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REFLECTIONS ON THERAPEUTIC JURISPRUDENCE, CREATIVE PROBLEM SOLVING, AND CLINICAL EDUCATION IN THE TRANSACTIONAL CURRICULUM

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One of the earliest essays of my academic career was published in the Journal of Legal Education in the year 1973. It was titled "Expanding Clinical Teaching Methods into the Commercial Law Curriculum," and it called for just what the title announced – a sharing of the benefits of clinical education with that large part of the law school curriculum that was not devoted to public interest litigation, which for all practical purposes then monopolized clinical offerings.

There was no curriculum in "Creative Problem Solving" or "Therapeutic Jurisprudence" at the time, or at least none by those names. The purposes of my advocacy were directed elsewhere: toward practical socio-legal studies, and to the teaching of what we now refer to as "transactional" lawyering, which was then a part of "Preventive Law." Live-client clinical work, I argued, could be an efficient vehicle for the sociological technique of participant observation, if the courses were established with that in mind. Even more easily, clinical experiences could educate students in the environment of legal creativity – of doing deals and planning transactions and preventing litigation and solving real problems in real time. This was the stuff of commercial and corporate law, yet there were to my knowledge no clinical initiatives in any of those areas at the time, even though Jerome Frank had braved the topic as early as 1933.[1] I

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1. Jerome Frank, *Why Not a Clinical Lawyer School?*, 81 U. PA. L. REV. 907 (1933).

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would add, in hindsight, another important advantage – having students understand that even in commercial matters people have real feelings about what they are doing and that feelings are just as much facts as widgets and dollars and documents are facts. Students, I have learned during the intervening years, regard clients' emotions as – the phrase is not originally mine – noise. Noise, to be gotten past during a client interview, or managed somehow so that the *real* facts about the matter could eventually be isolated. Looking for the signal in the noise, of course, ignores the possibility that the noise may be the most significant signal; nonetheless there seems a belief that clients do things for reasons that are legally describable rather than for emotional reasons that may not be. That is a mistaken belief that is impossible to dislodge just by saying it is not so.

We have also, since that time, come to understand more fully not only the centrality of psychological motivations in the lawyering process, but the psychological consequences of law and lawyering as well. This is the entirely satisfying consequence of the work of David Wexler and Bruce Winick and a growing troupe of lawyers and teachers working under the rubric of Therapeutic Jurisprudence ("TJ"). Had I been able to look through the lens of TJ back then, as I can now, I probably would have been even more strident: I cannot imagine a better application of experiential education than the glimpse it could give of the therapeutic and antitherapeutic meaning of what we transactional lawyers do.

In any event, the clinics of that day were essentially single-minded in their focus on training in litigation. For those who responded to my complaint about that with "Well, maybe you're right; but clinical education is *expensive* and we can't do it all for *everybody*," I had an equally persuasive (that is to say, utterly unpersuasive) retort: "So why is litigation monopolizing what we do have?"

With few exceptions – there were a few prosecutorial clinics that I knew of – the sort of litigation that clinics attended to was of a piece. Criminal defense, landlord-tenant, consumer protection, poverty law, civil rights and related public-interest matters dominated the clinical scene. In part, this was to be expected. The kinds of clients served by a legal dispensary at a law school almost had to be those who could not find representation elsewhere. IBM and General Motors would not likely turn to the State U legal clinic for representation in a major acquisition or financing initiative. But in equal part, the clinical orientation of the 1960's

Others included Gary Bellow and my departed friend and colleague Louis Brown, who regularly lamented the fact that "[l]egal education in this country started in the law office – and then quickly forgot it."

and 1970's was nurtured, if not spawned, by the prevailing political orientation of the law faculties of the day. In a substantial number of schools, the clinic was first a way of pursuing social justice and distributing its costs, and secondly, an opportunity for teaching. The transactional orientation that interested me, and the small-business clients who would be aided by it, did not have that kind of appeal. That is at least what I prefer to believe, since it explains why my ideas never did take hold. The alternative would be that I was wrong in my pedagogical analysis, and of that possibility we of course will not allow.

