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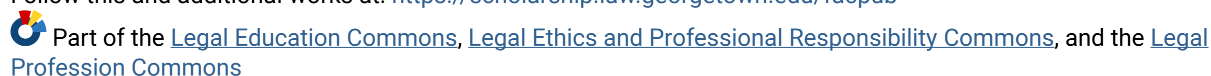

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Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General

Carrie Menkel-Meadow

Attorney General Janet Reno has taken seriously the notion that lawyers should make the world better than they find it, that problems should be prevented, where possible, before they occur, and that law should serve the needs of the people and deliver long-term justice. I want to suggest some concrete ways in which we can take her challenges seriously.

The lawyer of the next century will need to be able to diagnose and analyze problems, to talk to and listen to people, to facilitate conversations, to negotiate effectively, to resolve disputes, to understand and present complex material, to use ever-changing technologies, to plan, to evaluate both economic and emotional components and consequences of human decision-making, and to be creative—to use tried and true methods when they are appropriate, but not to fear new and category-smashing ideas or solutions.

So how do we educate our students for all these skills and capacities and, at the same time, immerse them in all the vast legal substance with which the modern lawyer must be conversant?

Educating the Problem-Solving Lawyer

I want to suggest briefly some ways we might teach problem-solving in law schools—right now, without the need for expensive studies or for even more expensive legal education reform.[1]

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Thanks to Robert Meadow for solving problems, legal and otherwise, on this and other articles. Thanks also to a small group of legal educators who have been taking problem-solving seriously, including Paul Brest, Robert Mnookin, Peggy Davis, Maude Prevere, Len Riskin, Nancy Rogers, Judy Areen, Don Langevoort, Marjorie Corman Aaron, Eleanor Myers, Margaret Shaw, and others who have advised the attorney general on these matters, including Peter Steenland, senior counsel for ADR, Department of Justice.

1. I have written extensively on these subjects elsewhere, as have many others. For a sampling of writings on legal problem-solving and related legal education reforms, see Carrie Menkel-Meadow, Toward Another View of Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754 (1984) [hereinafter Menkel-Meadow, Toward Another View]; Carrie Menkel-Meadow, To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum, 46 SMU L. Rev. 1995 (1993); Carrie Menkel-Meadow, Narrowing the Gap by Narrowing

Beginning with the first year, in every class, in every case, imagine if the teacher (and the student, while briefing a case) asked not only the usual IRAC questions but the following additional questions.

- What brought these parties/clients to a lawyer? What were they trying to accomplish?[2]
- What were their underlying needs or interests, in their actual experience and as expressed to the lawyer? What translation occurs by both client and lawyer when they first address each other across the legal-issue-spotting divide?
- What were the likely/possible needs or interests of the other parties involved in the case—the actual adversaries, other possible litigants, or involved parties who may not have been joined?
- What is really at stake? Scarce commodities, reputation, or legal principles? Some harm or hurt not traditionally considered compensable?[3]
- How would you evaluate the legal, social, economic, political, psychological, moral, or ethical risks and benefits of litigation? Of nonlitigated outcomes?
- What other resolutions/transactions/arrangements might have better dealt with this "case" or "problem" than the court's resolution?
- Are there other processes that might have led to different/better/ worse outcomes?

Consider the other elements, in addition to conventional legal reasoning, that might be taught by responding to these questions. What other facts/ feelings/issues would we have to have to evaluate this case or to assess the quality of the judicial or other resolution? How did the lawyer or legal system, with their "limited remedial imaginations," narrow or frame the issues pre-

the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being, 69 Wash. L. Rev. 593 (1994); Paul Brest, The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers, 58 Law & Contemp. Probs. 5 (1995); Paul Brest & Linda Krieger, On Teaching Professional Judgment, 69 Wash. L. Rev. 527 (1994); Donald C. Langevoort, Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review, 51 Vand. L. Rev. 1499 (1998); Linda Morton, Teaching Creative Problem Solving: A Paradigmatic Approach, 34 Cal. Western L. Rev. 375 (1998); Susan P. Sturm, From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy and the Legal Profession, 4 Duke J. Gender, L. & Pol'y 119 (1997); Alan M. Lerner, Law and Lawyering in the Workplace: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solvers, 32 Akron L. Rev. 107 (1999).

