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Marilyn J. Ireland  
*California Western School of Law*

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## MAGICIAN TO SORCERER: A BOOK REVIEW OF STEPHEN NATHANSON'S *WHAT LAWYERS DO*

MARILYN J. IRELAND\*

Law is the glue that holds together a diverse society. It is the only institution in America charged with the responsibility for ordering social chaos; and thus lawyers are practitioners of the art of ordering chaos.<sup>1</sup> Without any other common anchor in a shared religion or commonly held culture and value system, people want to believe that a lawyer, if he or she is honest and true can, like the alchemist, change ill luck and evil into the golden fleece of a just and secure world. There is magical thinking, unspoken, that law can miraculously transform reality and that lawyers possess secret rites and rituals containing mystical powers. At a minimum, the lawyer is expected to be the navigator of the last vessel of the Odyssey, who successfully steers his client Odysseus past the land of the Sirens, between Scylla and Charybdis, and out of the embrace of Calypso<sup>2</sup> while reassuring those crew members who lack adventurous spirit and reigning in those who do.

The images students have of lawyers include the legal sorcerer,<sup>3</sup> or at least the legal prestidigitator. Drawing on these and other popular images of the attorney, Stephen Nathanson's book, *What Lawyers Do*, attempts to bridge the gap between law school and practice. His primary audience is law students, who, he correctly concludes, may be confused in the belief that lawyers, like law students, are primarily engaged in the activity of reading appellate cases.<sup>4</sup>

Nathanson's explicit thesis is that lawyers are problem solvers.<sup>5</sup> His implicit thesis is that a problem solving approach should be a more central

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\* Professor of Law, California Western School of Law.

1. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 117 (1960).

2. See HOMER, *THE ODYSSEY* (Robert Fitzgerald trans., Anchor Books 1963).

3. STEPHEN NATHANSON, *WHAT LAWYERS DO: A PROBLEM-SOLVING APPROACH TO LEGAL PRACTICE* 4 (1997). Other images, which Nathanson draws primarily from fictional or media examples, include the lawyer as distorter of truth, paper generator, hero, underdog, dramatic character, savior, and warrior. See *id.* at 2-12.

4. See *id.* at 1-3.

5. See *id.* at x.

part of legal education.<sup>6</sup> The book is highly readable, and even enjoyable, because of its liberal use of examples drawn from known fictional lawyers, like Mr. Tangle, the solicitor in Dickens' *Bleak House*;<sup>7</sup> and Horace Rumpole, John Mortimer's charming *Rumpole of the Bailey* television barrister.<sup>8</sup> Through his choice of examples,<sup>9</sup> Nathanson inadvertently leaves a clue to one major problem law schools of the twenty-first century must face: law students who have no familiarity with law or professionalism when they enter law school. The small town lawyer who drafts wills and handles church accounts is not a youthful memory in the mind of the entering student. Instead, the student brings to the study of law a notion of the legal profession based on courtroom dramas or the purveyors of contentious dialogue offered up on television talk shows like Geraldo Rivera. Perhaps this realization underlies not only Nathanson's illustrative selections but also his excellent and extensive application of problem solving in the transactional (conflict-blockers) settings seldom seen on television.<sup>10</sup>

While the author is not directly aiming at an audience of law school teachers and curricular planners, his analysis will sometimes appeal to educational professionals.<sup>11</sup> American law schools have known for many years that reform is necessary. Unfortunately, Nathanson seems not to recognize how far many law schools have already come in integrating problem analysis and skills development into their programs.<sup>12</sup> Some, like California

6. *See id.* at 53.

7. *See id.* at 3. Nathanson refers to CHARLES DICKENS, *BLEAK HOUSE* (Oxford Univ. Press 1991) (1853).

8. *See id.* at 11-12. The Rumpole stories by John Mortimer are best known from their television adaptation and are available in three volumes. *Rumpole of the Bailey* (Thames Television, 1978), *The Trials of Rumpole* (Thames Television, 1979), and *Rumpole's Return* (Thames Television, 1983).

