

INTEGRATING PROBLEM-SOLVING AND PROBLEM PREVENTION INTO AN EXISTING LAW SCHOOL CURRICULUM©

By Thomas D. Barton
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I. THREE MODES OF LEGAL PROBLEM SOLVING, and THEIR ASSOCIATED STRUCTURES, LAWYER SKILLS, and “TENSE”

A. *Modes of Problem Solving*

Although we do not often stop to consider it, legal problems are resolved in three basic ways, or “modes:”

- (1) through *judgment*, the decision rendered by a judge as part of litigation;
- (2) through *consent*, where two or more parties to a legal issue resolve it among themselves; and
- (3) through *the conscious design of systems of rules and procedures*. Good system design helps to prevent legal problems as well as to solve those problems that arise.

B. *Associated Legal Structures*

Associated with each of the three modes of legal problem solving are characteristic clumps of substantive legal rules and procedures. For want of a better phrase I shall call these associated rules and procedures “structures:”

- (1) Structures associated with the *judgment* mode of legal problem solving are the procedures and power structure of formal litigation, and the substance of the common law.
- (2) Structures associated with the *consent* mode of legal problem solving are the rules of contract creation and the procedures of collective bargaining, mediation, and negotiation.
- (3) Structures association with the *system design and prevention* mode are legislation and regulation, and various non-judgmental, non-consensual procedures like the checks and balances of the U.S. Constitution, or the Administrative Procedures Act. Also strongly associated with the system design mode are non-legal processes of communication and mutual adjustment of parties to a problem or potential problem..

C. *Associated Lawyer Skills*

Similarly, for each mode of legal problems solving there are particular associated lawyer skills:

(1) **Judgment**: legal analysis; legal research and writing; and oral advocacy

(2) **Consent**: negotiation; active listening; empathy; strategizing; collaboration; the ability to generate multiple options for outcomes or arrangements through brainstorming or self-conscious re-framing of problems; and decisional flexibility by assessing proposals or options through multiple dimensions like logic, truth, feasibility, morality, efficiency, and emotion.

(3) **System Design and Prevention**: imagination, abstract and flexible thinking; understanding personal motives and the need for multiple, diverse forms of communication; and a recognition that procedures for change must be provided in any ongoing human environment.

D. “Tense”

Finally, each of the three modes of legal problem solving also has a characteristic “tense”: past, present, or future:

(1) **Judgment** is past oriented. This is because authoritative legal judgment (i.e. litigation) typically works by:

- (a) seeking to discover historical facts;
- (b) assessing those facts against established legal rules;
- (c) so as to determine blame or liability (and, incidentally, to vindicate the legal rules themselves.

(2) **Consent** is largely present-oriented, with some future orientation. This is because the consent mode typically works by:

- (a) uncovering current preferences and interests of the parties;
- (b) generating alternative solutions, the most acceptable and desirable of which offer a fair compromise of those interests or the prospect of “win-win” gains.

(3) **System Design and Prevention** is future oriented. This is because system design typically focuses on processes, although it may also set out substantive boundaries or entitlements. The processes are concerned to:

- (a) uncover and thus prevent potential trouble;
- (b) create multiple ways for multiples people to address the problems that do arise; and
- (c) build ways for the system to self adapt, i.e., change itself in response to changing conditions through an amendment process or consensus alteration of the procedures.

II. LAW TEACHING

Law teaching is very strongly focused on the *judgment* mode of legal problem solving, with its attendant structures of litigation procedure and rules of the common law, and its attendant lawyer skills of legal analysis, research and writing, and oral advocacy.

It is difficult to determine which of these three—the judgment mode itself, its associated structures, or its associated lawyer skills—really drives legal education. The typical case-method style of instruction conflates all three: the text about which the class is centered is itself a judgment that measures human behavior against legal rules; this judgment is justified by the structures of litigation procedures and common law rules; and the opinion’s argument suggests the skills of close analytical thinking and strong advocacy.

It is enough, perhaps, simply to observe that the traditional law school curriculum strongly emphasizes a consistent—but limited—view of law and lawyering. ADR courses and some “planning” or more integrative courses do address the *consent* mode of legal problem solving. Virtually no course self-consciously addresses the *system design and prevention* mode of legal problem solving.

If one accepts the idea that much legal problem solving really is by consent or through conscious system design, then law schools are under-emphasizing not only those alternative modes of problem solving, but also their associated legal structures and associated lawyering skills.

How, then, can law teaching be broadened to address better the consensual and system design/prevention modes of problem solving? In two ways: first, through adding more courses that particularly focus on those alternative modes; and second, through consciously articulating the consensual and system design modes in existing courses.

