


April 2015

# The Comprehensive Law Movement

Susan Daicoff

Follow this and additional works at: <http://digitalcommons.tourolaw.edu/lawreview>

 Part of the [Legal Education Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

---

## Recommended Citation

Daicoff, Susan (2015) "The Comprehensive Law Movement," *Touro Law Review*: Vol. 19: No. 4, Article 4.  
Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol19/iss4/4>

This *Lawyering and its Discontents* is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in *Touro Law Review* by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [ASchwartz@tourolaw.edu](mailto:ASchwartz@tourolaw.edu).

---

# The Comprehensive Law Movement

**Cover Page Footnote**

19-4

# THE COMPREHENSIVE LAW MOVEMENT

*Susan Daicoff<sup>1</sup>*

## INTRODUCTION

I have done a lot of work on lawyer personality and lawyer distress and dissatisfaction in the legal profession, but I promised I wouldn't talk about that today, that I would only talk about the comprehensive law movement. The first thing I want to say is, welcome to my dream. You are in the middle of a dream come true which started about five years ago when we were sitting at a therapeutic jurisprudence conference. It was David Wexler, Bruce Winick, some others, and me. It was then that I first thought, "This is a movement, there is a bigger movement here, there are these vectors, and we are all moving toward the same direction, and this is really exciting." There was talk about maybe having a series of conferences or summits and getting all of these vectors together, all of these people together. And the next piece of the dream was to start talking to practicing lawyers who are

---

<sup>1</sup> J.D., University of Florida; L.L.M., New York University; M.S., Clinical Psychology, University of Central Florida. Ms. Daicoff is an Associate Professor of Law at Florida Coastal School of Law in Jacksonville, Florida. She has taught contracts, jurisprudence, law and psychology, corporate taxation, partnership, taxation, the taxation of mergers and acquisitions, and commercial law. Since 1995, she has been researching and writing in the areas of the psychology of lawyers, lawyer personality, lawyer distress and dissatisfaction, the legal profession, professionalism, and ethical decision-making by lawyers. She is also the immediate past chair of the Law and Mental Disability Section of the Association of American Law Schools.

discontented and talk about the options and explain that maybe there is an alternative. And look at all of you, you are all here, so welcome to my dream.

## LAWYER PERSONALITY, DISTRESS, AND DISSATISFACTION

I wanted to respond to a few things discussed earlier this morning. I looked at about forty years worth of empirical research on lawyer personality. The first thing I wanted to say is that a lot of things we've talked about this morning and throughout this whole conference were all happening fifteen or twenty years ago in the legal profession and nobody could talk about it. When I left private legal practice the first time – I left a couple of times – but in 1988 or so, or 1989 when the stock market crashed and our securities practice dried up, I had people calling me and asking how I had done it and what I was going to do now. It was like going undercover; we couldn't talk about how we felt. And here are all of you, willing to talk about it and answer a questionnaire without shredding it; it is amazing, so I am really encouraged by that.

What I think I found in the empirical research<sup>2</sup> are eight traits that describe lawyers, traits that distinguish us from non-

---

<sup>2</sup> Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000).

2004]            *COMPREHENSIVE LAW MOVEMENT*            827

lawyers. And some of the things we talked about this morning, I propose to you, were results of some deeply-ingrained personality traits that we have before we ever come to law school. They flourish and are encouraged in law school, and then the profession feeds on itself. For instance, when I left the practice of law for the second time to become a law professor, I was just as driven, just as competitive, just as obsessive-compulsive, just as nuts as a law professor as I was as a lawyer. When I had my first baby, I was lying in the hospital on the cell phone calling the law school saying, "I won't be making class tonight, but I will be teaching a three-hour class next Monday." At that point, everybody said, "Oh, you are crazy, you need to go home." But that is not what I heard, and that is not what I saw on their faces. It wasn't, "You crazy person, you are pushing the limits"; it was, "Wow, we are so proud of you for being such a trooper; you are so great, you can drop a baby and a week later you can come back and teach." That is what the profession rewards me for; it feeds on these personality traits.