Not enough has changed from then to now. A few fads came and went over time – clinical legal education was conscripted by Ford Foundation money in the late 1970's to the cause of professional responsibility, for example, though that too had but a brief run on center stage. We do, today, have clinics in mediation as well as litigation, and through the pioneering work of David Binder and others like him, our clinical teaching techniques are *far* more sophisticated – and far more client-focused – than they were back then. But apart from a few laudable efforts here and there,[2] the width of the picture (or maybe just my perception of it) is pretty much unchanged. Rights-based and public-interest litigation is still the dominant flavor of clinical offerings. In the same way that youth is wasted on the young, clinical legal education is still severely underutilized by having its focus trained too much on the adversarial insistence of legal rights.

Undaunted by over three decades of *vox clamatis*, I return to the theme in the name of today's leading edges, namely TJ and Creative Problem Solving ("CPS"). In some ways that I believe are important, conventional legal education stands in the way of those adventures. Clinical legal education, by contrast, could be of significant advantage.

I am not an expert in Creative Problem Solving, nor TJ for that matter. The CPS agenda, however, enjoys a considerable overlap with that

2. *See generally* CLINICAL LEGAL EDUCATION ASSOCIATION, *available at* http://www.cleaweb.org/ (last visited on Dec. 16, 2004). A catalogue of clinical offerings can be found on this website of the Clinical Legal Education Association. The types of clinics listed are vast, including the sorts of initiatives I have been advocating, though it is difficult to assess their purpose and reach. Some whose titles suggest an advocacy orientation do include deliberate efforts at creative problem solving, such as those clinics taught at the University of Denver by my colleague Christine Cimini. I was delighted to see the position announcement just this year for a director of an "intellectual property and business formation" clinic at Washington University in St. Louis offering experiential and interdisciplinary learning. Likewise, clinicians more frequently now think about and teach and write about both their students' feelings and their clients'. *See, e.g.*, Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161 (2002).

of Preventive Law, about which I do know a little something. In Preventive Law we have long been concerned with how lawyers think about clients and about their clients' problems. In contrast to litigation, in which the boundaries of a problem are to a considerable degree preset, the task of creating things from scratch calls for an imagination – *viz.* creativity – unbounded enough to occupy not just the available legal space, but the client's business or personal space as well. Creating institutions and arrangements on a clean napkin and solving problems that have not arisen draw heavily upon the techniques of Creative Problem Solving, even if we who had been working in Preventive Law did not speak of it that way at the time.

I am likewise not an expert in the theory of legal education, despite having made a decent living at it for over 35 years. I have, however, watched what we do to our students as we teach them in the first year, and I have anecdotal if not systematic knowledge of the way we change the way they think, as we go from September to May. In some ways the change is astonishing. In some ways, it is truly distressing.

This essay is, accordingly, anecdotal rather than rigorous in the usual scholarly sense. Rather than begin, as law journal articles too often do, with a comprehensive *redux* of the entire question, I would like to muse about cats and barometers and brown sauce and neurobiology (about which I also know nothing).

First, cats. I had a friend named Jim. Jim had a wife named Jackie and a daughter named Laura, and Laura had a cat. One day the cat seemed acrophobically (or stubbornly) stuck in a tree outside their home. Laura was beside herself. Jackie had an idea about rescuing the cat. She found a garbage pail with a handle on it and tied a rope to the handle. She put a plate of sardines in the bottom of the garbage can and then tried to throw the rope over a branch in the tree above the cat. Jackie's idea was to hoist the bucket up to where the cat was, allowing it to smell the sardines. The cat was expected to jump into the garbage can, which Jackie would then lower by the rope thus saving the cat.

Jackie was standing under the tree repeatedly tossing the rope up, without much success, when Jim came out and asked what she was doing. Assessing the situation of the cat in the tree, Jim told Jackie that he had a better idea: he would get his shotgun and take aim at the cat. Fortunately for the cat, Laura intervened (eventually the cat lost interest in the humans' antics and climbed down by itself).

To Jackie, the sardines-in-the-garbage-can solution was a good one because it responded to her definition of the problem, which was how to

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get the cat out of the tree. To Jim, the shotgun solution was a good one because he defined the problem as how to rid the tree of the cat. Jim and Jackie were both, in a sense, absolutely right, despite the opposite consequences of their solutions.

