

Comprehensive Law Practice

Comprehensive Law Practice

Law as a Healing Profession

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PROFESSOR OF LAW

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This book is dedicated to my mother, Mary Jane Daicoff, the most brilliant woman and best teacher I know, who knows something about everything, whose unending curiosity inspires me, and who always encourages me to synthesize—and to my father, George R. Daicoff, Sr., whose shining example as a cardiovascular surgeon, lecturer, and professor impressed me and who always reminds me of the importance of doing good, healing people, and enjoying what you do. Their incredible talents as lecturers, investigators, and professors are present in all that I do.

Because my father always starts every lecture he gives with a joke, I'll start with this one, which he gave me just for this purpose:

Pearly Gates

On their way to get married, a young couple was involved in a fatal car accident. The couple found themselves sitting outside the pearly gates waiting for St. Peter to process them into heaven. While waiting they began to wonder; could they possibly get married in heaven? When St. Peter arrived, they asked him if they could get married in heaven. St. Peter said, "I don't know. This is the first time anyone has asked. Let me go find out." And he left.

The couple sat and waited for an answer ... for a couple of months.

While they waited, they discussed the pros and cons. If they were allowed to get married in heaven, should they get married, what with the eternal aspect of it all? "What if it doesn't work? Are we stuck in heaven together forever?" they wondered.

Another month passed. St. Peter finally returned, looking somewhat bedraggled. "Yes," he informed the couple, "You can get married in heaven." "Great!" said the couple. "But we were just wondering; what if things don't work out? Could we also get a divorce in heaven?"

St. Peter, red-faced with anger, slammed his clipboard on the ground. "What's wrong?" asked the frightened couple.

"Oh, COME ON!!!" St. Peter shouted. "It took me three months to find a priest up here! Do you have ANY idea how long it'll take to find a lawyer?"

Of course my father knows the purpose of this book is, in part, to change this perception of lawyers, which makes the joke here even more ironic. I hope this book will serve as part of the change of lawyers, the legal system, and society.

Susan Daicoff, July, 2011

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Two apologies: First, I am certain that I have left off this list, in complete inadvertence, many, many people important to me and to the movement. I apologize in advance for those omissions and hope you will forgive my memory loss. Second, I am also painfully aware of the shortcomings and omissions in this book. It became impossible for me to keep up with and include all of the wonderful comprehensive law movement resources available, particularly as their number has exploded in recent years. Please forgive those omissions as well; they are not intentional in any way.

Finally, I have wanted to write something like this since 1991, when I finished graduate school with a masters’ degree in clinical psychology, after having worked as a corporate, securities, and tax lawyer for several years. At the time, I had no idea it would be this extensive. There wasn’t that much to write about and the profession wasn’t dealing well with the integration of psychology into law. Thankfully, the last twenty years have seen many needed changes in our great profession. This book, therefore, represents a lifelong achievement for me, as it integrates my two careers, law and psychology, “does good,” improves my profession, and addresses problems I have struggled with since becoming a lawyer in 1984.

Susan Swaim Daicoff, July, 2011

Introduction

All Systems Fail

The legal profession, if not the world, is in crisis. Reportedly, the Chinese character for “crisis” denotes danger and opportunity, simultaneously. If crisis brings opportunity, then the profession is at a turning point. The legal profession is dangerously close to obsolescence for all but the most wealthy individuals, corporate, and institutional clients. It is estimated that 85% of Americans cannot afford a lawyer, resulting in unequal access to justice. However, the number of lawyers has doubled in the United States since about 1970, which influx has led to increased economic pressure and competition among lawyers.

The adversarial court system has failed. It is no longer functioning as a primary and efficient dispute resolution system, as 98% of all litigated cases settle without trial. Negotiation, settlement, mediation, and other forms of alternative dispute resolution, mandatory or not, are growing and legal personnel are experimenting with new models for resolving legal problems, such as collaborative law. In those rare civil cases that actually go to trial, the process frequently takes two years to resolve, resulting in calls for more accountability from lawyers. Lawyers are being asked to justify their fees and value. The corrections system has failed, as the United States has one of the highest per capita incarceration rates in the world and a high recidivism rate. Judges and court personnel are experimenting with alternative court models, such as problem solving courts, and alternative disposition systems, such as restorative justice.