I think we are driven; we are a group of driven people. We are competitive; we need achievement. We tend to work hard when we are under stress. We tend to become more aggressive when we are under stress. I think we are perfectionistic, and we have a difficult time letting go. We tend to be overly responsible. It really translates psychologically into having a little bit of trouble with boundaries, which I think we talked about. And I think we

are a little bit antisocial, we think we are above the law. It is true; we think it doesn't apply to us. That tends to isolate us.

The other thing is that we discovered that law student distress is associated with being focused on defining success as based on external rewards.<sup>3</sup> So, when Howard Lesnik talked about that gold star on his shoulder, I just burst out laughing. That is us; show me the money, show me how to win. We focus on the economic bottom line, and we are so competitive. We define success by external rewards, and the profession encourages that. We discovered in law students that this focus is associated with mental distress and psychological dysfunction.<sup>4</sup>

---

<sup>3</sup> See 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, 122 (2002) providing:

Assuming that the legal "success" paradigm is, indeed, largely defined by grades, external recognition, and money or position, these inherently competitive goals, values, and motives will promote tension and insecurity and will minimize satisfaction and well-being in the lives of many law students and lawyers. At the same time, this cycle of inherently unfulfilling activity supplants the intrinsic drive for growth, actualization, intimacy, and community, thereby exacerbating the negative effects on well-being. Anxiety or depression is likely to manifest because, regardless of one's level of success within this paradigm, one will not experience internal satisfaction.

See also Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1418 (1997) explaining:

[L]aw students equate self-worth with achievement, to the extent that self-esteem depends entirely on continual successes, a less-than-average academic performance equates with personal worthlessness. The law school experience itself frustrates individuals' need for achievement, since formerly top students in college may now be average students in law school.

<sup>4</sup> See Daicoff, *supra* note 3, at 1377.

The questions people are starting to ask are: Should we change these personality traits? Can we change our definition of success? Can we redefine success away from external rewards towards internal satisfactions, internal rewards? I don't think we are asking ourselves to expand the role of lawyer, but I think we are saying to redefine success, redefine the role of lawyer, and quit focusing so much on the external win/lose because that is where we experience "helplessness." But can we? I don't know. I am just asking the questions because I am a researcher. Can we redefine success in a way that works so we are not feeling helpless and frustrated? It is hard to change. I am having a really hard time changing the driven part of my personality; it is very difficult.

Okay, that was just the fun part about the lawyer personality. When I present this to law students, especially law students, I say, if you relate to this and you have all of these personality traits, you are in the right place. If you don't relate to this, maybe it explains why you feel like you are swimming upstream.

## **PRECURSORS AND PROPELLERS**

We talked this morning about the discontent in the legal profession. But, there are other neat academic kinds of philosophical underpinnings as to why now, what else is propelling the movement besides dissatisfaction? And one is what Professor

Tom Barton calls Post Enlightenment values.<sup>5</sup> This is the idea that over the last few years or so, people have started to suggest that maybe we are all in this together. And lately, I think we realize that if I hurt you, it might ultimately affect me – if I hurt the ozone layer over here it is going to harm your environment across the globe; or that we are all in this together, and that maybe community and getting along with each other should be the focus. Now, that is hard to say in these times, isn't it? But, this connectedness with other people is emerging as something we should begin to consider or look at, instead of simply working to maximize our individual happiness at the expense of everyone else's. The other propeller is that there seems to be a greater emphasis on human growth and development. We are willing to talk about ways to maximize and optimize our well-being, our happiness, and that of others. Maybe these are some of the things that are emerging to propel the movement forward.

I also want to say that there was an earlier movement that Howard Lesnik is associated with: humanism in the law.<sup>6</sup> It

---

<sup>5</sup> Thomas D. Barton, *Troublesome Connections: The Law and Post Enlightenment Culture*, 47 EMORY L.J. 163 (1998) (noting “the shift in society and law from an Enlightenment philosophy acknowledging relationships, connectedness and community.”). “Recently, however, signs of a ‘Post-Enlightenment’ era abound throughout American culture. With its coming, the concepts of separation – both intellectual and social – are eroding in favor of the long-subordinated notions of connection.” *Id.* at 163-64.

