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# CREATIVE PROBLEM SOLVING VS. THE CASE METHOD: A MARVELOUS ADVENTURE IN WHICH WINNIE-THE- POOH MEETS MRS. PALSGRAF

JANEEN KERPER\*

## I. INTRODUCTION

For over a century, the “case method” of instruction developed by Dean Christopher Columbus Langdell at Harvard has been the predominant mode of law school instruction. The case method remains the centerpiece of legal education although the last quarter of the twentieth century has witnessed increased experimentation with other models such as law clinics, simulations, learning-by-doing, and the problem method.<sup>1</sup> This is especially true in the first year.<sup>2</sup> In law school orientation, usually one of the first skills a student learns is how to brief a case. Many first year professors spend the first two or three classes indoctrinating their students in their preferred methods of case briefing. First year courses usually begin with the assignment of a case to read. It is the rare and exceptional first year course that begins by presenting a student with a problem to solve; even rarer is the first year course which suggests to the student that the solution to a client’s problem may have little to do with the law.

Defenders of the case method make extravagant claims for its effectiveness. The method is viewed as the appropriate method of teaching students how to “think like a lawyer”<sup>3</sup> and as “an essential foundation for the lawyer’s core task of advising clients about the legal consequences of particular courses of action.”<sup>4</sup> Some scholars go so far as to suggest that the case method contributes to the development of a lawyer’s judgment or practical wisdom:

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1. See generally Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1 (1996).

2. See *id.*

3. See *id.* at 20.

4. See, e.g., Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5, 7 (1995).

The case method of law teaching presents students with a sense of concrete disputes and compels them to reenact these disputes by playing the roles of the original contestants or their lawyers. It thus forces them to see things from a range of different points of view and to entertain the claims associated with each, broadening their capacity for sympathy by taxing it in unexpected ways. But it also works in the opposite direction. For the student who has been assigned a partisan position and required to defend it is likely to be asked a moment later for his views regarding the wisdom of the judge's decision in the case. To answer, he must disengage himself from the sympathetic attachments he may have formed as a committed, if imaginary, participant and reexamine the case from a disinterested judicial point of view. . . . One aim of this complex exercise in advocacy and detachment is the cultivation of those perceptual habits that lawyers need in practice.<sup>5</sup>

The thesis of this article is that inflated claims for the effectiveness of the case method are based on flawed premises, and are demonstrably false. It is time for law school teaching to relegate the case method to its appropriate position—as only one analytical tool among many which can be employed in the resolution of a client's problems. The skills developed by the case method are at best rudimentary; the much touted "legal analysis" of the case method is little more than a narrow articulation of rather obvious adversarial positions, accompanied by the selective matching of factual data with so-called legal elements to justify the positions advanced. Compared to more sophisticated models of problem solving, case analysis is a blunt instrument. Even worse, as a methodology it is antithetical to the effective resolution of most clients' problems.

What follows is a critique of the case method, contrasting the analytical methods it employs with the techniques of creative problem solving. The article concludes with a comparison of two simple models. The first is the "IRAC" model of case analysis described in numerous texts purporting to teach law students how to brief cases.<sup>6</sup> The second is a popular model of problem solving denominated by the acronym "SOLVE" and described in light-hearted detail in *Winnie-the-Pooh on Problem Solving* by Roger and Stephen Allen.<sup>7</sup> For comparison purposes, both models will be applied to a fact pattern familiar to American law students everywhere—the injury of Mrs. Palsgraf at a Long Island Railway station in August 1924.

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5. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 113 (1993).

6. See, e.g., HELEN S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* (3d ed. 1995); JOHN DELANEY, *HOW TO BRIEF A CASE, AN INTRODUCTION TO LEGAL REASONING* (1983).

7. ROGER E. ALLEN & STEPHEN D. ALLEN, *WINNIE-THE-POOH ON PROBLEM SOLVING: IN WHICH POOH, FIGLET AND FRIENDS EXPLORE HOW TO SOLVE PROBLEMS SO YOU CAN TOO* (1995).

## II. TRADITIONAL LAW SCHOOL METHODS AND PROBLEM SOLVING CONTRASTED

Before there are cases, there are human beings with problems. As every practicing lawyer knows, clients do not present themselves in lawyer's offices with well-defined fact patterns, clear adversarial positions, or precisely formulated objectives or goals. In short, real life clients look nothing like appellate cases. Instead, they most often provide partial information, and their presentation can be distorted by self-interest and intense emotions such as anger, fear, or shame. Their immediate goals may be in conflict with their long-term interests. Parties whom they perceive as their adversaries may in fact be their allies, and parties they believe to be their allies may in fact be adversaries. Particularly in the early stages of representation, good lawyering requires skills of listening, fact investigation, interest clarification, negotiation, and planning. However, the case method does not even purport to address these skills.

As a result of continuing criticism of the limitations of the case method in particular<sup>8</sup> and law school education in general,<sup>9</sup> courses teaching such essential lawyering skills are gradually being introduced into law school curricula. These skills courses tend, however, to be optional, and are offered only in the second and third year of law school. They have by no means surpassed or supplanted the case method which continues to be the centerpiece of legal education. As numerous practitioners, scholars, and educational theorists have pointed out, there is significant slippage between the law as taught and the law as practiced.<sup>10</sup> One result has been an explosion of continuing education courses designed to "bridge the gap" between the two. Yet it seems as if the gap continues to widen. Could it be that the case method is contributing to that gap? Is it time to systematically examine the limitations of the case method to determine whether it still deserves its long held position at the core of legal education?

Traditional law school methods emphasize the study of appellate cases, rules, statutes, and the procedures of the adversary method. The lawyer's perceived role is to vindicate the client's individual interests. Conflict is

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8. See Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

9. See SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASSOC., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992) [hereinafter MACCRATE REPORT].

10. See Amsterdam, *supra* note 8; Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995); Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue About Teaching Socratic Method*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1997); KRONMAN, *supra* note 5.

viewed as a zero-sum game with rights and liabilities, and winners and losers. Advocacy and assertiveness are seen as important skills. Emotion is consciously repressed in favor of a detached analysis.

In contrast, creative problem solving proceeds on the theory that lawyers can join together with other professionals to provide more effective solutions to clients' problems. Creative problem solving assumes that not all problems require legal solutions; and not all legal problems require a lawsuit. Instead, problems are viewed as multidimensional, often requiring nonlegal or multidisciplinary solutions. The lawyer's role is to assist the client in resolving problems in the broadest sense because, in our litigious society, many nonlegal problems tend to masquerade as legal problems. One of the most significant aspects of the lawyer's role is assisting the client in building, maintaining, and strengthening positive relationships with others to avoid or prevent conflict. Conflict, when it does occur, is viewed as first requiring exploration of opportunities for integrative bargaining and possible win-win solutions. The adversary process is viewed as a last resort. Emotion is viewed as integral to the problem solving process, as is human psychology, group dynamics, intuition, and values. Listening and collaboration are the salient skills.

It is important to note that creative problem solving does not jettison the adversary method. On the contrary, the adversary process is viewed as one important way in which individual and societal problems may be addressed. The difference is that creative problem solving seeks to rearrange priorities. Where collaboration is feasible, the adversary process is seen as the least desirable of a range of possible solutions. Where collaboration is not feasible (e.g., where the conflict is the product of a gross imbalance of power or where the conflict seeks to vindicate important civil or public rights) litigation may be the best solution.