2. Often we can only speculate about client motivations. I have sometimes had actual clients and parties speak to my classes about what they were trying to achieve (and how they actually experienced the ensuing litigation). Without actual human beings, documentary films, nonfiction works like Jonathan Harr's *A Civil Action* (New York, 1995) and Gerald Stern's *Buffalo Creek Disaster* (New York, 1976), and even movies can sometimes give students the experience of real litigants.

3. For a powerful statement of the many human harms not yet rendered compensable by our legal system, see Robin West, Caring for Justice (New York, 1997).

sented?[4] Do the parties see the issues in the same way? Do differences between the majority and the dissenting opinions expose different understandings of the facts, the law, relevant policy considerations, possible remedies? What are alternative ways of "framing" the dispute or case?

Most important, by considering what other resolutions (or other processes) might have been possible, we encourage students to think creatively about legal problem-solving. They may have to learn why certain ideas are not possible in our system, but they may also get to use their lay knowledge or some nonlegal expert knowledge to explore other possible resolutions.

Teaching students early to explore risk analysis emphasizes that valuation of a case is both a mathematical and a human problem. Asking students to look deeper into their cases—to understand that the apparent dispute is often only the tip of an iceberg—enables the student to see the lawyer's potential to bring added value to any case. The lawyer who can contextualize a problem and "solve" its constituent elements or create a new transaction, relationship, or entity will surely make a client feel better about the legal process.[5] This approach to cases suggests that transactional and "preventive" lawyering can be learned even within the context of conventional casebook materials.[6]

Several law schools have begun to explore how the business curriculum, with its more deeply contextualized case studies, might serve as a model for teaching multidisciplinary learning, fact gathering, and decision-making. Of course, we who have been teaching for many years using real cases or deeply contextualized simulations with multiple-party role-plays are now amused that legal education has finally caught up with this way of learning.[7]

4. The quoted phrase is from Menkel-Meadow, Toward Another View, *supra* note 1, at 791–92. Legal educators offer other knowledge systems of relevance to lawyers, Gerald P. Lopez, Lay Lawyering, 32 UCLA L. Rev. 1 (1984); Roger Fisher & William Ury, Getting to Yes (New York, 1991). I use creativity and problem-solving books from engineering, architecture, and other fields to teach students how to think out of the legal box; see, e.g., Martin Gardner, aha! Insight (New York, 1978); James L. Adams, Conceptual Blockbusting (Reading, Mass., 1986); Donald A. Schön, The Reflective Practitioner: How Professionals Think in Action (New York, 1983); Donald A. Schön & Martin Rein, Frame Reflection: Toward the Resolution of Intractable Policy Controversies (New York, 1994).

5. Ronald J. Gilson & Robert H. Mnookin, Forward: Business Lawyers and Value Creation for Clients; Symposium on Business Lawyering and Value Creation for Clients, 74 Oregon L. Rev. 1–14 (1995); Ronald J. Gilson & Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 Colum. L. Rev. 509 (1994).

6. See Robert Hardaway, Preventive Law: Materials on Non-Adversarial Legal Process (Cincinnati, 1997) for a useful text for teaching transactional and preventive lawyering, following the pioneering work of Louis Brown.

I have used the approach I describe here in both traditional and nontraditional versions of Civil Procedure. Each year in my negotiation class I ask students to pick five cases at random from a reporter and respond to these questions, to consider what alternative negotiated or other resolutions might have been possible for the cases. If a case requires a ruling or precedent, we can analyze when traditional legal process is most appropriate.