<sup>6</sup> See generally ELIZABETH DVORKIN ET AL., *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981) explaining:

The goal of this perspective is not to replace the traditional strengths of the profession but to include them in a larger context. For example, the point is not that concern with human aspirations and values should replace technical mastery and analytic rigor.



flourished in the 1970's, and then maybe sort of sat for a while in the go-go 1980's when everyone wanted to make money. I think we are seeing a resurgence of humanistic kinds of values.

Well, about five years ago, I was at a therapeutic jurisprudence conference where David Wexler and Bruce Winick had brought a lot of vectors together with therapeutic jurisprudence because they had seen some connections. All of us seemed to be moving toward the same goals, and people questioned what those goals were and whether they were all the same. Professor Winick said to me: "They are not really all the same, Susan. What they really are is a family." And so, he explained that these are all movements that have developed in the last ten or fifteen years all around the country, and sometimes around the world, and they all have some similarities. They have some family resemblances, just like members of a family look alike; but, they are very distinctive, very individual, and very unique. They retain their individuality and their separateness and distinctness while bearing family resemblances to each other.

---

**What is needed is a way of bringing together mastery with aspiration, intellect with experience, rigor with value, pragmatism with idealism, competence and skill with caring and a sense of meaning.**

## COMMON GROUND

So, if I could, I am going to move to the family resemblances for a moment and then describe the different vectors. One thing they all seem to have in common is that, unlike traditional law, the thing that they work toward is optimizing human well-being.

Therapeutic jurisprudence attempts to optimize people's mental health; was there a psychological condition?<sup>7</sup> Collaborative law,<sup>8</sup> a vector in the divorce area, may optimize mental health but may also optimize human relationships, how people get along with each other.<sup>9</sup> Restorative justice,<sup>10</sup> a vector in the criminal area,

---

<sup>7</sup> Daicoff, *supra* note 2, at 471-73.

<sup>8</sup> See Joanne Legomsky, *Collaborative Practices Ease Divorce Pangs; New Field Less Lucrative, More Rewarding*, CRAIN'S NEW YORK BUSINESS, Sept. 22, 2003, at 31 explaining:

Collaborative lawyers seek to avoid the high costs and emotional damage associated with traditional divorces by resolving legal disputes without litigation or the threat of litigation. Each party retains a specially trained attorney, and the lawyers and clients sign a binding agreement disqualifying the lawyers from representing the clients if collaboration breaks down. In New York, as in most states, collaborative law is confined to matrimonial law.

<sup>9</sup> Jennifer Mathieu, *Divorce Over Easy: Collaborative Divorce Promises to be Kinder, Faster, Cheaper -- But Does it Really Work?*, HOUSTON PRESS, Aug. 29, 2002, available at <http://www.houstonpress.com/issues/2002-08-29/feature.html/1/index.html> (last visited Dec. 22, 2003) (discussing collaborative divorce, an alternative method to dispute resolution in which the couple controls the negotiations and counsel assist when necessary).

<sup>10</sup> See Leland Rueb, *Justice Must Restore Community*, ST. CLOUD TIMES, Sept. 9, 2003, at 5B noting:

Restorative justice is not an escape from responsibility, and it is not a ready replacement for the current criminal justice system. Restorative justice is not revenge, and it is not mediation or plea-bargaining. Restorative justice is worthy of serious consideration as an alternative or supplement to the

includes victim-offender mediation, which is probably the most common form of restorative justice. It is very often used in teen court with juveniles.<sup>11</sup> With restorative justice, you might be optimizing a victim-offender relationship, or the victim's and offender's relationships to the community. Or, you might be optimizing the offender's sense of responsibility.

They all optimize human well-being as a broadly defined term, as opposed to maximizing individual legal rights, as opposed to saying what is right, what is wrong, who has the duties, who has the legal obligations, who is supposed to pay here, who is supposed to go to jail, or who is supposed to do whatever, and let's make sure that happens. They move toward a different goal as well as maximizing legal rights. So, we are not denigrating legal rights. We are not saying forget your rights. We are saying, if there are two ways we can maximize your legal rights and do what we normally do as lawyers, and, if one way optimizes your well-being and one way either doesn't optimize or is actually destructive to your emotional mental health, then let's do it in the way that optimizes human well-being; let's do it in that fashion.

