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The Modes and Tenses of Legal Problem Solving, and What To Do About Them in Legal Education

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THE MODES AND TENSES OF LEGAL PROBLEM SOLVING, AND WHAT TO DO ABOUT THEM IN LEGAL EDUCATION

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Legal problems are addressed in at least three basic ways, or modes, each of which is associated with a particular "tense": (1) through *judgment*, an authoritative decision pronounced by an empowered third party concerning the legal significance of past behaviors;[1] (2) through *consent*, a "present tense" resolution in which the parties to a legal concern resolve it privately by negotiated or mediated agreement;[2] and (3) through *prevention*, a future-oriented process that designs contracts, legal arrangements, compliance regimes, education and training programs, organizational structures, or even physi-

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1. "[J]udgment, the determination or decision of a court; the expression by a judge of the reasons for his decision." THE LAW DICTIONARY 226 (Amy B. Brann ed., Anderson Publ'g Co. 7th ed. 1997); "[J]udgment. . . . A court's final determination of the rights and obligations of the parties in a case." BLACK'S LAW DICTIONARY 858 (8th ed. 2004).

2. Legal problems are resolved consensually through a growing variety of alternative dispute resolution (ADR) mechanisms. For a thoughtfully constructed set of readings about the philosophy and early development of ADR, see CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHNEIDER & JEAN R. STERNLIGHT, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 3-58 (2005). *See also* Symposium, *Dispute Resolution: Raising the Bar and Enlarging the Canon*, 54 J. LEGAL EDUC. 4 (2004).

cal environments so as to keep legal risks from erupting into injuries or legal liability.[3] Far more legal problems are resolved consensually or prevented from arising in the first place than are judged in formal litigation or arbitration.[4] Most legal processes, in other words, are resolved in the present or future tense. Yet when explaining legal doctrine or even exploring legal theory, most law school classes continue to rely on reported cases, which are primarily past-tense resolutions resulting in judgments.[5] The reasons for this are apparent. Legal judg-

3. "Preventive Law" as a distinct approach to lawyering was first formulated by Louis M. Brown in his 1950 seminal work by that same name. LOUIS M. BROWN, PREVENTIVE LAW (1950). Throughout the second half of the century, Brown published many works addressed both to lawyers and to the lay public. *E.g.*, LOUIS M. BROWN, HOW TO NEGOTIATE A SUCCESSFUL CONTRACT (1955). Brown's work was carried forward by other lawyers and academics, especially Prof. Edward A. Dauer, with whom Brown collaborated in the treatise LOUIS M. BROWN & EDWARD A. DAUER, PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS (1978) [hereinafter PLANNING BY LAWYERS].

As developed by Brown and Dauer, Preventive Law focuses on the techniques and professional responsibility of a practicing lawyer when engaging with clients as an advisor and planner, rather than as an advocate. Primary in that approach are the ideas of regular meetings with clients and the development of checklists so that business and life events can be undertaken with minimal risk of problems. *See, e.g.*, Louis M. Brown, *Another Dictionary Definition of Preventive Law*, 42 J. ST. B. CAL. 867 (1967); Louis M. Brown, *Legal Audit*, 38 S. CAL. L. REV. 431 (1965). I broaden Brown's ideas by urging analysis of the social and non-social environments in which the client's risks are embedded. Mine is a more explicitly behavioral and systemic perspective.

4. Only about five percent of grievances result in a legal filing. Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544 (1980-1981), *cited in* LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 9 (3d ed. 2005). Further, among filings, "[f]ewer than 5 percent of all cases commenced in the federal courts go to trial, and a sizable number of the remainder are settled during trial or even at the appellate stage." STEPHEN C. YEAZELL, CIVIL PROCEDURE 39 (6th ed. 2004).

5. Louis Brown was also a pioneer in urging that legal education reduce its reliance on the case law method of instruction. *See generally* Louis M. Brown, *The Law Office—A Preventive Law Laboratory*, 104 U. PA. L. REV. 940 (1956) [hereinafter *Preventive Law Laboratory*]. His insight was that when attorneys give private advice to clients outside the realm of litigation, the attorney is functionally the authoritative source of law: "In the preventive law area of practice the lawyering process is final and decisive. There is virtually no appeal from the lawyer's preventive law decision that his client sign the irrevocable trust, or the deed conveying property, or a contract, or engage in numerous other events having legal consequences." Louis M. Brown, *Teaching the Low Visible Decision Processes of the Lawyer*, 25 J.

ments embody detached, objective application of legal rules to historical factual vignettes. Case judgments clearly articulate legal rules. Furthermore, their fact patterns offer opportunities for interpreting those rules and probing the edges of their application. However, the past tense to which judgments are directed—that is, whether behaviors were proven that result in legal liability—makes invisible any opportunities or willingness of the parties to accommodate themselves to the problem. Efforts or possibilities toward present-tense consensual resolution are not discussed in a typical legal judgment, nor are alternative possible futures envisioned. The facts reported in a case are immutable, or "cold."[6] Students are rarely, if ever, prompted to imagine themselves as lawyers advising clients prospectively so as to prevent a legal risk from erupting into a full-blown legal problem.

Law teaching, in sum, is mired in the past. To be sure, the recent growth in skills-based courses in negotiation and mediation is certainly helpful in advancing students' ability to operate in the present tense. On the whole, however, students are being offered a consistent but incomplete approach to law and lawyering. More should be done for now and the future. By better integrating all three problem solving modes throughout the curriculum—even in traditional doctrinal courses—students would gain a fuller and more realistic understanding of how legal problems are actually prevented and resolved by lawyers. They also would be better positioned to learn the distinct skills required to be effective in employing each of the three modes of legal problem solving.

This Essay urges more understanding and use of the alternative modes of "consent" and "prevention" in legal education. To facilitate this, Part I explains and contrasts the three modes. Then, Part II offers specific suggestions for how the alternative modes of consent and pre-

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LEGAL EDUC. 386, 387 (1973), *quoted in* PLANNING BY LAWYERS, *supra* note 3, at 2. For more recent treatment of ADR in the curriculum, see Symposium, *Dispute Resolution in the Law School Curriculum: Opportunities and Challenges*, 50 FLA. L. REV. 583 (1998).

