Exploring an Example of Creative Legal Problem Solving: Inventing the NOW Account

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Abstract

A concrete example, the invention of the NOW account, illustrates five characteristic steps of creative legal problem solving: recognizing an opportunity for creative legal problem solving, identifying the relevant legal, commercial and technical constraints, creating potential solutions perhaps by adapting past case solutions, evaluating the alternatives in light of the constraints, and bringing a solution into fruition. In a constrained pedagogical application, an AI & Law model might be able to model certain steps of this process. Reasoning systemically for purposes of adaptation and critiquing solutions that meet the letter of the law but not its spirit, however, will prove a challenge.

1.0 Introduction

Most law professors, judges, attorneys, legislators, regulators and clients probably would agree that creative legal problem solving is an important topic. An ingenious plan for structuring a deal or settling a dispute, a novel but convincing argument on appeal, even a clever formulation of contractual or statutory language that locks in a desired goal, are often a matter of admiration in the legal profession. Not only legal, but moral, problem solving prizes creativity. Professional ethics invites decision makers to devise a "creative middle way", a course of action that reconciles the conflicting norms that make up the "horns" of a moral dilemma, and to the extent possible, satisfies all relevant obligations [Harris, et al., 2000, p. 60].

Nevertheless, legal professionals might balk at the prospect of attending a workshop on legal creativity. Urging lawyers and law students to be creative is hardly likely to improve their reasoning. In fact, urging an attorney to "be creative" has a risk; too much creativity may land a legal problem solver in trouble. Witness the travails of tax attorneys and accountants whose creative tax shelters the IRS ultimately disallows. Abstract discussions of legal creativity also have a fatal flaw: they're abstract, often too abstract to shed light on the task of inventing new legal solutions that work.

In an effort to tiptoe past these problems, in this paper I focus on a concrete example of creative legal problem-solving, perhaps even a paradigmatic example: the invention of NOW accounts. The discussion of this example is adapted from [Rubin & Cooter, 1994], a text for teaching Commercial Paper, a law school course and bar exam subject that traditionally has also been called "Negotiable Instruments".

A negotiable instrument "is a piece of paper, possessing various formal attributes, evidencing a debt that one person (the maker or drawer) owes another person (the payee)" [Rubin & Cooter, 1994, p. 4]. If the maker promises to pay the debt, the instrument is a note. If the drawer instructs a third party to pay, the instrument is a draft. If that third party is a bank, the instrument is a check. Checks, of course, are the cornerstone of one of modern commercial society's most important payment systems, and historically, the concept of negotiation played a significant role in developing modern payment systems. Interestingly, the authors of this text

sought to change the focus of the Commercial Paper course from the historically interesting but no longer very relevant topic of negotiability to the study of modern payment systems.

2.0 An Example of Creative Legal Problem Solving: Invention of the NOW Account

The problem: In the early 1970's, U.S. checking accounts were interest-free according to a regulation of the Federal Reserve Board. This had presented no problems to the banking industry for nearly twenty years. Interest rates generally were low, so depositors did not care about not receiving interest on their checking accounts. To the extent that depositors did forego interest, the regulation was a "cross-subsidy from depositors to borrowers or to financial institutions" [Rubin & Cooter, 1994, p.185]. This placid arrangement changed forever when inflation and interest rates soared in the early 1970's in the midst of the oil crisis. Now, consumers forced to accept interest-free checking were losing significant sums [Rubin & Cooter, 1994, p.185].

Ronald Haselton, the president of Consumers Savings Bank of Worcester, Massachusetts, a state-chartered and state regulated mutual savings bank, sensed an opportunity. A mutual savings bank is one that takes deposits, invests in low risk securities, and makes small loans, frequently involving real estate transactions [Rubin & Cooter, 1994, p.12]. Since this particular bank's deposits were state insured, the Consumers Savings Bank was not subject to the Federal Reserve Board regulation [Rubin & Cooter, 1994, p.186]. Could it offer checking accounts paying interest?

There were two hurdles. One problem was whether a savings bank could offer checking services even on non-interest bearing accounts. Most savings banks and other thrift institutions were prohibited from offering checking services on their interest-bearing accounts [Rubin & Cooter, 1994, p.7]. The second problem was whether an account against which a check could be written would be considered a demand deposit, something Massachusetts law forbade savings banks to offer. [Rubin & Cooter, 1994, p. 186].