---

existing system. Restorative justice involves interaction between community stakeholders and a perpetrator. A compact or signed agreement is reached and follow-up is supervised by the community.

<sup>11</sup> Elizabeth R. Kosier, *Mediation in Nebraska: An Innovative Past, a Spirited Present, and a Provocative Future*, 31 CREIGHTON L. REV. 183, 198 (1997) ("Since 1991, county attorneys, juvenile probation offices, and juvenile court judges have given some recognition of the value of juvenile victim-offender mediation and other restorative justice measures within juvenile justice systems.").

The second family resemblance is that the vectors focus on extralegal concerns, what is called “rights plus.”<sup>12</sup> Let's look at legal rights, but let's also consider other factors: let's look at people's emotions, their needs, their values, their goals, their spirituality, their resources, their connections to the community, and their relationships with other people. Let's look at something more than legal rights as we form a solution for the client and for the legal problem.

The question arises regarding whose decision it is – the lawyer's or the client's. All of the vectors would say if you are going to optimize human well-being and look at rights plus, you are going to do that with the client making the decision. You'll say, “We can do it the traditional way and this is probably the result, or we can do it this way and this might be the result; but, if we do it this way perhaps we might achieve a better result for you emotionally, or psychologically, or within your community in the end.” And, the choice is up to the client. The lawyer is not going to force a choice down his or her throat; it is up to the client to decide how he or she wants to proceed. The practicing lawyers that I know that practice comprehensively, or therapeutically-oriented practicing lawyers, have all said that they do this. They are very explicit with the client up front about how they practice and allow the client the ultimate choice.

---

<sup>12</sup> Jean Hellwege, *'Comprehensive Law' Makes the Case for a Kinder, Gentler Law Practice*, 39-APR JTLATRIAL 12 (2003) (“Loosely defined [rights plus] means expanding the scope of traditional legal practice beyond clients' legal rights and responsibilities.”).

There are some potential sub-intersections of the vectors. Not all of the vectors are therapeutic, not all of them are non-adversarial, and some of them are adversarial. Sometimes it is quite therapeutic to be adversarial with someone because they will not listen any other way. One of my friends who is a practicing lawyer in Dallas, John McShane, has a wonderful story about playing really hardball litigation with somebody to get them to pay attention. Once they are paying attention and they are willing to be a little bit more malleable, then he says, "Fine, we can do it this way, which is going to be more painful for you, or we can do it in another process." He has had some success using this technique to encourage opponents to engage in a more therapeutic process.

## **ORGANIZATIONAL CHART OF THE VECTORS**

Let me go to this organizational chart.<sup>13</sup> This is how I want to present the vectors. This is a work in progress, too. If I had more space, I would organize the vectors into lenses, processes, and skills. One of the things that I am starting to realize is that not only are there ways of looking at practicing law (lenses) and the processes that we use for conflict resolution and resolving a legal dispute (processes), but there are also lawyering skills that we have to learn in order to practice comprehensively (skills). And, it is not as simple as just going to the library and finding a case and trying

---

<sup>13</sup> See Daicoff, *supra* note 2, at 488.

it; we require new kinds of skills. There are comprehensive law skills that are just emerging, like mindfulness meditation for example. Mindfulness meditation<sup>14</sup> is one of these skills, as well as perhaps psychological sophistication, communication skills, and self-awareness.

So, there are really three layers to the comprehensive law movement: lenses, processes, and skills. I suppose I called the disciplines “vectors” because I was a math major and I thought they were moving toward a common goal, and a vector to me is a line that starts here and goes there. So, they are all vectors because they are all moving toward these common goals of optimizing human well-being and considering rights plus. I realize that some of them are lenses: ways of looking at the world, ways of looking at practice, ways of looking at my work as a lawyer or my work with my clients. Some of them are really concrete, tangible processes that we can train and show people how they are done. The third level is the skills.