6. The approach to "prevention" adopted in this Essay builds on Louis Brown's suggestion that lawyers can be most effective when the facts are still "hot," that is, malleable. If a client delays speaking with the lawyer until a problem has actually arisen, the facts may be "cold," says Brown, and the lawyer is relegated to practicing "curative" rather than "preventive" law. Louis M. Brown, *Preventive Law/Curative Law: Facts (Cold-Hot) Make Difference*, 40 J. ST. B. CAL. 258 (1965); *Preventive Law Laboratory*, *supra* note 5, at 940-42.

vention—the present and future tenses—might be integrated into traditional doctrinal law school courses.

I. THREE MODES OF LEGAL PROBLEM SOLVING: OVERVIEW AND SIGNIFICANCE

A. *The Judgment Mode*

The judgment mode for solving legal problems is obviously the most familiar, reflecting the predominant use of the case method in legal education. In a typical case, the text is a judgment, the culmination of legal procedures that measure human behavior or institutional arrangements against legal rules or principles. Cases emerge from familiar lawyer skills and strategies: elemental legal analysis applied to factual research, coupled with strong oral and written advocacy from lawyers who seek (and typically receive) a winner-take-all solution to the legal problem.[7]

Stepping back a bit from the actual legal activities, the judgment mode can be seen to work through techniques of separation and reduction.[8] Factual matters that are not directly relevant to the application of the legal rules are simply pared away, ignored. The judgment inquiry seeks legal precision, converging on outcomes that have strong truth claims.[9] Getting there requires distilling the facts into discrete packets

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7. For a critique of binary, winner-take-all judgments that typically emanate from litigation, see Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

8. I first explored the theme of "connection versus separation" in my article Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47 EMORY L.J. 163 (1998) [hereinafter Barton, *Troublesome Connections*], and built on it in Thomas D. Barton, *Law and Science in the Enlightenment and Beyond*, 13 SOC. EPISTEMOLOGY 99 (1999) [hereinafter Barton, *Law and Science*]. In the latter work, I posit that the formal procedures of Anglo-American courts evolved alongside philosophies that sought to secure social order through separating humans one from another, as well as separating "mind from nature, fact from value, beauty from utility, reason from belief, law from morality, morality from science, individuals from groups, identity from role, and law from science." Barton, *Law and Science*, *supra*, at 99. Post-enlightenment social values about human connectivity—reactions against Enlightenment separatist philosophy—are advancing quickly and may explain some of the recent innovations in ADR methods. Barton, *Troublesome Connections*, *supra*, at 163-66.

9. *See* Menkel-Meadow, *supra* note 7, at 5-6, 12-16.

whose boundaries correspond crisply with the criteria or elements embedded in the legal rules. Pairing the contours of the facts cleanly and parsimoniously with the demands of the rules is the essence of the analytical thinking so strongly trained in law schools. In contrast, both the consent and the prevention modes *broaden* the inquiry, consciously opening toward and connecting to contexts of the problem that might not be explicitly "legal."[10] They work through connection and synthesis rather than separation and reduction. As a result, the outcomes of both consent-based and prevention-based problem solving are not *necessarily* based on legal rules. Similarly, resolutions that emerge consensually or preventively may take forms that do not correspond with traditional legal remedies. The legal risk or problem may be addressed through an apology, for instance, coupled with insights by the parties for improving future communication;[11] or through suggestions for restructuring communication or dispute resolution within an organization that would serve better the immediate or future needs of both parties;[12] or by other negotiated compromises based on the parties' preferences.

Nonjudgmental outcomes using alternative modes of problem solving make softer truth claims than do judicial pronouncements or arbitral awards. Instead of claiming to have found a right answer, consensual problem solving seeks an answer that is an acceptable accommodation of the parties to their dispute (and hopefully to one another).[13] Prevention, by further contrast, does not necessarily seek an "answer" at all. It seeks an understanding of the antecedents of problems, which in turn may reveal opportunities to make adjustments in

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10. *See id.* at 33-38 (discussing procedures integrating stronger community discourse).

11. For explorations of the idea of apology and its incorporation into legal processes, see Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002); Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289 (2001); Lee Taft, *On Bended Knee (with Fingers Crossed)*, 55 DEPAUL L. REV. 601 (2006).

12. *See, e.g.*, WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED 41-64 (1988).

13. For a description of the "accommodation" style of problem solving and how it may be used in the legal system, see Thomas D. Barton, *Therapeutic Jurisprudence, Preventive Law, and Creative Problem Solving: An Essay on Harnessing Emotion and Human Connection*, 5 PSYCHOL. PUB. POL'Y & L. 921, 924-36 (1999) [hereinafter Barton, *Harnessing Emotion*].

undertakings, communication, or environments that could be helpful prospectively to the parties.[14]

B. *The Consent Mode*

Outside of law schools, legal problems are often consensually resolved through one or more familiar alternative methods of negotiation, mediation, or hybrid processes.[15] These consensual approaches to legal problems are relatively neglected in legal education, although progress is being made. Virtually all schools now offer basic skills courses in Negotiations or Alternative Dispute Resolution (ADR).[16] Planning courses in taxation, estates, or business organization are also commonplace.[17] Even in these planning courses, however, the predominate focus may be on understanding and complying with the legal regulatory environment or achieving a single goal like minimizing

14. My behavioral/environmental approach to preventive thinking is more completely described in Thomas D. Barton, *Thinking Preventively and Proactively*, 49 SCANDINAVIAN STUDS. L. 71 (2006) [hereinafter Barton, *Thinking Preventively*]. Reaching outside of dispute resolution procedures broadens the inquiry even beyond the quite valuable "systems design" approach that seeks to put into place a variety of alternative mechanisms for handling disputes. *See, e.g.*, Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11 (2005); URY, BRETT & GOLDBERG, *supra* note 12. Prevention addresses risks when they are still susceptible to active management or interventions, before people become embroiled in disputes.

15. *See supra* note 4 and accompanying text. These alternative dispute resolution methods commonly employ connective techniques. Parties may be encouraged to communicate directly with one another and to participate collaboratively toward resolving their dispute. In negotiations, the facts and the law may be kept separate or interweaved, as strategy dictates. Substantively, the parties may be prompted to consider collaborative solutions in which varying interests are simultaneously advanced. Such "interests"-based negotiation is described in the seminal work of ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981). Among the many works building on theirs are, for example, ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000) and Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41 (1985). For useful social science research in negotiation style and psychology, see DEAN G. PRUITT & PETER J. CARNEVALE, NEGOTIATION IN SOCIAL CONFLICT (1993).

