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Teaching Creative Problem Solving: A Paradigmatic Approach

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TEACHING CREATIVE PROBLEM SOLVING: A PARADIGMATIC APPROACH

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Problems cannot be solved by thinking within the framework in which the problems were created.

—*Albert Einstein*[1]

I. INTRODUCTION

This essay describes my use of a visual paradigm, or model, to teach creative problem solving in the law school curriculum. The next section discusses the term "creative problem solving," and justifies its position in law school pedagogy. Section III describes the model I have developed to teach creative problem solving. The final section explains my use of the model in clinical classes, and suggests ways it can be used in traditional courses.[2]

II. CREATIVE PROBLEM SOLVING: WHAT IT IS AND WHY WE SHOULD TEACH IT

A. What It Is

An apparent contradiction exists in attempting to define problem solving; in particular, *creative* problem solving. Moreover, there are dangers of restriction and oversimplification in any attempt to do so. While legal academics, as well as problem solving theorists, have addressed and described

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1. Albert Einstein, *quoted in* ALAN BARKER, CREATIVITY FOR MANAGERS 41 (1995).

2. The views on creative problem solving I express in this paper are not necessarily those of the McGill Center for Creative Problem Solving of California Western School of Law.

problem solving, *creative* problem solving adds a new dimension not yet adequately explored in the literature,[3] particularly that relating to legal education. What follows are a few apt descriptions of problem solving by legal academics, with a discussion as to how creative problem solving differs from their descriptions.

Gerald Lopez writes, "Problem-solving involves perceiving that the world we would like varies from the world as it is and trying to move the world in the desired direction."[4] Borrowing from the cognitive science framework established by Allen Newell and Herbert Simon,[5] Gari Blasi discusses problem solving in terms of a search through a "problem space" for a solution path which begins from an initial state and leads to a goal state.[6] The commonality in the definitions is that both describe problem solving as a process—either a "move" or a "search," in effect, moving from a current state to a desired state.

More recently, Stephen Nathanson has taken the concept of problem solving a step further, applying it specifically in legal contexts. His theory views "all legal problems as client goals impeded by obstacles."[7] He describes two types of decisions in problem solving: "conflict blocking" (decisions dealing chiefly with transactional work) and "playing out conflicts" (decisions dealing chiefly with advocacy).[8] His legal problem solving process model has five stages: Problem and Goal Definition, Fact Investigation, Legal Issue Identification and Assessment, Advice and Decision Making, and Planning and Implementation.[9]

Also placing problem solving in the more narrow context of law practice, the MacCrate Report identifies the skills and concepts comprising problem solving as "Identifying and Diagnosing the Problem," "Generating

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3. The more general literature on problem solving views creativity with a narrow lens. Authors describe creativity in thinking as an end result to be achieved through specific methodologies, not as a broader, more conceptual framework for the entire process, as described herein. *See, e.g.,* KEITH F. JACKSON, THE ART OF SOLVING PROBLEMS 119-45 (1975) (describing such methods as brainstorming, attribute listing, fluency exercises, etc.); *see generally* JAMES L. ADAMS, CONCEPTUAL BLOCKBUSTING: A GUIDE TO BETTER IDEAS (3d ed. 1986) (describing conceptual blocks to creativity and how to remove them).

4. Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 2 (1984).

5. *See* ALLEN NEWELL & HERBERT A. SIMON, HUMAN PROBLEM SOLVING (1972).

6. *See* Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 331-34 (1995) (citing NEWELL & SIMON, *supra* note 5, at 809).

7. Stephen Nathanson, *Problem-Solving in Professional Legal Education*, 7 J. PROF. LEGAL EDUC. 121, 123 (1989) [hereinafter *Problem-Solving*]. Nathanson's own model for legal problem solving is premised upon his theory that all legal problems are "client goals confronted by obstacles." STEPHEN NATHANSON, WHAT LAWYERS DO: A PROBLEM-SOLVING APPROACH TO LEGAL PRACTICE 39 (1997) [hereinafter WHAT LAWYERS DO].

8. Nathanson, *Problem-Solving*, *supra* note 7, at 123.

9. Nathanson bases the framework of his model on that established by K.F. Jackson. Jackson's model has five features: problem definition, problem interpretation, option identification, decision making, and implementation. *See* JACKSON, *supra* note 3, *construed in* Nathanson, *Problem-Solving*, *supra* note 7, at 167-68.