One in five lawyers is suffering from clinically significant levels of depression, anxiety, psychopathology, alcoholism, or substance abuse. Many lawyers are desperate for work that matters, makes sense, makes a difference, is moral, is valuable and valued, and produces sustainable outcomes. The current economic crisis has pushed unemployment among lawyers to unprecedented levels, leading to more competition and demand for new forms of legal work, while law school admissions levels remain steady or continue to slowly rise. Legal education, operating on Langdell’s century-old model, has become increasingly irrelevant and unrelated to the skills required for and the demands of modern law practice, thus, new graduates are less prepared than ever to face practice conditions and capably serve clients. Clearly, it is time for a change.¹

1. See generally RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (Oxford University Press, 2008) (arguing for the obsolescence of traditional lawyering and calling for a sea change in the legal profession).

Traditional Adversarialism Wanes

I have been researching and writing about the legal profession since the early 1990s, when I became interested, as a lawyer enrolled in a graduate program for clinical psychology, in lawyer distress, dissatisfaction, wellbeing, and ethical decisionmaking. That research led me to survey 40 years of empirical research on lawyers. I concluded that there were about eight distinct traits that distinguished lawyers from nonlawyers, psychologically and decisionmaking preference-wise. In the mid-1990s, I argued that these “lawyer traits” were adaptive to the modern practice of law, which at the time demanded that lawyers be unemotional, rational, objective, amoral, zealous, and partisan advocates and representatives of their clients.

However, a number of developments in the law and in the world since then have eroded that model, leading the profession to where it is today—on the brink (or in the midst) of change. I am not convinced that the traditional adversarial model of law and lawyering was optimal, anyway, but recent developments have placed even greater stress on it, forcing change forward.

In response to the pressures on the legal profession, many proposed solutions. These solutions ranged from stress management, to mediation, to sheer innovations in the law. In the 1970s and 1980s (and, in some cases, as early as the 1930s), seeds were sown for a new legal profession by a number of insightful pioneers, trailblazers, and innovators. By 1990, many of these individuals had begun formulating and experimenting with new ways of practicing and adjudicating law and resolving legal disputes. Just a few of these (this is by no means an exhaustive list and I apologize for omissions) are: Professors David Wexler, Bruce Winick, Edward Dauer, Thomas Barton, Marjorie Silver, Michael King, John Braithwaite, Howard Zehr, Baruch Bush, David Hall, and Leonard Riskin; author Steven Keeva; judges Peggy Hora and William Schma; attorneys Stuart Webb, Bill Van Zyverden, John McShane, Pauline Tesler, J. Kim Wright, Rick Halpert, David Hoffman, Forrest Mosten, and Arnie Herz; and many more.

A Movement Emerges

In the late 1990s, at one of the many therapeutic jurisprudence conferences organized by Professors Wexler and Winick to which I was invited, I asked these founders whether they thought collaborative law, therapeutic jurisprudence, preventive law, restorative justice, and other emerging disciplines might be part of a larger movement in the law. Their response was to challenge me; if so, they said, then articulate the common ground among all these developments that bind them together, that unify them and distinguish them from the traditional adversarial justice system. So I tried. What I found was that all of these developments shared at least two common features. The first was what Pauline Tesler calls “rights plus,” meaning, reaching beyond bare legal rights to incorporate the parties’ needs, desires, goals, mental status, wellbeing, relationships, and future functioning into the resolution of the legal problem. Second, they all seek to optimize the outcomes of legal matters as measured by their impact on human wellbeing (meaning emotions, psychological functioning, and relationships involved in legal matters), while still resolving the particular legal matter. While many share other features in common as well, these are the only two features that appear to be common to all of the disciplines in the “compre-

hensive law movement” that are also not present in traditional forms of law, lawyering, and dispute resolution. For example, many forms of comprehensive law practice are non-adversarial, eschew protracted, scorched-earth litigation in favor of consensual, collaborative, community-based methods and processes affording voice and participation for all, solve legal problems creatively and holistically by teams of lawyers and clients working together as equal partners, and avoid having lawyers function as dispassionate expert legal technicians who “know best.” Excited by the forward-moving innovation I saw in these disciplines, I thought of them as “vectors” of a movement. I called the overall movement the “comprehensive law movement,” simply as a working title for the synthesis of these important developments.