16. CURRICULUM COMM., ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA 7 (2006).

17. *See id.*

taxation, rather than on the broader processes by which stakeholders in an enterprise are identified, their various financial and relational interests uncovered, and the structures arranged so as to satisfy those interests.

The consent mode could also be more explicitly considered in traditional courses. For example, private contracts are obviously based on consent of the parties. Most Contract Law courses, however, actually employ the judgment mode far more than the consent mode in explicating contractual doctrine.[18] This arises from the strong use of case reports in Contracts textbooks. Once litigation has occurred, agreed-upon arrangements between the parties have almost always broken down. Both instructor and student are left to imagine what efforts could have avoided the problem, or how the parties mutually could have adjusted their relationship to resolve an existing dispute. As is more fully developed below,[19] mock client interviews about the client's goals followed by planning and drafting exercises to demonstrate goal-directed incentives and risk-avoiding clauses would offer opportunities in a traditional Contracts class to explore both the consent mode and the prevention mode.

C. *The Prevention Mode*

The prevention mode is even more rarely discussed explicitly in legal education, even though it—like the consent mode—accounts for much legal activity. Because of its relative unfamiliarity, I introduce it here in more detail than the other two modes.

1. *Prevention Defined*

Acting "preventively" in the behavioral/environmental sense of this Essay is encouraging or designing a non-aversive environment that is free from legal liability, physical discomfort or injury, and the loss of freedom, friendship, finances, or life opportunities.[20] It at-

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18. A noteworthy and valuable exception is the relational contracting approach employed in IAN R. MACNEIL & PAUL J. GUDEL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS: CASES AND MATERIALS (3d ed. 2001).

19. *See infra* Part II.B.2.a.

20. *Cf.* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 26-43 (1971) (emphasizing design of non-punishing environments, rather than seeking subjective feelings

tempts to prevent a punishing environment, seeking instead to create conditions under which clients can achieve their legitimate goals efficiently and effectively. Preventive design is illustrated by consumer products that are engineered to avoid using small detachable parts that toddlers could swallow or automobiles that will not catch fire if rear-ended. Organizations can also be designed preventively. For example, workplaces may incorporate safety devices that prohibit operation of potentially dangerous equipment except in certain prescribed ways.[21] Less tangibly, prevention may be advanced in workplaces by training employees so as to reduce behaviors that would offend the civil rights or sensibilities of fellow workers.[22] More broadly, virtually all personal relationships can be "designed" or shaped to include activities or styles of communicating that promote mutual understanding and regard.[23]

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of personal freedom).

21. Professor Edward A. Dauer recalls, however, a cautionary story from his youth. Heavy stamping machines for pressing jewelry parts represented an obvious risk to their operators if an operator's hand were to slip under the powerful blocks as they pounded sheet metals. To prevent this from happening, the machines were designed to operate only when two widely separated buttons were pushed simultaneously. The expectation was that both of an operator's hands would have to be on the buttons (and thus away from the pounding blocks) whenever the machine was actually stamping metal. However, the machine's designers failed to consider broadly enough all elements of the human environment in which the machines were used. The workers were paid "piecemeal" for their work, creating a strong financial incentive for fast operation of the machines. As a consequence, the operators would routinely tape down one of the two operating buttons in the "on" position so that one of their hands would remain free to move metal quickly in and out of the stamping process, and thus render that hand susceptible to being crushed. Viewing the physical and financial elements of this system *together*, one can see how their conflicting aims led to injuries that a more comprehensive systemic thinking would have avoided. Edward A. Dauer, Class Lecture in Problem Solving and Preventive Law at California Western School of Law (Spring 2006).

22. Under the Federal Sentencing Guidelines for Organizations, such training efforts are rewarded with reduced penalties in the event of a violation. U.S. SENTENCING GUIDELINES MANUAL § 8C2.8(a)(10) (2006) (referring to 18 U.S.C. § 3572(a)(8) (2000) (stating that, in determining the amount of a fine, the court must consider "any measure taken by the organization to . . . prevent a recurrence of such offense")).

23. *See, e.g.*, ARTHUR L. ROBIN & SHARON L. FOSTER, NEGOTIATING PARENT-ADOLESCENT CONFLICT: A BEHAVIORAL-FAMILY SYSTEMS APPROACH (1989) (outlining a behavioral approach to adolescent communication).

The prevention mode also pervades constitutions. For example, political systems can be designed to require open deliberations which promote transparent decision making and discourage corruption.[24] More structurally, constitutions like that of the United States create cross-cutting institutional powers that constrain overreaching by balancing the operations of each institution against the others.[25] Further, periodic elections and term limits for holding office can be mandated so as to prevent extremism and power-grabbing.[26]

At the highest level of generality, designing clear criteria or procedures for almost any potentially competitive human interaction will help to prevent unfairness and bad feelings.[27] Setting defaults and entitlements can also prevent hard feelings and inefficiency.[28] If starting points or presumptions are not clearly established, negotiation will

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24. *See, e.g.*, Ralph M. Brown Act, CAL. GOV'T CODE § 54953(a) (West 2006) (requiring open meetings for local agencies in California).

25. Division of powers alone, of course, does not necessarily secure the rule of law. Professor Richard A. Epstein explores the interplay of constitutional structuralism and civic republicanism in his article *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 GEO. WASH. L. REV. 149 (1987).

26. This may be more apparent in theory than reality, however. Elizabeth Garret offers a healthy skepticism about whether legal term limits on political office will greatly reduce the ranks of the professional politician. Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. Rev. 623 (1996).

27. Moral/psychological clarity, however, may differ from legal clarity. One interesting study tested separate groups of practicing lawyers, undergraduate business students, and graduate business students for their perceptions about the legal and moral existence of job security in response to the language contained in a hypothetical employee handbook. Deborah A. Schmedemann & Judi McLean Parks, *Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses*, 29 WAKE FOREST L. REV. 647 (1994). Variables in the language provided to the subjects included verb strength, specificity of language, jargon, disclaimers, and the presence or absence of a signature block whereby the subject would acknowledge having read the handbook passages. *Id.* at 671-73. The authors argued for the idea that a "contract" can be either legal, psychological, or implied. Psychological or implied contracts are those not necessarily recognized legally, but "constructs defined and studied by scholars of organizational behavior." *Id.* at 649.

28. For a classic explanation of the relationship between secure entitlements and efficiency in negotiation, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090-92 (1972).

proceed clumsily because no one is certain which party must be compensated and which party must pay.[29]

Prevention efforts by lawyers can sometimes be very simple, like including a clause in a contract that establishes or disclaims warranties. This sets the initial entitlement about quality or durability risks of a product or service. As mentioned above, clarity in describing the scope of that initial right is an important first step in avoiding later disagreements.

