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WHEN WINNING ISN'T EVERYTHING: THE LAWYER AS PROBLEM SOLVER

*Carrie J. Menkel-Meadow**

It is very odd to give lectures in places where one has grown up. I grew up just a few miles from Hofstra in Queens in the 1950s and attended the Ethical Culture Society of Long Island just a few miles from there, where I spent my childhood learning about different cultures and religions of the world. I spent my early professional years in Philadelphia, as a legal services attorney in North Philadelphia, just a few miles from Temple Law School. In both of these metropolitan areas I was learning that there were many different kinds of people, a wide variety of legal problems and injustices to be corrected, and many different approaches to be used in both legal and social problem solving. Learning from others and appreciating the different ways we do things is one of the themes of this lecture.

Today I want to address the question of what the modern lawyer needs to *know* and what the modern lawyer must know how to *do* to be good at what he or she does, to be helpful to clients, to lead a fulfilling life, and hopefully, to leave the world a better place than he or she first found it. I went to law school to work on that illusive jurisprudential concept—justice. On the outside walls of the Edward Bennett Williams Library where I work in Washington, DC, is a quote, which we attribute to a former Georgetown student; “Justice is the ends, law is the means.”¹ So today I want to talk about some ways to achieve justice, both substantively and with different means—means in which law is part, but not the whole, of a process.

* Professor of Law, Georgetown University Law Center; Chair, Georgetown-CPR Institute for Dispute Resolution Commission on Ethics and Standards in ADR. This essay is based on a Visiting Scholar in Residence Lecture delivered at Hofstra University School of Law on March 8, 2000 and the inaugural Phyllis Beck Lecture delivered at Temple University Beasley School of Law on April 8, 1999. Thanks to my hosts (Stefan H. Krieger at Hofstra and Eleanor Myers at Temple) and appreciative audiences at both of these institutions.

1. Conversation with Robert Oakley, Director of Edward Bennett Williams Library and Professor of Law, Georgetown University Law Center.

I will explore the goals and means of effective negotiation, because, as lawyers, we accomplish things only by working with clients, legislators, policy makers, judges, administrative officials, other lawyers, and other people's clients—a process we need to pay more attention to in our teaching, learning, and self-evaluation. I also want to talk about problem solving as a legal goal that is different from “winning” (it can be both more and less than winning, but is often different). This is a focus on different substantive outcomes for the cases, matters, problems, and transactions on which we work.

I do not mean “win-win” negotiations either, for that is often a misnomer in legal negotiations. It is rare in legal negotiations or in life that everyone can win something. But problem solving negotiation means that the parties can do better than they might otherwise do, especially if they are employing an unnecessarily unproductive adversarial approach.²

Consider a case or matter you are working on, or for students, a case you have just studied for class. What are the conceptual frames or assumptions you bring to work on the case—what are the clients' or parties' goals, what are the lawyers' goals, and what are the system's concerns with respect to the matter? Then, consider what strategies or behaviors are conjured up by trying to achieve these goals. In the legal system as lawyers know it, most of them, especially after three years of law school training, adopt what the economists would call certain “default,” or what I would call “reflexive,” mind-sets. If it is a “case,” lawyers must be seeking to “win” something from the other side, ask the court to interpret a statute, or rule, or the facts in their favor, or, in a transaction, they hope to “get the better deal.” These mind-sets, which can be labeled together as “maximizing individual or client gain,” produce certain assumptions of scarcity or at least zero-sum games of limited resources³ which, in turn, produce either binary or polarized solutions (court judgments or I win-you lose) or split the difference

2. For my earlier and more extended treatment of these issues, see Carrie J. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984). For a shorter and more recent version, see Carrie J. Menkel-Meadow, *The Art and Science of Problem-Solving Negotiation*, TRIAL, June 1999, at 48.

3. These “games” are formally known as “distributive bargaining” problems. For a more detailed and in depth discussion of such problems, see HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* (2d ed., ILR Press 1993) (1965).

compromises.⁴ Lawyers hope to win, yet they know they could lose—in fact, if they do not go to trial,⁵ the most common result in our legal system will be some sort of monetary valuation of a case and some compromise value.⁶ (In one shot, two person pricing problems, like car or home buying, they can predict that the final price will be close to the mid-point of the first offers).⁷

These assumptions of goals and outcomes lead, too often, to behaviors that I have labeled the “culture of adversarialism,”⁸ with an emphasis on argument, debate, threats, hidden information, deception, lies, persuasion, declarations, and toughness. These behaviors, in turn, often escalate and lead to the most common results of adversarial bargaining—stalemate or mindless mid-point compromise. Even a “win” will be a loss if the other side is so beaten down or regretful that it will resist complying with a negotiated agreement. Consider the many examples from Twentieth Century international relations and war.⁹

4. Compromise is not necessarily good or bad in negotiations. It can be bad if the parties do not fully explore their needs and interests, and thus, take something less than what they want or is possible. But compromise is not necessarily morally inferior, as when there are two equally weighted interests or principles on either side or equally meritorious factual claims (such as in some child custody matters, for example). Furthermore, in the political realm, we could not have government, pass laws, or make peace if we did not recognize the importance of bargaining and compromise in collective settings. See generally COMPROMISE IN ETHICS, LAW, AND POLITICS: NOMOS XXI, (J. Roland Pennock & John W. Chapman eds., 1979); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., The MIT Press 1996) (1992); Jon Elster, *Strategic Uses of Argument*, in BARRIERS TO CONFLICT RESOLUTION 236 (Kenneth J. Arrow et al. eds., 1995).