If the popular press is to be believed, there is considerable support from the public for this reordering of lawyers' priorities. The press complains that as a nation we have become "lawsuit crazy," and regularly attacks lawyers for their aggressiveness and venality. Lawyers are continually criticized for their one-sidedness, attachment to the client's self-interest, and lack of concern for the public good. Within the profession, there is also a perceived need for change. This need is being spurred on by the explosive growth in alternative forms of dispute resolution such as mediation.

If we wish to change the way lawyers prioritize their thinking about problems, we must change the way they are educated. We cannot abandon the case method entirely, but we must rethink the advisability of its continued use as the primary method of legal education. We must particularly rethink the extent to which it is used in the first year of law school. Educational research demonstrates that once learners become habituated to a particular teaching method, it becomes difficult to introduce new methods. When teachers confront learners with new methods, they may expect to en-

counter reactions ranging from uncertainty to hostile resistance.<sup>11</sup> By continuing to rely on appellate cases as the primary method of teaching in the first year, we not only convey the tacit message that litigation is the problem solving method of choice, but we actually make it more difficult to introduce later instruction in other forms of problem solving.

The consequences of first year concentration on the case method are well-illustrated by an anecdote told by one of my colleagues. A heel broke off a shoe that she had purchased the day before. When she attempted to return the shoe to the store, the manager not only refused to correct the problem, but physically ejected her from the store when she began complaining about her treatment loudly enough for other customers to hear. My colleague teaches second and third-year law students, and she asked them what they thought about this story. Their responses were immediate: breach of contract, breach of implied warranties of fitness and merchantability, assault, battery, false imprisonment, and intentional and negligent infliction of emotional distress. The students were willing to file a lawsuit on behalf of their professor. All the professor wanted, however, was an apology and store credit. A lawsuit was the furthest thing from her mind.

The case method should be only one tool in the lawyer's tool box. To use a crude analogy, it is as if we were teaching carpenters how to build houses through a three-year training program in which the entire first year was spent teaching them how to use hammers (e.g., how to hammer floorboards, how to hammer the framing, how to hammer the wallboards, and how to hammer the shingles on the roof). In the second and third year of their training, we hand them an occasional screwdriver and pair of pliers. But by this time, of course, the hammer has become the tool of choice. It is no surprise that after graduation, when faced with a construction problem, our carpenter's immediate solution is: "Let's hammer it!" If we wish to avoid this consequence, we must start training our carpenter early in the use of other valuable tools. We still want our carpenter to be able to use the hammer, but in the first year we will also expose the carpenter to the saw, the level, the screwdriver, the wrench, and the pliers. We want to inculcate our carpenter early with instruction in a variety of tools, and with the flexibility of mind to reach for the right tool at the right time. We want our carpenter to understand early that there is a range of options.

Underlying the case method is a set of tacit assumptions which significantly constrain the options a lawyer may consider in attempting to resolve a client's problem. Chief among these is the implicit model of an adversary system based on rights and liabilities. Reasoning and decision making are seen as rule-based, in marked contrast to the relational reasoning and decision making seen in other cultures,<sup>12</sup> in feminist legal critique,<sup>13</sup> and in crea-

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11. See, e.g., BOB HOFFMAN & DON RITCHIE, EDUCATIONAL TECHNOLOGY BY DESIGN 111 (1998).

12. See, e.g., PETER M. SENGE, THE FIFTH DISCIPLINE, THE ART AND PRACTICE OF THE LEARNING ORGANIZATION 145 (1990).

tive problem solving. The case method assumes a single decision maker—a judge. In contemporary society, decision making is more commonly made by relational networks such as committees, communities, families, work-teams, agencies, or organizations with multiple constituencies. In the world of real life lawyers, it is far more likely to be one of these groups who will determine the client's fate rather than a judge.

The single decision maker hypothesis in turn produces other limitations including limits on: the number of perspectives which can be brought to bear upon the problem, the disciplines to be applied, and the analytical techniques to be employed. Judges are inclined to view disputes in binary terms (i.e., that disputes are about conflicting interpretations of the law, and that once the law is made clear it will favor one party over the other) because of their training and by formal role constraints.<sup>14</sup> The judge's reliance on precedent imposes significant limitations on creativity. Cases are used only to substantiate or falsify theories, instead of using theory in service to solving real cases and problems. The case method proceeds on a normative form of representation contemplating one lawyer representing one client, instead of teams of professionals working together to meet a client's needs.

In addition to the foregoing constraints, case analysis tends to be backward-looking in time. A major objective of the inquiry in a case is to determine what happened, instead of determining what can be done about a situation. Persistent focus on the case method emphasizes the role of lawyers as investigators and inquisitors instead of their role as arrangers and advisors.<sup>15</sup> In the case analysis mode, the lawyer's intellectual energy is often devoted to exercises in blame-shifting relative to past actions, as opposed to a search for future options.

But perhaps the most insidious assumption of the case method is its narrow view of the role of the lawyer; that is, the lawyer's task is to advise clients about the legal consequences of particular courses of action, and advocate their individual interests. Lawyering limited to the analysis and manipulation of rights misses opportunities to prevent or resolve problems by reconciling or redesigning the relationships in which problems are embedded. Such a short-sighted view of the lawyer's task would be startling to lawyers of my parents' generation. My parents both graduated from the University of Wyoming Law School in the early 1920s. Langdell's method had not yet established its all-pervasive grasp on law school education at the University because schools in the Far West were typically "behind the times" in relationship to the law schools of the East Coast. Many classes

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13. See, e.g., Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988).

14. See Anthony J. Cobb, *Coalition Identification in Organizational Research*, in RESEARCH ON NEGOTIATION IN ORGANIZATIONS 189 (Ray J. Lewicki et al. eds., 1986).

15. Compare with Cobb, *supra* note 14 (positing that in an organizational context the arrangers/advisors are far more effective problem solvers than the investigators/inquisitors).

were taught by practicing lawyers who became “lecturers” on the law. Many western lawyers were admitted to the bar by “reading” the law—learning it essentially by a system of apprenticeship and self-tutoring. The academic specialist was the exception rather than the norm, and the link between legal education and the practice of law was much less tenuous than today.

My parents ultimately practiced law in the small town of Cody, Wyoming. Their law practice would not have survived long if they had viewed their profession narrowly, and viewed themselves merely as advocates and transmitters of knowledge about the legal consequences of actions. My parents had a much broader concept of their professional role. As general practitioners, my father and mother occasionally went to court to champion a client’s rights; but the trip to the county courthouse was always viewed as the solution of last resort. My parents knew that in a small town everybody knew everyone—and everybody knew everyone else’s business. A person’s reputation and the quality of the person’s relationships were everything. My parents understood fully that their clients’ decisions were not constrained only by the process of law or what a legal decision maker might say. They were much more constrained by what the neighbors might say. Consequently, the nature of their practice demanded that they become skilled relationship builders. It also demanded that they be wise. They were not expected to present their clients with a series of options and remain neutral about their clients’ decisions. They were not expected to remain objective; they were expected to make moral judgments. Because they were advice givers in the broadest sense, my parents were forced to become excellent listeners. They were practitioners who carefully identified the persons involved in interdependent relationships, and they made sure that all key parties had a chance to contribute their perspectives. They saw themselves less as gladiators, and more as wise friends. As a lawyer, each was only one of the players in a web of relatedness. For my parents, the constructive solution to problems required a full understanding of the social context of the problem and the input, talents, and needs of all those involved.