Haselton and his legal staff addressed the first problem through legal research. They determined that Maryland and New Jersey courts had upheld the legality under state law of mutual savings banks' offering checking services on non-interest bearing accounts. In researching Massachusetts law, they determined that it did not explicitly prohibit mutual savings banks from offering checking services or offering checking services against interest bearing accounts.

The Solution: Their solution to the second problem, "a prime example of 'creative lawyering' – was to cast the check-like instrument Consumers was planning to offer as an adaptation of the standard savings bank withdrawal slip" [Rubin & Cooter, 1994, p.186]. Withdrawal slips were a mundane common place of savings account administration. When a depositor withdrew funds from a savings account, he filled out a withdrawal slip and gave it to the teller, who then paid him the funds. Haselton and his attorneys recast the withdrawal slips as negotiable instruments, specifically a Negotiable Order of Withdrawal (NOW) [Rubin & Cooter, 1994, p.186]. Now a depositor could make the NOW slip payable to a third party payee and the payee could collect the funds from the bank through regular banking channels, just like a check. In other words, "a NOW is a check for all practical purposes; it was designated as negotiable so that it could be collected through regular banking channels, and was designated as a non-check to avoid the interest restriction" [Rubin & Cooter, 1994, p. 7].

Consumers Savings Bank sought approval of the Massachusetts's Commissioner of Banks for the plan to offer NOW accounts, and upon the Commissioner's denial, sued the Commissioner for a declaratory judgment that the Bank was authorized to offer the accounts. [Consumer Savings Bank v. Commissioner of Banks, 361 Mass. 717, 282 N.E.2d 416 (1972).]

The Court granted the relief. The Court determined that the proposed NOW slip had "the attributes of negotiability required by the Uniform Commercial Code, Sec. 3-104(1)."

> It is an unconditional order to the bank signed by the drawer and depositor to pay a specified sum, and it is payable to order and on demand….The negotiable withdrawal orders would be drawn on a no passbook account and would be payable through a commercial bank or the Federal Reserve Bank. The orders would be presented to the bank for payment in a daily clearing, and payment would occur at its offices. The bank would make returns on stop payment orders, overdrafts, and so forth, and would handle signature verifications. [Rubin & Cooter, 1994, p.187].

Beside satisfying itself that the NOW had the required attributes of negotiability, the Court determined that NOWs were a permissible means of withdrawing funds under the relevant statute and the Bank's by-laws, that NOW accounts were not a new kind of account unauthorized by the state's banking laws, and that a passbook other than the NOW slips was not required.

Scrutinizing the Legal Analysis: Although the Court did not address it, the question arises whether a negotiable order of withdrawal satisfies the requirement of negotiability that the instrument be "payable on demand". According to UCC Sec. 3-104, a negotiable instrument must be "(2) payable on demand or at a definite time" [Rubin & Cooter, 1994, n. 1, p.188]. As noted above, this is potentially problematic. NOW's are drawn on savings accounts, and a "savings bank generally had the power to impose a delay of 30 days on any request for payment" [Rubin & Cooter, 1994, p.188].

Indeed, in a much later case, the United States Supreme Court held that NOW accounts are *not* payable on demand. The Court rejected an attempt by the Federal Reserve Board to extend its control to institutions offering NOW accounts with a regulation that defined a "bank" as any institution that accepts deposits that "as a matter of practice" are payable on demand. By contrast, the governing statute defined a "bank" as any institution "which ... accepts deposits that the depositor has a legal right to withdraw on demand." The Court stated:

> A legal right to withdraw on demand means just that: a right to withdraw deposits without prior notice or limitation. Institutions offering NOW accounts do not give the depositor a legal right to withdraw on demand; rather, the institution itself retains the ultimate legal right to require advance notice of the withdrawal. Board of Governors, Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 368 (1986)

Haselton and his legal staff knew that NOW accounts were not payable on demand. Indeed, Massachusetts law forbade savings banks from offering demand accounts. They should have known that "payable on demand" was also a requirement of the definition of negotiability. How much of a legal obstacle was this? How reasonable was their position that negotiable orders of withdrawal were, indeed, negotiable.