Effective prevention, however, goes beyond the language written into the contract. Prevention is better conceived in the broader contexts of real-life systems in which people interact with one another and with the objects and spaces of the physical world. Consider the warranty clause example more thoroughly. If we ask ourselves (as a good attorney would) how a manufacturing client might *most effectively* be protected by a disclaimer of warranties, we would of course begin by ensuring that the contract clause is clearly expressed, complying with any necessary Uniform Commercial Code language. But then we should also imagine the ways in which the products will be used. This is the step not always taken by lawyers, who may be trained to believe that clear, strong contract provisions will suffice to serve a client. As Brown and Dauer suggest, good lawyering predicts not only how a court will behave, but also "how *people* will behave."[30] Serving the client more fully would entail taking proactive measures to prompt proper use of the product through clear instruction sheets addressed to the consumer that would accompany shipment of the product. Furthermore, warning labels on the product itself, with pictures or diagrams, should alert people to unsafe uses. A consumer hotline or web e-mail system can be constructed to elicit feedback about the strengths and weaknesses of the product, which can then be used to improve the utility or safety of the device. Such communication can also supply early warnings of unanticipated (but perhaps foreseeable) product uses. With enough lead time, retrofits or additional advice about proper usage in such instances might be feasible. The feedback loop is thus used to refine the preventive measures.

29. *See id.* at 1092-93.

30. PLANNING BY LAWYERS, *supra* note 3, at 309.

The broader point of prevention is to keep lawsuits from occurring, not simply to position one's clients to win lawsuits.[31] Legal rules can help to deter unwanted conduct. But legal rules and goals are mediated by human motivations, emotions, incentives, constraints, and informal institutional norms. The environments in which legal rules are applied can be complex and unpredictable.[32] Lawyers can serve their clients more fully by understanding and helping to shape those environments.

2. *Prevention and Systems Thinking*

In applying legal rules preventively to the environments in which they will operate, systems thinking can be helpful.[33] Systems are simply collections of elements or components that interact regularly: people, rules, information, ways of communicating, and physical environments.[34] Systems may arise spontaneously, as in many natural processes or the development of some markets of exchange.[35] Alternatively, systems may be consciously designed to produce desired outcomes.[36]

Preventive thinking and design inherently force consideration of the contexts in which legal rules operate: the social, emotional, political, financial, and physical environments. Anticipating how well legal rules will actually work depends on understanding the systemic interactions to which the legal rules will be applied.[37]

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31. James G. Frierson, *Pre-Action Advice May Not Be Preventive Law Advice*, http://preventivelawyer.org/content/essays/frierson.htm (last visited Feb. 21, 2007).

32. As pointed out long ago by Professor Lon Fuller, problems differ in their difficulty or manageability. One important dimension making problems more resistant to solution is instability or variability in background conditions. Lon L. Fuller, *Irrigation and Tyranny*, 17 STAN. L. REV. 1021, 1034 (1965).

33. For a comprehensive overview of systems thinking in dispute resolution, see KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION (1998).

34. *See* ROBERT L. FLOOD & MICHAEL C. JACKSON, CREATIVE PROBLEM SOLVING: TOTAL SYSTEMS INTERVENTION 3-6 (1991).

35. *See id.* at 5.

36. Edward L. Rubin, *Images of Organizations and Consequences of Regulation*, 6 THEORETICAL INQUIRIES L. 347, 358 (2005).

37. Using examples from anthropological research, Sally Falk Moore illustrates how proclaimed legal rules can be limited in effectiveness, or even rendered

To accomplish that more applied and predictive understanding of legal rules requires more connective, and less separationist, thinking than is typically employed using the judgment mode.[38] As described above, the judgment mode commonly employs linear, analytical reasoning with facts being relevant only to the extent that they bear on the predefined elements of the rules.[39] Contextual information not bearing directly on the tests set up by the legal elements is simply not considered. In contrast, preventive thinking looks for, and attempts to understand, connections among laws and various components of the social or physical environment. Preventive thinking builds out the system.[40]

D. *The Significance of the Three Modes: Why Does It Matter?*

Much more can be said about the differences among the three modes of legal problem solving. That awaits another essay. This Essay seeks simply to introduce a vocabulary about the three modes so as to urge stronger classroom use of the consent and prevention modes. Before moving to the techniques by which the alternative modes might be integrated, however, we should stop to ask why it matters. Legal education has for decades successfully employed the judgment mode to explicate legal doctrine and sharpen analytical abilities of students. Why should we now divert our attention toward opening up law teaching to stronger, more explicit consideration of the consent and prevention modes?

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counterproductive, when the legal rules are introduced into cultural or organizational settings with prevailing cultural norms or patterns of organization that are antithetical to the aims sought by the laws. SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH 58-65 (1983).

38. *Cf.* J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 852-59, 893-99 (1996) (urging a systems-based understanding of the relationship between law and society); Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68 (1991) (calling for a nonreductionist approach to the multiple functions served by law).

39. *See supra* Part I.A.

40. *See* FLOOD & JACKSON, *supra* note 34, at 5-7 (conceptualizing systems not as disconnected or self-contained elements, but rather as elements relating in diverse ways to each other).

Three reasons justify greater attention to the alternative modes. The first reason was discussed at the outset of this Essay: that the majority of legal issues are actually resolved by consent or prevention. Students should better understand and be better equipped for approaching legal issues as they are actually addressed (or abandoned). The other two reasons are considered at some length in the paragraphs below. The first of those remaining reasons is that the outcomes of legal problems may *change* depending on the mode through which they are processed. This has both jurisprudential significance and strategic implications for how lawyering skills are employed. The final justification for stronger consideration of the alternative modes of legal problem solving is that exclusive use of the judgment mode in teaching may reinforce an overly narrow social mentality. That, in turn, may also narrow the professional identity of lawyers and the goals they seek.

1. *Outcomes May Differ Depending on the Mode Used for Problem Solving*

The outcomes or solutions of a problem may change, depending on which mode of legal problem solving is employed in attempting its resolution.[41] This can be shown in class with many of the cases that appear in legal casebooks by walking students through the "recasting" teaching strategy described further in Part II of this Essay. In brief, take a legal issue described in a textbook case. The judgment authoritatively declares or applies a legal rule. Then simulate a resolution of that same issue by the parties who appear in the reported case, using the consent mode. A different legal outcome (or several of them) may be suggested that plausibly better serves the interests of the parties.