The modern urban practitioner may find it all too easy to dismiss my parents’ style of lawyering as suitable for another place and another era. If anything, just the opposite is true. My parents’ community consisted of some 5,000 souls. In today’s highly fragmented and specialized society, we live in much smaller communities. Today our communities are not towns; they are churches, families, corporations, and fellow specialists. What our neighbors from across the street think of us may not matter as much as it once did; but what our co-workers, spouses, and professional colleagues think is important to our very survival. Even the big city lawyer cannot afford to treat clients as if they were autonomous, having only to answer to a court for the consequences of their decisions. Yet this is the model of the case method, iterated and reiterated thousands of times throughout three years of legal education, and most predominately in the first year.



The limitations of this approach to legal education are bluntly stated in a book which, for many students during the 1980s, became the handbook on how to survive the first year of law school. In *How to Brief a Case: An Introduction to Legal Reasoning*, New York University Law School Professor John Delaney states:

To understand what you do in the first year of law school, it may help to know what you will not do.

1. You will not participate in lengthy class explorations of:
  - justice and the requirements of a just society
  - abstract philosophical and ethical questions
  - economic and sociological theories
  - social science research methods, reports and data
  - political issues

Indeed, many of your professors will react negatively to student responses which reflect these “frequencies” of knowledge and analysis because they want to orient you to a legal frequency of knowledge and analysis. They seek to have you read, think, talk and write like a lawyer, not like a philosopher, ethicist, economist, sociologist, researcher or politician.<sup>16</sup>

The justification for the case method that it teaches law students “how to think like lawyers” is, of course, the most commonly advanced justification for this curiously limited view of the law.<sup>17</sup> Most lay people would be startled by Professor Delaney’s statement. My parents would have been appalled. Although they did not describe it in exactly Professor Delaney’s terms, most of their practice was devoted to: issues of justice and the requirements of a just society; abstract philosophical and ethical questions; economic and sociological theories; social science research methods; reports and data; and last, but certainly not least, political issues.

If the first year of law school is intended to teach students how to think like lawyers, perhaps someone ought to be asking two questions: (1) How do lawyers think?; and (2) How should they think? This much seems clear: practicing lawyers do not think like appellate judges, and lawyers do not think like academicians. Professor Delaney gives us some insight into how real lawyers think when he candidly admits some of the limitations of the case method:

[A] range of fundamental lawyerly skills are not taught, or mostly not taught, with the case method. These include skills in: (a) uncovering facts from clients, witnesses, documents and elsewhere; (b) interviewing; (c) client counseling; (d) negotiating and mediating; (e) writing; (f) motion, trial and appellate advocacy; (g) informal advocacy (e.g., with administrative agencies at federal, state and local levels); (h) working col-

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16. See DELANEY, *supra* note 6, at 1-2.

17. See, e.g., Friedland, *supra* note 1, at 20-21.

laboratively with others; (i) reflecting on the underlying values implicit in cases and the personal choices inherent in different forms of lawyering.<sup>18</sup>

Delaney then dodges the obvious question of why law schools do not teach such skills by suggesting that they “can often be learned in clinical and simulation courses” or by “acquir[ing] part-time paid [legal] and volunteer work.”<sup>19</sup> He cautions: “It is a mistake, however, to undertake such legal work during the first year of full-time law school unless economic pressures allow no alternative.”<sup>20</sup>

Thus, what *is* this famed legal reasoning (the ability to “think like a lawyer”) that the case method teaches? Based on the available evidence, it appears to be a uniquely circular style of reasoning.

### III. “TRAC” VS. “SOLVE”

The relative lack of sophistication of the case method can be appreciated through a comparison of a basic model of case analysis with a popular model of problem solving. The so-called “TRAC” model of case analysis is described in numerous texts purporting to teach students how to brief cases and write law school examinations.<sup>21</sup> A popular model of problem solving denominated by the acronym “SOLVE” is described in *Winnie-the-Pooh on Problem Solving*.<sup>22</sup> The limitations of the case method are seen immediately in the application of both models to a fact situation familiar to American law students everywhere: the injury of Mrs. Palsgraf at a Long Island Railway station in August 1924.

Generations of law students have sweated over the meaning of the Palsgraf case,<sup>23</sup> and gallons of ink have been spilled on the subject. Curiously, very little is known about the actual facts. This is partly due to the unusually terse statements of facts contained in both the majority opinion by Cardozo and the dissent by Andrews. Two noted authors have probed behind those terse statements, and have delved into the trial transcript,<sup>24</sup> a New York Times article,<sup>25</sup> and other public records surrounding the event. Judge John T. Noonan, Jr.’s account<sup>26</sup> is the more exhaustive, whereas Justice

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18. DELANEY, *supra* note 6, at 19.

19. *Id.*

20. *Id.*

21. See, e.g., GERTRUDE BLOCK, *EFFECTIVE LEGAL WRITING* (4th ed. 1992); DELANEY, *supra* note 6; SHAPO ET AL., *supra* note 6.

22. ALLEN & ALLEN, *supra* note 7.

23. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

24. The trial record is published in AUSTIN WAKEMAN SCOTT & ROBERT BRYDON KENT, *CASES AND OTHER MATERIALS ON CIVIL PROCEDURE* 1061-105 (rev. ed. 1967).

25. The newspaper account is titled, *Bomb Blast Injures 13 in Station Crowd*, N.Y. TIMES, Aug. 25, 1924.

26. See JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES,*

Richard A. Posner's discussion<sup>27</sup> is more whimsical. Both authors tend to focus on Cardozo's role in the landmark opinion, but Noonan also provides information about the lawyers involved on both sides of the case. Thus, Noonan gives us some sense of the quality of lawyering underpinning this remarkable decision.

Helen Palsgraf was a forty-three-year-old single mother, separated from her husband. She had three children, and the younger two were with her at the time of the accident: Elizabeth, fifteen and Lilian, twelve. She and her three children lived in a rented basement flat. Helen Palsgraf testified that she had always worked, and that she was "all alone," intimating that her husband contributed nothing to the family income. In order to make ends meet she worked two jobs. She performed janitorial work in the apartment building where she lived, and received a rent reduction of ten dollars a month. She also worked as a cleaning woman outside the apartment, earning two dollars a day or about eight dollars a week.<sup>28</sup>

On Sunday, August 24, 1924, Helen Palsgraf decided to take her younger daughters to the beach. The day was hot and seemed ideal for a seaside excursion. It was ten o'clock in the morning. Helen bought their tickets and walked onto the crowded station platform. Lilian went to purchase a Sunday paper. As a train started to pull out, there was an explosion with a blast heard blocks away. There was also considerable smoke and a fireball, and the force of the blast ripped up part of the wooden station platform. Helen Palsgraf's first concern was for her children.<sup>29</sup> She testified to "[f]lying glass—a ball of fire came, and we were choked in smoke, and I says 'Elizabeth turn your back,' and with that the scale blew and hit me on the side."<sup>30</sup> Immediately after being struck by the scale, Mrs. Palsgraf's concern was again for one of her daughters. "Well, all I can remember is, I had my mind on my daughter, and I could hear her holler, 'I want my mama!'—the little one . . . Lilian."<sup>31</sup>

At the moment of the explosion, Helen Palsgraf was standing next to a penny scale that was about as tall as she was. The force of the explosion shattered the glass in the scale and knocked the scale itself over onto Mrs. Palsgraf. Famed torts scholar William Prosser speculated that it was the crowd running from the explosion which actually tipped the scale over.<sup>32</sup> Justice Richard Posner surmised that the platform was so damaged, "it buckled under the scale, tipping it over."<sup>33</sup> Whatever the precise sequence of events, Helen Palsgraf was not severely injured. Although other passengers

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JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (1976).