Another, more serious, story illustrates the same idea. A young litigator at the firm where I was for a few years *of Counsel* was engaged in a trenchant dispute with counsel for the other side. I do not recall what the case was about, but I do recall that the question they were disputing was whether the matter would be arbitrated or litigated (there was an arbitration agreement in the underlying contract, but apparently its scope was less than clear). A good deal of both clients' money was being spent on wrestling about whether to arbitrate or to litigate.

Our guy was holding out for arbitration because he did not want this case to go before a jury. In his mind, the tribunal needed to be expert in the subject matter of the deal, and neither a jury nor a randomly assigned judge would be. The other side, it turned out, preferred to litigate because they wanted to have full-blown pre-trial discovery (and the arbitration statute at the time did not allow arbitrators to issue discovery subpoenas on reluctant third parties). We, I learned, did not mind having discovery; and they did not mind having a bench trial. So, the solution was pretty simple – file the lawsuit, go through discovery, then jointly move to dismiss it without prejudice and go to arbitration; or even better, agree to Rule 26-like discovery outside of the litigation process, with the arbitrator authorized to serve as a discovery master.

Most mediators would understand this as a shift from positions to interests. It is a standard mediation move, and it is really quite ordinary. The debate between the two lawyers was very much the same as the difference between Jim and Jackie and the cat in the tree: Were we concerned to arbitrate? Or were we concerned to avoid a generalist judge and jury? How the problem is defined determines the kinds of solutions that make sense.

I will return to this theme in a moment, but before leaving it would presage my point with a brief digression. In law school, we teach students about how to draft wills. A prime focus seems to be on the legal concept of validity (requisites of a valid will, testamentary capacity and its cognates, the techniques of probate administration, fiduciary duties and surcharge actions, the Rule Against Perpetuities – whatever that is . . .). I want to suggest that in the real world of planning, the question of validity is trivial. It widely misses the real lawyering mark. A valid will is not necessarily a good will. Validity is a necessary, but hardly a sufficient condition of a

good will. A good will is a will that accomplishes the client's goals. Likewise with contracts. I remember once hearing a colleague say that the best test of a contract is its ability to withstand challenge in court. Nonsense! The best test of a contract is whether it helps create an arrangement that achieves the client's goals. That distinction makes all the difference. Again, how we define the problem dictates the parameters of a good solution.

Barometers. Unlike the preceding stories, I have no idea if this one was ever true (I know how I modified the preceding). According to the story there was, once upon a time, a boring high school Physics teacher and a bored high school Physics class. The teacher one day posed a problem for the class: "There is a building. You have no yardstick or measuring tape. I will give you a barometer. Tell me how you would use the barometer to determine the height of the building."

The answer the teacher was looking for was an application of the lapse rate of atmospheric pressure with altitude (an aircraft altimeter is nothing but a sensitive barometer calibrated in meters or feet). We know that the lapse rate of atmospheric pressure is about one inch of mercury per thousand feet. So, if you read the barometric pressure at the bottom of the building and you read the barometric pressure at the top, you can multiply the pressure difference in inches between the two by one thousand to determine the height of the building in feet.

This class, however, wanted nothing to do with pedestrian solutions like that. They came up with some others. One student said, "You do go to the top of the building; but you don't read the barometric pressure on the barometer. What you do is drop the barometer from the top of the building and you time how long it takes for it to hit the ground (no-one said we couldn't have a watch as well as a barometer). We know that the gravitational acceleration of an object falling toward the Earth is 9.8 meters per second per second. By timing how long it takes for the barometer to hit the ground, through the miracle of calculus we can determine the average velocity of the barometer and from that, having determined the elapsed time, we can tell the distance traveled"[3] which is equal to how tall the

3. I would ask those who dislike the footnote fetishism of legal literature as much as I do to excuse this note: Yes, yes, I know that the 9.8 m/s^2 ignores atmospheric friction effects, but wait. When I was in high school we were required to determine "G" (the acceleration due to gravity) experimentally, by rigging a board on a third floor window with an electrical switch that would close when a rock was pushed off the end of the board. The rock was supposed to hit another board on the ground under the window, which would close another switch. An electrical timer connected to the two switches would start when the rock was launched and stop when it hit the board on the ground. Knowing the time interval and, in that case, knowing the distance from the

building is.