7. As a matter of intellectual and educational history, my colleague Wally Mlyniec and I find ourselves much amused by this acceptance of "simulated" case studies when they come from the business schools when law school clinicians have been using these methods for years. Will the history of legal education give adequate credit to clinical teaching as the one legal education reform since the days of Langdell that has succeeded, or will this be a story of convergence of training in law and business as decision-making in advanced capitalism?

Important interpersonal-skills aspects of problem-solving need to be introduced early into the law curriculum with both theoretical and practical material. Game theory and its applications to such areas as cooperative, collaborative, and competitive behavior are important in transaction planning, contracts, property, and environmental problems—both substantively and in terms of process choices in negotiation, discovery behavior, and solution crafting.[8]

Going beyond the single case or class, a teacher of any first-year subject should be mindful of the messages sent to students about how legal problems are best framed and resolved. By using some of the language presented by the attorney general, teachers can remind students why they came to law school—to use the law "in the right way" to meet the needs of everyday people. This does not exclude or supplant traditional analysis—it adds another layer of rigor to the inquiry.

As the attorney general has acknowledged, several schools have developed innovative programs for teaching problem-solving concepts and skills in the first year. They teach "appropriate dispute resolution" pervasively in all the required courses, with cases, role-plays, problem sets, and instruction in interviewing, counseling, negotiation, mediation, and arbitration.[9]

Attorney General Reno also alluded to a more ambitious form of problem-solving instruction employed by some law schools with innovative clinics. While community-oriented clinics at (for example) Buffalo, Georgetown, CUNY, and Temple involve students in community service, transaction planning, or policy clinics, other schools have developed seminars, simulation courses, or quasi-clinical courses or externships that focus concretely on a specific problem in the region or locality (e.g., homelessness, education, transportation, or health and AIDS issues) and focus student attention on bringing together many disciplines, experts, community members, and client groups to develop multiple solutions. Such learning demonstrates the varieties of legislative, litigational, community-based, consensual, mediated, or negotiated solutions that may be possible.

Although there has been much rhetoric over the years about broadening our teaching methods and the content of our materials to explore interdisciplinary approaches to legal problem-solving, I think we are finally making progress. As the attorney general suggests, one of the important components of case valuation is economics and assessments of risks and probabilities. The disciplines of economics, mathematics, statistics, accounting, and other "quantitative" approaches to decision-making are clearly essential in modern transaction planning, financing, and community and governmental planning, as

8. See, e.g., Robert M. Axelrod, The Evolution of Cooperation (New York, 1984); Robert M. Axelrod, The Complexity of Cooperation: Agent-Based Models of Competition and Collaboration (Princeton, 1997); Steven J. Brams & Alan D. Taylor, Fair Division: From Cake Cutting to Dispute Resolution (Cambridge, Eng., 1996); Douglas G. Baird et al., Game Theory and the Law (Cambridge, Mass., 1994).

9. See Leonard L. Riskin & James E. Westbrook, Dispute Resolution and Lawyers, 2d ed., and Teacher's Manual for text and class exercises (St. Paul, 1998).

well as in single-party and class action disputes. Other areas of law (e.g., mass torts, environmental problems) have demonstrated the need to combine "natural" and "social" sciences—public health, epidemiology, sociology, psychology—to assist in the solving of human problems. Clearly, our curricula will have to make room for broader knowledge bases, because lawyers will have to know how to "consume" such information.

Just as legal writing has had to absorb the new technologies of computer-based learning, our other traditional courses will have to expand as well. Indeed, as one savvy client of lawyers told me recently, with easy access to information on the Internet, lawyers and other brokers of deals and information will have to find new ways to demonstrate their "value added," or clients will simply bypass them and transact their business through Internet connections.[10]

The recognition that modern problem-solving is transdisciplinary may be advancing faster in the "real world" than in the legal academy. Many jurisdictions have begun using "integrated," interdisciplinary courts—for example, family courts dealing with custody, divorce, and abuse and neglect by focusing on family solutions, and drug or "vice" courts that focus on treatment as well as punishment. Judith S. Kaye, chief justice of the New York Court of Appeals, proudly proclaims these to be "problem-solving" courts.[11] Our students will need to know how to operate in them, judge in them, and manage them.

