

The Comprehensive Law Movement: An Emerging Approach to Legal Problems

Susan Daicoff

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ABSTRACT: This article will introduce the comprehensive law movement, a synthesis of various emerging movements in the legal profession, designed to solve legal problems in ways that preserve and optimize the wellbeing of the individuals and organizations involved in legal matters. These movements include: proactive or preventive law, therapeutic jurisprudence, restorative justice, creative problem solving, collaborative law, problem solving courts, transformative mediation, procedural justice, and holistic justice. It will then briefly explore the potential effects of this growing movement on the future of the legal profession and society as a whole.*

“All legal disputes are interpersonal failures.” – Source unknown.

1 Introduction

Litigation was originally designed to resolve disputes when the usual nonlegal dispute resolution mechanisms in society failed. Instead, in today’s fast-paced, anonymous, high-tech world, people have become increasingly dependent upon litigation to resolve conflict. As a result, the world may be suffering from the effects of law’s overly adversarial, other-blaming, position-taking, and hostile approach to conflict resolution. People often believe that if something went wrong, someone else must be responsible, and so they sue. They then encounter the enormous pain and staggering costs of undergoing litigation. And they feel empty, even after a “win,” because litigation is not designed to satisfy the psychological needs of the participants to be heard and to obtain a sense that “justice” was done.¹ Perhaps as a result of these experiences, clients and lawyers alike frequently disparage the legal system.² Commentators bewail excessive aggression and greed, bordering on unethical or unprofessional behavior, among lawyers. Lawyers suffer from emotional distress at a rate about twice that found in the general population.³ Finally, clients, no longer loyal to a particular lawyer

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¹ Tyler, Tom R., *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, in Wexler, David B. & Winick, Bruce J., *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* 9-11 (1996) (reporting the results of an empirical study finding that litigants’ satisfaction depended more on three factors – participation (voice), being treated with dignity, and believing the authorities were trustworthy -- than on the win/lose outcome).

² See, e.g., Daicoff, Susan, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Beaming on Professionalism*, 46 Am. U.L.Rev. 1337 (1997); and Daicoff, Susan, *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) (both citing commentary on a “tripartite crisis” in the legal profession of deprofessionalism, low public opinion, and attorney distress).

³ Studies from 1986 to 1996 indicate that a fairly consistent 18% of lawyers exhibit clinically significant alcoholism or another substance abuse problem. This is about twice the incidence of alcoholism existing in the general population. Beck, Connie J. A., Sales, Bruce D., & Benjamin, G. Andrew H., *Lawyer Distress: Alcohol Related Concerns Among a Sample of*

or firm, have begun to seek alternatives to litigation and legal representation by lawyers.⁴

Against this backdrop, several new approaches to law and lawyering have emerged, over the last fifteen years or so.⁵ These new approaches share many features in common and have, in some instances, begun to coalesce, thus forming a growing “movement” to approach law from a humanistic, resolutionary, and nontraditional perspective. This movement consists of about ten seemingly unrelated, concurrent developments, all of which attempt to reach results for clients that optimize the clients’ goals, satisfaction, emotional and relational health, and overall wellbeing. This movement has been called “the comprehensive law movement,” for lack of a better term, although names such as transformative law, integrative law, and law as a healing profession are also sometimes used.⁶ This chapter will introduce and describe the main features of the comprehensive law movement and then conclude with a brief exploration of its potential to transform law and the legal system in a positive fashion.

2 An Overview of the Comprehensive Law Movement

This “comprehensive law” movement explicitly seeks to resolve legal matters in ways that are optimal for the individuals and entities involved in the matter, in terms of personal functioning, interpersonal relationships, wellbeing, and

Practicing Lawyers, 10 J. L. & Health 1, 18 (1995-6). Beck and her colleagues report that about 18% of attorneys are significantly depressed, while only about three to 9% of adults in Western civilized countries exhibit this level of depression (see also Gater, Richard, Tansella, Michele, Korten, Ailsa, et al., *Sex Differences in the Prevalence and Detection of Depression and Anxiety Disorders in General Health Care Settings*, 55 Archives Gen. Psychiatry 405 (1998), abstracted in *Gender, Culture, and Psychiatric Symptoms*, 15 Harv. Mental Health Letter 7 (1998) (average rate of depression was 7% in men and 12.5% in women in 14 countries studied)). Beck and her colleagues found in their study that about nine to 35% of attorneys suffer from clinically significant levels of various problems, such as: obsessive-compulsiveness (19%), anxiety (30%), paranoia (12.5%), depression (23%), hostility (8.7%), and social isolation and alienation (26.6%). See Beck, et al., *supra* this note, at 18 (Table 1). On measures of global psychological distress, about 18.5% percent of lawyers score at a clinically significant level. *Id.* (meaning that 18.5% score more than two standard deviations above the mean and above the “clinical cutoff”). They note that one would statistically expect only 2.27% of the general population to score this far above the mean. *Id.* at 4.