A second student said, "Yes, I agree. You take the barometer to the top of the building; but you don't have to destroy the barometer. What you do is lower the barometer on a string down the side of the building (no one said we couldn't have string). We know that the period of a pendulum – how long it takes it to swing back and forth one time – is a constant function of its length. Specifically, $T = 2\pi(L/G)^{1/2}$, where G is the known acceleration due to gravity and L is the length of the pendulum in meters. The period, T, is independent of both the mass and the amplitude of the swing. So, once T is known, the equation can be solved for L and the height of the building determined.[4]

A third student said, "I have an even easier way to do it. You don't need to go to the top of the building at all. What you do is take the barometer to the basement of the building. You find the superintendent and give him the barometer as a bribe to tell you how tall the building is."

While the barometer story is almost certainly apocryphal, the point I want to make with it is analogous to a phenomenon well rooted in experimental psychology. Consider an anagram – a scrambled group of letters which, when rearranged just right, make a word that responds to a given clue. Suppose the word being clued – the "solution" – is the word THING. One cohort of subjects (always undergraduates in Psych 101) are presented with the letter group GTNIH. A second cohort is shown the letters NIGHT. In repeated experiments the amount of time it took the NIGHT group to achieve the "THING" solution was much greater than the time it took the GTNIH group to do the same thing. The NIGHT group was blocked by the familiar. Like using barometers as indicators of atmospheric pressure. We are blocked by the familiar components in the presentation of a problem. That is my second point, and I will come back to that too.

Brown sauce. The third point, which may be only a special subset of the problem just discussed, has to do with brown sauce. Brown sauce, as every cook must know, is the base ingredient of many other sauces, like the wonderful *sauce Robert*, or a spicy sauce *au poivre*. Brown sauce is best made from scratch. One of the things that can happen, however, is that as

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window to the ground, we were supposed to be able to determine "G." The problem was that none of us could hit the board on the ground – it was just too small a target from that distance. So we did it in a more practical way. One of us stood on the ground next to the lower board, and stepped on the board at the moment he saw the rock hit the ground. The experimental error was considerable, but I got an "A" anyway. So I am comfortable for the sake of the present story in ignoring friction effects.

4. Same excuse as in the previous footnote.

the brown sauce simmers it condenses and often becomes too salty – even using low-sodium stocks.

What to do, then, with brown sauce that has become too salty? There was an old trick in my family's lore that seems to work. Slice a raw potato thinly and simmer the slices in the sauce for a while. Then toss the potatoes out and, so it seems, the sauce tastes less salty than it did before. I do not know why that is – whether the potatoes add something or just suck up the sodium is beyond me. But for present purposes the mechanism does not matter. It works.

Imagine now that we have an entire law school course in the use of potatoes to reduce saltiness in brown sauce. We talk about the technique of slicing, the time for simmering, the underlying chemistry, and the best kinds of potatoes to use. We debate whether it is ethically OK to sacrifice society's potatoes for the benefit of people who have idiosyncratic hypersensitivities to saltiness. We examine the policy perspectives and the economic effects on both the potato farming community and the salt-exporting countries. We consider working conditions in border-town restaurant kitchens where migrant workers receive illegal wages for stirring potatoes into steaming vats of too-salty brown sauce. Then we address practical questions, such as how we know whether this particular pot of sauce is suited for the potato treatment. That goes on for weeks – weeks of talking about using potatoes to reduce the saltiness of brown sauce. We are in Potato class together day after day and we now know everything one can imagine there is to know about saltiness and brown sauce. We have talked of almost nothing else. And then I ask you, with a triumphant Socratic demeanor, "Suppose the brown sauce isn't salty *enough*? Now what would you do?"

I have actually tried this on audiences (including this one.) It takes longer than it should (as it did this time) before someone cautiously ventures, "Add some salt?"

When I do it well, most of the others are still thinking about how the potato process could be reversed, or whether there is some contra-potato that works in an opposite way, or some other such implausible misdirection.

This, I submit, does have to do with law school. Suppose we have a problem in Wills and Estates. A family owns a successful business corporation. They are committed to leaving their estate to their four children with absolute equality – to prevent disputes, they say. They think then about leaving the shares of stock in the corporation to the children in four equal blocks (and, typically, become wedded to that idea). Suppose

further that, had they thought it fully through, they could have predicted that the three sons would continue to work for the corporation, while the daughter would continue with her separate career. Their lawyer then foresees a source of conflict – the three sons could take the value of the corporation out in salaries, leaving no income to support dividends or capital growth for the daughter.