Alternative Solutions and Strategies," "Developing a Plan of Action," "Implementing the Plan," and "Keeping the Planning Process Open to New Information and New Ideas."[10]

Although these attempts to link the concept of problem solving more squarely within a legal arena may lend credibility to the process for legal academics, practitioners, and students, both Nathanson and the MacCrate Report place too much emphasis on problem solving in the context of client-driven representation by individual lawyers. While these applications of problem solving are certainly important facets of law-related work, they are not the only ones.[11] Lawyers also perform such tasks as policy formulation, legislative work, organizational structuring, and consultation. Further, the processes offered by Nathanson and the MacCrate report do not provide enough attention to the more humanistic roles of values, interests, problem prevention, interdisciplinary analysis, creative thinking, and self-reflection—essential elements of professionalism for practicing lawyers which law students ought to be taught.[12]

Creative problem solving, on the other hand, is not as constricting as a model of problem solving based solely on individual law practice. It promotes a deeper and broader analysis of an existing or potential problem. Thus, creative problem solving offers a more useful, global approach, not

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10. SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, AMERICAN BAR ASSOC., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 138 (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 1992) [hereinafter MACCRATE REPORT]. As part of the MACCRATE REPORT (*Id.* at 135-221) and also in separate pamphlet form, the ABA Task Force issued a *Statement of Fundamental Lawyering Skills and Professional Values*, 1992 A.B.A. Sec. Legal Educ. & Admission to the Bar) [hereinafter *ABA Pamphlet*].

11. Kimberly O'Leary provides the same criticism in her recent article on the importance of using a "difference analysis" to teach problem solving. In discussing the problem solving section of the MACCRATE REPORT, O'Leary states that the report does not recognize "that actors other than the client have legitimate needs and interests that the lawyer should seek to understand in the course of identifying the problems to be solved and the strategies to be employed in solving them." Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLINICAL L. REV. 65, 73 (1997). Carrie Menkel-Meadow critiques the MACCRATE REPORT in a similar vein. She criticizes the Report for describing the lawyer as a "technocratic problem solver . . . rooted in a conventional litigation conception of lawyering . . . ." 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, 603 (1994).

12. Margot Costanzo describes the MACCRATE REPORT as an "action model" which "may . . . de-emphasize situation and problem analysis." MARGOT COSTANZO, PROBLEM SOLVING 79 (1995).

The dichotomy between the "art" of problem solving and the "skill" of problem solving is another way to frame objections to the more narrowly drawn models. Problem solving as an "art" involves investigation into realms of uncertainty, value conflict, intuition, and human interaction. Problem solving as a "skill" involves a more scientific, doctrinal approach to law practice. *See* Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 253 (1992); Menkel-Meadow, *supra* note 11, at 603.

only by the individual law practitioner in her relationship to her client, but also by the legal profession in its relationship to society.

Specifically, creative problem solving in law has six facets which differentiate it from the more narrow approaches to problem solving Nathanson and the MacCrate Report provide. First, it focuses on underlying needs and interests, rather than positions, of individuals as well as society.[13] The focus on interests necessitates a second facet of creative problem solving—an analysis of values inherent in the process: values of the parties and lawyers involved, values of society, and values related to relevant rules.[14] The third facet is the exhaustive and continuing investigation into disciplines and resources other than the law which creative problem solving requires. The process also requires modes of creative thinking not found in legal analysis alone,[15] a fourth differential. In addition, creative problem solving places greater emphasis on problem prevention in terms of predicting and analyzing methods of preventing problems, both before and after problems begin. Finally, creative problem solving requires conscious self-reflection and analysis; it is essentially an examination of the extent to which we have solved the problem or created additional problems, whether our solution is the "best" course of action, and whom it affects.[16]

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13. A "needs" versus "positions" focus is a central tenet of negotiation technique. *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

14. Commenting on the need for self-awareness in the role of one's own values as a lawyer, Dean David Hall of Northeastern University School of Law states, "[t]he more you start putting your own values to the side, the more you lose touch with your humanity and thus with the humanity of the clients you'll work with and with the whole legal system." An impoverished view of one's own identity impedes creative thinking. Steven Keeva, *Opening the Mind's Eye*, A.B.A. J., June 1996, at 48, 51. For a more extensive discussion of the need for lawyers' awareness of others' values, see O'Leary, *supra* note 11, at 80 ("A lawyer should make a particular effort to understand the views of those not represented by lawyers, those not formally a part of the process and those who have limited resources to present their perspectives.").