---

<sup>14</sup> Leonard R. 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). Mindfulness meditation is “also known as insight or Vipassana meditation” and derives from Buddhist practices. *Id.* at 3. “In mindfulness meditation, a person seeks to develop ‘bare attention,’ or presence, i.e., to notice, without judging and with equanimity, whatever passes through her awareness — bodily sensations, emotions, sounds and thoughts.” *Id.* at 23.

*The Vectors*

**Therapeutic jurisprudence** concentrates on the law's impact on people's emotional lives and psychological well-being.<sup>15</sup> It is a perspective that regards the rules of law, legal procedures and legal actors as a social force that often produces, like it or not, therapeutic or anti-therapeutic consequences.<sup>16</sup> It doesn't suggest that therapeutic concerns are more important than other concerns, such as rights, but it says the law's role as a potential therapeutic or counter-therapeutic agent should be recognized.<sup>17</sup> Therefore, therapeutic jurisprudence is going to say: let's look at these processes and rules that we have available to us and ask whether they are therapeutic or not.

**Procedural justice**<sup>18</sup> is more of an academic, empirical vector. It looks at litigant satisfaction, based on social science research that showed that litigants' satisfaction had less to do with whether they won or lost and more to do with whether they were heard, whether they had a voice, whether they were treated with respect, and whether they respected the authorities who made

---

<sup>15</sup> Daicoff, *supra* note 2, at 471.

<sup>16</sup> Daicoff, *supra* note 2, at 471.

<sup>17</sup> Daicoff, *supra* note 2, at 471.

<sup>18</sup> Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, in *LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 3* (David B. Wexler & Bruce J. Winick, eds., 1996). See also Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 506 (2003) (discussing the argument that empirical psychological research into the idea of procedural justice shows that litigants are less likely to be dissatisfied with adverse outcomes in litigation if they personally participate in the legal process and have the chance to be heard; additionally, such litigants feel they were treated fairly).

decisions over them in the process.<sup>19</sup> So, procedural justice would say we care less about winning or losing, we care more about the process people are put through and how they are treated in that process.

**Holistic justice**<sup>20</sup> is a little bit more nebulous. It is based on a group of practicing attorneys that have banded together; it is not an academic discipline at all. But, their perspective focuses more on peacemaking, peace building values, spiritual values perhaps, and holistic legal practice. **Creative problem solving** is also sort of not necessarily therapeutic, but creative problem solving would say: given the legal problem, what is the most creative or broad-based approach we could take to this?<sup>21</sup>

Those are the “lenses” through which you could view different legal processes. So, four of the vectors, therapeutic jurisprudence, procedural justice, holistic justice, and creative problem solving, might be thought of as lenses or perspectives. They are different, but they are all a bit similar in the sense of family resemblances. The more process-oriented vectors are:

---

<sup>19</sup> Tyler, *supra* note 18, at 3.

<sup>20</sup> Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 283 (2003) (“The idea of holistic lawyering . . . suggests that legal practitioners should be client-centered in their approach, viewing their responsibilities as not just solving issues of law but also helping address the various problems (both legal and nonlegal) that have contributed to their client's troubles.”).

<sup>21</sup> Thomas D. Barton, *Conceiving the Law as a Creative Problem Solver: Introduction*, 34 CAL. W. L. REV. 267 (1998) (advancing reasons why law schools should serve as “the training ground for creative problem solving. . .”).



preventive law,<sup>22</sup> collaborative law,<sup>23</sup> restorative justice,<sup>24</sup> and problem solving courts.<sup>25</sup>

**Preventive law** has been around for a really long time; it is probably the oldest vector that we have. And preventive law, obviously, like preventive medicine, says let's intervene in legal problems before they become problems; let's set things up ahead of time so we don't have a lawsuit down the road.<sup>26</sup> A lot of commentators have said this is just good lawyering, it is not new. Recently, preventive law was integrated into therapeutic jurisprudence. The therapeutic jurisprudence perspective found in

---

<sup>22</sup> Symposium, *Preventive Law: A Strategy for Local Governments in the Nineties*, 44 SYRACUSE L. REV. 957, 958 (1993). Preventive law seeks to “minimize the risk of litigation or to secure more certainty as to legal rights and duties” by reducing or avoiding potential litigation. *Id.* See generally ROBERT M. HARDAWAY, PREVENTATIVE LAW MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS (1997).