5. Less than five percent of all cases filed, in any kind of court, federal, state, criminal, civil, etc., actually go to full adjudication. See ADMINISTRATIVE OFFICE OF THE COURTS, STATISTICAL DATA ON COURTS, NATIONAL CTR. FOR STATE COURTS; see generally Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (analyzing the aftermath of the tremendous increase in lawsuits in America); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (discussing the perception that everyone is litigating compared with the reality of very few cases actually going to court).

6. Those who have participated in pre-trial settlement conferences in which judges, magistrate judges, or other settlement officers attempt to broker these monetary compromises know them as the “Lloyds of London” formula. For a comprehensive discussion of the settlement conference, see Carrie J. Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

7. See RAIFFA, *supra* note 3, at 40.

8. Carrie J. Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 11 (1996).

9. See generally ROGER FISHER ET AL., *COPING WITH INTERNATIONAL CONFLICT: A SYSTEMATIC APPROACH TO INFLUENCE IN INTERNATIONAL NEGOTIATION* (1997); WORDS OVER WAR: MEDIATION AND ARBITRATION TO PREVENT DEADLY CONFLICT (Carnegie Comm'n on Preventing Deadly Conflict, 2000).

Even “wins” in the legal system often represent “imprecise” justice.¹⁰ The law all too often deals in binary on/off positions. There is contract or no contract, negligence or no negligence, and guilt or innocence with very few “mediated” substantive choices—comparative negligence in torts, material breach, promissory estoppel or quantum meruit in contracts, or “not proven” in Scottish criminal law as a few examples. Yet, on/off decisions these days seldom reflect the complex reality of post-modern life and lawsuits with multiple parties and issues, complex causation chains and liability and responsibility, and situations where two “rights” or claims for justice may stand in equipoise on opposite sides of a case (for example, free speech and regulation against hate speech and child custody cases).

The forces which produce this thinking are many and complex and I do not mean to simplify them. They are epistemological—many believe the truth is learned better by having two sides square off and “fight” each other (an evolutionary move forward from trial by ordeal or battle).¹¹ Many believe that clear rules are necessary to guide society and that disputes belong to the polity and not to the disputants¹² once they enter the public courthouse.¹³ They are structural—our litigation system most often consists of two sides (plaintiff and defendant), even when modern day problems are more likely to be multi-party and multi-issue.¹⁴ Judges have “limited remedial imaginations,”¹⁵ meaning that by law they can only order certain things—past-oriented verdicts for one side or another, guilt or innocence, or injunctions and monetary damages. Juries may nullify or compromise, but they also have limited remedies or solutions at their disposal. The jurisdiction of courts to craft remedies and solve problems is limited—by legal principles and by procedure. And, the forces of adversial thinking are behavioral—the struc-

10. An analysis of the possibility of “imprecise” justice may be found in John E. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U. L. REV. 750 (1964).

11. For additional discussion on the roles lawyers play or should play in the modern “fight,” see MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS* (1990); David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 83 (David Luban ed., 1983).

12. For a further examination of the purpose of disputes in our country, see Carrie J. Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

13. See, e.g., Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

14. Lon Fuller called a multi-party or multi-issue conflict a “poly-centric” dispute. See generally Lon L. Fuller, *Mediation: Its Form and Its Functions*, 44 S. CAL. L. REV. 305 (1971).

15. Menkel-Meadow, *supra* note 8, at 7.

tures and frames of thinking about the legal system have together created a system of adversarialism that leads us to argue in oppositional modes, to see black or white, to resist nuance and complexity, and at worst, to be uncivil to each other.¹⁶

To develop another mind-set or *reflective* approach to legal problem solving requires, therefore, both conceptual or structural change and behavioral and processual change in how we conceive of legal problems. Thus, as I have spent years teaching, negotiation and problem solving are analytic, cognitive, conceptual, and scientific, as well as behavioral, affective, strategic, and processual. Effective legal problem solvers must learn to *think* differently before they learn to *act* differently. This is the *science* and the *art* of negotiation.