27. See RICHARD A. POSNER, *CARDOZO, A STUDY IN REPUTATION* (1990).

28. See NOONAN, *supra* note 26, at 126.

29. See *id.*

30. *Id.*

31. *Id.* at 119.

32. See William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 3 n.9 (1953).

33. See POSNER, *supra* note 27, at 34.

injured in the accident were taken away by ambulance, Helen Palsgraf was simply led into the waiting room and given something to drink by an ambulance doctor. She ultimately took a taxi home. On the next day, a doctor from the Long Island Railroad Company visited her and asked her about the incident. On Tuesday, she called her own doctor, Dr. Karl Parshall, whom she visited approximately twenty-five times during the next two and a half months.<sup>34</sup>

About a week after the event, Mrs. Palsgraf began to stutter and stammer. The stammer was the major element of damages at her trial. According to Dr. Hammond, a neurologist who testified at her trial: "It was with difficulty that she could talk at all."<sup>35</sup> He diagnosed Helen as suffering from "traumatic hysteria." Significantly, Dr. Hammond took the position that the stammer was symptomatic of a deeper trauma, associated with the litigation itself: "While her mind is disturbed by litigation she will not recover, but after litigation—I don't mean by that her getting any verdict but as soon as the worry of the trial is over and she knows she doesn't have to go here on the witness stand and undergo cross-examination she should make a fairly good recovery in about three years."<sup>36</sup> On cross-examination the defense lawyer asked, "Might this condition have been corrected before this time by medical treatment?" and he answered, "Not while litigation is pending. It has been my experience that it never is benefited or relieved or cured until the source of worry disappears by the conclusion of the trial."<sup>37</sup>

The trial did not begin until October 1927, almost three years after the accident. At the conclusion of the trial, Mrs. Palsgraf received a jury verdict of \$6,000, a windfall of fourteen times her annual income or about \$50,000 in today's dollars. The intermediate appellate court affirmed the jury's verdict. The Court of Appeals ultimately took this verdict from her by a narrow margin, resulting in the famous Cardozo opinion and Andrews dissent now read by every law student in America. In a final bit of irony, Cardozo assessed costs "in all courts" against Mrs. Palsgraf, both her own and those of the railroad. Noonan estimates that the total costs were probably close to a year's income for Helen Palsgraf.<sup>38</sup> According to one report, Mrs. Palsgraf became mute after losing her case.<sup>39</sup>

Through the Palsgraf case, law students learn something about the remarkably confused state of the law of proximate causation. More importantly, they learn something about the art of framing legal issues. Students learn that how an issue is framed can determine both how an issue is decided and who decides it. If, as Cardozo said, the issue is one of duty, the judge

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34. See NOONAN, *supra* note 26, at 127.

35. *Id.*

36. *Id.*

37. *Id.*

38. See NOONAN, *supra* note 26, at 144.

39. See Walter Otto Weyrauch, *Law as Mask: Legal Ritual and Relevance*, 66 CAL. L. REV. 699, 706 n.25 (1978).

will decide. If, as Andrews stated, the issue is one of fact, the jury will decide. Palsgraf teaches law students a very important principle of advocacy. They learn that the way the issue is stated can completely skew the result. This ability to slant the issue is soon elevated to an essential skill of lawyering; it is applicable to case briefing, writing appellate briefs and motions, and, of course, to writing law school examinations. Like their models, Cardozo and Andrews, students are repeatedly taught to formulate an issue in a one-sentence question which incorporates the key facts (or some of them) and points to an applicable rule of law.<sup>40</sup> Moreover, students are taught to state facts tersely, extricating the relevant key facts which are defined a priori as only those facts with legal significance. Key facts are the "facts or combination of facts which have the most legal significance . . . [and] which establish the elements of a legal rule and therefore require or permit application of that rule."<sup>41</sup> Mrs. Palsgraf's age, poverty, marital status, occupation, and concerns as a mother were omitted from both the majority and dissenting opinions because they were not legally relevant.

A 1995 textbook on legal writing and analysis teaches that "[t]o find the issue, you have to identify the rule of law that governs the dispute and ask how it should apply to those facts."<sup>42</sup> This version of legal analysis assumes that in order to frame the question, you must already know the answer. As Professor Delaney points out: "The only difference between the statement of the issue and the statement of the holding is that the issue is in the form of a question and the holding is in the form of a declarative sentence."<sup>43</sup> Elsewhere he admits that "legal reasoning is circular."<sup>44</sup> Indeed it is. As taught by Professors Shapo, Walter, Fajans, and Delaney, and as modeled in hundreds of cases like Palsgraf, legal reasoning starts with a desired conclusion, frames the question to fit the desired outcome, then selects the facts to fit the issue and the foregone conclusion. This is a peculiar form of backward reasoning. It resembles reverse engineering. It is also the antithesis of creative problem solving. The difficulty with this approach to "legal reasoning" is that it completely overlooks Mrs. Palsgraf and her daughters. To these individuals, the issue was neither whether the railroad owed Mrs. Palsgraf a legal duty, nor whether the railroad's negligence was the proximate cause of her injury. Mrs. Palsgraf's problem was: that she was dirt poor; that she had developed a speech impediment which seriously impacted her ability to get better employment; and that she was having difficulty communicating with, and caring for, her children. Her age, poverty, marital status, occupation, and family concerns were all vitally relevant to Mrs. Palsgraf and her daughters.

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40. See DELANEY, *supra* note 6, at 11.

41. *Id.*

42. SHAPO ET AL., *supra* note 6, at 28.

43. *Id.* at 31.

44. *Id.* at 11.

Both Noonan and feminist critics have implied that Cardozo showed a lack of empathy for Mrs. Palsgraf in his selective presentation of the facts, and in his ultimate decision.<sup>45</sup> Justice Posner, on the other hand, praised the artistry and economy of Cardozo's statement of the facts. He attributed much of Palgraf's celebrity to:

the elliptical statement of facts, which strips away all extraneous details, except Mrs. Palsgraf's destination, and perhaps some essential facts as well. This economical, indeed skeletal, presentation enables the reader to grasp the situation—or rather, so much of the situation as Cardozo wants the reader to grasp—at a glance. The compact lucidity of the statement of facts is refreshing and is in striking contrast to the flaccid prolixity of ordinary judicial prose and the occasional plumminess of Cardozo's own prose. His artistry is nowhere better exhibited than in his omission of a fact that would have assisted the thrust of his opinion—namely, the injury for which Mrs. Palsgraf was suing. Mention that it was a stammer would have made the accident seem not only freakish but silly, a put-on, a fraud. The scale fell on Mrs. Palsgraf and made her stammer. Tell us another. Great cases are not silly.