9. As additional examples, Nathanson draws on GEOFFREY CHAUCER, *The Man of Laws*, in *THE WORKS OF GEOFFREY CHAUCER 3* (Oxford Univ. Press 1957) (1390). Nathanson also discusses the motion picture, *TO KILL A MOCKINGBIRD* (Pakula-Mulligan Productions, CIC Video, 1962); and the television shows *L.A. Law* (NBC television broadcasts, 1986-1994) and *Perry Mason* (CBS/PAISANO television broadcasts, 1957-1965).

10. *See* NATHANSON, *supra* note 3, at 100-29. One impediment to creative problem solving is the linear assumption that the pie is fixed, with the only issue being how it is to be split. *See* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1, 7 (1997). *See also* Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 *GEO. L. J.* 369, 394 (1996).

11. *See, e.g.*, Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 *J. LEGAL EDUC.* 241 (1992).

12. In fact, legal education has already taken significant steps in this direction; a process that started at least with Karl Llewellyn. *See* MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 194 (1994). The "MacCrate Report" has also been very influential in legal education reform. 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). Problem text books are now so common in American Law Schools that it would be impossible to cite them all, and more traditional case books often include problems. For a cur-

Western School of Law, have moved heavily into skills training and have adopted a problem solving curricular focus.<sup>13</sup> However, the pace of educational reform has sometimes seemed agonizingly slow; particularly to the law student. This slow pace of educational reform may not be due solely to institutional conservatism and apathy—although both can be and often are present. Curricular reform faces numerous problems.

Applying a problem solving approach similar to that suggested by the author is useful in: (1) identifying the curricular problems; and (2) articulating the goal of making law school education more relevant to the practice of law.<sup>14</sup> But, his subsequent steps (fact investigation,<sup>15</sup> issue identification and assessment,<sup>16</sup> advice and decision making,<sup>17</sup> planning and implementation,<sup>18</sup> and flexibility<sup>19</sup>) are too linear to provide much assistance in arriving at the kind of inspired and synergistic creativity necessary to frame a solution to a complex problem like reform of the law school curriculum.<sup>20</sup> They are also probably too vague to give students the textured understanding of the practice of law that modern entering law students lack.

### I. THE PROBLEM

Students do not understand what law is or what lawyers do.<sup>21</sup> This lack of comprehension is not based solely on ignorance but also on media based misinformation. The fictional media representations of lawyers, as well as the behavior of real lawyers in relation to the media, including the huckster personal injury attorney ads, may contribute to public disrespect for attor-

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rent review of the integration of problem analysis in legal teaching, see Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547 (1997). In addition to courses in alternative dispute resolution, transactional practicums are being explored. See Karl S. Okamoto, *Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School*, 45 J. LEGAL EDUC. 498 (1995).

13. California Western School of Law operates the William J. McGill Center for Creative Problem Solving.

14. See NATHANSON, *supra* note 3, at 40.

15. See *id.* at 41.

16. See *id.* at 42.

17. See *id.* at 43.

18. See *id.* at 46.

19. See *id.* at 48.

20. Nathanson sees problem solving as both linear and fluid. But the fluidity he describes as "flexible thinking" is not applied to creativity in general, but only to "unforeseen problems." His process of problem solving is consciously linear; a "logical step-by-step method for problem-solving." NATHANSON, *supra* note 3, at 48. Yet art and inspiration, as much as preparation and linear planning, are essential to creativity. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 819 (1984). Thus, Nathanson offers the reader a good road map to the non-creative part of creative problem solving. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

21. See NATHANSON, *supra* note 3, at 1.

neys. ("Have you heard the one about the priest, the doctor, and the lawyer. . .")<sup>22</sup> Count on it, the lawyer is always the brunt of this joke, which appears in endless variations.)

Students also are increasingly risk averse, bringing to law school an expectation of certainty fueled by the very examples on which Nathanson draws. A television show can arrest and try a criminal in one hour with time to spare for commercials.<sup>23</sup> How, society wonders, can Jon Benet Ramsey's murderer still be at large over a year after her death? By the end of a Perry Mason trial, we know who did the foul deed. The good guys are never convicted and the script assures that the bad guys always are.