15. For descriptions of various creative approaches to problem resolution, see, e.g., COSTANZO, *supra* note 12, at 61-64; JACKSON, *supra* note 3, at 119-145. *See generally* ADAMS, *supra* note 3. Interestingly, despite her approach to creative ways to solve problems, Costanzo draws a distinction between requiring the thinker to search for new knowledge and new methodologies, which she labels "creative thinking," and applying established professional knowledge to solve a problem, which she terms "problem solving." Disparaging of lawyers doing such creative thinking, she states: "It is problematic for professional problem solvers to call their work creative problem solving. Creativity, in part, recognises that a better answer might only be revealed through error. Creativity requires a climate in which the decision maker is encouraged to take risk." COSTANZO, *supra* note 12, at 3.

16. While Stephen Nathanson and the authors of the MACCRATE REPORT mention several humanistic concepts, they nonetheless emphasize the scientific client-representation model. For example, Nathanson acknowledges the importance of defining goals of adversaries, courts, regulatory authorities, government departments, and "everyone involved." NATHANSON, WHAT LAWYERS DO, *supra* note 7, at 39. However, Nathanson does not adequately describe societal interests in determining goals. Although he draws a distinction

B. Why We Should Teach It

There is an identified gap between legal education and legal practice.[17] Problem solving describes, in holistic terms, what lawyers do in practice: identify, understand, and resolve problems.[18] Placing the subject in the law school curriculum helps bridge the gap for frustrated students between classes in law and the legal profession. In addition, problem solving focuses on the "whole picture" of what lawyers do,[19] and thus provides a wonderful compendium of skills taught in law school. Any problem solver must have competencies or, at minimum, an awareness of the skills of legal analysis, legal writing, negotiation, client counseling, and mediation. Thirdly, creative problem solving involves not only legal skills, but also development of our cognitive, heuristic thought processes.[20] The ambiguous situations of law practice require more original thought than is taught through appellate cases. In fact, the narrow analysis of appellate cases, particularly in the second and third years, may stifle students' development of original thinking.[21]

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between "law student thinking" (legal issues) and "lawyer thinking" (client's legal problems) the latter having increased scope, depth and viewpoint, he sidesteps larger issues of truth and justice. *See id.* at 53-54. The Statement of Fundamental Lawyering Skills and Professional Values lists Problem Solving as the first "Fundamental Lawyering Skill." *ABA Pamphlet*, *supra* note 10, at 15. In its description of the skill, it acknowledges the importance of values, although it doesn't explicitly use the word, in its recommendation that the lawyer understand the "legal, institutional, and interpersonal frameworks in which the problem is set . . . ." *Id.* It also suggests investigation into expertise in fields other than the law, where necessary to implement a plan, and a continuing self-evaluation by the lawyer. *See id.* at 19, 20. Perhaps most significantly, the report mentions the skill of "creativity" in the comments to skills delineated in problem solving, which it describes as open-mindedness and independent thinking. *See id.* at 23-24. Nonetheless, the MACCRATE REPORT lacks both a discussion of problem prevention and a discussion of "interests" rather than "client goals."

17. *See* MACCRATE REPORT, *supra* note 10; NATHANSON, WHAT LAWYERS DO, *supra* note 7, at 1-2. Our students are well versed in legal analysis, but not in creative thinking that the demands of practice now require. It used to be that an educated lawyer could develop many of the skills of creative problem solving in practice but, with our current state of increasing globalization and interdisciplinary interaction, this is no longer true. In order to better equip our students for future practice, teaching methods and principles of creative problem solving is essential.

18. In describing problem solving, the MACCRATE REPORT states, "[t]he term 'problem' is conceived as including the entire range of situations in which a lawyer's assistance is sought . . . ." MACCRATE REPORT, *supra* note 10, at 141 n.1.

19. *See* NATHANSON, WHAT LAWYERS DO, *supra* note 7, at 1-2.

20. *See* Stephen Nathanson, *Creating Problems for Law Students: The Key to Teaching Legal Problem Solving?*, 10 J. PROF. LEGAL EDUC. 1, 6-7 (1992); *see generally* APPLICATIONS OF COGNITIVE PSYCHOLOGY: PROBLEM SOLVING, EDUCATION, AND COMPUTING (Dale E. Berger et al. eds., 1987); *see also* Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 543-49 (1994) (discussing use and potential misjudgments of cognitive processes).