More than artistry is at work in the omissions. The more facts that are stated in an opinion, the easier it is for judges in subsequent cases to distinguish, narrow, confine, and otherwise diminish the scope and impact of the opinion. If Cardozo had mentioned Mrs. Palsgraf's stammer, later judges might have limited the holding of the case to situations in which the *type* of injury that occurs is unforeseeable.<sup>46</sup>

Although Posner himself shows an appalling lack of empathy for Mrs. Palsgraf in the foregoing quotation, he is, I believe, correct in identifying why the censures of Judge Noonan and the feminist legal critics are misplaced. By virtue of their role constraints, because of societal needs for generalized rules of law which provide predictability, and because of principles of precedence, common law judges must necessarily deal in a level of abstraction. By definition abstraction is "the act of considering something as a general quality or characteristic, apart from concrete realities, specific objects or actual instances."<sup>47</sup> Remember, both Cardozo and Andrews stripped from their statements of facts most of the information which would uniquely identify Mrs. Palsgraf or the particular contours of her problem. They did this for good reason. It was not the judges' job to focus on Mrs. Palsgraf's peculiarities. That was the job of her lawyer. If anyone deserves censure in the Palsgraf affair, it was her lawyer. After all, it was her lawyer who chose a method of attacking Helen Palsgraf's problem which prolonged her emotional distress and its symptoms, saddled her with an impossible debt, left her even more destitute than she had been before, and ultimately (if her daughter's account is to be believed) rendered her mute.

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45. See NOONAN, *supra* note 26.

46. POSNER, *supra* note 27, at 42-43.

47. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987).

According to Noonan, Helen Palsgraf's lawyer was a sole practitioner named Matthew W. Wood, a graduate of Yale law school who had been in practice twenty-one years when he took Mrs. Palsgraf as a client. Noonan describes Wood as follows:

His biography gives the outline of a boy from the country, making with diligence a modest legal career. Only his longevity and endurance are remarkable: until his death in 1972 at the age of ninety-seven, he was listed in the standard lawyers' directory as in practice at the Woolworth Building [in New York].

Operating by himself, he was in the least prosperous category of urban practitioners and had to resort to stratagems to dig up business.<sup>48</sup>

Wood became Mrs. Palsgraf's lawyer only two months after the accident. Noonan describes Wood's case as "an economical one, sparsely presented and sparsely financed," and Wood's preparation as "not elaborate."<sup>49</sup> The key witness, the neurologist Graeme M. Hammond, was hired the day before the trial. Noonan infers that Wood planned to bargain because he asked for \$50,000 in the complaint, a fabulous sum in the 1920s.<sup>50</sup> Because of Wood's lateness in obtaining expert medical opinion, Noonan also infers that Wood's opponents were:

not interested in negotiating seriously short of what professional jargon denominates as "the courthouse steps." As [the defense lawyer's] time was cheap, they may have offered only out-of-pocket expenses. Their offer was too low or Wood's expectations too high to produce a settlement at the last minute. Other negotiations, no doubt, must have gone on before the appellate division heard the appeal. The railroad would not have risked a written opinion holding it liable if it could have settled for a moderate amount. Wood made a serious misjudgment in not compromising after the jury verdict. His mistake was the necessary condition of Cardozo stating the rule.<sup>51</sup>

Again, Judge Noonan's criticisms seem misplaced. Wood's judgment *as a trial lawyer* seems on the whole to have been quite sound. After all, he was able to achieve a substantial jury verdict from a case that most trial lawyers would have deemed quite marginal. Moreover, he was able to sustain that verdict at the first level of appeal, losing by only one vote (presumably Cardozo's) in the court of last resort. The case was decided twice in Mrs. Palsgraf's favor. Ultimately, a majority of the appellate judges who reviewed the case sustained the jury verdict. It was perhaps just bad luck for Wood that Cardozo happened to attend a meeting of the American Law Institute in which the Palsgraf case was discussed during its appeal to his

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48. NOONAN, *supra* note 26, at 123.

49. *Id.* at 124.

50. *See id.* at 125.

51. *Id.* at 125-26.

court, and before Cardozo wrote his famous opinion.<sup>52</sup> But what had been bad luck for Wood was disastrous for Mrs. Palsgraf. If there is a criticism to be leveled at Wood, it is that he chose the risk of litigation instead of a more creative form of problem solving.

In a way, it is grossly unfair to question Mr. Wood's decision on the basis of such sketchy facts some seventy-five years later. It may seem apparent to a modern lawyer that Mrs. Palsgraf was probably suffering from some form of post-traumatic stress disorder, and that she could have benefited from the assistance of a good psychiatrist or psychologist. But Helen Palsgraf stepped into Matthew Wood's office only a few years after Sigmund Freud had published his great works, and long before Roosevelt's New Deal began to expand the social services available to Americans. In the 1920s, Mrs. Palsgraf's options were undoubtedly much more limited than they would be on the cusp of the twenty-first century. Nonetheless, options existed, and we have no evidence that Matthew Wood ever explored any of them. He appears to have filed the lawsuit almost reflexively, shortly after meeting Mrs. Palsgraf.

Why did Matthew Wood reach immediately for a legal solution? Could it be that as a graduate of Yale Law School, which in 1903 had begun its adoption of the case method,<sup>53</sup> Matthew Wood had been overly indoctrinated in the processes of litigation? Could it be that lawsuits had become second nature to him? Drilled too well in the use of the hammer, did he reach for the hammer without thinking? Could it be that his training as a transmitter of legal knowledge compelled him to believe that he was obliged to offer legal advice? Whatever the reasons for Matthew Wood's choices, it would be better for the modern law student if the Palsgraf case were no longer held up as a piece of brilliant legal reasoning, but rather as an example of particularly bad lawyering.

#### IV. THE INITIAL STANCE OF THE CREATIVE PROBLEM SOLVER

By reflexively framing the issue as a legal one, Matthew Wood actually did his client much more harm than good. Yet this reflex is the inevitable byproduct of a legal education which focuses predominately on the case method. The "I" in IRAC represents the *issue* which the law student must learn to frame when briefing a case. In his "hints for formulating issues," Professor Delaney warns first-year law students that: "courts, contrary to what some beginning students believe, ordinarily decide cases on the narrowest ground (issue) presented by the facts. . . . Many of your professors therefore insist on narrow framings of issues."<sup>54</sup>

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52. The details of this particular scandal, although interesting, are not important here. For a more detailed discussion of the event, see *id.*

53. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 61-62 (1983).

54. DELANEY, *supra* note 6, at 29-30.



Creative problem solving demands the opposite approach. The first letter of the acronym "SOLVE" is the *statement of the problem*. For creative problem solving to occur, it is essential that the problem be stated as simply, but as broadly as possible to allow for a variety of different solutions. As a foundation for the investigative steps which follow it, the statement of the problem must avoid anticipating the conclusion or outcome. Too narrow a problem definition risks overlooking both the complexity of the problem and the richness of resources to resolve it. In addition, too narrow a definition will also stifle creativity. Moreover, a definition which assumes the answer is anathema.