<sup>23</sup> See *supra* text accompanying note 8. See generally PAULINE H. TESLER, ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (2001).

<sup>24</sup> See *supra* text accompanying note 10. See generally MARK UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION (1994).

<sup>25</sup> See Peggy Fulton Hora et al., *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, 448-49 (1999) explaining:

[Problem solving courts, such as drug treatment courts] are a recent phenomena within our criminal justice system. The emergence of these new courts reflects the growing recognition on the part of judges, prosecutors, and defense counsel that the traditional criminal justice methods of incarceration, probation, or supervised parole have not stemmed the tide of drug use among criminals and drug-related crimes in America.

<sup>26</sup> David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work*, 89-MAY A.B.A. J. 54, 56 (2003) (stating that preventative law, “which developed as a careful approach to client interviewing and counseling, seeking to anticipate and to avoid potential legal problems” by emphasizing certain legal procedures, i.e., periodic legal check-ups, has given therapeutic jurisprudence “practical law office procedures and client counseling approaches”). See generally HARDAWAY, *supra* note 22.

preventive law a set of processes and procedures such as sitting down with your client and saying: let's have a legal checkup; let's go through and see what your situation at your company looks like; let's put things in place so you don't have a lawsuit down the way. So, preventive law is a lens and also contains actual concrete things lawyers do with their clients.

**Collaborative law**, as I said, is a nonlitigative process in the divorce area where the two lawyers and the two clients, divorcing spouses, sit down in a series of four-way conferences and resolve the divorce.<sup>27</sup> It is different from mediation. The lawyers withdraw from representation should the case go to trial so that if it ends up in court, the lawyers are not allowed to continue into the trial.<sup>28</sup> What Pauline Tesler and Stu Webb explain is that this feature aligns the lawyer's incentives with the client's incentives to settle and resolve the problem. The lawyers don't win either way and, combined with its emphasis on creative resolution by the clients, collaborative law changes the process.

**Restorative justice** focuses more on reconciliation or restoration of the offender and the victim, or the offender with the community, than it does on punishment. It has even spread to Jacksonville, Florida, where I am from.<sup>29</sup> The widespread use of

---

<sup>27</sup> See generally TESLER, *supra* note 23.

<sup>28</sup> See generally TESLER, *supra* note 23.

<sup>29</sup> Jill King Greenwood, *Neighbors Help Turn Juveniles Around*, TAMPA TRIBUNE, April 26, 2003, available at 2003 WL 4590422. As applied to juvenile justice, “[r]estorative justice is what law enforcement agencies call initiatives that help neighborhoods take responsibility for the successes and failures of their own youth.” In the usual case, youths under the age of eighteen who commit non-violent crimes are given the choice of appearing before either

restorative justice in the American juvenile justice system is surprising.

**Transformative mediation**<sup>30</sup> is a form of mediation that focuses more on the process than on the outcome; it focuses more on the moral growth of the individuals involved. So, it seeks through the process of mediation to have people actually grow, I would say psychologically, but, I think the founders of it would say morally, so that each party has a better understanding of the other person. Optimally, they are able to put themselves in the other person's shoes at the end of the process, and they are empowered themselves, so they grow morally or even spiritually as they go through the process. It is just a very different way of looking at mediation.

---

the court or an "accountability board." The boards are comprised of community residents and victims who are encouraged to attend board hearings. After the board considers the youth's offense and family and school reports about the youth, the offender and victim work with the board to draw up a contract whereby the youth makes restitution to the victim and the community. If the youthful offender keeps his part of the bargain, the youth's record is "wiped clean." *Id.*

<sup>30</sup> See Daicoff, *supra* note 2, stating that:

Transformative mediation is a newer form of mediation that emerged around 1994. It sees mediation as an opportunity for the parties to learn how to resolve disputes more effectively. It explicitly seeks to change the parties in the mediation process to improve their conflict resolution abilities so that they can resolve future disputes themselves, without help. In this process, the procedure and the players are dynamic. The process is not viewed as a one-shot, static event accomplishing the resolution of simply one dispute. Instead, parties are moved towards effective, continuing relationships with each other.