Taking another page from the business (and public policy) schools, some of us are now recognizing the importance of another set of skills for lawyers—facilitation, democratic participation, meeting management, and consensus-building techniques that develop from more conventional process courses like mediation or "leadership" training, but teach essential skills for legal decision-making in municipal government, reg-neg (negotiated rulemaking), legislation and lobbying, class action representation, multiparty negotiations, and other complex arenas.[12]

In addition to the arts and science of decision-making, management, negotiation, and other combined analytic-personal skills, law students need to be taught how to think creatively. While business schools and business practice value and reward entrepreneurial ideas, law, with its deliberative judgments, may inadequately prepare students to be active and creative. Here again, clinics and simulated courses are essential to teaching the full context

10. I am indebted to commercial real estate broker Robert A. Manekin for this observation.

11. Changing Courts in Changing Times: The Need for a Fresh Look at How Our Courts Are Run, 48 Hastings L.J. 851, 862 (1997).

12. See, e.g., Lawrence Susskind et al., Consensus Building Handbook (Thousand Oaks, 1999); Roger Schwarz, The Skilled Facilitator; Practical Wisdom for Developing Effective Groups (San Francisco, 1994).

At the direction of Judith Wegner, former president of the AALS, a number of our own members have been trained to facilitate strategic planning processes for curricular and other issues in law schools; call the AALS office and ask for the AALS Resource Corps. Several law deans, including Paul Brest of Stanford and Judith Areen of Georgetown, have used their considerable knowledge and skill to pioneer courses in decision-making, client counseling, and leadership, bridging the disciplines of law, business, and economics.

of legal problem-solving.[13] I use a series of creativity exercises and brain teasers to force students to think out of the box and return to a particularly intractable legal problem. Students also need to learn the converse of creativity—"reality testing." How can this particular solution to a problem be implemented? What barriers will it face? Into what context will it be placed? The important integrative work done by an interdisciplinary team of scholars at Stanford has demonstrated that cognitive and social psychology, economics, sociology, and law can work together to overcome barriers to resolving legal problems.[14]

Most important, students need to learn that there may be multiple solutions to problems: early misdiagnosis and narrow closure on a problem can be dangerous. When many students work on the same problem, as in a simulation, they learn that there may be more than one Pareto optimal solution to a problem.[15] In particular, through courses in negotiation, mediation, and other forms of ADR, students can learn that money is not the only way to settle a lawsuit or solve a problem: apologies, job transfers, nonmonetary solutions, "cathartic" processes, and simply the ability to vocalize a complaint (so often thwarted in our lawyer-led negotiated settlements) may increase satisfaction with the legal system.

The Problem-Solving Curriculum[16]

In my ideal legal curriculum there would be logical development, beginning with first-year courses that teach traditional theoretical and doctrinal analysis but incorporate problem-solving skills and interdisciplinary materials. The second year would be devoted to the acquisition of more substantive knowledge (in law and other disciplines) with simulated and integrated skills courses (on question framing, interviewing, counseling, decision-making, problem-solving, case valuation, negotiation, mediation, facilitation, transaction planning).[17] The third-year capstone would include intensive work in one area of specialization, advanced writing, and exposure to real clients and real

13. Several law schools have offered pioneering clinics in mediation (Nancy Rogers at Ohio State, Leila Love at Cardozo, Douglas Frenkel at Pennsylvania); small business, planning, and community economic development (Buffalo, Chicago-Kent, Georgetown, Temple); or legislation (Georgetown, Washington University).