Real life is not so scripted. O.J. Simpson was convicted by public opinion but not by criminal jury. In another era, the population concluded that "Lizzy Borden took an ax and gave her father forty whacks," although she, like Simpson, was acquitted by a jury of her peers. But this "error" of the legal system—if error it was—could be tolerated by a less diverse society with anchors in a shared cultural heritage. The law was not then the only certainty available. Its foibles could better be accommodated when less was expected of it.

## II. THE GOALS

The law student needs to learn basic substantive law and how it evolves and changes.<sup>24</sup> He or she also needs to know about legal structures and how

22. It has been suggested that lawyer jokes stem from the "hired gun" perception of lawyers. See Nancy Rapoport, *Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney*, 70 IND. L.J. 783 (1995). There is also, in some of them, an undercurrent of distrust, on a mystical level, of lawyers as manipulators of truth and reality.

*A dying man gives one million dollars each to his doctor, priest, and lawyer with instructions to put it in his coffin as he wants to take it with him. As each enters heaven through the pearly gates, the man asks each whether his wishes were carried out. The doctor admits to using the money for a hospital wing. The priest repaired the church roof. The lawyer states that he did carry out the last wish by putting his own personal check for one million in the man's coffin.*

This joke illustrates something about public perception of these professions. The doctor and priest may be trusted to do good, but not necessarily to protect individual interests. At the same time, the lawyer is seen as serving both the client's and his own interests, not the public good. The means the lawyer uses is a trick, a manipulation of both truth and reality in the tradition of the supernatural trickster found in many mythical systems (e.g., *Native American*- Coyote; *Norse*-Loki; *Greek*-Iambi). The trickster may not be the most dignified personification of divine power, but, like the lawyer, trickster gods and goddesses are powerful and cunning and thus subject to jealousy and suspicion.

23. See, e.g., *Law and Order* (NBC television broadcasts).

24. See NATHANSON, *supra* note 3, at 53-54. "One of the more important questions asked by law teachers is, where does law come from? Or, what are the sources of law?" *Id.* In a common law context, he also recognizes that "the law progressed, however, presumably through the work of creative conflict players." *Id.* at 79. However, he does not draw the correlation between the teaching of legal evolution and creative problem solving. Nathanson seems ultimately to agree with attorney Gerry Spence that "[t]rial lawyers are 'fighters struggling to accomplish justice under the great disability of a legal education.'"

the courts function. That is, to use Nathanson's analytic approach, the lawyer needs knowledge.<sup>25</sup> The lawyer also needs some basic skills. Nathanson identifies many: client interviewing and investigation, writing, drafting, negotiation, and advocacy.<sup>26</sup> Finally, Nathanson champions attitude, including professional dedication to client needs (the Perry Mason factor).<sup>27</sup>

What Nathanson's book does not do, what probably no book can do, is provide a road map to creativity. He does cite a few examples. Rumpole leads the fictional jury to an acquittal by playing on their experience with inattentive sales clerks.<sup>28</sup> Johnny Cochran uses a similar approach, drawing on the jury's experience of racist actions by some police officers to create doubt in the O.J. Simpson trial.<sup>29</sup> Both examples demonstrate a lawyer with knowledge of human nature and of particular cultural attitudes, as well as an inspired non-linear problem solving approach. How do you learn or teach creativity? Nathanson tries to leave a linear problem solving path, but succeeds only when he uses examples in a manner not dissimilar to the case study approach which he criticizes.<sup>30</sup>

### III. SYNERGISTIC ANALYSIS

*What Lawyers Do* invites "Creative Problem Solving" and outlines its components, but does not really tell how to do it. If legal education cannot always offer law students the certainty of black letter law, a problem solving approach does, at least, give a methodology. But the methodology is not an automatic or linear thought process. It is much more like poetry than arithmetic.<sup>31</sup> For all its literary allusions, *What Lawyers Do* is too analytic to teach the underlying art.