Creative problem solving begins with an assumption of not knowing, a confession of ignorance, a kind of bafflement, and a surrender to curiosity. This initial stance of creative problem solvers is described in many ways within many cultures, and by numerous psychologists and other scientists who have studied creativity. Michael Ray and Rochelle Myers, who developed a renowned course in creativity for the MBA program at Stanford Business School, suggest four heuristics of preparation for creative problem solving: (1) If at first you don't succeed, surrender; (2) Destroy judgment, create curiosity; (3) Pay attention; and (4) Ask dumb questions.<sup>55</sup> Zen master Shunryu Suzuki puts the concept this way: "If your mind is empty, it is always ready for anything; it is open to everything. In the beginner's mind there are many possibilities; in the expert's mind there are few."<sup>56</sup>

Ironically, this state of surrender or emptiness is one of the objectives of the "socratic method" which law professors purport to use. In a brilliant essay entitled, "*A Dialogue About Socratic Teaching*," Peggy Cooper Davis<sup>57</sup> and Elizabeth Ehrenfest Steinglass<sup>58</sup> discuss with clarity the dialogic method attributed to Socrates.<sup>59</sup> As they describe it, the dialogues begin with "*elenchus*—a process through which Socrates' interlocutor is made to realize [through a series of questions] that he does not know what he thought he knew."<sup>60</sup> The purpose of *elenchus* is to produce an acknowledgment of ignorance and the experience of perplexity, or *aporia*. Socrates believed that intellectual humility was a necessary first step to serious philosophical in-

55. See MICHAEL L. RAY & ROCHELLE MYERS, CREATIVITY IN BUSINESS (1989).

56. SHUNRYU SUZUKI, ZEN MIND, BEGINNER'S MIND (1981).

57. Peggy Cooper Davis is the John S.R. Shad Professor of Law at New York University School of Law.

58. Elizabeth Ehrenfest Steinglass is a Research Fellow at New York University School of Law and a doctoral student at the Harvard Graduate School of Education.

59. Davis & Steinglass, *supra* note 10. This wonderful essay is sponsored by Workways, a multidisciplinary collaboration designed to identify, analyze, and learn to develop the full range of intellectual capacities necessary to excellence and social responsibility in the practice of law. The essay goes on to describe Christopher Columbus Langdell's introduction of Socratic techniques to law teaching and describe various versions of the method as practiced in contemporary law school classrooms, testing its strengths and weaknesses in light of particular pedagogic goals.

60. *Id.* at 253.

quiry. “*Elenchus* generated *aporia* and thus motivated a genuine interest in learning.”<sup>61</sup> Paradoxically, to the extent that law professors use the Socratic method to teach substantive doctrine,<sup>62</sup> they are generating expertise and authority, not intellectual humility.

*Aporia* cannot be achieved by lawyers who view themselves as constrained by their role to be transmitters only of legal knowledge or legal advice. Such a limited role definition imposes upon the lawyer a requirement of being the person with the answers, when in cases like Mrs. Palsgraf’s, it might be better to be the person with the right questions. If we are to train lawyers as creative problem solvers, we must expand their view of their role so they know when to be knowledgeable and give legal advice, and when to be ignorant and ask dumb questions. More than that, we need to train them in the techniques of how to ask dumb questions—questions, which unlike the issue framings of Professor Delaney or Judges Cardozo and Andrews, do not assume the answer or skew the result.

Systematic training in the art of asking dumb questions is much of what creative problem solving is about. In the SOLVE method advocated in *Winnie-the-Pooh on Problem Solving*,<sup>63</sup> fully three quarters of the process is devoted to asking questions. The “S” of the process involves the initial statement of the problem; the “O” entails observing and organizing the problem through the identification of initial conditions, goals, resources and constraints; the “L” of the acronym is “Learn by Questioning All Parts of the Problem.”<sup>64</sup>

Using the SOLVE method, questions asked along the way may include:

*Initial Statement of the Problem:* What is the problem? State the problem as clearly as you can; does the problem have emotional associations? Does the problem have political ramifications? Is the problem single and simple, or complex and multiple?<sup>65</sup>

*Observing, Organizing, and Redefining the Problem:* What are some alternative ways of stating the problem?—Use perspectives of different actors. What is the starting place for the problem—any initial conditions, resources, current status? Define the goal; what is the desired end result upon successful completion? Are there constraints (any limiting factors or obsta-

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61. *Id.* at 254.

62. A substantial number do. See Friedland, *supra* note 1, at 17-18. The *elenchus* of the Socratic method is subject to other criticisms as a pedagogic method, some of which are touched upon by Peggy Davis and Elizabeth Steinglass in their excellent essay. Among these are the effects of inauthentic questioning in establishing the power and authority of the teacher, and a kind of learned helplessness and passivity on the part of the student. One of the little discussed effects of *elenchus* is that rather than inducing intellectual curiosity, it is more likely to induce intense feelings of shame and inferiority, which in turn are likely to generate an unhealthy need to appear knowledgeable and authoritative regardless of the depth of substantive knowledge. Davis & Steinglass, *supra* note 10, at 253-55.

63. ALLEN & ALLEN, *supra* note 7.

64. *Id.* at 173-74.

65. *See id.*

cles)?<sup>66</sup>

*Questioning the Problem:* “Why solve it? Why is it a problem? What specifically is the problem? Where does the problem occur? Why does it occur there? When does the problem occur? Why does it occur then? Who is involved? Why are they involved? How does it happen? Why does it happen that way?”<sup>67</sup>

Had Matthew Wood bothered to ask even some of these questions, he may well have given Helen Palsgraf far different advice. As noted above, Mrs. Palsgraf’s problem was that she was poor, that she had developed a speech impediment which seriously impacted her ability to get better employment, and that she was having difficulty communicating with, and caring for, her children. The problem clearly had multiple emotional associations having to do not only with Mrs. Palsgraf’s mental health, but also her relationship with her daughters. The problem also had political ramifications related to class and wage structures which were well beyond the capability of Mr. Wood to address. In addition, the problem was multiple and complex, stemming from a variety of sources—most of which had nothing to do with the Long Island Railway or the explosion on August 24, 1924.

If Mrs. Palsgraf’s problem were viewed from the perspective of her daughters, one would suspect they were less concerned with their relative poverty than they were for their mother’s mental health. If viewed from the perspective of the railway, there was no problem at all. However, if one viewed the problem from the perspective of society at large, the conclusion would probably be that this was not a major social problem of any consequence. Judge Noonan suggests that it might have been a social problem when he points out that in 1924 the railroads of the United States killed 6,617 persons and injured 143,739, most of whom were either the railroad’s own employees or trespassers. Yet even Judge Noonan concedes that Helen Palsgraf’s injury could fairly be categorized as a “non-train accident” or a “train service” accident, and in those subcategories only “a tiny percentage of these casualties were passengers.” Judge Noonan concludes that “to suppose that such injuries were totally avoidable by the railway system would be an illusion.”<sup>68</sup> Accordingly, even Judge Noonan’s arguments tend to support the view that Mrs. Palsgraf’s accident was indeed a freak accident, probably not foreseeable or preventable by the railroad. Therefore, it was not a major social problem which might require vindication by a court of law.