If changing legal processes really can change outcomes, then by working through alternative processes students may discover a more subtle, reciprocal relationship between legal rules and the social envi-

41. This point differs from and does not depend on "rule skepticism," the idea that legal rules are not the best predictors of decisions or outcomes even where the case is being judged using traditional court procedures. *See* H.L.A. HART, THE CONCEPT OF LAW 133-35 (1961) (contrasting rule skepticism and formalism). Regardless of what may best predict courtroom decisions, my thesis here is simply that different outcomes are possible (even likely) where mediation or negotiation are used instead of the procedures leading to court judgments.

ronment. Furthermore, limits to the instrumental use or understanding of legal rules may also be revealed.[42] This is especially important in considering legislation. The effectiveness of a legislated scheme will be mediated by the social system in which the legislation must operate.[43] If various financial incentives or cultural beliefs push against the legislated legal outcome, the actual result of the legislation may be far less than intended, or even counterproductive.

The alternative modes of legal problem solving become strategically important because different lawyering techniques may be appropriate depending on whether a problem has fully erupted into losses, or whether the problem is as yet only at the risk level. If a problem is still at the risk level, then factual environments still can be shaped to prevent the emergence of problems, or at least to limit the damage.[44] In contrast, where a full-blown problem has emerged and costs already incurred, the lawyer's options are reduced.

2. *Avoiding Simplifying Social Assumptions*[45]

The second justification for including a stronger consideration of all three problem solving modes in legal education is humanistic. Thinking through all three modes, even if only occasionally, will soften the two simplifying assumptions discussed below that tend to accompany an overreliance on the judgment mode.

a. Assumption 1: *People exist largely in isolation from one another, living their lives through autonomous informed choices rather than through the bonds of love, tradition, honor, or spirituality.*[46]

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42. *See* James Boyd White, *Imagining the Law, in* THE RHETORIC OF LAW 29, 29-38 (Austin Sarat & Thomas R. Kearns eds., 1994) (resisting the instrumentalist understanding of the law and instead imagining the law as rhetoric, a process of human dialogue).

43. MOORE, *supra* note 37, at 58.

44. *See supra* note 6 and accompanying text.

45. *See generally* Thomas D. Barton, *Creative Problem Solving: Purpose, Meaning, and Values*, 34 CAL. W. L. REV. 273, 285 (1998) [hereinafter Barton, *Creative Problem Solving*] (discussing how the image of humanity is reduced within the legal system so as to fit within the law's limited tools for investigation and assessment of human motives and behavior).

46. *Id.*; *cf.* GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS (1993) (noting neglect by the law of the idea and influence of loy-

The judgment mode reinforces this first simplifying assumption through its heavy reliance on adversarial procedures and the legal rules which underpin a judgment's legitimacy. The rights and duties embedded in legal rules are typically held individually. They are not, in other words, analyzed as though they were held relationally among groups of individuals (like tenants in common or agent/principal), or within families (like the rules of intestacy), or collectively within groups or communities (like Constitutional rules about federalism or division of powers among the branches of government).[47] In other words, legal decisions that emerge from the judgment mode typically assume that rights are not contingent on the approval of surrounding family or community members. Hence the participation or interests of both family and the public are generally marginal to the problem solving *notwithstanding* that those persons may actually be dramatically affected by a legal decision. Quite to the contrary, apart from family law cases or those in which consortium damages or character evidence may be relevant, formally bringing the concerns or opinions of family or community members into civil litigation processes would likely be considered disruptive. Even to suggest putting on such testimony would, in most trials, be regarded as preposterous and reflective of an incompetent or quixotic attorney.

In contrast, dealing with the same legal problem through consent-mode procedures can open up the decision making to the interests of those persons. The problem holder may consult and regard those persons as he or she chooses in coming to a resolution of the problem.

Dealing with the legal problem preventively may also be more inclusive of family or community views. The preventive lawyer would understand family pressures, for example, as part of the social context in which legal rules or purported solutions operate. If the realities of such influences are ignored, any proposed or imposed legal solution may be ineffective and the problem may recur needlessly. Attempting to find out the likely views of family members would permit prediction of how they might support or sabotage particular legal solutions. Good preventive design packages its solutions together with explana-

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alty); LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE (1990) (discussing the intensity with which Americans seek to preserve and expand individual choice).

47. Barton, *Troublesome Connections*, *supra* note 8, at 170-72.

tions and incentives for family members to support the legal solution. Emotions and relationships that are part of the social world can either reinforce or undermine legal solutions to problems. The legal system need not forego opportunities to be more effective, as well as more respectful of the ties and impulses that people have toward one another.

The other aspect of this first simplifying assumption is the proposition that people care far more about autonomy and choice than about the sentiments that bond them to other individuals or groups. In traditional litigation, individual actions are assessed against a standard of personal free agency and detached rationality. Rarely are formal legal judgments and accountability affected by the relational, ethnic, or religious ties of the parties. The "cultural defense" against criminal prosecution, for example, remains highly controversial.[48]

The values underlying this first simplifying assumption are undoubtedly worthy. They stress individuality and moral autonomy. They presume a fundamental equality among people who are subjects of the law. This ideal of a color-blind equal protection and application of the law is unquestionably wise, unifying, practical, and even moral. Most people in our culture are willing to defend this basically egalitarian understanding of the rule of law. I have in other works strongly defended these values.[49] Nonetheless, we should be aware that the vision of humanity thereby portrayed is incomplete. Moral, social, and political pressures are actually experienced by people that differentially influence the meaning, impact, and onerousness of the law. Such rela-

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48. For descriptions and analysis of the cultural defense, see Daina Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994); Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996); Deirdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1 (1995); Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437 (1993); Austin Sarat & Roger Berkowitz, *Disorderly Differences: Recognition, Accommodation, and American Law*, 6 YALE J.L. & HUMAN. 285 (1994); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994).

49. *See, e.g.*, Thomas D. Barton, *Liberalism and Theories of Adjudication*, 28 B.C. L. REV. 625 (1987); Thomas D. Barton, *Fears and Conflicts*, 37 STAN. L. REV. 1425 (1985) (reviewing GOTTFRIED DIETZE, LIBERALISM PROPER AND PROPER LIBERALISM (1985)).

tional and heritage influences, however, are marginal to the judgment mode of the legal process.