What should a good legal problem solver do? Law students, lawyers, judges, clients, and law teachers in the audience should now return to the case or matter I asked you to think about a few moments ago. Imagine that in addition to the commonly “briefed” questions students pose today in the “IRAC” mode (issue, ruling/reasons, analysis/arguments, conclusions), we also considered the following questions:

1. What brings these parties/clients to a lawyer? What are they trying to accomplish?
2. What are their underlying needs or interests (as they experience them)? As the lawyer will translate them or frame them as “legal problems?”
3. What are the likely/possible needs/interests/concerns of the other parties involved in the matter/case or transaction? (Of the adversaries or third parties affected by the matter?)
4. What is really at stake in the dispute or transaction? (What is the “res” of the dispute—scarce commodities, divisible items (money), reputation, on-going business relations, legal principles, harms or hurts not easily compensable by our legal system?)
5. What are the legal, social, economic, political, psychological, moral, ethical and organizational issues, benefits, and risks implicated in the matter?
6. How might the process chosen to resolve these issues affect them?

16. For an argument that this adversarial culture, drawn from law, has permeated the rest of our institutions, see DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* (1998).

7. How will or do the parties feel about the resolutions/solutions/outcomes that are produced?

8. What outcomes are produced by what processes?¹⁷

Structures do just that—they structure thinking. Litigation begets win/lose; some think mediation begets “split the difference” or compromise. Triadic decision making produces a ruling from above.¹⁸ Dyadic negotiation produces, at least in theory, control by the parties or their agents.¹⁹

Adding these questions to the more conventional questions asked about legal cases broadens our notions of what is relevant to consider, as it broadens the possibilities of choices that we should consider. Instead of “maximizing individual gain,” we can be focused on “solving the problem,” “creating the transaction,” “planning for the future,” “improving relationships,” and perhaps even seeking “joint gain” and “achieving justice.” Thus, a good legal problem solver needs a greater repertoire of intellectual choices or “tropes” as well as a much broader and deeper set of behaviors. (Note, I did not say more arrows in the quiver, tools in the chest, or weapons in the arsenal—all terms of military destruction. How about, instead, more spices or ingredients for a more flavorful meal? More human diversity for a greater source of ideas?)

Try another thought experiment—if you were going on a camping trip with twelve other people and there was some chance you might get lost, whom would you want on the trip—twelve adversarial lawyers? I doubt it. Chances are you would want a good map reader, an astronomer, a good storyteller, a doctor or nurse, a good cook, a good fire builder, someone strong, someone with a good singing voice, and of course, at this point, a good dispute resolver in case all these talented people do not get along with each other! To solve human problems and climb the mountain or get out of the forest, a good problem solver wants diversity in thinking, human beings to do that thinking, and some people who can effectively coordinate the action.

Thus, the ideal legal problem solver needs these modern skills, in addition to more conventional advocacy and argument: question fram-

17. See Carrie J. Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14, 15 (1999).

18. See generally MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

19. See generally Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976) (discussing the operation and effect of negotiation).

ing,²⁰ investigative skills,²¹ quantitative skills for valuation of cases and issues, listening and hearing, as well as talking, emotional awareness²² and empathy (differentiated from sympathy),²³ creativity,²⁴ the ability to synthesize, as well as analyze, coordinate and implement (a "reality tester"), manage conflict, superintend meeting and group facilitation,²⁵ and offer expertise in decision making (for groups, individuals, clients, organizations, and selves).²⁶ I will explore some of these other skills and what one needs to learn to really be competent in them in a moment, but first, take a minute to contrast the problem solving mode with the more conventional legal mind-set.

I do not mean to overly polarize these models—the major theme of my life's work has been to try to see and/or when others see only either/or, but a problem solving approach to legal issues does suggest other goals (joint-gain, acknowledging that the other party is part of the problem to be solved),²⁷ which should produce different behaviors and different outcomes. Problem solving does not mean cooperation (cooperation must be earned—we do not simply give in to the other side) or unnecessary compromise. When my brother and I fought over the last piece of chocolate cake, my mother made the mistake of all reasonable mothers—she cut the cake in half and told us to share. This was unnecessary—if she had asked us what our interests were, she would have learned that I like icing and my brother likes cake—a simple "horizontal" cut, rather than a vertical one, would have made us both 100% happy (rather than the 50% compromise)—in economic terms, a "Pareto

20. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 70-81 (1991).

21. See generally DAVID A. BINDER & PAUL BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* (1984).

22. For further discussion of the skills needed to successfully understand cases attorneys will be faced with, see DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1995).

23. See Carrie J. Menkel-Meadow, *Measuring Both the Art and Science of Mediation*, 9 *NEGOTIATION J.* 321, 322-23 (1993).

24. See HOWARD GARDNER, *INTELLIGENCE REFRAMED: MULTIPLE INTELLIGENCES FOR THE 21ST CENTURY* 116-24 (1999); Carrie J. Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem-Solving and Teachable in Legal Education*, 6 *HARV. NEGOT. L. REV.* (forthcoming Winter 2000).