As the various disciplines of the comprehensive law movement eked into the legal consciousness from 1990 to now, they hit a chord. Many recognized the need for the reforms being proposed and more reforms, innovations, research, scholarship, and interest among legal educators, lawyers, mediators, and judges emerged. By the end of the 1990s, these innovators and many others interested in these disciplines were connecting with each other (often through the tireless work of Professors David Wexler and Bruce Winick, founders of therapeutic jurisprudence). They shared information and ideas at various conferences, realizing that their observations were similar and their objectives were related.

The next decade saw growth, experimentation, and collaboration; by the mid-2000s, it became clear that these efforts did indeed herald an overall movement, one that touches all areas of the law and transcends the scope of each individual discipline. From 2006 to 2010, no less than five books were published recognizing the scope of the changes being wrought in the legal profession; Julie MacFarlane in Canada, Marjorie Silver, Susan Brooks and Robert Madden, Michael King and his associates in Australia, and J. Kim Wright have all authored books on this greater “movement” (these books are listed at the end of this Introduction). Ambitious research and scholarship agendas, frequent national and international conferences, and the persistent efforts of hundreds of committed individuals in the law have all contributed to the growing weight of this movement towards positive change.

Comprehensive Law Practice

This book begins with the premise that the time is ripe for a “new model” for lawyering, adjudicating, and dispute resolution to fully emerge, one which might even become the dominant model for the future. It then attempts to begin to outline how this “new lawyer” might approach clients, witnesses, other parties, lawyers, judges, mediators, cases, and matters (whether transactional or litigative). It proposes that these approaches may be a useful addition to all lawyers’ toolkits, including those lawyers who prefer not to practice “comprehensively.”² Continuing the “toolkit” analogy, if what lawyers have been using in the legal profession to date have been hammers and nails, with an occasional saw, the comprehensive law movement adds screwdrivers, chisels, and drills to the lawyer’s tool-belt. Staying competitive in today’s challenging market for legal services may well require additional, new, and innovative tools, such as those afforded by the comprehensive law movement.

2. Credit for this excellent idea is due to attorney (and my former student) Jeffrey D. Devonchik, see <http://www.shblaw.com/devonchik.htm> (last visited July 11, 2010).

The tools or approaches introduced here are creative problem solving, therapeutic jurisprudence, problem solving courts, restorative justice, collaborative law, holistic justice, preventive law, procedural justice, and transformative mediation. They all share the vision that law can have positive social and psychological consequences for those involved in legal matters. Together, they form an overall movement towards law as a healing profession. Here, they are often individually referred to as “vectors” of the comprehensive law movement, denoting their forward movement into the future and their parallel but related status.

This book briefly describes the conditions propelling the emergence of this movement, explores the overall philosophical and behavioral shifts inherent in practicing law “comprehensively,” and then develops each discipline (or vector) within the movement in more detail, in a separate chapter. It concludes with an attempt to synthesize all of these approaches, or tools, in a comprehensive approach to law, legal problems, and legal disputes.

This book can be read alone as an introduction to the vectors of the comprehensive law movement or can be used as a practice guide to accompany existing anthologies on the subject (listed below in this Introduction). The purpose of this book is to introduce the reader to the vectors of the comprehensive law movement and begin to explore the skills required to apply the vectors in a practical manner. Actual practice of the vectors will, however, require reading and training beyond this book; each chapter suggests resources for this additional study.