In the remainder of this paper I will elaborate the second option, suggesting ways that existing courses can be re-framed to increase their reference to the structures and skills of the consent and system design modes.

III. ARTICULATING NEW MODES IN EXISTING COURSES

A. Existing Courses, the Subject Matter of which Have Strong Consensual or System Design Components

The substance of a few courses already are based on, or have strong components of, consensual or system design modes of legal problem solving. Existing course in which the law employs significant consent or system design/preventive modes of problem solving include:

- ?? *Consent*: Contracts; Interviewing and Counseling; ADR courses except Arbitration (because in Arbitration the mode is still judgment, even though the judgment is made by a private person rather than by a judge;

?? ***System Design/Preventive:*** Constitutional Law; Administrative Law; some regulatory courses like Environmental Law, Health Law, or Land Use Planning; and some integrative courses like Business Planning and Real Estate Transactions.

The task in bringing the alternative modes of problem solving into those courses is to ***emphasize what is already there.*** Do this by explaining ***how*** the consensual or system design mode differs from the judgment mode; and ***why*** this alternative mode of legal problem solving is actually used in this area of law.

(1) ***Explaining how the consensual and system design/preventive modes differ from the judgment mode***

A start was made above in explaining these differences. Other differences among the three modes can also be described:

(a) ***the relative reliance on power:***

The judgment mode relies very heavily on power. The legal norms governing the case are enforced by the state; the judge assumes jurisdiction and legitimacy through the state; the formalities of court assume a clear power structure that begins with the law itself, and moves downward through the judge, to the attorneys, to the parties. The attorneys attempt to summon the power of the law on behalf of their clients by arguments made to the court. Any remedy that follows the court's judgment is enforceable through the power of the state.

The consent mode, on the other hand, relies very little on power. Instead, it assumes that the parties will have fashioned an agreement that is acceptable to both, in the best interests of both to respect. The consent mode can be highly informal and unstructured. Unlike litigation, the parties themselves may have a significant role in the problem solving.

The system design/preventive mode may or may not employ considerable power. The main body of the U.S. Constitution, a document creating a system to solve the problem of self-governance, assumes the power of the state and allocates among the states and the branches of the federal government. In contrast, where a private corporate counsel sets up an employee program as part of a corporate compliance program, virtually no power is employed. In general, a constructed system may rely on achieving deliberative ordering—like the sort of order that emerges from a conscious effort to design and build a lawnmower—or on “spontaneous” ordering which, once set in place, in essence runs itself through the mutual adjustment of its parts, like the formation of a snowflake from the internal mechanics of molecular crystallization.

(b) ***different sources generating norms***

In the judgment mode, the judge as agent of the state articulates the norms. In consent, the parties themselves do so, based on their aims and influenced by their culture. In system design, the norms largely await articulation ***and amendment*** later, by elements that are

empowered through the system.

(c) disparate concern for ongoing personal relationships

The judgment mode typically is unconcerned with future personal relationships. This follows in large part from its strong past orientation. Its concern is to assess historical behavior against legal rules. The consent mode may or may not care about the consequences of its problem solution on the personal relationships of the parties. Where the problem solved by consent is an automobile accident between strangers, future relationships will not likely be a major focus. In contrast, where the problem solved is the custody of a child, relationships may be paramount. As to system design/prevention, again it will vary with the problem, but the wise system acknowledges the importance of satisfactory personal relationships and attempts to harness those relationships as a source of legitimacy and strength for the system.

(d) how emotions are handled

The judgment mode does not relish dealing with strong emotions. Apart from its strategic use by lawyers in appealing to the jurors and the occasional emotional intensity of a witness, emotion is out of place in the courtroom and can even draw a contempt warning. In the consent mode, emotions may be a routine part of the procedures. In community mediation, for example, the ventilation or communication of emotions is often deemed important to crafting a sustainable agreement. In systems design/prevention, again the reality and power of emotion may be both acknowledged and harnessed.

(e) the ease with which problems of complexity; or intimacy; or potential violence; or public values are treated

The system design/preventive mode does well with problems of very great complexity, meaning those in which multiple variables must be traded off against one another. A system often works best when comprised of numerous elements that can buffer one another. The judgment mode does poorly with this sort of problem. Consent is midway—it is less formal, thus permitting the measure of various options. However, the ordering is typically deliberate, thus relying on the quality of information and acuity of the particular parties. Consent works very well, however, with questions of intimacy, since the parties will likely understand one another well, and an agreement may be based on deep understanding of personalities. Once again, the binary quality of the judgment mode flounders with issues of intimacy.