⁴ See, e.g., Chanen, Schachner, Jill, *The Strategic Lawyer*, American Bar Association Journal (July 2005) p. 43-47 (noting that many business clients believe lawyers are not helpful because they do not understand the client’s business, they simply “spend their time arguing about silly legal points,” and “ruin their [business] deals because they do not understand how to think and work strategically”).

⁵ This “comprehensive law movement” is more fully described in Daicoff, Susan, *Law as a Healing Profession: The “Comprehensive Law Movement,”* Pepperdine Dispute Resolution Law Journal (2005, in press) and in the final chapter of Daicoff, Susan, *Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses* (2004).

⁶ See, e.g., websites such as “www.RenaissanceLawyer.com” and “www.TransformingPractices.com”, as well as www.healingandthelaw.org, the website of the International Centre for Healing and the Law, that refer to the movement by other, various names (all websites visited on September 30, 2005).

morale. To do so, it values concerns beyond simply the legal rights and obligations of the parties. This is a “rights plus” approach.⁷ In addition, as it recognizes that litigation is one of the least optimal methods for resolving conflict, it often views litigation as a last resort. While this movement is not explicitly nonadversarial, its focus is on resolving legal matters in a way that leaves the parties in better or no worse shape, overall, than they were at the outset. It delights in creative, win/win solutions. It tries to preserve important interpersonal relationships and guards the parties’ emotional wellbeing and functioning. As a result, it often encourages nonlitigative resolution. Finally, it particularly enjoys preventing legal problems by the shrewd use of its sensitivity to matters beyond legal rights and duties, such as delicate interpersonal relationships, parties’ emotions and psychological states and parties’ needs.

Examples abound of how this approach to law and lawyering differs from a more traditional approach. Below is one:

Example. New York attorney Arnie Herz represented a large, imposing, ex-football player, “John,” in a dispute he had with the new owners of the company he had just sold, after 15 years of successful solo ownership. John was furious with the new owners’ treatment of him as an employee, post-sale, and with their mismanagement of the company. Unfortunately, he had signed a noncompete agreement as part of the sale, so he felt bound to stay working for the new owners, despite his frustration. Determined to sue the new owners for mistreatment and mismanagement, he approached Arnie.

Arnie assessed that the lawsuit could be successful, but would cost well over \$100,000 in fees and costs to litigate. John had the money and was ready to “write the check” for the entire \$100,000, but Arnie decided to slow him down just a bit. The lawyer asked, “If you could have anything you wanted in your life, what would you want your life to look like six months from now?” John said more than anything he wanted to be free of the new owners and wanted to make more money, and thought he could make a lot more money if he were free of them, but he didn’t want to let them “off the hook.” However, the lawyer’s question frustrated John and, concluding that Arnie wasn’t aggressive enough and was trying to talk him out of suing, he commented, “You are too nice. I need a tough litigator.” He then packed up and began to leave Arnie’s office.

Quickly assessing the situation, Arnie responded, “I know you think you are so tough and I am not, but the truth is that, in all my years, I think you may be the weakest person I have ever known. You’ve set out a vision of where you’d like your life to be, which was to be free of these people. You didn’t mention that you wanted to punish them, teach them a lesson, spend \$100,000 of your own money and five years of your life. What you said was that you wanted to be free of them to be able to make a lot more money on your own. What I see is that you don’t have the strength to hold on to your own vision and deal more effectively with your own anger. And I’ll bet you have been doing this all your life.” At first, John flushed red with anger towards Arnie. But something in what Arnie said rang true. He sat down and began talking and listening to Arnie. And together, they agreed on a plan of action that involved a more collaborative, nonlitigative approach to resolving the matter.

⁷ This term was coined by collaborative lawyer Pauline Tesler in a personal communication with the author at a therapeutic jurisprudence conference in Dublin, Ireland in July, 1999.

John was freed from his noncompete clause three weeks later. The new owners teetered on the edge of bankruptcy for years, so, as Arnie had predicted, even if he had sued them, he wouldn't have been able to collect anything. Free of the new owners, John was able to make a lot more money. The lawsuit and the costs, time, and emotional strain of litigation were avoided. Financially, the plan was a huge success. Personally, John later said that the process of resolving this legal matter 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, thus he gained more than a simple legal resolution to his problem; he learned from and was enriched by the experience.

However, the plan might not have worked if the lawyer had not taken a fresh approach to the client and his problem. It is just this sort of humanistic, holistic, interpersonal, collaborative approach to the lawyer-client relationship that exemplifies the new approaches of the comprehensive law movement.

Arnie's approach to representing John is one illustration of how a "comprehensive lawyer" might conduct his or her law practice. Arnie went beyond the law to ask about this client's deepest needs, goals, and desires and then used that information to create, with the client, the best strategy for proceeding. Admittedly, this lawyer took a major risk early in the lawyer-client relationship and not all comprehensive lawyers would be comfortable doing what Arnie did. Using excellent interpersonal skills, though, Arnie assessed that John was a no-nonsense person who would only respond to "hearing it straight," which he did. Litigation in this case would have only wasted time and money and fueled the client's excessive anger. The process and outcome were not only financially successful, but personally and emotionally beneficial for John.