25. See, e.g., *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (Lawrence Susskind et al. eds., 1999).

26. See generally JOHN S. HAMMOND ET AL., *SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS* (1999).

27. However, using joint-gain for people issues is not the problem solving approach for everyone. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 17 (Bruce Patton ed., 1981) (urging us to "separate the people from the problem").

optimal” solution. Problems like these have become the staple of game theorists and mathematicians as well as city planners and military strategists, and jurists and philosophers.²⁸ Thus, problem solvers need to seek information, first from clients and then from the other people in the legal matter. At a behavioral level, lawyers need to learn to ask more questions, rather than to make so many declarative statements and arguments (seeking to persuade before one really knows what the other side values and will find persuasive). A good problem solver “collaborates” or “coordinates” with the other side—testing information he or she already has in order to find out what the parties need and want, learning whether the other side can be trusted to collaborate, and then exercising the creativity that is so seldom taught and learned in lawyering.

And now—to the “center” of my lecture—it is time for you to work. While I could, and usually do, spend sixty hours a semester teaching people to be good negotiators and problem solvers by combining analytic with behavioral simulations with real clients and real cases, let me illustrate what I think good legal negotiators and problem solvers need—more training, teaching, and thought about creativity and problem solving. Legal analysis is a necessary, but not sufficient, condition of good problem solving.

Try to solve the following problems:

Draw three rows of three equally spaced dots:

• • •
• • •
• • •

1) Connect the dots with four straight lines without taking the pen off the page.

2) Now connect the dots with three lines.

28. For further illustration of the application of these solutions to a variety of domains, see DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994); STEVEN J. BRAMS & ALAN D. TAYLOR, *FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE RESOLUTION* (1996); STEVEN J. BRAMS & ALAN D. TAYLOR, *THE WIN-WIN SOLUTION: GUARANTEEING FAIR SHARES TO EVERYBODY* (1999); AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE* (1991).

3) Now connect the dots with one straight line.²⁹

4) Now take a piece of paper from your notebooks—put your entire body through that piece of paper.

Solutions? What is learned? Ideal problem solvers must:

1) Think out of the box (the legal box of precedent—the way things are usually done). To connect the dots, one must transgress the perceived limitations of a “box” created by the four corners of the dots.

2) Reframe (without violating) the instructions.³⁰ What are the definitions of the concepts we are working with? What are “dots,” what are “lines”?

3) Reconstituting the material (or altering the “res”) with which we are dealing—transform the paper,³¹ transform the relationship, and transform the transaction into something else closer to what the parties want.

4) Learn something about our thinking processes. How did you approach this problem? By looking at someone else’s work (cheating, “borrowing,” or translating from others, from book or precedent)? Thinking about the words and how they can be stretched? Fighting the hypo? Thinking out of the box? Remembering the solution to the problem when your child showed it to you? (Can you replicate the solutions if you “knew” the solution? Problem solving includes execution and implementation, as well as analytic understanding.)

All of these answers will tell a problem solver something about their thinking processes. Now ask others how they attempted to solve the problems. Were the problem solving approaches similar? Different? This will explain what happens when different negotiation styles meet up to try to solve a problem. It also illustrates that often “two heads are better than one”—different approaches to problems may lead to more, or different, solutions.

Those who study thinking processes—cognitive and social psychologists and decision scientists—have produced empirical studies and helpful information about how individuals and groups make decisions,

29. For the “solutions,” see JAMES L. ADAMS, *CONCEPTUAL BLOCKBUSTING: A GUIDE TO BETTER IDEAS* 24-33 (3rd ed. 1986).

30. To further understand how to undertake the process of reframing situations in order to think out of the box, see DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983); DONALD A. SCHÖN & MARTIN REIN, *FRAME REFLECTION: TOWARD THE RESOLUTION OF INTRACTABLE POLICY CONTROVERSIES* (1994).

31. Try tearing the paper in one continuous skein so you can step through it as a long continuous circle.

judgments, and draw conclusions³²—all of which affect the ability to negotiate with others and solve problems. For years, the stated problem in cognitive psychology was to consider why human beings departed from “rational” choices. Psychologists have learned that human beings are subject to many “heuristic biases,” some of which especially affect legal negotiators.

Reactive devaluation³³—a subset of “attribution theory”—occurs when someone on the other side suggests something and one cannot hear it (or “process” it) simply because it comes from the other side. (Reactive devaluation is one reason to use a mediator. A mediator presents suggestions and ideas in a more “neutral” format so that both sides can consider the merits of an idea, without the emotional rejection or attachment to a particular side.) Individuals often give too much credit to the first thing they hear (primacy) or the most recent thing they hear (recency) which is why attorneys care about the order of opening and closing arguments, or as Lou Natali³⁴ recently called it, “clopening,” when one has just a few minutes to get out his or her case (such as in a too short court-annexed mediation or arbitration statement). Individuals make different choices to avoid losing what they already have, rather than risking for gain something they do not have yet (the difference between loss and risk aversion)³⁵ and each individual differs in how he or she values these things.