Acknowledgments, Adaptations, and Reprints

Many portions of this book were adapted from, and excerpt or reprint portions of, previously published works by the author and are here used by permission. These are:

1. Susan Daicoff, *Resolution Without Litigation: Are Courtrooms Battlegrounds for Losers?* GPSOLO 44–50 (October/November 2003) (republished as a book chapter, Susan Daicoff, *The Comprehensive Law Movement: An Emerging Approach to Legal Problems*, in PETER WAHLGREN, ED., *A PROACTIVE APPROACH*, 49 SCANDINAVIAN STUDIES IN LAW 109–129 (2006)) (incorporated in its entirety in Chapter 3);
2. Susan Daicoff, *Growing Pains: The Integration vs. Specialization Question for Therapeutic Jurisprudence and Other Comprehensive Law Approaches*, 30 T. JEFFERSON L. REV. 551 (2008) (used in its entirety in Chapters 1–4) © Professor Susan Daicoff, reprinted with permission. This article was originally published with Thomas Jefferson Law Review, available at 30 T. JEFFERSON L. REV. 551 (2008);
3. Susan Daicoff, *Collaborative Law*, 20 U. FLA. J. L. & PUB. POL’Y 113 (2009) (reprinted in Chapter 12);
4. Susan Daicoff, *Lawyer Personality Traits and Their Relationship to Various Approaches to Lawyering*, in MARJORIE A. SILVER, ED., *THE AFFECTIVE ASSISTANCE OF COUNSEL* (Carolina Academic Press, 2007) (adapted for use in Chapter 4);
5. Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPPERDINE DISP. RESOL. J. 1 (2006) (incorporated in its entirety and adapted for use in Chapters 1–3; expanded upon in Chapters 4–16 hereof);

6. SUSAN DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* (American Psychological Association Books, 2004) (this book summarizes Chapters 1–6 and incorporates Chapter 7 in its entirety) Copyright © 2004 by the American Psychological Association. Reproduced or adapted with permission. The use of this information does not imply endorsement by the publisher;
7. Susan Daicoff & David B. Wexler, *Chapter 26: Therapeutic Jurisprudence*, in *COMPREHENSIVE HANDBOOK OF PSYCHOLOGY: VOLUME 11: FORENSIC PSYCHOLOGY* (Alan M. Goldstein, ed., John Wiley & Sons, Inc. 2003) (adapted for use in Chapters 5–7) Copyright © 2003, John Wiley & Sons, Inc. Reprinted with permission of John Wiley & Sons, Inc.;
8. Susan Daicoff, *Afterword: The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in DENNIS P. STOLLE, DAVID B. WEXLER, & BRUCE J. WINICK, EDs., *PRACTICING THERAPEUTIC JURISPRUDENCE* (Carolina Academic Press, 2000) (incorporated in its entirety);
9. Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 *PSYCH., PUB. POL'Y. & LAW* 811 (1999) (incorporated in its entirety into Chapters 1–3 and 4) Copyright © 1999 by the American Psychological Association. Adapted with permission. The use of this information does not imply endorsement by the publisher;
10. Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 *AM. U. L. REV.* 1337 (1997) (incorporated and adapted for use in Chapter 1);
11. Susan Daicoff, *Asking Leopards to Change Their Spots: Can Lawyers Change? A Critique of Solutions to Professionalism by Reference to Empirically-Derived Attributes*, 11 *GEO. J. LEGAL ETHICS* 547 (1998) (incorporated and adapted for use in Chapter 1);
12. Susan Daicoff, *(Oxymoron?) Ethical Decision-Making by Attorneys: An Empirical Study*, 48 *FLA. L. REV.* 197 (1996) (incorporated into Chapter 1);
13. Susan Daicoff, *Lawyer, Be Thyself: An Empirical Investigation of the Relationship Between the Ethic of Care, the Feeling Decisionmaking Preference, and Lawyer Wellbeing*, 16 *VA. J. SOC. POL'Y & L.* 87 (2008) (incorporated into Chapter 1);
14. Susan Daicoff, *Sorry Seems to Be the Hardest Word: Apology, Forgiveness, Reconciliation, & Therapeutic Jurisprudence*, Case Western Reserve University School of Law symposium article (manuscript) (adapted and excerpted in Chapter 11);
15. Susan Daicoff, *Preventive Law Essay* (reprinted in Chapter 6);
16. Susan Daicoff, *Comprehensive Law: Transformative Responses by the Legal Profession*, in CANDICE C. CARTER, ED., *CONFLICT TRANSFORMATION AND PEACE EDUCATION: TRANSFORMATIONS ACROSS DISCIPLINES* (Palgrave MacMillan, 2010) (incorporated in its entirety throughout the book and excerpted in the Resources section of each Chapter);
17. Manuscript of *The Future of the Legal Profession*, accepted for publication in *MONASH UNIVERSITY LAW REVIEW* (in press) (ideas incorporated throughout the book, particularly in Chapters 1–3 and 16); and