This is an opportunity for future disputes. This is a legal problem – how are we going to fix this? When I put this problem to students in the Preventive Law course, their initial difficulty is in predicting (or caring about, it is hard to tell) the future emotional risk to the daughter. Once they past this, they usually start thinking about devices like voting trusts, and shareholders' agreements, and employment agreements with salary formulas tied to other corporate benchmarks (*e.g.*, earnings to support dividend distributions), and a variety of similar *legal* constraints on the brothers or limitations on salaries.

I then ask them why they are doing that. The fact is that if we define the problem as avoiding conflict rather than as avoiding losing a legal conflict, even from the brothers' point of view none of these contraptions is likely to work for long. There is, however, an old saw in transaction planning, attributable to a fellow named Corneel, that solving a problem effectively can be helped by identifying the common element in all of the solutions that do not work. Here, that common denominator is one corporation owned by four siblings.

Who told us we had to have one corporation? Why can't we have two corporations? One of them could own a piece of the production chain while the other owns the building and leases it to the first. Even more simply, the parents' will could leave the corporation to the three sons and leave the villa in Tuscany or some other equally valued assets to the daughter. After their first year, law students have a harder time seeing these kinds of solutions than they did when they arrived in September. Let me say that again – in my experience, students have less ability to identify problems with affective dimensions and less ability to invent barometer-like solutions after a year or so in law school than they did before. The lessons of TJ too are harder for law students to learn, I believe, than they were for the same students before we ever saw them. I will come back to this point too.

To make an initial connection among these three groups of anecdotes at this point, permit me to tell one more. My point will be that each of these three follies has to do with limitations in law students' frames of reference.

My friend Bob Redmount was a practicing psychologist and a lawyer, and one of the first to see how the psychology of lawyers and lawyering affected the processes of what we now call Therapeutic Jurisprudence and Creative Problem Solving. In one of his articles, Bob put a case, which I have embellished just a little over the years. Imagine that we have a person who comes in for a consultation. He – Sonny (the masculine is deliberate) is clearly experiencing disquiet while telling the following tale. His father died a couple of years ago, leaving his estate by will in a very conventional way: "Everything to my trustee, who shall pay the income to my wife for life, remainder to my son."

Everyone reading this knows what that means and how it works. In this case, the son believes that the trustee is investing the funds in things that are producing a good deal of current income for Mom, but which have no potential for capital appreciation. The son believes he is losing out because Mom is receiving all the income while over time the purchasing value of the trust will erode with inflation, and his remainder interest when he gets it will be worth much less.

That is the background. Now think about the questions the professional counselor might ask the client. The first professional is a lawyer. The lawyer talks in phrases such as "the duty of a trustee to deal fairly among the beneficiaries," or the possibility of a "surcharge action," and asks questions that would help the lawyer assess the viability of such a strategy. Maybe that works; maybe not.

Now imagine that the same client with the same facts comes to a different kind of professional – say, a financial consultant. What questions now get asked? One thing a financial counselor might say is that everyone should hold a diversified investment portfolio, including assets with varying dimensions of risk and return. Then the counselor points out that Sonny's interest in the trust is pretty secure – the bonds may not appreciate, but their value will not decline in market downdrafts either. Putting that in the basket as the stable anchor in fact releases some of Sonny's other assets to be invested in higher-risk instruments. The low-risk trust, in other words, could be a useful component of a diversified portfolio when looked at in the whole context of Sonny's wealth.

The third professional Sonny sees is a psychiatrist. The first question the psychiatrist asks is different: "For how long have you hated your mother?" That, then, is a very different set of questions and answers. It is apparent that a professional something has a different frame of reference than does a professional something else.

Abraham Maslow once penned what I refer to as Maslow's dictum:

"If the only thing you have is a hammer, everything looks like a nail." One of the things we do in professional education is give students, if not a single hammer, a single toolbox. They then behave accordingly. Everything they look at begins to look like a nail. I see this, in fact, on a daily basis when I teach ADR (alternative dispute resolution). In the ADR course we use few familiar materials like cases, in favor of materials from psychology and sociology and, sometimes, political science. Most of the students in the course are second-semester first year students. Every year, without fail, I have some number of students who approach me outside of class to ask, "What am I supposed to do with this stuff? It's not cases. How do I read this? What am I supposed to get out of it?"