Despite all the efforts to study departures from “rational” thinking, not really “irrational” thinking, but potentially “arational” thinking, there is now some strong empirical evidence that some decision makers do not use legalistic and rational “decision-trees” with choices and pros and cons (like those counseling charts I used to teach students to use with clients). Instead, many decision makers, particularly those with “professional expertise,” use more intuitive or experience based “natu-

32. See, e.g., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); GARY KLEIN, SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS (1998); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); JAMES REASON, HUMAN ERROR (1990); LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY (1991); HERBERT A. SIMON, MODELS OF MAN: SOCIAL AND RATIONAL (1957).

33. See generally Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 4, at 26.

34. Professor of Law at Temple University, Trainer for the National Institute for Trial Advocacy (“NITA”).

35. For a general discussion of the barriers to negotiations posed by the manner in which the human mind processes information, deals with risks and uncertainties, and makes inferences and judgments, see Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 243-46 (1993).

realistic" types of decision processes, called "pattern recognition primed reasoning,"³⁶ in which situations are "sized up" from past experiences and a solution is chosen and used until it does not work and a new solution emerges and is tried. This is creativity in context and it is what is needed, among other things, to solve problems and to think "out of the box" for so many of the complex and difficult problems the legal system currently faces.

I have been working with a group of legal educators³⁷ to develop a curriculum, which will, in the words of the Attorney General, "create a problem-solving . . . and peacemaking capacity in all . . . lawyers."³⁸ Such training would not eliminate the case method, which teaches both inductive and deductive forms of legal reasoning, but would add instruction, as so many schools do already, in counseling, interviewing, case valuation (quantitative skills in statistics and economics), negotiation, planning, meeting facilitation, mediation, decision making, and leadership. (As an aside, many think the business schools are already doing a better job of this than law schools, with several major business schools now requiring negotiation courses of all of their students. In some schools, like Northwestern, business students play the client roles and law students the lawyer roles in complex transactional and business disputes. In my experience with this model at Stanford, the business students were far more creative in solutions to problems, including creating joint ventures, buy-outs, contingency planning, and shared financial risk solutions to complex problems. Business students seem better prepared to deal with dynamic, constantly changing situations, perhaps because their case method is so much more contextual than that of law schools).

A good problem solver must take the problem, transaction, or matter presented by the client, analyze what the problem or situation requires, and then use creative abilities to solve, resolve, arrange, structure, or transform the situation so it is made better for the client, not worse. To do this, the lawyer must also take account of the other side, not as someone to be "bested" or beaten, but as someone with needs, interests, and goals as well. How can both or all parties (including the

36. See generally KLEIN, *supra* note 32, chs. 1-4 (discussing pattern-recognition primed reasoning in the context of decision making by firefighters and military personnel in emergency settings).

37. Center for Public Resources Commission on Problem Solving and Legal Education (funded by the Open Society Institute).

38. Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5, 5 (1999).

state and the defendant in a criminal case, the plaintiff-victim and the tortfeasor, the breaching contractors, buyer-sellers, the regulated and private industry, and the many responsible parties in a clean-up site in an environmental case) attempt to structure their negotiations so that they learn what they want to do and what they can do?

Here, the important observation of social psychologist George Homans is significant: people often have complementary interests.³⁹ Individuals do not always value things exactly the same way—remember I liked icing and my brother liked cake. By having many issues and many different preferences, individuals actually increase the possibility of reaching an agreement, whether it is settling a case or arranging a transaction. It may be useful if judges and litigators narrow the issues for trial, but it is detrimental to the settlement process to narrow issues. The more issues, the more likely trades or “log-rolls,” as the legislators call them, will be possible. Therefore, seeing many issues and parties and all organizational needs and preferences is essential to good problem solving.

Before one starts to compete with the other side, it is useful to see if the pie for which one is fighting can be expanded, before one divides it, if one must. This is what negotiation theorists call “expanding the pie” or “value creation,”⁴⁰ before one gets to the nasty “value claiming”⁴¹ or pie-dividing stages. (Notice all the food metaphors? Sure beats war and sports.) So, one should always ask the journalist’s basic questions of every matter: 1) WHAT (What is at stake? What is the “res” of the dispute? Can it be changed, expanded or traded?); 2) WHEN (Must one resolve this now? Are installments possible? Are there any tax consequences or contingency agreements? What risk allocation and sharing is involved?); 3) WHERE (Where can something be moved or transferred? Can a change of forum or process be effected?); 4) WHO (Who are all the relevant parties here? Can one add some people or entities with resources and the power to do things?); 5) HOW (What means may be used to solve the problem: money, land, or an apology?); and finally; 6) WHY (Why are the parties here? What are the underlying reasons, motivations, or interests in this matter? Can one reconstruct the reasons for being here and look for new ways to resolve the issues?). Answering

39. For a more detailed discussion, see GEORGE CASPAR HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (rev. ed. 1974).

40. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* ch. 2 (1986) (describing the “negotiator’s dilemma” as that of creating, then claiming value).