A creative solution is a thread, woven into the fabric of the problem. Like a child's finger string game, a solution is often deceptive in its simplicity—once the solution is found. Perhaps the answer to teaching creativ-

*Id.* at 12, citing GERRY SPENCE, *WITH JUSTICE FOR NONE: DESTROYING AN AMERICAN MYTH* 43 (1989). However, Gerry Spence's primary objection to legal education is not that it teaches only appellate law, but rather that it overlooks human emotions.

25. *See id.* at 30-37. Admirably, Nathanson does not fall into the Skills or Theory trap. He also correctly adds transactional knowledge to the knowledge of substantive and procedural law.

26. *See id.* at 23.

27. *See id.* at 19, 36. For a consideration of the ethical issues related to client representation under the adversarial model, see Peter Marguiles, *Progressive Lawyering and Lost Traditions*, 73 *TEX. L. REV.* 1139 (1995).

28. *See id.* at 57.

29. *See id.* at 62-63.

30. *See* NATHANSON, *supra* note 3, at 1, 54.

31. *See* David R. Culp, *Law School: A Mortuary for Poets and Moral Reason*, 16 *CAMPBELL L. REV.* 61 (1994) for a criticism of law school training. It "will not equip you to become a poet" because it teaches suppression of emotion, linear logic rather than free association. Culp's point is that imagination is destroyed by a law school approach to analysis which is overly linear.

ity lies in the increased use of non-linear teaching materials. Books, even books full of examples, are by their nature either linear or disorganized. Media assisted learning may turn out to be much more than a convenient and cute thematic device with which the author can punctuate a book. The media is part of the problem and also must be part of the solution; for the solution to any problem is and must reside in the problem itself.

If media images of lawyers have made it difficult to teach attainable professionalism, the methodology of multi-media offers the student an increasingly familiar world in which exploration rather than rote is an expected activity. If talking heads in the classroom are, by student expectations, supposed to expostulate truths ex cathedra, there is no similar expectation for computer assisted learning materials.<sup>32</sup> While the creative part of problem solving cannot be taught or learned in a step-by-step process, it at least can be modeled; and multi-media models are ideal for this purpose.

#### IV. CONCLUSION

Nathanson diagnoses a problem faced by the law student. However, his thought provoking book does not have sufficient texture to truly inform law students what either the practice of law or the process of Creative Problem Solving is really like.<sup>33</sup> The strength of *What Lawyers Do* is that it contains the germ of an insight greater than its thesis. Only a fictional lawyer could be perfect enough to provide society with solutions to all social problems. Yet this is the task American society has set for its lawyers. Law students and the law schools they attend will need to be creative indeed to fill this demand. Multi-media has helped to create this impossible dream, and only with the help of multi-media can the need be answered creatively.

Law schools can continue to experiment with new approaches to teaching the theory and practice of law, but creativity requires a revolution much larger than prescribed in *What Lawyers Do*. In seeking to make the process of law more analytical, law schools and Stephen Nathanson have made the same mistake. They have stripped the humanity and emotion from the script, replacing it with linear analysis thereby divorcing the problem from the human content that underlies it.<sup>34</sup> The true legal sorcerer is not a magi-

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32. "As we move from a book-based to a computer-based profession . . . we are also moving to an entirely different way of thinking about legal problems." Barbara Bintliff, *From Creativity to Computerese: Thinking Like a Lawyer in the Computer Age*, 88 L. LIBR. J. 338, 338 (1996).

33. For some excellent examples of "out of the box" literature in the area of creative problem solving, see A. OSBORN, *APPLIED IMAGINATION; PRINCIPLES AND PROCEDURES OF CREATIVE PROBLEM-SOLVING* (3d ed. 1963); Gordon A. MacLeod, *Creative Problem-Solving—For Lawyers?!*, 16 J. LEGAL EDUC. 198 (1963); Kimberly E. O'Leary *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLINICAL L. REV. 65 (1997).

34. Thus, Nathanson repeats the oversight of the MacCrate Report on Legal Education. See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing*

cian, reuniting bodies that have been sawed in half only in a world of reflected illusion. He or she, like Rumpole, must deal with truly injured human beings. A creative lawyer understands that the real magic of law requires, at a deeply profound level, that a fine lawyer prefers to like rather than judge people.

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*from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994).



