

California Western Law Review

Volume 34

Number 2 *Conceiving the Lawyer as Creative Problem Solver*

Article 2

1998

Introduction

Thomas D. Barton

California Western School of Law, tdb@cwsl.edu

Follow this and additional works at: <http://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Barton, Thomas D. (1998) "Introduction," *California Western Law Review*: Vol. 34: No. 2, Article 2.

Available at: <http://scholarlycommons.law.cwsl.edu/cwlr/vol34/iss2/2>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized administrator of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

CALIFORNIA WESTERN LAW REVIEW

VOLUME 34

SPRING 1998

NUMBER 2

CONCEIVING THE LAWYER AS CREATIVE PROBLEM SOLVER: INTRODUCTION

THOMAS D. BARTON*

In this symposium issue, "Conceiving the Lawyer as Creative Problem Solver," the *California Western Law Review* celebrates the central mission of California Western School of Law to educate creative problem solvers. Long part of the philosophy of the school, the concept has recently galvanized formation of the McGill Center for Creative Problem Solving. Generously funded by the Weingart Foundation, the McGill Center will undertake empirical and qualitative efforts to understand and promote non-violent dispute resolution skills among youngsters, and will seek ways to make law more effective in the prevention of domestic violence. Additionally, the Center will produce and circulate written materials and videos designed to raise awareness in the legal community and among the public generally about the opportunities for solving problems better.

With this issue, the *California Western Law Review* begins what will be an ongoing effort to publish a rich diversity of scholarly discussion of creative problem solving. The *Review* hopes—now and in years to come—to be a primary source for those who seek to examine how law and the legal process may contribute to effective, respectful, inclusive ways to resolve personal and social problems. A portion of every volume will address this mission, and the *Review* invites all those who may be inspired by the goal to submit their own contributions. As with the articles in this symposium, authors may address particular problems, techniques of problem prevention and resolution, theoretical aspects of assessing problems and their solutions, or the teaching of problem solving theory and skills.

In the best tradition of scholarly investigation, no one political or theo-

* Professor of Law, California Western School of Law. B.A., 1971, Tulane University; J.D., 1974, Cornell Law School; Ph.D., 1982, Cambridge University.

retical orientation will be privileged in the *Review's* offerings. Some published articles will be critical of legal assumptions or legal institutions; others will detail historical successes of the law. Yet others will suggest particular legal reforms, or will attempt to couple the language of law with that of psychology, sociology, politics, or ethics.

The works of the current symposium are representative of this diversity. They urge, for example, the use of a universalist legal language to challenge the prevailing rhetoric of power in international relations (Kritsiotis),¹ and to empower indigenous peoples everywhere (Smith).² They reveal the core of legal thinking to be the abstraction and articulation of consistent principles, and advocate the greater use of precedent in environmental decision making (Pardy).³ They address substantive problems, and the need to reform legal rules or practice concerning those problems (Brownlie regarding securities class action suits in state courts;⁴ Kanazawa regarding manufacturer exposure to product liability claims;⁵ Sorenson regarding sexual harassment actions⁶). They seek to enhance sensitivity to the emotional needs of clients by calling on lawyers to join in identifying "psycholegal soft spots" in legal representation (the paper of Patry, Wexler, Stolle, and Tomkins).⁷ They call for lawyers to develop a variety of problem solving tools plus the imagination, personal courage, and human empathy to employ those particular tools that best address a particular problem (the separate papers of Kerper,⁸ Cooper,⁹ and Barton¹⁰). They advance the pedagogy that will be essential to educating lawyers in developing those skills (the separate works by Nathanson,¹¹ Morton,¹² Johnson,¹³ and Ireland¹⁴). Last but not least, they compile

1. See Dino Kritsiotis, *The Power of International Law as Language*, 34 CAL. W. L. REV. 397 (1998).

2. See Rhona K.M. Smith, *The International Impact of Creative Problem Solving: Resolving the Plight of Indigenous Peoples*, 34 CAL. W. L. REV. 411 (1998).

3. See Bruce Pardy, *Abstraction, Precedent, and Articulate Consistency: Making Environmental Decisions*, 34 CAL. W. L. REV. 427 (1998).

4. See Robert W. Brownlie, *Federal Preemption as a Possible Response to a New Challenge: Securities Class Actions in State Court*, 34 CAL. W. L. REV. 493 (1998).

5. See Sidney K. Kanazawa and Dan R. Gallipeau, *Minimizing Product Liability Exposure: Practical Solutions for Manufacturers*, 34 CAL. W. L. REV. 509 (1998).

6. See Richard C. Sorenson et al., *Solving the Chronic Problem of Sexual Harassment in the Workplace: An Empirical Study of Factors Affecting Employee Perceptions and Consequences of Sexual Harassment*, 34 CAL. W. L. REV. 457 (1998).

7. See Marc W. Patry et al., *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439 (1998).

8. See Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351 (1998).

9. See James M. Cooper, *Towards a New Architecture: Creative Problem Solving and the Evolution of Law*, 34 CAL. W. L. REV. 297 (1998).

10. See Thomas D. Barton, *Creative Problem Solving: Purpose, Meaning, and Values*, 34 CAL. W. L. REV. 273 (1998).

11. See Stephen Nathanson, *Designing Problems to Teach Legal Problem Solving*, 34 CAL. W. L. REV. 325 (1998).

12. See Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*,

published sources through which new ideas may be explored and developed (the annotated bibliography of Phyllis Marion).¹⁵

The scholarly and educational ambition of California Western is the construction of, in Cooper's words, an "architecture" of problem solving.¹⁶ But why, it may be asked, should a law school embark on such an enterprise? The question has two distinct dimensions: first, why is creative problem solving important? And second, why a law school? Why not leave problem solving to cognitive scientists, logicians, or economists?