The consent and prevention modes can more easily incorporate social realities of difference. In the consent mode, the problem holders themselves decide the issues. People are thus free to accord whatever significance they choose to personal, historical, or ethnic ties. Because people are not bound to follow formal, evenhanded legal rules, people can functionally adopt different standards for different sensibilities. Functionally, the consent mode permits legal pluralism.

Similarly, lawyers working in the prevention mode can attempt to anticipate these impulses, taking into account the reception that a legal rule or solution would meet among different groups. Consider the example of recent Western efforts to extend ideas of transparency, governmental accountability, and democratic practices to parts of the world that are accustomed to winner-take-all politics.[50] A preventive approach would attempt to tailor the reform institutions particularly to each receiving culture, so as to symbolically appeal to that culture. The preventive approach would recognize that successful reforms best take hold when attempts are made to reconcile the reforms with centuries-old symbolic institutions and cultural understandings about truth, authority, and the sources of legitimacy.[51] Preventive design would understand pragmatically that the functions of limited government may sometimes be possible only through structures that look very different from those that work well within our own cultural traditions.

b. Assumption 2: *In resolving their problems, people seek validation through legal judgments that pronounce one person to have been right and the other person to have been wrong.*[52]

This second simplifying assumption is highlighted by the regularity of formal legal procedures and the limited remedies that are avail-

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50. *See, e.g.*, Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327 (calling for more attention to individual differences among countries in democratic reform efforts).

51. *Cf.* LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY (1989) (describing the integration of modern judicial institutions with traditional qadi justice).

52. Barton, *Creative Problem Solving*, *supra* note 45, at 285; *see also* Barton, *Harnessing Emotion*, *supra* note 13, at 929.

able to courts. The legal system is not well designed to work with the diverse motives for people launching lawsuits against one another, especially in noncommercial suits.[53] How often are lawsuits filed that are motivated more by hurt personal feelings accompanying a breach of legal rights, than by the legal rights themselves? How much more efficient could the legal system be, and how much stronger could both legal remedies and personal relationships be, if the legal system incorporated better measures for counseling the antagonists in a prospective legal action?

Once problems reach formal adjudication, the official possibilities of apology, forgiveness, or reciprocal acknowledgment are few.[54] Common law remedies and even equitable remedies neglect solutions based on mutual accommodation between the contending parties. By contrast, the consent mode opens up a diverse range of options for how people can come to a satisfactory resolution of a dispute. In community-based or facilitative-style mediation, for example, the mediator's role is to help the parties find their own solution to a problem.[55] The mediator might suggest areas of life for the parties to explore, but the mediator would be inappropriately overstepping to suggest a particular outcome. Giving people the experience of understanding others and accommodating their needs is an intended by-product of many mediations.[56] Broader yet, the prevention mode suggests that people can take pride from constructing a world which seeks to facilitate and enable others, rather than procedures that seek to domesticate and channel personal conflict.

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The simplifying assumptions advanced by the judgment mode are not very realistic. Yet we rarely stop to consider them. That is because

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53. *See generally* SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (1990) (describing the frustrations of working-class people in attempting to summon the assistance of the legal system in resolving their interpersonal problems).

54. *See supra* note 11 and accompanying text.

55. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 16-17, 28-29 (1994).

56. Patricia L. Franz, *Habits of a Highly Effective Transformative Mediation Program*, 13 OHIO ST. J. ON DISP. RESOL. 1039, 1044-45 (1998).

when operating in the judgment mode, the law (unlike psychology, for example) can rely solely on tools of problem solving based on power rather than based on consent, reciprocity, emotion, or the bonds of human relationship.[57] The law can summon the formidable power of the state to enforce its resolutions. Psychology cannot.[58] Lacking such power, practitioners of psychology must understand and harness personal emotion and relationships.[59] This goes far toward explaining therapeutic practices, just as the ready availability of state power goes far toward explaining formal legal procedures. However, relying too heavily on the simplifying assumptions about people and their problems can produce outcomes that are artificially easy: solutions that focus more on finding someone to blame and vindicating the legitimacy of the legal rules than on encouraging mutual understanding and accommodation and on redesigning the antecedents of a problem so as to prevent its recurrence.

II. WHAT TO DO ABOUT THE THREE MODES: STRATEGIES FOR INCORPORATING THE CONSENT AND PREVENTION MODES INTO EXISTING CLASSES[60]

In this Part, I suggest two distinct strategies for better incorporating the consent and prevention modes into doctrinal law teaching. These are (A) moving back and forth among the three modes in class discussion, depending on the particular doctrinal or factual issues raised in assigned readings, and (B) using a simulated "recasting" of the textbook cases to illustrate one or both of the alternative modes.

A. *Shifting Modes of Discussion According to the Problem Presented*

This first strategy assumes that all three modes of legal problem solving can be discussed not only in the same course, but also in the context of a single textbook case. An initial foundation must be laid, of course, for students to understand the distinctions among the three

57. Barton, *Harnessing Emotion*, *supra* note 13, at 923, 927-28.

58. *Id.* at 927.

59. *Id.*

60. Although the examples have been changed, the strategies for incorporating alternative modes are built on discussion in Barton, Curriculum, *supra* note *, at 3-11.

modes. Having done that once—even in a twenty-minute discussion that sketches the distinctive modes and their characteristic tenses—any given doctrine or aspect of a course can thereafter be discussed using the mode that best explores the doctrine or topic.

Knowing which mode to prompt for discussion need not be difficult. Particular problems or topics that are treated by legal rules possess certain attributes that prompt analysis through the consent or prevention modes. The paragraphs that follow offer some questions that probe the appropriateness of using a particular mode in discussing a certain topic in the law.