21. Dean Paul Brest of Stanford Law School states, "by the time students have completed their second year, if not before, they have mastered the essentials of case analysis and yearn for something more." Paul Brest, *The Responsibility of Law Schools: Educating*

Finally, and perhaps most importantly, the process of creative problem solving offers a broader perspective on our roles as attorneys. It demands a focus on a lawyer's duty beyond the normative legal rules pertaining to client advocacy, including a duty to promote societal justice, awareness of values, problem prevention, and self-reflection. In sum, creative problem solving concerns a broader, more humanistic approach to the law than both the traditional Langdellian "law as science" model and the problem solving model of the MacCrate report. It accepts the practical approach to lawyering, but rejects narrow pragmatism as the essence of the study and practice of law.

III. A VISUAL MODEL FOR CREATIVE PROBLEM SOLVING

A. Why Models Are Useful

Paradigms are a method for translating thought into action. They are offered as an alternative method of imprinting a process, and can explain more clearly subtle aspects of a process. Models enable students to see the complete process, as opposed to detailed pieces of it. Thus, paradigms are helpful in giving students a toehold in their skills development, and provide a convenient reference as they attempt to learn and enact a process. Once mastered, models are a method for ensuring all steps have been undertaken.[22] They can increase efficiency by guarding against wayward tangents.[23] They can also increase the quality of each stage by ensuring appropriate depth of analysis.[24]

However, once a paradigm is imprinted in a learner's mind, it can mire the student in a rigid formula. Paradigms can be too simplistic according to the learner's state of learning development, or too narrowly drawn, as in the Nathanson and MacCrate models critiqued, and thus not as useful as they might be otherwise.

To avoid some of the above problems, it is essential that teachers construct paradigms geared toward learners' needs. Also, the formula offered must be portrayed as a *potential* model—a model constructed from a set of alternatives, rather than a rigid formula, and a model which can be adjusted to fit the student's needs and goals.[25] Students should be encouraged to provide their own critique and adjustments to whatever model is offered.

Lawyers as Counselors and Problem Solvers, 58 LAW & CONTEMP. PROBS. 5, 6 (1995).

22. *See* COSTANZO, *supra* note 12, at 53.

23. *See* JACKSON, *supra* note 3, at 12.

24. *See id.*

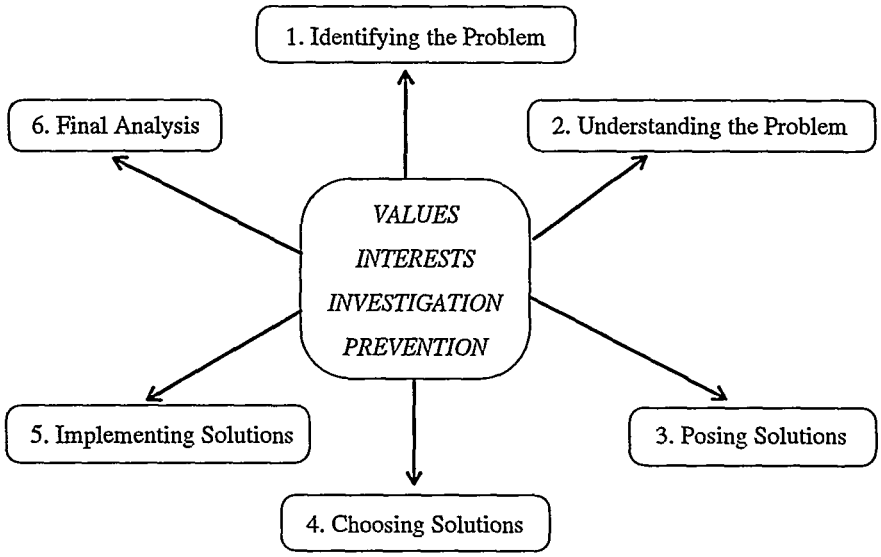
25. Students' stages of development and values often differ from those of their teachers. For an extensive discussion of this theory, see Linda Morton et al., *Not Quite Grown Up: The Difficulty of Applying an Adult Education Model to Law Students*, CLINICAL L.J. (forthcoming 1999).