This illustration is only one example, though. The comprehensive law movement has at least nine converging "vectors," so called because of their forward movement towards a common goal. These are: collaborative law,⁸ creative problem solving,⁹ holistic justice,¹⁰ preventive law,¹¹ problem solving

⁸ See e.g., Tesler, Pauline H., *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).

⁹ See, e.g., Cooper, James M., *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); Kerper, Janeen, *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 Barton, Thomas D., *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.

¹⁰ See, e.g., the International Alliance of Holistic Lawyers' website: "www.iah.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.

courts,¹² procedural justice,¹³ restorative justice,¹⁴ therapeutic jurisprudence,¹⁵ and transformative mediation.¹⁶

Like the members of a family, the vectors all share commonalities and yet are individually different from each other. All of the vectors intersect in two places, though. First, they seek to optimize the wellbeing of the people involved in the legal matter, whether by maximizing their emotional health, the health of their personal relationships, their moral development, or their integration into society. Second, they encourage the lawyer and client to focus on more than simply the client's legal rights and duties (or the economic bottom line). This is a "rights plus" approach, which considers matters such as the client's wishes, goals, desires, needs, resources, emotions, relationships, values, morals, and beliefs. In achieving these two goals, the vectors of the comprehensive law movement are often (but not always) nonadversarial, nonlitigative, noncompetitive, and collaborative. They are almost always creative, interdisciplinary, and intrinsically satisfying to both the lawyers and clients involved. The next section describes some differences between traditional lawyering and comprehensive lawyering, generally.

11 See, e.g., Hardaway, Robert M., *Preventive Law: Materials On A Nonadversarial Legal Process* (1997) (the "textbook" for preventive law; now in its second edition). Preventive law is related to "proactive law," a Nordic movement under the guidance and leadership of International Contract Counsel Helena Haapio.

12 E.g., drug treatment courts, mental health courts, domestic violence courts, and other specialized courts. These courts were formalized in the United States 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.

13 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 Tyler, Tom R., *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, in Wexler, David B. & Winick, Bruce J., *Law In A Therapeutic Key: Developments In Therapeutic Jurisprudence* (1996) [hereinafter KEY].

14 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: "2ssw.che.umn.edu/rjp/People/Umbreit.htm") (visited April 12, 2005).

15 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).

16 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). Note: The vectors are listed in this article in alphabetical order, not in order of importance, size, or seniority.

3 Traditional Lawyering vs. Comprehensive Lawyering

The following table was developed to distinguish collaborative law and holistic justice from traditional law, but it is an excellent comparison of traditional adversarial lawyering and comprehensive lawyering.

*Comparison of Adversarial and Collaborative Lawyering*¹⁷

<i>Adversarial</i>	<i>Collaborative</i>
Limited time for client; emphasis on getting the legal work done	Time with client central to process
Focus on legal analysis: facts, law, cases Aligns with client's view of the facts	Focus on client and other party Understands the client's inevitable coloring of the facts
Q&A of client for efficient retrieval of essential elements of case	Active listening for clear comprehension of situation: history, goals, priorities, fears
Asks close-ended questions to fit facts into legal framework	Asks open-ended questions to elicit full understanding
Views emotions and feelings as distractions from the "real work"	Views emotions and feelings as important elements of process that need to be acknowledged and appropriately managed
Supports client in his/her beliefs about others—including negative beliefs Supports client's self-concept as victim	Encourages respect for all participants Aims to foster personal responsibility
Takes directions which may arise from client's anger, fear or grief	Separates client's true interests from emotion-based impulses and reactions
May foster or disregard client's unrealistic or illusory perceptions	Counsels and challenges client to transform understanding of what is real and what is not

¹⁷ Copyright 1999 Pauline H. Tesler. This table is reprinted (with slight revision by the author) with permission of Ms. Tesler. It was adapted by her with permission from a similar comparison of "adversarial vs. holistic" lawyering by William Van Zyverden, president and founder of the International Alliance of Holistic Lawyers.

May support client's desire for revenge and undue advantage	Encourages compassion and enlightened self-interest
Insists on control over all contacts with client related to case	Values team approach, including mental health and financial professionals
Tells client what game plan is	Presents options for strategy and tactics
The law is for lawyers	Invites client to understand the law
Fears that the other professionals will compromise the lawyer's ability to "win big"	Works collaboratively with all retained professionals to achieve the overall best outcome for the client
Tries to control advice and conclusions of other professionals involved with client	Values sound input from other disciplines as aid to providing high-quality legal assistance; respects potential contribution of other disciplines in problem-solving effort
Considers the work of other professionals in the process ancillary to the main task: legal work	Considers the legal issues to be only a portion of a larger, longer and more complex process of conflict resolution between parties

4 The Vectors of the Comprehensive Law Movement

Four or five of the vectors are broad approaches to law and lawyering; these are: therapeutic jurisprudence, creative problem solving, procedural justice, preventive law, and holistic justice. The other vectors (restorative justice, collaborative law, transformative mediation, and problemsolving courts) are not only approaches to law and lawyering, but also tangible, concrete processes for resolving disputes or handling legal matters. Each of the vectors will be briefly described below.