41. *Id.*

these questions often, not always, provides new insights and new resources for solving problems.⁴²

One still needs law and a lot of other knowledge to solve problems and structure transactions. As Gary Klein's work indicates, "pattern recognition" helps those with experience quickly analyze and diagnose a problem and select a single solution, which is abandoned if it does not work.⁴³ Lawyers need life experiences and they need to be generalists who can recognize many different kinds of patterns. Specialization may be increasing because of a perception or belief that individuals can only recognize a limited number of "patterns" in their experiences. I want to suggest that good legal problem solving, however, also requires the cross-fertilization of solving problems across fields.⁴⁴ Individuals develop creativity by translating from one realm to another—transfers of assets lead us to see the possibilities of transfers of people—to new uses, to more satisfying jobs, to removing difficult personalities from each other. The cost sharing of clean-up sites in environmental law is related to market share settlement grids in mass torts. The "structured settlement" or annuity in tort can work in installment payments for other damages or employment settlements. What I like most about being a mediator in a wide variety of fields is learning how one industry or one substantive field "solves" its risks and contingency problems and seeing how that solution can be adapted to other fields. So, in this sense, problem solving is analytic, rigorous, intellectual, interdisciplinary, and certainly more than doctrinal learning. Lawyers must learn to think of themselves in terms of experts in problem solving who draw on a wide range of disciplines. Lawyers are intelligent; they work with words and concepts ("linguistic intelligence").⁴⁵ They must learn to be facile with more systems of thought, as well as with the experiences on the ground, such as the experiences of the people they serve.

42. See an excellent illustration of using these questions to expand the pie and settle a case in GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: NEGOTIATION* 149-50 (1981). While a price fixing anti-trust settlement was pending in the appellate courts, proceeds of the settlement were placed in escrow, earning interest and tax deductions, so that an increased corpus of funds was available to settle with a class of intervenors who sought to challenge the settlement. *See id.*

43. For an exploration of the differences between the decision making processes of an experienced lawyer and a novice lawyer, see Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995).

44. See generally GARDNER, *supra* note 24 (discussing the important argument that human beings have multiple kinds of intelligences). Creative problem solving in law probably needs to draw on more of these competencies than it currently does.

45. *Id.* at 41.

Finally, and perhaps most important to me as a “people” person and a justice seeking person, is the recognition that professionals solve human and legal problems by working with others. We need to, as my third grade report card said: “Work and play well with others.” The emphasis on argument, debate, issue spotting, moot courts, and trials does, I think, encourage a culture of acrimony, or as author Deborah Tannen calls it, “The Argument Culture.”⁴⁶ As problem solvers, lawyers must learn to be more effective interpersonally. Their work is with words and concepts, but it is used with people who will sometimes agree with them and sometimes not. Problem solving legal educators and my other professional reference group—conflict resolvers—are now placing more attention on teaching and learning about collaborative work. One begins, of course, with one’s client. Clients often have good ideas about what they want to achieve. I begin every client interview with the question: “How would you like this to turn out?” Often the lawyer may have to redirect the client to what is legally possible, but a good possible solution or suggestion that is new or different might come from one’s client, or, surprisingly, the client on the “other side.”

Understanding that individuals need to work in groups to solve the myriad of difficult local, national, and international problems that face them, as I was reading Buzz Bissinger’s account of Ed Rendell’s first term as mayor of Philadelphia in *A Prayer for the City*,⁴⁷ I charted the problems of my former city—increasing unemployment, a changing economy from manufacturing to service, a decreasing urban tax base, welfare reform, school decay, crime, and imprisonment—and I charted what kinds of experts, people, and disciplines would have to be coordinated to “solve” some of these problems or at least make better the quality of life in the City of Brotherly Love. Attorney General Janet Reno⁴⁸ and I⁴⁹ have both suggested that law schools should offer problem solving seminars to take on local, national, and international problems, and as a working group, try, first in simulations and then with real, concrete ideas, to negotiate, plan, and mediate solutions. Scott Burris’s AIDS clinic at Temple University School of Law is one such example of a localized (state level) problem solving enterprise where stu-

46. For a discussion of the predominance of criticism, attack, and opposition as a means of responding to people and ideas, see TANNEN, *supra* note 16.

47. See generally BUZZ BISSINGER, *A PRAYER FOR THE CITY* (1997).

48. See generally Reno, *supra* note 38 (discussing the importance of adding problem solving courses to the legal curriculum as a tool for teaching negotiation skills).