B. My Own Visual Model

Several visual models for creative problem solving exist; however, most are too linear and scientific in concept.[26] Two law professors, Stephen Nathanson and Kimberly O'Leary, have offered visual models specific to the legal profession. Professor O'Leary's model, which focuses on an analysis of diverse perspectives, is much broader in scope and therefore more conducive to a creative problem solving process.[27] The model I have created offers an additional stage of final analysis and focuses on continuing investigation and prevention analysis throughout the process, in addition to awareness of values and interests.

The process I have designed has six phases, which I describe following the visual representation (See Figure 1). As with all models and frameworks, this one is meant to be merely a starting point—not an absolute or necessary framework, but simply a point of reference. I attempt to show in the center of the visual that each phase of the process is infused with four elements: Values, Interests, Investigation, and Prevention.

Figure 1.
A VISUAL MODEL FOR CREATIVE PROBLEM SOLVING



26. For a general overview of visual models, see J. DANIEL COUGAR, CREATIVE PROBLEM SOLVING AND OPPORTUNITY FINDING 110-31 (1995). Describing the creative problem solving process, Cougar states, "[a]lthough the Creative Problem Solving model is a latter 20th Century development, it evolved from an ancient concept, the scientific method." *Id.* at 130.

27. *See* O'Leary, *supra* note 11, at 81.

"Values" refers to values of all kinds which may influence the process. Examples of these values are: values of the individuals engaged in the process,[28] values of the culture(s) involved in the process, and values of various systems and institutions which may touch the process. The "Interests" of those involved or potentially involved must be analyzed immediately, but may change as each stage is structured and analyzed. "Investigation" (both legal and interdisciplinary) is also a necessary component of each step, as is "Prevention." The latter term refers to the analysis of how the problem, once identified, could have been prevented, and might be prevented in the future. Attitudes and perceptions toward prevention frequently change as the process ensues.

To identify the problem, a host of questions must be posed (e.g., What is the problem? Is there more than one? Is it part of a larger problem? If so, what should be addressed first? What interests are involved? Whose are they? Client's? Lawyer's? Opposing Party's? Society's? Is the problem big or small? Long-term or Short-term? Who are the stakeholders? What/whom does it harm? What are our objectives? Whose/what help do we need to identify the problem?). This process is phase one of creative problem solving.

Phase two attempts to better understand the problem. In so doing, possible questions are: Who/what is responsible for the problem? How could it have been prevented? Who/what are our obstacles? What other facts do we need? What are the issues of law, if any? Who can help us?

Posing solutions to the problem occurs in phase three. First, the question should be asked as to whether or not we should fix it. If so, how? Through what process? Who/what should be involved in the process? When should the process begin and conclude? How should decisions be made? This process will hopefully result in more than one solution.

After numerous solutions are conceived, the solutions are compared and selected in phase four. In performing the comparison, possible questions to consider are: What are the tradeoffs? Who/what is benefited? How? Which solution is best? For what purpose? Based on whose interests? Who should choose the solution? How should the solutions be implemented?

Once a solution is chosen, phase five analyzes the implementation of the solution. Queries include: What must be done in order to effect the chosen solution? How will it happen? Whose help must we enlist? What are the costs and benefits? When will it take place? Who will be responsible for ensuring its implementation?

Phase six provides a final analysis of the solution and its implementation with the original problem, as identified. Questions include: Does our

28. See, e.g., COSTANZO, *supra* note 12, at 13-52, for a discussion of the effect of lawyers' perceptions and personalities on problem solving.

solution solve the problem? (If not, the problem may need further analysis, or alternative solutions. In other words, we must return to some phase on the wheel.) Are we better off than before? What other problems might the solution create? Can any of those additional problems be prevented now? If so, how and by whom? If not, should we still implement the solution chosen?

Phases do not necessarily proceed in the order named. Frequently, phases may be combined (e.g., posing and choosing solutions at the same time), and often those engaged in the process must return to a prior phase for additional analysis. For example, the problem may need to be rephrased, or further understanding undertaken before solutions are posed. Many of the questions in each phase repeat one another; obviously, one need respond only to the relevant ones. And, most likely, phases may require additional questions. Above all, application of the visual model must not become a lockstep procedure, but must remain a spontaneous and flexible process.[29]

IV. USING THE VISUAL MODEL IN LAW TEACHING

Methods of teaching problem solving are numerous. Approaches have been both individual (by course or professor)[30] and holistic (by university).[31] One school of thought believes that problem solving must be taught as a reinforcement and application of content learned, while others view it as an application of existing knowledge combined with the seeking of new knowl-

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29. To ensure spontaneity and flexibility, perhaps a more apt visual model would exist on a three-dimensional level—essentially, a sphere moving through space as perceptions and facets of the problem change.