My answer to them is straightforward, and some think flip: "Can you remember what you did before you came to law school? Well, do that."

Bringing this full circle now, let us take a snapshot of conventional legal education in the light of these few stories and admonitions. By my reckoning, the majority of what we teach in law school is offered in ways that tend to foster the very kinds of blockages to both creativity and emotional intelligence that I have tried to describe. We teach our students to think in categories with criteria: "Is this a case in which the remedy of restitution is appropriate? Don't know? Well, what are the elements of restitution? Are those elements present here? What are the facts here? Do those facts amount to the elements necessary for restitution?" We teach those categories as if they had *necessary* resonances with the real world outside the law – a conceptual map drawn to the longitude and latitude of the Table of Contents of the Decennial Digest. True, most of us back up from that to reflect on "policy" analysis ("How does it affect the decency of our society, to have only those criteria and no others for the remedy of restitution?"). But policy is not about clients one-at-a-time; it is about social groups a million or two at a time. Almost nowhere in law school, and especially not in the precious first year, do many of us address things like planning about family, wealth, and intergenerational transfers. Nay, we talk about estates and trusts. What we wind up with as a result is blockage by the familiar.

We ask our students to learn the requisites and limitations of an enforceable trademark. Whether we realize it or not, what we are talking about is, again, the necessary but insufficient question of legal validity. We teach all of this, most of us, most of the time, with the kinds of materials that have winning and losing as their outcomes. The effect is to offer our students a very much narrowed selection of goals – which is, in another argot, a limiting definition of the problem (Is the cat stuck in the tree, or is

the tree infected with cat?). The test of the good will or the good trademark or the good contract, again, is not whether it is valid; the test of a good will is whether it puts in place something that actually works for that family – and, as TJ would commend, whether the family is in the longer run effectively better off for having had its encounter with lawyers and the law.

I should hasten to add that this is not all bad. A good will cannot work if it is not valid, and part of what lawyers do is make sure that the documents that create structure and support for a deal will not crumble under stress. My point is not that it is wrong or bad to do this; but rather that it is bad for the creative enterprise to do *only* this, or to do entirely *too much* of this. Yes, our students need to know about consideration and offer-and-acceptance, but in all my years of practice as both an arbitrator and a lawyer, involving hundreds of contracts problems, I have never once seen consideration actually matter. Maybe it is necessary. It surely is not enough.

In a similar vein we call on students and ask, "Mr. Schneibleman, can you tell us, please, what happened in the case of *Hawkins v. McGee*?" And in that case we deal with judicial as well as medical pathology. We might be able to see in that case the kind of stuff that does not work, but we cannot see – or show our students – from that pathology alone very much at all about the kind of stuff that does work, because the kind of stuff that does work does not make it into the cases. Be honest now – has any contracts teacher reading this essay ever said to a student, "Let me take you through a contract that worked beautifully in a matter that built an enterprise around it, without legal disruption or risk?" Some may have; I will wager that most have not.

Hence our selection of materials is likewise related to the kinds of blockages to creativity I mentioned at the outset. All in all, I suspect we are creating closed frames of reference for our students, with the effect of confining creativity and numbing sensitivity. I recall my own Corporations professor (Victor Brudney, an exception to the general rule) asking, in a shareholder squeeze-out case, an odd question: "Why is this case being litigated?" And my classmates answering in categories: "Because X violated his fiduciary duty by appropriating to his personal use a corporate opportunity." Or variations thereof. Brudney sighed and bellowed in turn: "This case is being litigated because these two people *hate* each other!" They do? Well, that tells us something about the usefulness of a judicial "solution" to the problem, doesn't it? The fact is that people do sometimes hate each other; and they do sometimes sue each other for that reason; and nowhere in the Decennial Digest is there any category or any entry or any

clue about how a lawyer with one of those dudes as a client ought to respond to that.