49. See generally Menkel-Meadow, *supra* note 17 (suggesting methods for introducing problem solving techniques to the law school curriculum).

dents look at legislation, community advocacy, and negotiation with a variety of local officials to support needle exchange programs and community education.⁵⁰ The simulation model is used in many negotiation and mediation classes today; schools of urban planning, architecture, medicine, and business have used them for years. In my negotiation courses, students “represent” real people in simulations so that they can see that different people have different value preferences, even with the same facts. This is one of the best ways to demonstrate that there may be many Pareto optimal solutions to the problem or many clauses to use in a transaction. Students should learn not only how to negotiate dyadically with the simplistic legal model of two parties, but they should also learn how to facilitate meetings of contested interest groups,⁵¹ and how to mediate between and among competing interests both in terms of personalities and in terms of substantive issues. In my experience, mediation of any dispute involves both issues of handling or “managing” people and personalities and seeking mediated substantive solutions that do not compromise the parties’ interests but seek to satisfy them.⁵²

Training in questioning and active listening serves lawyers, not just as trial advocates, but as mediators and as representatives in mediation or other ADR settings where all kinds of facts may be important beyond what is legally discoverable or admissible. I call these “settlement facts,” which include such items as the feelings of the parties, financial information, plans for product development, expansion, down-sizing, human resource realignments, land development, acquisitions, and other things which are relevant to the parties’ intentions about their dealings with each other and conflicts or transactions that may be bigger than the concretized disputes before them.⁵³

50. See generally Laura Ferguson et al., *Syringe Exchange in Pennsylvania: A Legal Analysis*, 8 TEMP. POL. & CIV. RTS. L. REV. 41 (1998).

51. See generally THE CONSENSUS BUILDING HANDBOOK (Susskind et. al. eds., 1999) (describing processes for facilitating public policy and other conflictual disputes); PHILIP J. HARTER, NEGOTIATING REGULATIONS: A CURE FOR MALAISE, 71 GEO. L.J. 1 (1982) (discussing who should determine participants in negotiations, whether negotiations are feasible, interests of parties, and procedural aspects of negotiation in the negotiated rule-making context).

52. This may be the difference between “satisficing” and “optimizing.” See JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 161-62 (2d ed., Blackwell Publishers 1993) (1958) (distinguishing between a “satisfactory” alternative and an “optimal” alternative in problem solving).

53. See Carrie J. Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1872 (1997) (suggesting that alternate dispute resolution provides solutions that are specifically tailored to the needs of the parties in a dispute).

Thus, learning to speak clearly and to listen “heedfully” are essential interpersonal skills for the lawyer. The Integrated Transactional Program at Temple University School of Law⁵⁴ is the kind of program that marries interpersonal skills development with doctrinal learning, decision making, and counseling, as well as ethical considerations in lawyering. Studies of effective decision makers suggest that people who can “see the invisible,” “hear the silences,” and “read other people’s minds,” develop a sense of the relationship of the past and future to the present and the other party’s desires to the achievement of their goals.⁵⁵ Consider the famous brainteaser about finding a common location to meet a friend or significant other when one is lost in a large public place—the development of empathy—true knowledge of the other side of the problem. This kind of “intuitive” or “gestalt” knowledge is actually experience-based and can be learned, or at least reflected upon and systematized.

What was the last problem you solved? (For me it was putting a hotel key inside my name tag to avoid carrying a handbag to a cocktail party, using the limited amount of spatial intelligence I have.) What did you use to do it? Logistics or “forward-thinking” (arranging children, transportation, or meeting the family’s competing needs regarding a vacation)? Asking a friend for advice? (When I was a brand new legal services lawyer, I hardly ever took an action without consulting three other people, developing my own “rule of 3” for exercising legal judgment.)⁵⁶ Translating from another domain or solution? Using an analogy or metaphor? This attention to the *je ne sais quoi* part of human decision making, as well as different forms of cognition and knowledge, is important in legal problem solving. Some lawyers suffer from what decision scientists call “hyperrationality” and are surprised when the other side does not respond to “clear and rational arguments” or “the numbers.” Other things, such as values and emotions—fear, altruism,

54. For examples of guides developed to teach lawyering skills, such as interviewing, negotiation, and drafting of legal documents, see NANCY J. KNAUER, SUZANNE T. CARSON: PLANNING FOR INCAPACITY (NITA 1998), NANCY J. KNAUER, A FRIEND IN NEED: FORMING NONPROFIT CORPORATIONS (NITA 1998), and NANCY J. KNAUER, QUALITY PAPER PRODUCTS: PURCHASING A CLOSELY HELD CORPORATION—SELLER (NITA 1998).

55. See generally KLEIN, *supra* note 32, chs. 10-13 (discussing how effective decision making requires the power to “see the invisible,” use ideas from stories, compare current situations with analogous experiences, and the power to discern what the other person actually intends).

56. I later elaborated this intuitively based rule into a requirement in my clinical teaching. I would not advise or supervise students about what to do in a case unless they could present at least three alternative courses of action for consideration and evaluation.

vengeance, need for certainty—often motivate parties—and prevent consideration of otherwise rational “solutions.”