As for Mrs. Palsgraf’s goals—at the beginning of the representation and before she received a jury verdict which must have seemed like a fortune to her—her goals were probably quite modest. She had medical expenses, she wanted to stop stammering, and she wanted a better paying job. The con-

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66. *See id.*

67. *Id.*

68. NOONAN, *supra* note 26, at 129-30.

straints included her educational level, her low wages, her lack of time due to the fact that she was working two jobs to make ends meet, coupled with the fact that her children's father was apparently contributing nothing to their support. The availability of jobs may have been another constraint. Potential resources might have included the absent father, other family members, local churches, and charities. Other potential resources included Mrs. Palsgraf herself, her family, her employer, and her landlord. The least likely of her resources were the conductor, the owner of the package of firecrackers, the railroad, and the railroad's insurance company.

In retrospect, one wonders what conclusions Matthew Wood might have reached had he taken the time to bring Lilian, Elizabeth, Helen, and her eldest daughter into his office to jointly engage in any of the brainstorming processes suggested in the "V" portion of *Winnie-the-Pooh on Problem Solving*. The "V" stands for "Visualize Possible Solutions, Select One, and Refine It," and includes the following suggested questions in *brainstorming* possible solutions: Have you ever had a similar problem? If so, how was that problem solved? (Note that experience and precedent are only one aspect of brainstorming.) What are the numbers involved? Can the problem or possible solutions be graphed? Is there a logical solution (i.e., one which can be arrived at through logic, deduction or inference)? What are the applicable analogies? What are the similar items, processes, or ideas? What does intuition tell us about how to resolve this problem? Does anyone have any hunches or gut feelings? Is there any way we can make the problem bigger? Is there any way we can make it smaller? Can we add something? Can we take something away? Can we exchange two parts? Can we replace something with something else? Can we combine two elements? Does anything else come to mind? (Use the process of free association here.)<sup>69</sup>

As with issue framing, the brainstorming phase of creative problem solving demands a set of skills which are almost the polar opposite of those cultivated by the case method. The "A" of IRAC is the analysis of the case method which requires the application of rules through the systematic selection of facts and the matching of those facts to the appropriate elements of the rule. Policy is considered only to the extent it illuminates or explains the applicable rule. The entire process involves constant evaluation, judgment and rejection—what is relevant?; what is irrelevant?; what satisfies an element?; what does not?

In contrast, effective brainstorming requires the suspension of judgment. Engineers, military personnel, and business people who regularly use the techniques of brainstorming understand that the best solution to a problem is often the one which initially seems the least plausible. They also recognize that premature evaluation or criticism of ideas during the course of a brainstorming session will quickly stifle the creative process, and limit the suggestions offered. In order to foster the largest possible selection of op-

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69. See ALLEN & ALLEN, *supra* note 7, at 174-75.

tions in effective brainstorming, all ideas are accepted—no matter how weird or far-out they might seem to any one participant. The leader of the brainstorming session is trained to enforce a “no criticism, no judgment, no evaluation” rule in order to make the process work well.

Who knows what ideas Helen Palsgraf and her daughters might have come up with had they engaged in such a process in Matthew Wood’s office in October 1924? Perhaps there would have been no knee-jerk reaction to file a lawsuit. Perhaps they might have decided to pursue the lawsuit anyway, but at the same time to pursue other options which would help to build and strengthen their family. Had they done this much, perhaps the ultimate loss of the verdict would not have been so devastating that it rendered Mrs. Palsgraf mute.

The “E” of the acronym SOLVE stands for “Employ the Solution and Monitor Results.” This entails selecting a solution or set of solutions, creating an action plan and monitoring criteria that will indicate success.<sup>70</sup> All of these skills and processes can prove extremely useful to the practicing lawyer; specifically, a lawyer should:

Choose best solution[s] . . . be judgmental . . . list pluses and minuses for each, and feel free to combine, or modify.

Refine and improve—Review the selected idea carefully and improve or tweak [it].

Employ the [s]olution and [m]onitor [r]esults [by designing an] [a]ction plan. Create a path from here to there—list of all the things that need to be accomplished or gathered in sequence with timing and responsibilities noted.

Test on a small scale—if applicable, . . . put [the] solution in place, and monitor criteria that will indicate success.<sup>71</sup>

Again, we have no way of knowing what choices Mrs. Palsgraf might have made, had she and her family gone through this process. However, if we did know that she and her family had brainstormed a number of different solutions with lawyer Wood, we would at least be somewhat reassured that she had carefully considered the pluses and minuses of a lawsuit, rather than pursuing it simply because her lawyer told her to do so.

## V. SOME FINAL THOUGHTS AND RECOMMENDATIONS

Should we toss out the case method entirely? Definitely not. The study of litigated disputes not only teaches the rules of law, but provides the reasoning to show how and why the cases were won. Preventive law cannot be

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70. *See id.* at 175.

71. *Id.*

properly practiced until the practitioner knows what must be prevented and how it can be done. Problems cannot be creatively solved until the practitioner fully understands the problems and the nature of their *legal* solutions. An example is the drafting of a contract. It is very difficult if not impossible to draft a contract which will foresee and prevent all the problems and pitfalls which the agreement may face, and fully provide against them—until the practitioner knows the facts and subtleties of the subject matter; learns the types of problems and controversies which may arise in the area; knows both the statutory and common law of such contracts thoroughly; and, has personally tried in court (or at least closely observed) breach of contract and contract enforcement lawsuits.

But we should recognize the truth about the case method: it does not teach law students to think like lawyers; it teaches them to think like judges—with all of the constraints that role implies. This is not a bad thing. In order to be competent advisors, lawyers must understand how judges think. But they also need to understand that, as lawyers, their available options are greater, and therefore their own thought processes can be much broader. They will be much more effective in representing their clients if they think more as creative problem solvers, and less like the ultimate decision maker.

Should we teach *Winnie-the-Pooh on Problem Solving* to first-year law students? Probably not. *Winnie-the-Pooh on Problem Solving* is only one simple model of the techniques involved. Engineers, mathematicians, linguists, philosophers, psychologists, businesses, and educators in other fields have all developed highly sophisticated models of problem solving which are far less “cutesy” than *Winnie-the-Pooh*, and which can be reshaped and adapted to the legal field. Among the prototypes available to us are the “ADDIE”<sup>72</sup> and related models utilized by educational technologists and performance analysts; the numerous models of collaborative negotiations arising out of the groundbreaking work of Fischer and Ury;<sup>73</sup> the “fuzzy logic” employed in the field of engineering; and the theories of multiple intelligences developed by Harvard psychologist Howard Gardner,<sup>74</sup> confirmed by the work of Italian neurologist Antonio Damasio,<sup>75</sup> and significantly ex-

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72. See generally HOFFMAN & RITCHIE, *supra* note 11. The acronym stands for Analyze, Design, Develop, Implement, and Evaluate, a dynamic model which includes a number of precisely described sub-steps to assist in the design of training and other programs designed to solve performance problems in education and industry.