The judgment mode works well, however, when potential violence accompanies the problem or its non-resolution. Being based largely of power, the judgment mode is most reliable in suppressing disorderly behavior. Judgment also can work well where it seems important that the solution to the legal problem be articulated in public, as an expression of state-backed norms. Consent does poorly along this domain, especially since many of the decisions are, by agreement of the parties, kept secret. The system design/preventive mode can do well on the public values

dimension of issues where initial entitlements or substantive boundaries for actions must be set.

(2) Explaining why the subject matter of this particular course leads to employing a strong measure of the consensual or system design/preventive mode

In large part, this may be a function of the particular sorts of problems often encountered in an area of law. Attributes of these commonplace problems faced in the particular area of law may suggest strongly that one mode is more efficacious, along the lines described immediately above. Here are some examples of problem attributes typically faced in some legal subject matter areas, and the mode of problem solving thereby suggested:

(a) consent

- ?? Does this subject matter often confront problems that require adjusting ongoing strong personal relationship that have a long history and many incidents of mutual blame?
- ?? Are problems encountered in this subject frequently accompanied by strong emotions?
- ?? Would the remedies of traditional legal judgment be ineffectual or unenforceable?
- ?? Does the subject often entail choosing between alternative legitimate, legal courses of action, each with various attributes and advantages?

(b) system design/prevention

- ?? Are problem encountered not just of transactions, but of relationship, as in a merger of businesses with differing corporate “cultures” or personnel that have been very differently trained?
- ?? Or what if the problems are about future governance or grievance management, in which the precise nature of the problem is unknown, personnel are likely to change, substantive or process values are debatable, and background conditions are volatile?

IV. EXERCISES THAT ILLUSTRATE AN EXPANDED LAWYER SKILL-SET

In both heavily traditional, judgment mode courses, and in courses like those described above that already partake of some use of the consensual or system design/preventive mode, some easy in-class exercises can be done to enhance student awareness of the alternative modes of problem solving. These exercises need not take more than a couple of classes in a semester, so that they do not compromise coverage of legal doctrine. Further, the exercises are simple, requiring very little time to be spent in advance by the instructor. Finally, the instructor should

not be deterred by his/her very limited knowledge of the lawyer skills that are associated with either the consensual or system design/preventive modes—the point of the exercises is *not* to teach the skills to the students. Instead, the purpose is to alert the student to the existence of the alternative modes through comparing the outcomes of a problem using first the judgment mode, and then one of the alternatives.

Recall that in traditional judgment mode classes, the casebooks strongly orient problem solving toward the past. This is because the concern of litigation procedures—reflected in the court’s judgment—is to discover what happened so as to measure the parties’ behaviors against the legal rules, so as to determine which party is liable, or to blame.

The trick, therefore, is to place the students into either:

- ?? the present tense, to illustrate lawyer skills that are useful in the consensual mode of problem solving; or
- ?? the future tense, to illustrate lawyer skills that are useful in the system design/preventive mode of problem solving.

Rather than drafting hypothetical fact patterns, the instructor can “shift the tense” of the students by re-casting the facts of a case that appears in the casebook. Not only does this save time, but using the facts of a reported case dramatically illustrates the different legal outcomes from the use of different problem solving modes. *Many* cases in traditional casebooks may readily be re-cast into the present or future tense.

A. Illustrative Exercises: Back to the Present

The most promising cases in the casebook to be re-cast into the present tense would be ones in which: first, we can imagine that both parties to the dispute essentially lost in the end, owing to high litigation costs or destroyed personal relationships. Second, a case is best used where the law is clearly doubtful, as evidenced by a strong dissent being reprinted in the casebook.

- ?? Do the re-casting *after* the class has discussed the case in a traditional way, so that the students are fully familiar with the facts.
- ?? Have the students imagine themselves in the position in which a *loss* has occurred, but we are not yet in litigation
- ?? The task of the students will be to role-play the attorneys for the parties trying to negotiate a solution to the problem.
- ?? Have the students break up into teams of two, by simply turning to a person who is physically close.