Someone once said, "It's easy to be negative." It's harder to be creative. And negative is what I have been in this essay, so far. Before I sign off, then, I would like to offer an off-the-wall idea – something that will take me even further out on the limb than Laura's cat was. Something I know nothing about. Neurobiology.

Neurobiology. One day recently I was working out at my gym, climbing the Stairmaster into immortality and reading Scientific American (which is to me something like "Science for Dummies"). I was thinking about how to teach the rules of third-party beneficiary law when I came across an article in the May 2003 issue on the subject of "Synesthesia."

Synesthesia, to put it in an analogy that helps me understand it, is a cognitive phenomenon that occurs in some people which is something like having cross-wired senses. Some people, when they hear sounds, see colors; some people touch things and they experience taste; other folks look at numbers and those numbers have colors (something more authentic than what those of us who grew up in the sixties induced in other ways).

The Scientific American article was about the neurobiology and the phenomenology of synesthesia. It turns out to be significantly genetic. More interesting to me was the fact that the prevalence of synthesia in creative artists is seven times as high as its prevalence among the population at large, and that multiple comes with a substantial degree of statistical significance. The article suggested that there might be something about the phenomenon that is causally related to the talent for creativity. This was heightened by some other even more interesting findings, particularly the suggestion that there seems to be a meaningful connection between sensory synthesia and the capacity for metaphor.

Wow! Now that is *really* interesting. I have long believed that the capacity for metaphor was a useful ingredient in creativity, particularly in creative problem solving. The ability to describe a common situation with a word picture that brings in ideas and constructs from elsewhere frequently opens up wider possibilities – even if only as a seed crystal for free-wheeling brainstorming. One example of this happened to me just a few weeks ago. I was involved at the time in facilitating a dispute between two groups of physicians who were having a turf battle over their patients' bodies, a conflict about who with what credentials gets to do what to or with which parts of you. I had been wrestling for some time with various ways to mediate that case when I had a chance conversation with a neurosurgeon friend of mine to whom I told the general outlines of the

problem. His response was magnificent: "You're dealing with people who, whether they like it or not, are simply joined at the wallet."

That metaphor, of two practice groups as conjoined twins, invoked a cascade of ideas about interdependence and mutual sacrifice and of walking together effectively however awkwardly and unwillingly at first. Although many of the ideas spawned by that image were not helpful, in fact a few were, at a minimum, alternative ways of understanding and thinking about the problem.

Metaphor in creative problem solving may not be a necessary piece of the skill, but it is surely a useful piece. It may even be so at the level of policy. Not long ago, schools of public health began talking of youth violence as a disease. Once that metaphor (now an axiom) appeared, ideas about curative approaches to youth violence began to flow as never before.

Assume then that, as the Scientific American authors were supposing, the capacity for metaphor is biologically similar to synesthesia. One of the remarkable features of the biology of synesthesia is that it results not from "crosswiring," but rather from the *absence* of the *inhibition* of crosswiring. That is, either in an evolutionary or a developmental sense, brains before they are educated do not have all their sense perceptions segregated into silos. It is as the brain develops and learns and experiences that the *qualia* of the senses become so fully distinct. The isolation of hearing from vision appears to be both structural and chemical, with chemicals in the brain inhibiting what would otherwise be communication among the differentiated centers of sensation. Synesthesia results not from something added, but from something missing – not from "crosswiring," but from an absence of the chemistry that would inhibit what would otherwise result in synesthetic perceptions in all of us.

Because the condition is known to be genetic, and because the synesthetic phenotype is the absence of the inhibitor, it is probably fair to deduce that under "normal" peoples' inhibitors lies the possibility of uninhibited synesthetic experience. And since metaphor is related to that phenomenon, maybe there is a capacity for metaphor greater than what most of us express on a daily basis – inhibited, somehow, by other chemical or developmental attributes of the brain? This goes *way* beyond the empirical data points of the Scientific American piece, but it is really fun to think about, isn't it? Better metaphors through (the lack of) chemistry?

With this layman's understanding in hand, I went back to my friend the Neurosurgeon, and asked whether conscious action could change the chemistry of the brain. If there is a chemical basis for the inhibition of

mental cross-talk – which may also be inhibiting innate capacities for metaphor (what a leap!) – then could we enhance our capability by deliberate action? The answer was yes, within unknown but inevitable limits, by forced repetition of the desired function.