18. Susan Daicoff, *On Butlers, Architects, and Lawyers: The Professionalism of “The Remains of the Day” and “The Fountainhead,”* 17 J. L. BUS. & ETHICS 23 (2011) (excerpted in Chapter 1).

In addition, various previously published articles and books in the comprehensive law field have been excerpted for various chapters; those works are also used by permission and credited, where used.

Use of This Book

This book can be used as a reader by itself, as a course book for a course on comprehensive law practice, or as an adjunctive book in a skills-oriented law school class. While it is designed to be of use to practicing lawyers, judges, mediators, law students, law professors, or any other legal professionals, it is most likely helpful for practicing lawyers who represent clients and judges seeking reform. It introduces the comprehensive law movement and its vectors to the reader; it is an overview and not a complete guide for training oneself to practice in any one discipline within the movement. In its attempt to summarize the vectors, it may oversimplify them or appear to distort them, to the seasoned comprehensive law practitioner.

It is also specifically designed to be a practical, skills-oriented companion to any one of the following, listed books. For example, one might read one or more of these books for more detail on the included subjects and use this book to begin to apply those concepts in simulated practice settings. (Where relevant, the Resources section of each Chapter will list the related portions of the following books by Brooks & Madden, Silver, Stolle, et al., Wright, King, et al., and Macfarlane, to aid in such coordination.)

Companion books are:³

SUSAN L. BROOKS & ROBERT G. MADDEN, *RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE* (Carolina Academic Press, 2010) (including TJ, PL, TJ/PL, PJ, TM, & RJ).

MARJORIE A. SILVER, *THE AFFECTIVE ASSISTANCE OF COUNSEL* (Carolina Academic Press, 2007) (including CL, TJ, & PSCs).

DENNIS P. STOLLE, DAVID B. WEXLER, & BRUCE J. WINICK, EDs., *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (Carolina Academic Press, 2000) (including TJ, PL, TJ/PL, PJ, & CL).

J. KIM WRIGHT, *LAWYERS AS PEACEMAKERS: PRACTICING HOLISTIC, PROBLEM-SOLVING LAW* (American Bar Association, 2010) (including all of the vectors).

MICHAEL KING, ARIE FRIEBERG, BECKY BATAGOL, & ROSS HYAMS, *NON-ADVERSARIAL JUSTICE* (The Federation Press, 2009) (Australian publication including all of the vectors).

JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (UBC Press, 2008) (Law & Society Series) (Canadian publication exploring

3. *Note:* While this book was not designed as a companion to it, when listing books that synthesize the vectors of the movement, it is important to note the synthesis of vectors in THOMAS D. BARTON, *PREVENTIVE LAW AND PROBLEM SOLVING: LAWYERING FOR THE FUTURE* (Vandenplas Publishing, 2009) (integrating PL, CPS, & TJ).

in depth the lawyering approach underpinning the movement and including CL, RJ, TJ, & PSCs).

The assignments at the end of each chapter are designed to assist the reader in applying the concepts described above, in the practice of law.

A sample course description for a course based on this book might be as follows:

Comprehensive Law Practice is designed to teach the theory, practice, and skills of law as a helping or healing profession. It explicitly uses psychology and social science to assess the consequences of law and legal procedures on people, their relationships, and their communities in an effort to make law have a positive effect. It explores approximately nine emerging innovations in law, legal process, and dispute resolution based on these ideas, covering civil, criminal, family, and all substantive areas of the law. If you have found yourself thinking during the course of your career in the law, “there must be a better way,” then perhaps this course is for you.