In a recent book applying moral philosophy to business ethics, Joseph Badaracco uses three case studies in the life cycle of three business managers to suggest how important context, empathy (consideration of other employees, colleagues, boards of directors, and competitors), and self-knowledge are to good and ethical judgment.⁵⁷ While working with others and solving the immediate problem, one must also keep his or her eye on the long-term aspects of the problems one is solving and the relationships he or she is developing. In negotiating and problem solving one becomes two, possibly different, personas: the face one sees in the mirror each morning and the reputation one creates in the outside world. Ronald Gilson and Robert Mnookin have explored the worth of lawyer reputation as “value creators” for those who make good collaborative deals and are repeat players.⁵⁸ Recently, a repeat client of lawyers, a commercial real estate broker in Baltimore, told me that unless lawyers could demonstrate their honesty as value creators and bring some added value to transactions they would lose out completely to the Internet. In modern times, clients can collect their own information in a public place, and if lawyers lie, deceive, or use less than honorable tactics, it will become readily known and the transaction costs will be prohibitive; lawyers and other third party brokers who do not bring added value will be eliminated.⁵⁹

In the vastly changing multi-cultural and international context in which lawyers do their work, processes like negotiation, mediation, consensus building, and other forms of facilitated communication will be essential to bridge the language, cultural, and legal divides of the parties to any dispute or transaction. To negotiate or mediate is to use communication to achieve results for groups of people who cannot do it alone. Lawyers have an opportunity to serve as leaders of a hybridized “bridge” discipline, which can, on its good days, speak to different kinds of people. To the extent that traditional lawyers speak only the adversarial language of litigation and winning, they will be used nar-

57. For a more detailed discussion, see JOSEPH L. BADARACCO, JR., *DEFINING MOMENTS: WHEN MANAGERS MUST CHOOSE BETWEEN RIGHT AND RIGHT* (1997).

58. See generally Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994) (exploring the importance of lawyer reputations as “value creators” or “competitors” in evaluating lawyer work); Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493 (1989) (discussing the significance of ethics in the negotiation process).

59. Conversation with Robert A. Manekin, President and Chief Operating Officer of Casey & Associates, Baltimore, Maryland.

rowly for only one function, trial work, when that function is increasingly wasteful and inefficient, as well as emotionally draining, on most, if not all, of the players. Being a problem-solver has been, for me, far more creative, empowering, and exciting than the times I have spent using a stylized and specialized, but limited, vocabulary of thought and language in the courtroom. Even as tough a lawyer as the hero of *A Civil Action*,⁶⁰ Jan Schlichtman, now touts mediation to avoid "the total war of litigation."⁶¹ Bob Bennett, the President's lawyer in the Paula Jones case, said recently of the settlement, "[s]ometimes you have to rise above principle."⁶² To the extent that processes like negotiation and mediation open up broader passages of communication and allow more creative forms of thought than the boilerplate of form contracts or the bargains extracted "in the shadow of the law,"⁶³ legal work, for both lawyer and clients, will be improved as more creative forms of problem solving are pursued.

At the institutional level, even courts are expanding their self-conceptions, with Justice Judith Kaye of the New York Court of Appeals as a leader in "problem solving courts,"⁶⁴ which seek to "treat," as well as discipline, the multiple causes of serious urban problems, such as drugs,⁶⁵ vice, and family disruption. Workplaces have become sites of individual and group problem solving as they replace, in some cases, religious organizations and other structural sites for group engagement and participation.⁶⁶

60. JONATHAN HARR, *A CIVIL ACTION* 51 (1995).

61. *A Civil Action* (BookTV, C-SPAN television broadcast, Jan. 3, 1999).

62. David Ignatius, *Don't Take It Personally*, WASH. POST, Mar. 17, 1999, at A27.

63. For the argument that divorce law should merely provide a framework within which divorcing couples may create their own legally enforceable rights and responsibilities, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

64. See generally Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851 (1997) (discussing the changes implemented in the family court and criminal court systems and the jury system in response to changes in society).

65. See, e.g., Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000) (explaining the role of treatment courts, which allow individuals to avoid criminal trial court if they plead guilty and enroll in a drug treatment program).

66. See generally ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997); Cynthia L. Estlund, *Working Together: The Workplace in Civil Society* (Dec. 1999) (unpublished manuscript, on file with the Columbia University Public Law & Legal Theory Working Paper Group) (discussing the workplace as a mediating institution).

As I learned so many years ago in my legal services practice and my early years of clinical teaching, there is nothing like the “rush” of helping a person, of really solving a problem. How much sweeter than the temporary victory of a lawsuit, so often followed by resentment, enforcement problems, and the economic and psychological costs to the body and soul of clients and lawyers. Imagine if lawyers were not only the protectors of rights, but also the architects and engineers of justice and the satisfaction of human needs. I hope you will all join me in the efforts we make to teach and do problem solving. Try one final thought experiment: consider one intractable problem that you face in your cases, your work life, your family, an institution you are a member of, and consider how thinking out of the box, or employing a different process for resolving it might give you some new insight or some new way to think about being a problem solving lawyer. There are enough human problems to go around; what is needed are more problem solvers who care, not just about winning, but about really solving the problems.