5 Restorative Justice

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.¹⁸ This is a vibrant and stirring example of restorative justice at work. While RJ has been used more frequently with teenage offenders, as this story illustrates it is equally useful to bring healing between victims of serious crimes, their offenders, and the communities in which they live. In the United States, 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. However, in other legal systems, such as in Native American and aboriginal settings, restorative justice is used even for sentencing. These "circle sentencing conferences" are used to discuss the event, air feelings, and sentence the offender via a collaborative, community-wide process including the offender, victim, their friends and families, and their surrounding communities. Forms of RJ in the US include victim offender mediation and reparative probation programs. RJ allows the victim to ask questions, express feelings, and reach resolution about the event and allows the offender to accept appropriate personal responsibility for his or her actions, thus perhaps leading to changed behavior.

6 Transformative Mediation

Four people show up to the mediation: the mediator, the teenaged victim, Jerome, and his father, Regis, and the offender, Charles. Charles had chased and attacked Jerome and his friends several times over the past month. Fed up, Regis went after him and warned him, then pressed assault charges. Regis enters mediation visibly angry, while Charles appears undefensive, quiet, even cowed.

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 busstop to see his girlfriend, and Jerome and his friends routinely "razed" Charles as he passed. But, one day, Jerome took it a bit far with his verbal insults and Charles physically assaulted Jerome. 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. Charles explains

¹⁸ Stahura, Barbara, *Trail 'Em, Nail 'Em, and Jail 'Em: Restorative Justice, Spirituality & Health*, Spring, 2001, p. 43.

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 by focusing on 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 grew in maturity by developing and owning their own solution. TM looks a lot like traditional facilitative mediation at first, until you realize that it explicitly works towards these two goals, empowerment and recognition, instead of focusing on resolving the dispute.¹⁹

7 Collaborative Law

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 below-statutory guidelines support. 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 are 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 for the psychological and financial issues involved in Henry and Ruth's lives. Full and honest disclosure of assets and financial matters is required. Between the four-ways, the attorneys and their clients talk, the two clients may talk, and the two attorneys talk. In the four-ways, communication flows in six directions, between all members of the four-party conference.²⁰

¹⁹ Example from Bush, R. Baruch, & Folger, Joseph P., *The Promise of Mediation* (Jossey-Bass 1994).

²⁰ Example taken from training materials created by Pauline Tesler and Stuart Webb, pioneers and leaders in the collaborative law field. Training conducted for practicing attorneys in Dallas, Texas, January 6, 2000.

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, however, are the six-way communication, the parties' commitment to the process, and the attorneys' binding agreement to withdraw if the parties go to court. This feature aligns the attorneys' financial interests with 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." CL proponents maintain that this feature produces unprecedented creativity and revolutionary energy in both attorneys and clients.²¹

8 Holistic Law

Arnie Herz's approach to his client, John (described earlier), is a good example of holistic lawyering. It encompasses an understanding that the legal matter may have ramifications beyond the simple legal analysis and maximizes the intrapersonal and interpersonal potential of the dispute resolution and the lawyer-client interaction. It encourages the lawyer to utilize his or her personal moral values in his or her representation of clients. Holistic law or holistic justice is hard to define because it refers to an inclusive coalition of practicing lawyers in the United States who embody a rather diverse set of approaches to law and lawyering.²² Many view themselves as healers and peacemakers; some focus more expressly on spiritual principles. Holistic justice expressly 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."²³ Some of its practitioners see legal disputes as an opportunity for personal or spiritual growth and focus on the lessons or gifts inherent in the process of resolving the matter. Arnie Herz does not identify himself as a "holistic lawyer," but the story involving his client, John, is a good example of holistic lawyering because he elicited the client's deepest needs and goals and engaged the client in a dialogue about them which led the lawyer and client towards a legal course of action and ultimately a "good" result (on many levels).

²¹ See Tesler, Pauline H., *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (2001).

²² It is associated with the International Alliance of Holistic Lawyers, whose website is found at "www.iah.org"(visited September 30, 2005).

²³ See *id.*

9 Therapeutic Jurisprudence

Therapeutic jurisprudence (TJ) is one of the most well-known and well-established vectors of the movement. Since 1990, it has seen phenomenal growth in its application and notoriety.²⁴ TJ acknowledges that law has inescapable psychological consequences for people and it asks whether legal rules, practices, and procedures promote or harm the psychological and physical well-being of the people involved.²⁵ It then tries to maximize therapeutic results and minimize nontherapeutic effects of the law.²⁶

TJ asks lawyers to look for “psycho-legal soft spots,” which are areas “in which certain legal procedures (e.g., litigation or its alternatives), or legal interventions (e.g., filing for bankruptcy or making certain testamentary dispositions) may expectedly produce or reduce anxiety, anger, hurt feelings, and other dimensions of law-related psychological well-being.”²⁷ 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 not get “stuck” in the grief process. Domestic violence victims may need extra understanding and support, suffer from low self-esteem, and have ambivalent feelings towards the offender. A lawyer or judge who insists that the 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, one lawyer told a 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.”²⁸ Alcohol or drug dependent clients are likely to display denial, rationalization, and resistance and may 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 is quick to point out that therapeutic concerns never trump legal rights and that pursuing a particular course of action is always ultimately the client’s

²⁴ The vast literature on TJ is listed on the website of the International Network on Therapeutic Jurisprudence, which is found at “www.law.arizona.edu/depts/upr-intj” (visited September 30, 2005).