- ?? Once done, go around the room and assign a number to each team of two persons. Tell the students to keep track of their numbers.
- ?? Assign the even number teams to represent the plaintiff, and the odd number teams to represent the defendant.
- ?? Assign the students to meet as teams out of class to discuss the real interests of their client in the problem. Then they should brainstorm all imaginable solutions, and determine a negotiation strategy based on the desirability of the various outcomes.
- ?? Assign team 1 to negotiate against team 2 out of class, team 3 against team 4, etc. until either impasse or to solution is reached.
- ?? The next following class, have students report their results. If the class is very large, the instructor can ask for a show of hands instead of individual reporting, to illustrate the range of money settlements reached.
- ?? The instructor should also then ask for any unusual settlements to be reported, where some “win-win” combination or cooperative arrangement was found.
- ?? In all the class discussion, the instructor should elicit and emphasize student comments that illustrate the particular lawyer skills associated with the consent mode of legal problem solving:
 - active listening;
 - empathy;
 - strategizing;
 - collaboration;
 - creative option generation through conscious re-framing of perspectives of imagining of alternative metaphors
 - decisional flexibility through assessing option on the multiple dimensions of logic, truth, feasibility, emotions, and personal relationships

Importantly, again, *the instructor need not teach negotiation skills for the exercise to work*. The point of the exercise is not to teach skills. Rather, the point is to contrast the outcomes reached using the consent mode rather than the judgment mode as reflected in the casebook. The students will incidentally enjoy the exercise, as a different way of approaching a legal problem, and as a break from the otherwise uninterrupted focus (at least in first year classes) on the skill of analytical thinking. Further, the students will likely spend much time and intellectual energy arguing their legal positions during the negotiation. Once again, doctrine need not be sacrificed.

(B) Illustrative Exercises: Back to the Future

To re-cast a casebook judgment into the future tense so as to illustrate the system design/preventive mode, the students should imagine themselves in the position prior to *either* loss or litigation. By doing so, they will be foreseeing the legal consequences of future actions, and are positioned to suggest measures that may prevent legal problems and liability.

In all of the examples that follow, the instructor should try to connect follow-up student comments and proposals regarding the exercise to the particular skills that lawyers use in the system design/preventive mode of legal problem solving:

- ?? imagination
- ?? abstract and flexible thinking
- ?? understanding personal motives and the need for multiple, diverse forms of communication; and
- ?? a recognition that procedures for change must be provided in any ongoing human environment.

In the examples that follow, the students are somehow placed in a position of looking ahead. They are at the planning stages of a transaction, or the design stage of an educational program for employees, or at the beginning of a process of public comment on a public project; or designing procedures and entitlements that then later will be used in a power/judgment mode.

(1) Contract Law

Take the familiar *Wood v Lucy, Lady Duff-Gordon* case about a fashion promoter and a celebrity personality. Break the students into negotiating teams, as described above. Tell the students that they are to negotiate a contract out of class that will

- ?? create better incentives in the contract so that neither party will be tempted to breach;
- ?? avoid litigation even if there is a breach, by:
- ?? making the duties of both the promoter and the celebrity clear, rather than relying on promises to be implied by the judge;
- ?? including clauses that require airing of grievances informally, in varying ways, prior to filing suit; and
- ?? including a liquidated damages clause.

(2) Tort Law

Following a casebook problem about sexual harassment (or any civil rights discrimination matter):

- ?? Break the students into groups of three, with both male and female members

- ?? Assign the groups to work out of class to suggest workplace rules that will:
- prevent complaints about sexual harassment;
 - set up a variety of ways for those who feel victimized by harassment to register their complaints; and
 - establish a variety of possible ways for potential offenders to learn about the allegation and be held accountable.

(3) Property Law

Have the students work in teams of two in which they are the City Attorney. A traffic engineer for the city has consulted them about a proposed new highway that is desperately needed in the city. It would run diagonally through the city, which is otherwise laid out on a grid pattern.

The precise siting for the road is uncertain, but significant resident opposition can be expected *wherever* the highway is placed. The engineer seeks advice from the City Attorney about setting up a program that would receive community input about the location of the highway, and that would minimize the potential for expensive, obstructive lawsuits.

The student should work out of class to suggest methods for:

- ?? meeting with the public
- ?? bringing in suggestions about siting
- ?? creating incentives for residents to *want* the new road to go through their neighborhood, perhaps by offering new parks, public landscaping, or more pleasing street lights
- ?? airing grievances; and
- ?? non-litigation procedures for dealing with serious disputes.

In class, have the students report on the various alternatives they have devised. This discussion can be expanded or restricted as much as time permits.

(4) Criminal Law

Working in teams of two, assign the students the role of Attorney General of the United States. Their task will be to devise a set of procedures for dealing with U.S. residents (both legal and illegal) who are accused of planning terrorist acts in the U.S., as part of an internationalist terrorist network.

The students must take both the legal responsibility and the political heat for their system. The President has given a free hand in designing the set of procedures, but says that it must be in accord with “American values.” In follow-up class discussion, the instructor should press students not only on the system design/preventive skills, but also on the Constitutionality of the

system and the feasibility of its administration.