I. THE IMPORTANCE OF CREATIVE PROBLEM SOLVING

Creative problem solving is important for at least three reasons, one of which is obvious and the other two more subtle. The obvious reason is that creative problem solving is dedicated to generating new mentalities and skills to be applied to problems. In turn, problems are likely to be solved better—more reliably, more durably, more respectfully and with fewer side-effects—where a diversity of alternative procedures is available to approach the problem. Each new procedure offers a slightly different perspective on a problem from which some nuance or facet of the problem may be uniquely visible. The more dimensions of a problem have been considered in advance of applying a solution, the more comprehensive and better the solution is likely to be.

The second reason that problem solving is important is that techniques of problem solving must be humanly invented. Problem solving does not exist in nature, or at least not at the cognitively complex levels that humans understand the concept.¹⁷ We have inherited from previous generations—through their genius and sometimes considerable personal sacrifices—the devices that we now take for granted in solving problems: democracy, the rule of law, scientific rationality, even the seemingly simple notion of enforcing promises.¹⁸ Untold numbers of persons literally gave their lives to secure these advances in non-violent problem solving. Simply put, we owe it to future generations to continue this evolution—we owe it not only because the world may thereby be more peaceful, secure or just; and not only because to do otherwise is to subordinate imagination to complacency and

34 CAL. W. L. REV. 375 (1998).

13. See Andrea L. Johnson, *Teaching Creative Problem Solving and Applied Reasoning Skills: A Modular Approach*, 34 CAL. W. L. REV. 389 (1998).

14. See Marilyn J. Ireland, *Magician to Sorcerer: A Book Review of Stephen Nathanson's "What Lawyers Do,"* 34 CAL. W. L. REV. 529 (1998).

15. See Phyllis C. Marion, *Problem Solving: An Annotated Bibliography*, 34 CAL. W. L. REV. 537 (1998).

16. See Cooper, *supra* note 9.

17. See Lon L. Fuller, *Irrigation and Tyranny*, 17 STAN. L. REV. 1021 (1965).

18. See Friedrich Wilhelm Nietzsche, *The Genealogy of Morals*, in FRIEDRICH NIETZSCHE, *THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS* 190 (Francis Golfing trans., 1956).

institutional inertia.

We owe the future our efforts at creative problem solving for the fundamental reason that the means by which we seek to understand and address our problems goes far toward constituting who we are, and what in the future we will perceive as our problems.¹⁹ Means and ends are not discontinuous.²⁰ What would we be, had we never adopted democracy—how limited our horizons? What level of social trust could exist without enforceable promises?²¹ Absent the rule of law who could dare to be different?

II. LAW AS A BASIS FOR EXPLORING PROBLEM SOLVING

The second question asks why a *law* school should emerge as the training ground for creative problem solving. For several reasons, law is an attractive foundational discipline on which to design the architecture of problem solving. First, law is self-conscious of the values advanced by its procedures. Second, its practitioners develop sensitivity and respect for process regularity and legitimacy. Finally, by reason of its position as default problem solver, law has grappled with the most difficult issues faced by individuals and society as a whole.

The central premise of law has always been that, quite apart from particular outcomes, *how* problems are solved matters greatly. As Pardy suggests, legal process does indeed work by hoisting an abstract principle and shepherding related disputes under its canopy.²² Doing so offers order and protection through a process that, at least rhetorically, advances the rationality and equality of an enlightened society. Law certainly is propelled by instrumentalist goals, but it has always been willing to balance the quest for accuracy and efficiency by a concern for human dignity and a belief in the possibility of human redemption. Other disciplines like operations research, economics, and engineering employ procedures that trade off some measure of accuracy for higher efficiency. But as the law of evidentiary privileges²³ and various aspects of criminal investigation and prosecution demonstrate, only law will sacrifice *both* efficiency and accuracy to preserve the ties of human loyalty²⁴ or to shield individual autonomy from the reaches of the state.

Second, the legal concern for procedure has instilled instincts among lawyers for regularity and legitimacy. Such instincts may provide an in-

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

20. See *id.* at 650-51.

21. See Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U.L. REV. 531 (1995).

22. See Pardy, *supra* note 3.

23. See Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631 (1984).

24. See GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 77-82 (1993).

valuable ethical tether on the techniques that may be proposed under the license of "creativity." In my view, techniques which are manipulative, deceptive, cruel, or malicious have no place in an expanded repertoire of legal skills. Winning through intimidation or the promotion of fear does not "solve" problems; it merely represses their symptoms and awaits their re-emergence as covert retaliation.

Third, the law is experienced with the most contentious, most sensitive, most important, and perhaps even the most complex problems. Over the years the problems of scarcity, intolerance, and human cruelty have been addressed in the law—although certainly not completely successfully. Growing social problems of distribution, identity, and relational fragmentation will require the breadth of vision—some would say arrogance—that the law presumes. The traditional legal tools of rules and rights may well be inadequate to meet the demands of those problems, but the common law spirit of necessitated improvisation may fuel the creativity needed to fashion new legal tools or forge partnerships with other disciplines.

Toward, then, the end of civil, respectful relationships, we invite your participation in the means of achieving it: studying, criticizing, and building creative ways of solving problems.