²⁵ Wexler & Winick, Key, *supra* note 14, at xvii, in part quoting Slobogin, Christopher, *Therapeutic Jurisprudence: Five Dilemmas To Ponder*, 1 Psych., Pub. Pol. & L. 193 (1995) (reprinted in Wexler & Winick, Key, *supra* note 14, at 767).

²⁶ Stolle, Dennis P., et al., *Integrating Preventive Law and Therapeutic Jurisprudence*, 34 Cal. W. L. Rev. 15 (1997).

²⁷ Wexler, David B., *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in Stolle, Dennis P., Wexler, David B., and Winick, Bruce J., *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000) p. 45, 48.

²⁸ Paradine, Kate, *The Importance of Understanding Love and Other Feelings in Survivors’ Experience of Domestic Violence*, 37 Ct. Rev. 40 (Spring 2000), p. 44.

decision. However, where two courses of action would yield the same legal result, TJ would choose the action with the better psychological outcome.

TJ recognizes the often devastating effects of protracted, costly, and adversarial litigation as a “psycho-legal soft spot” and would probably seek nonlitigation alternatives for those clients. For example, it is a well-known psychological finding that medical 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.²⁹ For this reason, a TJ defense lawyer might prefer a nonlitigated, immediate settlement of the first malpractice case to minimize the effect of this phenomenon.

In cases in which ongoing relationships are key, a nonlitigated settlement may preserve the interpersonal relationships between the parties and lead to a better overall outcome. For example, in a case in which a tenured law professor is suing his or her school for gender discrimination, the professor may expect to continue working there, post-lawsuit. A nonlitigated resolution is likely to preserve a better working relationship for employee and employer, in the future. However, there are situations in which litigation may be therapeutic (such as cases in which litigation empowers a disempowered party or increases self-esteem), therefore, TJ is not exclusively litigation-avoidant.

10 Preventive Law

Preventive law is the oldest vector, as it emerged around 50 years ago.³⁰ Like preventive medicine, it seeks to put legal structures in place to prevent lawsuits before they occur. It employs a variety of methods designed to prevent future legal problems, such as “legal check ups,” or regular audits, with lawyer and client. For example, an employment law attorney might review 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 inservice trainings, if any “legal soft spots” emerged as a result of the lawyer’s “audit.” Periodic check ups would be done with the client to intervene proactively with any troubled employee/employer situations. Preventive law assumes that a strong, collaborative bond will be

²⁹ Dauer, Edward A., et al., *Transformative Power: Medical Malpractice Mediations May Help Improve Patient Safety*, ABA Dispute Resolution, Spring 1999, p. 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.

³⁰ The preventive law textbook explains that Professor Emeritus Louis Brown (who wrote the book, *Preventive Law*, in 1950) wrote the “landmark” article, *The Practice of Preventive Law*, in 1951 and that he and Dean Emeritus Professor Edward Dauer wrote the original preventive law textbook in the late 1970s. The second edition of the textbook was published in 1997, see Hardaway, Robert M., *Preventive Law: Materials On A Nonadversarial Legal Process* (1997), p. xxxvii. The first volume of the American 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.

formed between lawyer and client in which both work together to prevent future legal problems of the client.

The merger of preventive law and therapeutic jurisprudence was proposed in the late 1990s, with the idea that preventive law's concrete lawyering methods would be of great benefit to TJ-oriented lawyers, who had a theoretical approach to lawyering, perhaps, but not a clearly defined set of techniques to implement their ideas. This merger resulted in the idea of a "psycho-legal soft spot," introduced above in the TJ discussion. This concept can be expanded to include all places where the law and the psychology of a legal matter intersect and where the lawyer can intervene to prevent future legal problems. For example, psycho-legal soft spots could include (1) legal problems that create a psychological difficulty, or (2) emotional conditions or interpersonal dynamics that create a legal problem. The first form was encountered in the TJ discussion; other examples include when an involuntary civil commitment leads to further social stigma and low self-esteem for the committed person, when litigation painfully prolongs the grief process of a wrongful death plaintiff, or when a legally appropriate accommodation in the workplace for a mentally challenged employee creates resentment among and isolation by his or her co-workers because it appears to be "special treatment" or favoritism. The second form might occur when sibling rivalry leads to a will contest, the emotional pain of rejection felt by a divorcing spouse leads him or her to engage in bitter custody disputes, or a simple failure to communicate leads to a contractual dispute. The therapeutically-oriented preventive lawyer is adept at identifying and planning around psycho-legal soft spots, particularly those in the second category, where careful legal planning and client counseling might help to avoid future litigation.