Now that is very interesting. If the ability to generate useful metaphors is an ingredient in creative problem solving, then what we need to do is remove the excess inhibitions to cross-talk (or prevent them from arising in the first place); that is, to remove the inhibitions to perceiving connections that are not normally apparent. We can do that, maybe, through education that incorporates forced exercise of that very skill. Maybe the inhibitions themselves – what I call "cabined" thinking – are nothing but the chemical mediators of our having been educated about silos.

So then, back to legal education. Once again we seem to have it backwards. We create inhibitions *against* cross talk: We have law students talking with law students, rather than with other people – such as, for example, live clients whose frames of reference and perceptual maps can be wonderfully different from our own. We deprive them, in addition, of the portraits of people painted in the subtler hues of TJ.

Here is the punch line. Creativity in legal problem solving, and the emotional intelligence that is an indispensable part of it, are enhanced by processes like metaphor; and the capacity for metaphor, like synesthesia itself, is inhibited by developmental history, by experience, and by education. Neurochemistry, however, can be altered by practice, and creativity can be learned by practicing with frame-of-reference translations. Can you imagine a course called, "Conjuring Extraordinary Metaphors"? I can't either.

What we are talking about is not a course, but a more pervasive process. To some extent we do this with cross-disciplinary programs (which, in my experience, become more like marble cakes than like mocha – the components are swirled together but remain distinct). Such initiatives are good but are not enough. The world our students will work in is not a world of other students, all of whom are also struggling to absorb their mentors' frame of reference well enough to join the club, as Jack Hexter once described the process of "doing history." Students who will eventually be relied on to help people create things need to be tutored in experiential interactions with people who are themselves creating things. Simulations can help, but my guess is they are not nearly so effective at simulating dialogical reality as reality is. One cannot learn Icelandic without hearing it spoken. One cannot learn creative problem solving for

small business clients without having tutelage in the creative context of small business activity. One cannot easily appreciate the therapeutic and non- or anti-therapeutic potential of transaction design without having that very kind of guidance as they do it. And that, I submit, is the forte and the validation of clinical education.

Perhaps, in the last analysis, all this brooding is nothing but jealousy on my part, a sense of deprivation nurtured these past thirty-plus years by the fact that the Curriculum Committee loved the litigators more than it loved me. My criminal law and poverty law and public interest law colleagues have, perhaps unwittingly, garnered our limited clinical teaching resources largely for themselves, applying them to the litigative arts, leaving most of us in the wider space of transaction planning to do it, so to speak, by the book. Clinical legal education's history has driven it towards a public service model and therefore toward litigation law. If we approach the distribution of those resources from a sounder educational rather than a weakly political point of view, that hegemony may simply not be justifiable. More to the point of this plaint – and more in keeping with its claim for the legitimacy of the kinds of psychological sensibilities TJ has taught us to care about – it just does not seem fair.

For whatever these observations may be worth, rehearsing them here has offered me, at least, an opportunity to revisit arguments I had first made some years ago: First, lawyering in the planning realm, no less than lawyering in the courts, requires the capability to build solutions around clients' needs and wants and fears and feelings, as well as around the requisites of the law. Second, conventional classroom legal education risks inhibiting the very kinds of sensitivities and creativities of which that capability is made. Third, clinical teaching modalities offer exactly the opportunities so lacking otherwise. And fourth, it is unfortunate for this purpose that our clinical resources have so consistently answered other calls.

Having reviewed those arguments, I judge them still sound – but more, since the time of that essay in 1973, legal education and the law have seen the development of two additional paradigms, in Therapeutic Jurisprudence and in Creative Problem Solving. Those bodies of work compel the conclusions we knew less clearly before. CPS teaches us to see that the quality of a solution is judged by the definition of the problem, and that in transactional lawyering, legal issues are seldom the problem. TJ's message is equally straightforward: both law and legal processes,such as lawyering, can have psychologically significant consequences that reach well beyond our clients' concrete "legal" problems. The contributions to

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this symposium then close the loop, showing why and how those two programs may be advantaged, perhaps uniquely so, through experiential – that is to say, "clinical" – legal education. The challenges are, then, even more insistent than they were before. The opportunities are no less. This time, let's go do it.