their clients. It will help lawyers reach their full potential as solvers of legal problems and dispute resolution professionals, help legal services consumers reach their full potential as individuals and maximize the functionality of their relationships, and thereby help our society transform into the next phase of our evolution.