1. *The Consent Mode*

In considering a particular aspect of legal doctrine, ask the following questions:

a. Does this doctrinal issue often arise out of intense or long-standing personal relationships? If so, the consent mode may be especially appropriate. This is because, when problems are strongly embedded in relationships of friendship or intimacy, how people think and behave, and what they value morally, may not correspond well with the elements of the legal doctrine. Previewing a technique that is more fully described below,[61] if the assigned reading introducing this particular legal doctrine is a reported case, work directly with that case: Did the factual incident that gave rise to this particular lawsuit seem to be precipitated by a series of personal interactions involving blame on both sides? If so, did the court refer explicitly to that relational history? Or is the reader left to infer it from other reported circumstances? Does the density and ambiguity of the relationship seem to have affected the legal judgment? Should it have? Then prompt students' imaginations about the conversations that might unfold if the parties to this lawsuit were to employ the consent mode for their legal problem. Compare and contrast the arguments, entreaties, and possible accommodations offered by the students with the rationale of the court-issued judgment.

b. Are strong emotions often associated with the human problem to which the legal doctrine is addressed? If so, how may those emotions influence a decision to take the problem to litigation? May it be

61. *See infra* Part II.B.1.

that anger or jealousy can find no better outlet? What if some alternative way of spending or resolving the emotions was found? What if, in a given case, the emotions are based on a misunderstanding? Might that misunderstanding be resolved through better communication? Do conversations about liability and blameworthiness just make those emotions or misunderstandings more intense? What alternative questions could be asked other than those posed by legal rules, and with what results?

c. Do traditional legal remedies fail to resolve satisfactorily this human problem? This is a very practical concern, and again it can be an invitation to consider a topic through an alternative mode. If traditional legal methods flounder in constructing an effective remedy, then what different remedies might become available by solving the problem through an alternative mode? Legal remedies depend on power, as suggested above.[62] Where the power is insufficient or too expensive to fix a problem, a remedy based on reciprocity, cooperation, or mutual regard might work better.

If any of the above questions are answered affirmatively, then an important jurisprudential point can likely be made about the particular legal doctrine at issue. Look carefully at the history and application of the legal rules: Can we find embedded in the elements of the rules, or in their historic application, an explicit or tacit acknowledgment that winner-take-all judgments are not completely appropriate when confronting this area of the law? For example: historically, does this aspect of legal doctrine employ equitable remedies? Are the basic legal rules peppered with exceptions, or legal fictions?[63] Are the legal rules interpreted with especial elasticity? Does this doctrine invoke specific references to broad notions like justice or fairness as a criterion for invoking the rule or fashioning a remedy? Have the subjective intentions of the parties been incorporated formally into an element of the legal rule? Does the court keep ongoing jurisdiction in the matter, requiring periodic review and possible adjustment of the resolution? All of these devices enable formal adjudication to respond to a problem that actually may be better suited to resolution through the consent mode.[64]

62. *See supra* Part I.D.2.b.

63. *See generally* LON L. FULLER, LEGAL FICTIONS (1967) (describing legal fictions and the functions they serve in stabilizing the legal system).

64. *See* Thomas Barton, *Justiciability: A Theory of Judicial Problem Solving*, 24 B.C. L. REV. 505 (1983) (suggesting a set of variables for both problems and pro-

Whenever the judgment mode is used to resolve a problem whose structural features suggest that the consent mode is more appropriate, we should expect to find in the substantive doctrine one or more features like resort to equity, doctrinal exceptions, a history of widely varying interpretations, or subjectivity that soften the binary tendencies of the judgment mode.

2. *The Prevention Mode*

As with the consent mode, instructors may identify doctrinal issues that may be especially appropriate for prevention mode treatment by asking a series of questions:

a. Does the problem associated with this legal doctrine involve ongoing management rather than a single permanent resolution? If so, the risk of a recurring problem is high, and the prevention mode is more strongly suggested.

b. Is the precise nature of the problem shrouded, or does it involve long-term issues where personnel or background conditions are likely to change?[65] If so, then the prevention mode is suggested because a single judgment that is "one-size-fits all, for all time" is not likely to work. Even if the doctrine is appropriate for one fact pattern, it may be clumsy for future iterations of the problem.

c. Does the problem entail trade-offs among many variables,[66] especially variables that are not easily reduced to uniform measures upon which formal operations (like arithmetic) can be performed?[67] If so, then preventing the problem from arising has a special importance, because legal judgments are less likely to resolve the problem accurately or satisfactorily.

d. Does the problem involve both transactions and relational components, such as business franchises, partnership arrangements, or transfers of property within families? If so, then the preventive system design can incorporate incentives, education, and structured commu-

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cedures, and identifying methods by which the common law modifies either the problem or its own procedures, when confronting problems that are structurally unusual).

65. *See, e.g.*, Fuller, *supra* note 32, at 1034-35.

66. *See, e.g.*, *id.* at 1035-36.

67. *See* Laurence H. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 625-30 (1973).

nications that will take these relationships and human dynamics more fully into account.

Whenever the prevention mode is strongly suggested for understanding a human problem, recommend to students that they use a special method for examining the existing legal rules pertaining to that problem.[68] Encourage the students to try to describe a system in which humans interact among themselves and with a surrounding nonsocial environment. The dynamics revealed by thinking about various elements in such a system can help students understand the rationale and also the limitations of the legal rules. What sort of information is needed within the system and by whom? How may it be obtained? How is the needed information represented and processed? Can the system be better designed for discovering and processing that information? Does the system tend to degrade? To stagnate? Can better feedback mechanisms be incorporated to ensure that the system functions better over time? By identifying the elements of the system and their typical (or mandated) interactions, a deeper understanding is gained not only of the current legal treatment of this ongoing human problem, but also of the preventive advice that might be supplied to a client as well.

B. *Exercises That Illustrate an Expanded Skillset*

Some easy in-class exercises can be done to enhance student awareness of the alternative modes of problem solving. These exercises do not take more than a couple of classes in a semester; hence, they need not compromise coverage of legal doctrine. The exercises are also simple, requiring very little time to be spent in advance by the instructor. Finally, the instructor should not be deterred by limited experience with teaching the lawyer skills that are associated with either the consent or prevention modes. These exercises are designed simply to alert students to the existence of the alternative possible modes of legal problem solving through comparing the outcomes of a problem using first the judgment mode and then one of the alternatives.

The exercises take advantage of the different tenses in which the modes operate.[69] As introduced above, the past tense is associated

68. Barton, *Thinking Preventively*, *supra* note 14, at 84-91.

69. *See supra* notes 1-6 and accompanying text.

with the judgment mode; the present tense with the consent mode; and the future tense with the prevention mode (although a "present tense" consent mode agreement can also operate prospectively to preempt new controversies). The judgment mode seeks to map the criteria of legal rules onto historical facts so as to determine liability. Consent, by contrast, reveals the current interests of the parties. Prevention projects legal risks outward into various possible scenarios, seeking current ways to intervene that will enable the system to self-correct before significant damage is done. Casebooks strongly orient problem solving toward the past, using the judgment mode. To overcome this, students can be placed artificially into the present tense to illustrate lawyer skills that are useful in the consent mode. Alternatively, they can be placed in the future tense to illustrate lawyer skills that are useful in the prevention mode.