73. See ROGER FISCHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981). For a survey of subsequent models based on their work, see *RESEARCH ON NEGOTIATION IN ORGANIZATIONS* (Roy J. Lewicki et al. eds., 1986).

74. See *Rethinking the Value of Intelligence Tests*, N.Y. TIMES EDUC. SUPPLEMENT, Nov. 3, 1986 (interview with Howard Gardner); HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* (1993).

75. See ANTONIO DAMASIO, *DESCARTES' ERROR: EMOTION, REASON AND THE HUMAN BRAIN* (1994).

panded by Yale psychologists Sternberg<sup>76</sup> and Salovey.<sup>77</sup> Numerous models of creative problem solving can be derived from the literature on business and management, ranging from the Total Quality Management concepts developed in post-war Japan to the structural problem solving methods suggested by M.I.T. Sloan School of Management Professor Peter Senge in the Fifth Discipline,<sup>78</sup> and by his disciples in the Fifth Discipline Fieldbook.<sup>79</sup> We need to begin the process of incorporating these models into legal education.

But if we begin to teach problem solving skills in the first year, will we be attempting to do too much? Will we compromise our students' ability to analyze doctrine? Peggy Davis and Elizabeth Steinglass provide intriguing answers to these questions:

Of course, law schools must serve the goal of teaching fundamental legal concepts, but this is only the beginning of a first-rate legal education. The MacCrata Commission and other critics argue that legal educators must avoid being too narrow, devoting too much time to honing the ability to analyze doctrine and too little to developing other abilities that are relevant to competent practice. We are sympathetic to this criticism. Unfortunately, however, the criticism has been misunderstood to set doctrinal analysis apart from all other kinds of lawyering work. This misunderstanding undermines reform efforts, for the doctrine-versus-other-skills dichotomy makes it difficult to appreciate the *integration* of capacities that occurs when one practices law successfully. We take a slightly different approach, arguing for development of an intellectual versatility that enriches doctrinal analysis as much as it expands the number of lawyering activities that students are led to consider. Legal education needs to be broad-ranging in its approaches to the analysis of doctrine as well as in its approaches to other tasks like counseling, negotiation, business planning, or advocacy. We therefore seek to develop a range of intellectual capacities and to teach students to integrate the use of those capacities across the various categories of lawyering work.

Practitioners readily affirm our conviction that high quality, responsible lawyering requires integrated development of a broad range of intellectual capacities. In our research, we break those capacities down into logical-mathematical, interpersonal, intrapersonal, narrative, categorizing and strategic intelligences, and we find that *each of them is important to doing every kind of lawyering work*. The analysis of doctrine is deeper if one has the intrapersonal intelligence to grasp multiple perspectives; the conduct of a mediation is more successful if one has the logical-mathematical intelligence to calculate prospective gains and losses; advocacy is more convincing if one has the strategic intelligence to assess both the efficacy of a move in the small world of litigation and

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76. See ROBERT J. STERNBERG, *BEYOND I.Q.: A TRIARCHIC THEORY OF HUMAN INTELLIGENCE* (1985).

77. See PETER SALOVEY & JOHN D. MAYER, *EMOTIONAL INTELLIGENCE, IMAGINATION, COGNITION, AND PERSONALITY* 185-211 (1990).

78. SENGE, *supra* note 12.

79. PETER M. SENGE ET AL., *THE FIFTH DISCIPLINE FIELDBOOK: STRATEGIES AND TOOLS FOR BUILDING A LEARNING ORGANIZATION* (1994).

the policy implications of a legal interpretation in the larger world. . . .

Our goal for legal education is, then, to provide contexts in which students can learn fundamental legal concepts, develop intellectual versatility, learn to use the range of their intellectual capacities across the range of lawyering tasks, and develop a critical consciousness about their professional role.<sup>80</sup>

This approach suggests a wealth of possibilities going far beyond the occasional inclusion of a paragraph “problem” at the end of a chapter in a first year case book, and far beyond the “skills only” courses which are now developing in the second and third year of law school. Wouldn’t it be possible to systematically pair the reading of cases with a fuller contextual analysis of how the lawsuit might have been prevented or avoided—much as we have just done with *Mrs. Palsgraf*? Can we look behind the cases to the quality of lawyering involved? This seems possible even in the first year. We can couple the reading of appellate cases with full-blown experiential exercises, full contexts in which students can experience the law in its living breathing state, instead of its resting place in the cold pages of the official reporters. Instead of teaching students from appellate decisions on how to win or defend a lawsuit, we could teach from those same cases the following: how to draft the will or trust; how to write a security agreement or mortgage; how to prevent or mitigate an actionable tort; how to protect intellectual property; how to obtain approval of development plans; how to negotiate, mediate and arbitrate; and how to word the settlement agreement. The possibilities of using full-context case studies along with appellate decisions are challenging and endless.

Lawyers and law professors are by nature a traditional and conservative lot. Many of us will feel uncomfortable about what appears to be a blurring of professional lines. We can take comfort that we are not alone in this process. In *Goodbye, Descartes*, Stanford mathematician Keith Devlin eloquently describes how the fields of linguistics and mathematics have begun to hit walls, and have come up against the limits of the traditional methods of science and mathematics.<sup>81</sup> Basic assumptions of science going back to Plato, Aristotle, Descartes, Galileo, and Bacon are now being challenged. The tidy compartmentalizations are no longer working. Theorists now perceive marked differences between logical behavior and rational behavior. Compared to the context driven teaching methodologies of Davis and Steinglass, scientists are increasingly providing theories of context where human cognitive activity can be examined.<sup>82</sup> According to Devlin, there is a new “soft mathematics” emerging—but many scientists and mathematicians throw up their hands in horror to Devlin’s suggestions. The traditionalists

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80. Davis & Steinglass, *supra* note 10, at 251-52.

81. See KEITH J. DEVLIN, *GOODBYE, DESCARTES: THE END OF LOGIC AND THE SEARCH FOR A NEW COSMOLOGY OF THE MIND* (1997).

82. See *id.* at 267.



view such theories as “fringe science” on a par with astrology, New Age medicine, space aliens, and California hot-tub encounter groups. But a number of mathematicians see the development of soft mathematics as inevitable, and also envision its eventual growth into an established branch of mathematics.<sup>83</sup>

A similar situation exists for creative problem solving as a legal discipline. However strongly the traditionalists may object, there is a growing body of scholarship supporting the need for radical changes in legal education. To paraphrase Keith Devlin in the Preface to *Goodbye, Descartes*, you may not like what I have to say about the limitations of the case method. But don't blame me. As far as the concepts in this article are concerned, I am only one of many messengers. The plain fact of the matter is that in law, as elsewhere, traditional borders between separate intellectual disciplines are rapidly breaking down. The complaints of the profession, and the public dislike of lawyers and lawsuits, are all forcing legal educators to face up to the fact that there are definite limitations to what can be achieved through the case method of instruction. So we have a choice. We can either cling to our most cherished assumptions, or let them go and join such scholars as Anthony Amsterdam, Gary Blasi, Paul Brest, Carrie Menkel-Meadow, Peggy Davis, Elizabeth Steinglass, and Paul Zwier—as well as Piglet and Winnie-the-Pooh—in a marvelous adventure in legal education.

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83. *See id.* at 282-83.