Psycho-legal soft spots can be avoided or handled either through (i) a legal strategy that improves the parties' emotional or interpersonal situation or (ii) an emotional or interpersonal strategy that avoids a legal problem. For example, the TJ-oriented family lawyer might carefully arrange the timing of the filing of a divorce petition, to avoid surprise that might lead to unnecessary interspousal conflict and thus emotional harm to the minor children. The TJ-oriented employment lawyer might propose to the client's employer that his or her coworkers be involved and engaged in the planning and design of a legal accommodation for the mentally challenged employee, to reduce resentment and lowered workplace morale that could result from the accommodation. Preventive law, again, adds to the analysis; in comparison, the TJ-oriented preventive lawyer might be able to use social science to prevent legal problems,. For example, the TJ/PL lawyer might become adept at facilitating communication between participants (lawyers and parties) at pre-litigation or pre-trial settlement conferences so as to maximize the parties' mutual understanding, cooperation, collaboration, and sense of participation and justice, because they might then be less likely to proceed to trial.

Another preventive law technique is the "rewind" method, in which the lawyer can rewind a lawsuit to ask "what could have been done differently in the lawyer's office, during the planning stages, to prevent this litigation?" This, then, informs the lawyer's work with other clients. For example, a lawyer representing a client in a will contest might rewind the case back to the moment in time when the will was being drafted, to see what legal or nonlegal moves

might have been made to prevent the current controversy. For example, suppose the will contest resulted because, of two siblings, one was left out of the will entirely and felt slighted. The lawyer drafting the will could have had the testator draft an explanatory letter or record a video explaining his or her decision to bequeath assets to one sibling and not the other (suppose one is penniless and the other quite wealthy, for example) and affirming his or her equal love and esteem for both children, in an attempt to ward off the future will contest.

Because of the sheer number of intersections of legal and emotional issues, therapeutically oriented preventive law (“TJ/PL”) and its techniques can be particularly useful for lawyers. TJ/PL provides concrete ways for lawyers to optimize the legal and emotional outcomes of legal representation and to prevent future litigation. It may even assist nonlawyers in their efforts to prevent legal problems and the need for legal representation; for example, corporate executives might utilize excellent interpersonal and communication skills with employees and vendors in order to avoid employment law or contractual disputes (respectively) that might lead to litigation against the corporation.

Finally, clients are beginning to demand preventive law, from their corporate lawyers. Corporate and business clients are avoiding lawyers who overuse litigation or function merely as technicians; they say they are seeking attorneys who are “strategic” planners, who can suggest legal moves that enhance the client’s business.³¹ For example, in a breach of contract situation, many lawyers might see no other alternative but to sue. The strategic lawyer would assess the value of the underlying business relationships and evaluate whether litigation would cause more harm to those relationships or to the client’s business than to the breaching party. In a situation where a corporate client has just unsuccessfully defended a lawsuit and been assessed punitive damages, but knows that it is facing repetitive, similar lawsuits, the strategic lawyer, like a preventive lawyer, might not focus on reversing the judgment on appeal. Instead, he or she would strategize with the client to evaluate how the original suit occurred, set up new systems for oversight, and implement external and internal public relations campaigns, to ensure that the problem did not happen again.³²

11 Procedural Justice

Procedural justice (“PJ”) refers to Tom Tyler’s social science findings that litigants’ satisfaction with the litigation process is related more to three nonmonetary factors than it is to the actual outcome (win/lose) or amount of monetary award. These are: (1) voice or participation, referring to the chance to be heard, (2) being treated with dignity by the judge, (3) and the litigant’s perception that the legal authorities (i.e., judges) are trustworthy. Interestingly, trustworthiness appears to depend in part upon whether the litigant was treated with dignity, the litigant was given a voice, and the decision maker explained the

³¹ This new breed of lawyer, the “strategic lawyer,” was profiled in a recent national bar journal, *see* Chanen, Jill Schachner, *The Strategic Lawyer*, American Bar Association Journal (June, 2005), p. 43-48.

³² *See id.* at p. 44-45.

basis for his or her decision. PJ suggests that litigation in itself is not necessarily what people want from the law; they desire nonlegal things such as voice, an opportunity to tell their story, speak their piece, and be heard, respect from the legal authorities, and an explanation of how the decision was made (if made by a third party).³³

For example, suppose a female sexual harassment plaintiff brings a lawsuit against her former employer and ultimately receives back pay and a medium-sized damage award, but is poorly treated by the judge, the attorneys, and the employer's representatives throughout the proceeding. The glow of the "win" fades substantially, if it is even present to begin with. She feels as if she was not given an opportunity to tell her story due to the restrictions placed on witness testimony, and her credibility and character were impugned during cross-examination, so she feels totally decimated afterwards, and gets the impression that the judge does not want her to speak freely either. She is likely to feel violated by the whole process rather than vindicated. PJ suggests that she will feel less satisfied, or even be unhappy, with the outcome under these circumstances, even if she wins and gets a reasonable monetary award.