30. Moshe Rubenstein teaches a problem solving course to undergraduates at UCLA; Paul Brest teaches a course entitled "Problem Solving, Decision Making, and Professional Judgment" to graduate students at Stanford Law School. Other faculty have developed a problem-based approach in their teaching. For numerous cross-disciplinary examples, see PROBLEM-BASED LEARNING IN EDUCATION FOR THE PROFESSIONS (David Boud ed., 1985). For use of the problem-based method in law classes, see, e.g., Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654 (1984); Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, n.44 (1992).

31. The Faculty of Law at Maastricht University in the Netherlands has adopted a problem-based, interdisciplinary curriculum, modeled on that of the University's medical school; the Faculty of Medicine at McMaster University in Hamilton, Ontario, Canada has a similar problem-based curriculum. Both curricula are described in Jos. C. Moust & Herman J. Nuy, *Preparing Teachers for a Problem-Based, Student-Centered Law Course*, 5 J. PROF. LEGAL EDUC. 16 (1987). The College of Law in New South Wales, Australia, has developed a pilot course, based on problem-based learning, in segments of the Property/Commercial class taught there. The course is described in Keith Winsor, *Toe in the Bathwater: Testing the Temperature with Problem-Based Learning*, 7 J. PROF. LEGAL EDUC. 1 (1989). Southwestern University Law School has developed an optional co-curricular program based on hypothetical problems as teaching tools. For a description of the program, see Darrell B. Johnson, *SCALE: An Educational Alternative*, 68 A.B.A. J. 558 (1982).

edge, potentially in other disciplines.[32] Some educators view the problem method and learning problem solving as different processes, while others do not.[33] Many are of the view that component skills pertaining to problem solving must be taught before the subject is advanced in holistic terms.[34]

My own approach to teaching creative problem solving has been recent, and on an individual class basis.[35] I teach second and third year law students; thus, I assume they have an awareness of, if not a competency in, the typical panoply of legal skills involved in the problem solving process. I also assume that most law students, having been appropriately versed in the rigors of legal analysis, are less comfortable with the processes of creative thinking.

My short-term goal in teaching a creative problem solving component in my classes is to engage students in thinking processes in addition to that of legal analysis, and to offer them a procedure for doing so (and hopefully, useful to them in practice). A long-term goal is to encourage a broader, more humanistic outlook within the legal profession. This section describes my method in teaching creative problem solving through use of the visual model in my clinical externship and mediation classes, and suggests ways the same model can be used in traditional law classes.

A. Teaching Creative Problem Solving in Clinical Courses

My method in teaching creative problem solving is to offer students some context for the process, but also challenge them to engage in the process within contexts of their own choosing. I explain the use of a visual map in the context of a specific case, then offer a problem or two for students to resolve in class. The students work usually in groups of three, and use the model I have presented to them. As a final step in the process, students research legal problems related to the course subject and of interest to them, and resolve them using my paradigm or another of their own construction.

The problem I have used (now in two different classes) to explain the model is based on an actual case. A woman went inside a shoe store to re-

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32. *See* COSTANZO, *supra* note 12, at 5.

33. *See* Donald R. Woods, *Problem-Based Learning and Problem Solving*, *in* PROBLEM-BASED LEARNING IN EDUCATION FOR THE PROFESSIONS 23-24 (David Boud ed., 1985) (problem-based learning may not explicitly teach problem solving, which explores problems in which there is no apparent solution). For a description of the differences between problem-based learning and problem solving in a law school setting, see David A. Cruickshank, *Problem-Based Learning in Legal Education*, *in* TEACHING LAWYERS' SKILLS 194-99 (Julian Webb & Caroline Maughan eds., 1996) (problem-based learning applies current knowledge to an unfamiliar situation, whereas problem solving involves decisions in situations not experienced or identified).

34. *See* Donald R. Woods, *How Might I Teach Problem Solving*, *in* DEVELOPING CRITICAL THINKING AND PROBLEM-SOLVING ABILITIES 64 (James E. Stice ed., 1987).