*Id.* at 479.

And then, finally, there are the **problem solving courts**.<sup>31</sup> This is really the most exciting vector, I think. Therapeutic jurisprudence started as an academic discipline from the law and mental health perspective looking at the therapeutic or anti-therapeutic consequences of law and legal processes and what we did as lawyers. However, the courts have glommed onto therapeutic jurisprudence, and it is absolutely wonderful what the judges have done with it.

Examples of problem solving courts include drug treatment courts,<sup>32</sup> mental health courts,<sup>33</sup> domestic violence courts,<sup>34</sup> unified

---

<sup>31</sup> Derek A. Denckla, *Forgiveness as a Problem Solving Tool in the Courts: A Brief Response to the Panel on Forgiveness in Criminal Law*, 27 FORDHAM URB. L.J. 1613, 1615 (2000). Problem-solving courts developed to address the “significant non-legal problems that arise along with the legal issues in a given case.” Problem-solving courts do not utilize particular law or jurisprudence theories; rather, they “tend to use whatever works, borrowing from many new approaches that have surfaced over the years.” Problem-solving courts enable courts to become “results driven and outcome-oriented.” Even though individual problem solving courts serve different needs, they share common characteristics:

- (1) an expanded scope of non-legal issues are presented to the court;
- (2) the use of judicial authority to solve both legal and non-legal problems that arise from an individual’s case;
- (3) the consideration of outcomes that go beyond merely applying the law, such as increased sobriety for addicts;
- (4) increased collaboration between government and non-government partners to help achieve shared goals; and
- (5) the modification of traditional rules by casting judges and attorneys in new roles.

See also Hora, *supra* note 25; William G. Schma, *Therapeutic Jurisprudence: Recognizing Law as One of the Healing Arts*, 82-JAN Mich. B.J. 25; Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055 (2003).

<sup>32</sup> Arthur J. Lurigio et al., *Therapeutic Jurisprudence in Action: Specialized Courts for the Mentally Ill*, 84 JUDICATURE 184 (2001) (tracing the history of drug treatment courts and explaining their function in “expedit[ing] case processing, intensive case monitoring, drug testing, outpatient treatment, and

family courts,<sup>35</sup> and specialized courts where the judges have specialized knowledge about the particular area that they are working in. Instead of just disposing of the case, often these

---

support services (e.g., job skills), combining any and all of these options and often operating in conjunction with probation supervision and services.”)

<sup>33</sup> *Id.* at 185. Broward County, Florida put the nation’s first mental health court into operation in 1997 as a “specialized court dedicated to handling [persons with serious mental illnesses] accused of nonviolent, low level misdemeanor offenses, excluding driving under the influence and domestic violence crimes.” Initially, defendants are evaluated for competency, and if necessary, have their mental health “restored” through inpatient or outpatient treatment so that they can “comprehend and meaningfully participate in the legal process.” After a review hearing, a mental health team formulates a treatment plan for defendants accepted into the court’s program. Mental health courts are “staffed by a judge, state’s attorney, public defender, and court monitor; all of them have received extensive training in mental health issues and are assigned to the court on a permanent basis.” *Id.* at 186.

<sup>34</sup> Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33 (2000).

A specialized domestic violence court is an integrated system that can handle both civil protection orders and criminal domestic violence cases. In addition to its ability to allow for integrated adjudication of all issues related to the domestic violence occurring in a victim’s environment, the court can address domestic violence from a community-wide perspective by incorporating into the judicial process referrals for counseling, batterers’ intervention treatment programs, substance abuse programs, and other resources for victims, their batterers, and their families.

*Id.* Such a “multidisciplinary, comprehensive approach designed to promote both the rehabilitation of abusers and to assist victims to receive necessary services, can be seen as reflecting the principles of therapeutic jurisprudence.” *Id.* at 39.