Rather than drafting hypothetical fact patterns, the instructor can "shift the tense" of the students by recasting the facts of a case that appears in the casebook. Not only does using the facts of a reported case save time, but it also may demonstrate vividly the different legal outcomes that can emerge from using different problem solving modes.

Many cases in traditional casebooks may be valuably recast into the present or future tense. Promising candidates for recasting are those cases in which the law seems especially doubtful or controversial, or where both parties to the dispute seem to have suffered financially, emotionally, or relationally, even though one party has triumphed in the judgment mode. In the paragraphs below, I offer more detailed suggestions on how this "tense recasting" can be done.

1. *Recasting into the Consent Mode (Present Tense)*

To do the recasting into the present tense of the consent mode, first discuss the case in a traditional way, explicating the legal doctrine and the judgment made on the particular facts. Then, "rewind the tape" a bit. Ask the students to assume that although the problem has occurred, no legal claim has yet been filed. The purpose of this tense shift is to permit the students to consider broader, more imaginative sorts of solutions in addition to the traditional legal solutions. In particular, instruct the students that with a consensual solution, no legal judgment need be pronounced, nor money remedy imposed. Then ask

the students to role-play in class the attorneys for the parties who may be trying to negotiate a solution to the problem. This can be done informally with the students pairing off or forming small discussion groups.

Have students share their diverging results with the rest of the class. The outcomes of the consent process should be compared and evaluated against the judgment-based remedy reported in the casebook. Students should also be prompted to recognize the differing skills or questions asked that led to those differing outcomes.

2. *Recasting into the Prevention Mode (Future Tense)*

The prevention mode can be invoked by first rewinding the case history even further, to a point prior even to the loss or eruption of the problem. Students should then imagine themselves in the position of an attorney with the luxury of being consulted regularly by a client who may or may not perceive this particular risk that was destined to emerge into a problem requiring litigation. The students should articulate observable warning signs that may have been visible at an early stage regarding the client's organization, contracting partners, or family. From the imaginary position of an early counseling of the client, the students should address what as yet is merely a legal risk. They should be prompted to envision alternative futures from those that actually arose. They should then devise immediate ways to intervene so as to alter the problematic trajectory and counsel a simulated client on the steps to be taken. Here are three possible examples from subjects typically addressed in first-year classes:

a. *Contract Law*

Virtually any case involving the breach of a fully negotiated agreement can be used. Following the traditional doctrinal discussion of the case, break the students into negotiating teams. Tell the students that sometime prior to the next class meeting, they are to negotiate a contract that will:

i. Avoid a breach through contract language that is clearer than the language that resulted in litigation.

ii. Avoid a breach by structuring better incentives in the contract for each party to perform.

iii. Avoid litigation even if there is a breach, by inserting into the contract any of the following clauses: a *force majeure* clause that excuses performance under various conditions; a clause that requires prompt notification of dissatisfaction; a clause that mandates informal procedures to be followed in the event that dissatisfaction cannot be resolved immediately; and a valid liquidated damages clause.

b. *Property Law*

The following example is especially practical, but at the same time requires the students to reflect imaginatively on human motivations. Have the students work in teams of two in which they role-play a City Attorney. They should assume that the city council has mandated that a percentage of any newly constructed housing in the city will be "affordable" under a formula tied to the median income of city residents. The affordable housing must be fairly distributed around the city, not centralized into one neighborhood. The students should assume that significant opposition from residents can be expected *wherever* new affordable housing will be built in an otherwise higher-priced neighborhood. The Planning Department seeks advice from the City Attorney about how to set up the affordable housing program that would avoid expensive and obstructive lawsuits from disgruntled neighbors, and that also would ensure that only economically deserving persons would be able to obtain and remain in the designated affordable housing.

The students should work out of class:

i. To suggest procedures for determining how new housing can be integrated into both older and newer neighborhoods.

ii. To create financial or other incentives for builders, occupants, and neighbors regarding the new housing.

iii. To prevent resale or subleasing of the housing to persons whose income or wealth does not qualify them for such housing.

iv. To license or otherwise ensure that proposed housing actually meets the original objectives.

v. To receive and review community complaints and responses to the program.

c. *Torts/Products Liability*

Following a casebook problem about products liability, have the students break into small groups to imagine all the distinct points in the system of design, production, distribution, sales, and use of a product at which interventions could be made to reduce the risks of product liability. Each point of intervention presents an opportunity for designing an intervention that would help to break a pathological problem dynamic. Discussion should reveal issues and opportunities like the following:

i. Were the original specifications for the product overly specific, so that alternative design features could not be considered where risks might have been foreseen? Do the designs reflect technological state of the art respecting these risks? Have alternative designs been submitted by separate people, with their strengths and weaknesses objectively debated?

ii. Have reliable component and materials suppliers been used and adequate quality assurance steps taken?

iii. Has each product, or at least a random sampling, been tested for functionality and durability?

iv. Has the sales force made imprudent written or oral representations? What systems are in place for preventing such promises or descriptions from becoming part of the contract?

v. Do managers have incentives to ignore quality problems, or instead to find risks and respond quickly to them?

vi. Do consumers or users of the product have adequate warnings and/or training for its use?

IV. CONCLUSION

The judgment mode is unquestionably effective in addressing many legal problems. As authors of legal texts have understood for decades, it also offers a useful vehicle for understanding legal doctrine. However, not all legal problems are actually resolved by authoritative judgment. Furthermore, some legal doctrine can be more richly understood by discussing it using the assumptions and features of either the consent mode or the prevention mode.

By understanding better how these three modes of legal problem solving differ one from another, law students can gain a more comprehensive appreciation of the legal system as a whole, especially its

task of solving a broad range of human problems. The alternative modes can be employed in either traditional class discussion or in simulated recastings of textbook cases. In both discussion and simulations, the students should be prompted to imagine a broad range of skills that can be pertinent to lawyering. They should imagine themselves speaking more broadly and frequently with clients, to widen and deepen the contexts in which legal problems are understood. They should also endeavor to think systemically about how problems arise, so that problem antecedents can be comprehensively identified. Finally, they should be prompted to use their imaginations in proposing interventions that will smooth existing frictions, to create multiple channels of communication so that future dissonance is reduced, and to assist in the efficient, effective resolution of problems that do arise.