These ideas are closely related to the significance of a defendant's apology, which is becoming more and more evident in the law. For example, the plaintiffs in an environmental, toxic torts case might express dissatisfaction with the financial outcome of the case, even if it settled with a reasonably large monetary amount.³⁴ They might complain to their lawyers and say, "All we wanted was an apology and for the defendant to clean up the polluted area." They did not receive a verbal apology, nor did the defendant agree to a clean-up. Even if their lawyer explains to them that money is how defendants apologize, in the law, they may not feel satisfied, vindicated, or fulfilled by this outcome. Because of procedural justice concepts, they may long for some "proceeding" or interaction other than simply a faceless check written by the defendant and delivered to their lawyers. Procedural justice is therefore a body of knowledge that comprehensive lawyers can use as a resource to inform their approaches to various client, legal problems, and conflict resolution, in ways that result in greater client satisfaction with legal process.

12 Creative Problem Solving

Creative problem solving ("CPS") refers to a broad approach to lawyering and legal problems which takes into account a wide variety of nonlegal issues and concerns and then seeks creative solutions to otherwise win/lose scenarios. One example is a situation in which the client has been sued by a neighbor who is claiming adverse possession. Analysis of legal doctrine would focus on, "was the use permissive?" "was there sufficient use of the premises to constitute ownership through adverse possession?" and may result in a legal "answer" to who is right and who is wrong. However, in CPS the analysis does not end there;

³³ Tyler in Wexler & Winick, Key, *supra* note 14, at 6-7.

³⁴ For example, this situation was portrayed in the recent film, "A Civil Action," which was based on an actual environmental lawsuit.

CPS also evaluates the needs and interests of the neighbors: is this just a case of neighbor hostility? or land acquisition? what does the client really want? what can he or she afford? what are the client's values or needs in competition with those of others involved? It then asks: what other disciplines should be consulted (such as, psychology)? how could this have been prevented or how can further problems between these neighbors be prevented? should the client sell the property, or can this be resolved through negotiation, mediation, or more informal talks? And, finally: what is the best solution here? what effects will it have and on whom?³⁵

Janeen Kerper gives an excellent illustration of the difference between straight legal analysis and a creative problem solving, broad, interdisciplinary, free-of-traditional-constraints approach. She compares and contrasts how the two approaches view the famous Palsgraf explosion-on-the-railroad-station case, taught in virtually every first-year torts class. In the case, Mrs. Palsgraf ultimately loses her personal injury lawsuit against a railroad because the court essentially draws a line in the sand beyond which a defendant is not legally liable. From a traditional perspective, the opinion is "a piece of brilliant legal reasoning," because of its elegant line-drawing; from a CPS perspective, once you know the actual situation of the plaintiff, her needs, her goals, and her resources, Kerper says it is "an example of particularly bad lawyering."³⁶

The accident had left Mrs. Palsgraf mute, thus impairing her ability to function as a single, working-class, immigrant parent. All she wanted was to be able to take care of her daughters, communicate with them, and improve her earning ability. She lost the lawsuit and ended up having to pay all of her attorney's fees and costs. Financially, she ended up poorer as a result of the lawsuit and she achieved none of her nonlegal goals. Kerper suggests that a CPS-oriented lawyer would have focused on her need for better employment, job training, and speech therapy to restore her communicative abilities, her relationships with her daughters, her need for money and social support, and the overall picture of her life, instead of simply pursuing the railroad and gambling on obtaining a judgment. A full CPS analysis would have assessed her goals, needs, resources, strengths, and weaknesses, before determining, with the client's collaboration and input, any particular course of action.

CPS proponents sometimes use the "SOLVE" acronym or method of problem solving, among others. This method relies on five steps: (1) state the problem clearly – is it single and simple, or complex and multiple? (2) observe, organize, and redefine the problem; state it in from different perspectives; list initial resources, conditions, status, goals, and constraints; (3) learn about the problem by questioning it – why solve it? ask why, when, where, how, why regarding the problem; (4) visualize possible solutions, select one, and refine it – in a brainstorming session with the client, using free association and a "no

³⁵ Example and questions from Morton, Linda, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 Cal. W. L. Rev. 375, 386-87 (1998).

³⁶ Kerper, Janeen, *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).

criticism, no judgment, no evaluation” rule; and (5) employ the situation and monitor the results of it.³⁷

13 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 have been established on TJ principles and are rapidly growing in the United States. Examples are drug treatment courts, mental health courts, domestic violence courts, and unified family courts, which focus on resolving the interpersonal issues underlying the legal problems rather than on punishing defendants or assigning fault. They take a long-term, relational, interdisciplinary, healing approach to judging. The following chart compares traditional litigation with the approach taken by these “problem solving courts.”

*A Comparison of Transformed and Traditional Court Processes*³⁸

<i>Traditional Process</i>	<i>Transformed Process</i>
Dispute resolution	Problem-solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
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

³⁷ *Id.* at 367-370.

³⁸ Warren, Roger K., *Reengineering the Court Process*, Madison, WI, Presentation to Great Lakes Court Summit, September 24-25, 1998.