35. I began using the model in my current Internship and Advanced Mediation classes.

turn a pair of shoes which had broken the first day she wore them. She explained to the manager that she had taken the shoes to a shoe repair person, who explained to her that the shoes should not have broken as they did. She asked the manager for another pair of the same style of shoes, a refund, or a store credit. The manager refused. When the woman complained of the store's service to another customer, the manager came up to the complaining woman, put his hand on her back, opened the door to the outside, and gently pushed her out.

After narrating the story to my students, I ask them about their current thoughts. Consistently, their immediate focus is the store's liability, and the patron's possible causes of action. But, after discussing each phase of the model in the context of the hypothetical, the class comes to a different conclusion. First, students identify and attempt to better understand the problem (e.g., Is the problem simply the customer's anger at the store manager? Her embarrassment? Her need for a decent pair of shoes? Or need for revenge? Is it a problem with the customer herself, as opposed to the store manager? How is the problem affected by the culture and values of those involved? How might our own values conflict or comport with those of the client or those of the store manager? What are the customer's real interests? An apology? Revenge? Teaching the store manager a lesson? What are the costs and benefits involved? Who are the stakeholders? Is the problem actually part of a larger issue? What societal interests might be involved? How, if at all, could the problem have been prevented? What/whom else should we consult?). After this process, the students are able to pose a much broader range of solutions. Once the implementation and final analysis phases are discussed, many students conclude that litigation may not be the best solution.

After students see the viability of the model in coming up with more creative solutions, I offer them another problem related to their interests, and I again ask them to use the model in groups to resolve it.[36] I use a simple policy issue in order to steer them toward a creative problem solving analysis, rather than a more narrow analysis of the law. The discussion which ensues is based more upon their process in and reaction to using the model than upon their actual solutions to the problem posed. At this point, student feelings toward formulaic thinking, or rigid adherence to professorial models, are exposed. It is critical to encourage students to develop a process for creative thinking consistent with their own values and mental processes.

In my Internship Seminar, once they have practiced using the model a few times in class, students are assigned to respond to readings and accompanying problems using a creative problem solving process. Pairs of student facilitators develop the readings and the problems for class discussion.[37]

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36. In both classes, I have used the problem of the lack of student parking on campus.

37. An example of a recent problem was that of a lawyer receiving information that a client may not tell the truth at trial. Using the creative problem solving model, students had to analyze what the attorney should do. Readings assignments included a law review

Students write responses to the problem, and their responses become the topic for class discussion. Students also write about issues which arise at their externship placements in weekly journals.[38] Again, I ask that they use some form of creative problem solving process in presenting, discussing, and resolving the issues discussed.

In Advanced Mediation (which I co-teach with Professor Floralynn Einesman), we spend one class teaching the model, as in the Internship Seminar. In the remaining classes, student pairs present a problem relating to an aspect of mediation and, using the model we offer or another process conducive to creative problem solving, offer possible solutions to it.[39] Again, students' use of the model on an issue they are interested in is key to imprinting the problem solving process.

B. Teaching Creative Problem Solving in Traditional Classes

The same model and process can be extended to other aspects of the law school curriculum. For example, in a Property class, the concept of adverse possession, as well as a process for creative problem solving, could be reinforced by offering a problem in which the client has been sued by a neighbor, claiming adverse possession. The students' initial reaction might be to examine legal doctrine learned through the study of appellate cases (e.g., Was there sufficient use of the premises? Was the use permissive?). In teaching substantive law, this process must be undertaken in order to learn both content and legal analysis. However, analysis of the issue should not end there. A creative problem solving paradigm can teach other methods that lawyers might use to resolve the issue. In doing so, students would inevitably incorporate more humanistic and creative concepts in their thinking.

In using the model offered, students would first have to identify the problem, taking into account interests and needs of those involved (e.g., Is this a case of neighborhood hostility? Land acquisition? What does the client want to happen? What can she afford? How do her values and interests compete with others involved?).

Understanding the problem is the next step (e.g., What further research would have to be undertaken? What other disciplines should be consulted? How could the problem have been prevented?). Once the problem is thoroughly understood, solutions, in addition to that of litigation, are posed

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article and relevant American Bar Association Model Rules.

38. Examples thus far have included: how to deal with the problem of failing to cite potentially damaging authority in a pleading, and how to resolve the issue of police who fail to make a second appearance in a court case because they are not paid for the second appearance.