<sup>35</sup> Symposium, *What Works and What Does Not*, 29 FORDHAM URB. L.J. 1929, 1944 (2002). Although there is no consensus on the meaning of “unified family court,” such problem-solving courts have identifiable strands of commonality. A unified family court is a “single court system with comprehensive subject matter jurisdiction,” including “everything related to family law matters: domestic violence, juvenile delinquency, child abuse and neglect, divorce, custody, child support, the full range of family proceedings, including some inter-family offenses.” A unified family court system deals with legal, social, and emotional issues through “holistic treatment” by programs tailored to individual family needs by specially trained judges. *Id.*

judges have ongoing relationships with the people before them, especially in treatment courts. They know a lot about drug addiction and alcohol addiction. They know a lot about relapse and different treatments; they monitor the treatment if that is appropriate. Problem-solving courts have gained enormous recognition; they are really popular and they seem to be effective.<sup>36</sup>

So, my other dream is that lawyers are going to embrace therapeutic jurisprudence (or the comprehensive law movement) as the judges already have. They are going to say, “This is what we want to do because we are burned out with what we have been doing, too.” The judges enjoy these courts and had become dissatisfied with what they were doing.<sup>37</sup> This is a way that judges

---

<sup>36</sup> Hora, *supra* note 25, at 456 (stating that “[t]he enthusiastic reception of the [drug treatment court] concept can be attributed to a variety of factors found therein, including more effective case load management, reduced systemic costs and jail crowding, and decreased rates of recidivism among [drug treatment court] participants.”).

<sup>37</sup> *Id.* at 455 (finding that the judicial response to drug treatment courts has been positive since “[p]utting more and more offenders on probation just perpetuates the problem. The same people are picked up again and again until they end up in the state penitentiary and take up space that should be used for violent offenders. The Drug Court tackles the problem head-on.”(quoting Herbert Klein, DRUG STRATEGIES, CUTTING CRIME: DRUG COURTS IN ACTION 6 (1997)). In a survey of over 500 state court judges nationwide about their attitude toward problem solving by the judiciary, the University of Maryland’s Survey Research Center reported that “more than 90 percent of judges believed that they should be involved in addressing social problems like drug addiction, domestic violence, and mental illness.” Greg Berman & John Feinblatt, *Problem-Solving Justice: A Quiet Revolution*, 86 JUDICATURE 182, 213 (2003). “Like the prosecutors and defense attorneys, . . . judges and court administrators have grown frustrated with ‘milling cases,’ ‘repeat players’ — defendants who return to court again-and-again on the same charges — rising caseloads and new and different types of cases that elude traditional judicial responses.” Denckla, *supra* note 31, at 1615.

can actually make a difference and see positive change in the people they continually see before them.

## **THE SKILLS: WHAT DOES IT TAKE TO PRACTICE LAW THIS WAY?**

I actually teach a course on this. I know it sounds kind of bizarre. My students initially give me a hard time because they say: (a) I am not going to make any money and (b) is this really happening, are there really practicing lawyers that do this? And I say yes, you are, and yes, there are.

One of the skills that you need is people skills. I didn't have any people skills when I came to law school, and I didn't get any in law school, and they kind of eroded from there; I got worse. It was not until five years out of law school when I went back to school to become a clinical psychologist that I was taught all of these people skills, and I thought: This is what I needed to have before. So, I try to teach my students some of those people skills. Mindfulness meditation is, I would propose, one of those underpinning, underlying, fundamental skills that one needs in order to practice law this way. The other skills I've identified so far are: basic and advanced empathy, active listening, open-ended questioning, basic psychological sophistication, an understanding of power struggles, conflict dynamics, interpersonal interactions, boundaries, and self-awareness.

## **CONCLUSION**

In summary, then, these skills, these vectors, the comprehensive law movement, all outline the possible future of the legal profession and of problem resolution within our society as a whole. Welcome to my dream; welcome to the possibility of a future in which the practice of law and administration of justice can be exciting, invigorating, positive, therapeutic, curative, restorative, creative, and inspiring. Welcome to a place in which the human element, so long absent from the law and legal education, assumes a greater role and where the fabric of society is knit together by lawyers rather than rent. I hope you will find it as fascinating as I do.