Few participants and stakeholders stakeholders	Wide range of participants and stakeholders
Individualistic	Interdependent
Legalistic	Common-sensical
Formal	Informal
Efficient	Effective

14 Interplay of the Vectors

Therapeutic jurisprudence, creative problem solving, procedural justice, preventive law, and holistic justice are all broad, theory-rich vectors, each of which could form an “umbrella” discipline for the comprehensive law movement. They overlap and in some cases seem quite similar. In contrast, the concrete, process-oriented vectors (restorative justice, collaborative law, transformative mediation, preventive law techniques, and problemsolving courts) are simultaneously an approach to law and a method for resolving conflicts. Yet they might easily be utilized by lawyers operating from a TJ, CPS, preventive, or holistic perspective.

For example, a TJ-oriented, holistic, or CPS lawyer might choose a collaborative law, restorative justice, or transformative mediation process or a preventive law technique in a particular case, to achieve the client’s ends. Further, each of the process-oriented vectors (such as CL, TM, RJ) can be viewed from a TJ (is this process therapeutic or not? how could it be made so?), holistic (how does this process take into account the healing of the client and lawyer?), procedural justice (how will this process affect the participants psychologically?), or CPS perspective (does this process allow for the broadest, most creative approach to solving the problem?). As the comprehensive law movement grows and develops, it is likely that the vectors will continue to coalesce into a more cohesive approach to law and lawyering. An alternative possibility is that all the vectors will become standard practice for all lawyers, not just those seeking a fresh approach to legal representation, and thereby become subsumed in a new standard of legal care.

15 Implementation

A note of caution might be appropriate, as lawyers begin to incorporate comprehensive approaches into their work. The comprehensive law movement does not require lawyers to be collaborative, nonadversarial, “nice,” or constantly psychologically-minded. Comprehensive lawyer do not always suggest collaborative dispute resolution processes because, for some clients, hardball litigation is either the most therapeutic strategy or the only way for

them to achieve their truest personal and legal goals. Also, comprehensive lawyers need to be able to threaten (and provide) vigorous representation, often in order to bring a recalcitrant opponent to the table. We need to be proficient at traditional approaches in order to successfully practice comprehensive ones.

Second, comprehensive lawyers are not asked to become psychologists; instead they are skilled questioners and good listeners and they know when to refer clients to, and how to collaborate with, psychologists and other mental health professionals.

Third, comprehensive lawyers are still bound by the ethics rules to allow the client to determine the ultimate goals of representation. The lawyer does not tell the client what to do or how to feel; instead, the lawyer elicits from the client his or her true long-term goals using excellent communication skills and then works within the lawyer-client team to develop ways to achieve those goals. The client has the final say as to which approach to pursue, in resolving his or her legal matter. However, with comprehensive lawyering, the client is more likely to make this decision with full knowledge of all of the consequences of potential legal actions, including the emotional, developmental, relational, moral, and spiritual (if applicable) effects, as well as the legal and economic results.

Finally, the comprehensive lawyer is careful not to suggest a collaborative approach to a legal matter mainly because he or she is inherently uncomfortable with confrontation or conflict. The lawyers who are proficient in this way of practicing law report no loss of income and a great increase in their own and their clients' satisfaction with their work. If, however, the lawyer stubbornly refuses to listen to and engage in dialogue with his or her clients and routinely persuades his or her clients to abandon litigation and utilize cooperative dispute resolution processes, that lawyer is likely to lose credibility, clients, and income. That lawyer has indeed become paternalistic and rigid. He or she has perverted and collapsed the comprehensive law movement into a one-size-fits-all nonadversarial collaboration, which is not its goal.

16 Conclusion

Lawyers who were trained to practice law in the traditional manner may require additional training in order to develop proficiency in practicing the comprehensive law approaches. The skills necessary to practice comprehensive law often are a bit different from those emphasized in the training and personality of lawyers.³⁹ Trainings are regularly available in collaborative law, restorative justice, and transformative mediation through their individual websites. Conferences on therapeutic jurisprudence, preventive law, holistic justice, and creative problem solving are typically available annually. Lawyer groups, such as Renaissance Lawyer and the International Alliance of Holistic Lawyers, provide clearing houses to network lawyers together and disseminate

³⁹ See, e.g., Daicoff, Susan, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U.L.REV. 1337 (1997) (regarding typical lawyer personality traits and the effects of legal education).

information about trainings and coaching in the comprehensive law movement generally (“www.renaissancelawyer.com/”).

The comprehensive law movement may be part of the answer for the malaise infecting the legal profession and, some say, for the ills affecting society as a whole. If the growth of its “vectors” since 1990 is any indication, its approach is well overdue and sorely needed. At its best, the comprehensive law movement offers approaches to resolving conflicts and legal matters that help, not harm, people, relationships, and society and ultimately provides a new model for lawyering and conflict resolution. At the least, it simply offers lawyers more tools for their toolkits. Either way, it appears to be a development that is sorely needed in the legal profession and for society in general, with a vast potential to transform law and society for good.