39. Examples thus far have included: aspects of mediation as a solution to the frustrations of negotiated or court-initiated compromise; solutions to the problems involved with the mediation of custody disputes; and how to bridge the gap in dealing with cultural differences and prejudices in mediation.

(e.g., Can this be resolved through a negotiation, mediation, or neighborhood coffee? Or should the client simply sell the property? What are the possible results of each?).

After a full range of solutions is offered, the next step is to choose among them, keeping in mind the effects of implementing each one (e.g., Who decides? And, according to whose values? Who might be harmed?). Ultimately, an analysis is required as to whether the "best" solution has been chosen (e.g., Will such choice prevent future problems?). By framing class discussion in a creative problem solving context, the student is exposed to a much richer variety of approaches to the issue that legal analysis alone can offer.

Similarly, in a Constitutional Law class, the student could be invited to discuss whether the United States Supreme Court's "scientific" approach in *Roe v. Wade*[40] was the "best" solution in retrospect? To examine the problem, students would have to analyze the original problem the Supreme Court faced in the case and, using the creative problem solving model, come up with as many alternative solutions as possible. Analysis of their solutions, compared to that of the Court, would require investigation of *Roe's* progeny (e.g., Has the Court's decision "worked"? If not, why not?). Values, interests, interdisciplinary and creative thinking, and problem prevention are all necessary elements of the process.

Many faculty members involved in traditional teaching methods have concerns as to lack of time for necessary course content. For those who feel this is the most important aspect of legal education, incorporating a problem solving paradigm would not only add to their workload, but decrease the amount of time for content. There is also a concern that students are not quite ready for the concept of thinking "outside the box" of legal analysis until they have mastered thinking "inside the box." Thus, for reasons based on individual pedagogy, use of a creative problem solving paradigm may be limited in first-year traditional classes.

However, some use of creative problem solving in first-year substantive courses is important, whether or not basic skills classes teach the concept. It is critical that students are informed early that an interest-based, creative approach to legal issues is a necessary element of their professional development. It is important that the concept is reinforced by traditional first-year professors, who frequently serve as students' mentors. Application of a creative problem solving process in a few traditional courses lends legitimacy to the process that teaching it in an isolated skills class does not. But the process of incorporation requires the willingness of a few faculty members to recognize the need for it, to understand the process, and to potentially sacrifice some course content.

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40. Roe v. Wade, 410 U.S. 113 (1973) (basing a woman's right to abortion on the fetus' development by trimester).

V. CONCLUSION

Problem solving is a not a new concept in legal education. The problem method and aspects of the process itself have been taught for decades. What is new is its reconceptualization as a more pervasive, humanistic, and *creative* method for examining issues related to the law. Questions remain as to whether the use of a paradigmatic approach to teaching creative problem solving is useful—and, if so, where that leads us.

To date, there are no empirical data supporting my use of a model to teach creative problem solving. But, based on a very informal, anonymous survey halfway through the semester, the vast majority of my students found the model to be "useful," if not "very useful."[41] Comments on its usefulness included, "a good, foundational beginning"; "helpful to have a framework with which to begin an inquiry"; "keeps you on the creative problem solving track"; "creates a natural flow from problem to solution"; "gives me something to fall back on"; "simple, brief, and to the point—highly practical and useful"; "very flexible"; "guides our class discussions well"; "helps us stay focused and delve into areas we had not thought of"; and "wish it had been introduced earlier in law school."

Negative comments were as follows: "limiting at times"; "confusing"; "stages of choosing and implementing solutions had too much overlap"; "too hard to categorize thoughts as 'problem' or 'solution'"; "not useful in overly broad problems"; "hinders brainstorming discussion"; and "repetitive."

Clearly, more empirical and theoretical research is needed as to the benefits and methods of teaching creative problem solving to law students. The focus of the future should be on continuing the dialogue on the effects of and improvements in our methods to incorporate creative problem solving in the law school curriculum.

41. The survey asked students whether they found the model to be "not useful," "slightly useful," or "very useful" in relation to the class and in relation to law practice generally. Out of the twenty-six students responding, only two students found it to be "not useful" in class. Although some students were unsure as to how useful it might be in law practice, no one stated that they thought it would not be useful to lawyers in practice. (One creative student concluded that his or her own model for problem solving was more useful in practice than the one I proposed.)