14. See Kenneth J. Arrow et al., Barriers to Conflict Resolution (New York, 1995).

15. In my negotiation courses I use "real people," not actors or students, to play clients. Students learn that, even with the same facts, different people will value things differently and may choose different solutions. This teaches students the important lessons of client autonomy, agent-principal duties, different preferences, and the importance of not assuming too much about any particular client. Entity clients may present other important lessons in client counseling, getting authority, negotiating with clients, and accountability and legitimacy of legal problem-solving.

16. For one example of an integrated curriculum in problem-solving and dispute resolution, see Georgetown Upperclass Curriculum Guide 12–15 (Washington, 1997); I will send a copy on request.

17. See Eleanor W. Myers, Teaching Good and Teaching Well: Integrating Values with Theory and Practice, 47 J. Legal Educ. 401 (1997); Nancy J. Knauer, The Transactional Practice Series (NITA, 1998).

legal problem-solving in clinics. In my ideal world, every law student would have to engage in problem-solving education in both the litigational and the transactional context, because the problems and skills employed may be sufficiently different for useful comparisons. Rigorous analysis during law school of the consequences and effects of lawsuits on real people, before all the pressures of law practice take over, can permit a deeper inquiry into the many factors that affect collaborative decision-making among and between lawyers and clients.

As a "problem-solving" educator, schooled in the trenches of clinical education, I can't leave the topic without express attention to teaching self-evaluation and lifelong learning. As a frequent teacher in CLE programs, I am convinced that the effective problem-solving lawyer must continue to learn, to keep up with rapid changes in both substance and process. It saddens me to watch my law school classmates continue to practice with the old routines we learned over twenty-five years ago. CLE, like legal education, needs to broaden the subjects it teaches, including process and skills, interactive and behavioral, as well as conceptual, and substantive, learning.

Note that the attorney general has told us that the old things still matter and still are essential to good legal problem-solving: we must still teach our students to write and to speak; to hear as well as listen; to take the rule of law seriously; to litigate and vigorously try cases when necessary—in short, to seek justice. But she also wants us to understand that law is a good "bridge" discipline. We may be in an ideal place to craft solutions that serve people and serve justice at the same time—solutions that meet the needs and interests of people effectively and long-lastingly, that reduce the harm done by a legal system that is too costly, complex, and cumbersome for many.

She tells us that we can ignore these new needs for problem-solving only at our own risk and the risk of our students. Increasingly, the government and the private sector are using new forms of dispute resolution and problem-solving to seek solutions to complex problems where the lengthy and binary structures of litigation just are not effective.[18] The attorney general has put an emphasis on preventive problem-solving in crime reduction and violence prevention; she is now turning to the civil area, to look for ways to enhance relationships and improve the quality of life for litigants and litigators too. Indeed, as she so often stresses—with the importance to all Americans, including lawyers, of spending time with their families and developing into full human beings—one can think of problem-solving skills as a win-win-win, providing good resolutions for both parties and lawyers, who feel that they are leading more productive lives and helping others achieve good solutions, with processes that are more humane for all concerned. She tells us to continue to be concerned about access to justice—to simplifying, rather than complexifying, law so that all citizens can understand and be bound by it—while we continue to work to make law and legal institutions as just and humane as they can be.

18. See Alternative Dispute Resolution Act, 28 U.S.C. §§ 651–658 (1998), requiring consideration of some form of ADR for all 94 federal district courts. The Intergovernmental Agency Coordinating ADR for the Federal Government (headed by Peter Steenland, the Justice Department's senior counsel for ADR) works with 60 federal agencies to establish dispute resolution programs.

The attorney general brings us an important message: legal education cannot stand still while the modern complex world continues to move. She asks us to train our students to be rigorous, supple, and deep enough to solve legal problems and make more harmonious relations among those who inhabit this planet. I hope she has inspired you, as she has inspired me, to keep trying to make the world a better place.