One way to analyze the question legally is to examine the definition of "payable on demand" in the statute defining negotiability. According to UCC Sec. 3-108 (1), "a promise or order is 'payable on demand' if it (i) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (ii) does not state any time of payment." In fact, negotiable orders of withdrawal, like checks, do not state a time of payment. One could argue, therefore, that the "payable on demand" requirement is satisfied on the face of the instrument. This formal requirement is intended to reduce a negotiable instrument to "a pure payment function. [It gives] it a stereotyped form that makes it immediately recognizable, and allows the parties using it to know precisely what it implies from a few brief entries on that form" [Rubin & Cooter, 1994, p. 4].

Given the fact that savings accounts are not demand accounts, however, this argument seems to be a "triumph of form over content" [Rubin & Cooter, 1994, p.188]. Or is it? What is the underlying content of the law of negotiability in this context? In practice, savings accounts were functionally payable on demand. Savings banks hardly if ever insisted on delaying payment for up to 30 days, regardless of what the banking law permitted. From that viewpoint, NOW accounts are effectively demand accounts (but see the U.S. Supreme Court's argument above.)

Moreover, one could make a cogent argument that negotiability is not really important in the context of the check-based payment system, and therefore, that it does not matter whether the NOWs are negotiable, only that they function like checks in that system.

> "Theoretically, [the concept of negotiability] still governs checks and notes, but checks are rarely negotiated from one party to another any more. Instead, the payee deposits the check in its own bank, which then sends the item through the banking system to the drawee bank in accordance with specialized rules. While the [Uniform Commercial] Code casts these rules in terms of negotiability, they would work just as well without that concept; indeed, the most important actors in the check collection system, the Federal Reserve Banks, are governed by a federal regulation…that makes no reference to negotiability." [Rubin & Cooter, 1994, p. 7].

In any event, NOW accounts became tremendously popular to the chagrin of the savings banks' commercial bank competitors, who were forbidden from paying interest on checking accounts as even federally regulated mutual savings banks were not. The competitive pressure led to changes in regulation and eventually to nearly complete deregulation of interest rates on checking accounts [Rubin & Cooter, 1994, p. 188-190].

Along the way, other ingenious means of circumventing the ban on interest-bearing checking accounts were invented. For instance, the Federal Reserve Board authorized commercial banks to create Automatic Transfer System accounts in which depositors could automatically transfer funds from a savings account to a checking account whenever a check drawn on the checking account was presented to the bank for collection. In this way, customers could leave their funds in interest-bearing savings accounts and move them into a checking account simply by writing a check. In addition, the first automatic teller machines (ATM's) were authorized in part to make it easy to switch funds from savings to checking accounts [Rubin & Cooter, 1994, p. 189].

3.0 Characteristic Steps of Creative Legal Problem Solving

The example of the development of the NOW account illustrates some general characteristic steps that are important in creative legal problem solving. The problem solver needs to:

1. Recognize an opportunity for creative legal problem solving.
2. Identify the legal, commercial, and technical constraints on the possible solutions to realizing the opportunity.
3. Create potential solutions that achieve some tradeoffs with some level of certainty in realizing the opportunity and satisfying the constraints.
4. Evaluate each solution against its alternative solutions in terms of the tradeoffs and risks and select the most viable; and
5. Take necessary steps to bring the solution into fruition.

First, someone needs to recognize an opportunity for creative legal problem solving. Usually, the opportunity for commercial gain or success in litigation motivates the commitment of the sometimes considerable time and resources needed for a creative legal solution, but even the possibility of academic publication and distinction may suffice (as in the example of statutory interpretation discussed below in Section 4.0.) Here, bank president Haselton saw his opportunity in depositors' desire to earn income on their savings, a desire made ever more acute by rising interest rates and rising inflation. Indeed, savings banks were in desperate straits, as were commercial banks. Consumers in droves had discovered that they could earn considerably more in money market accounts, and both savings and commercial banks faced an increasing risk of "disintermediation" (i.e., consumers' taking their money out of banks.) Under these circumstances, "opportunity" was really "imperative".

Recognizing opportunities is important not only for motivation. It is also important that a legal problem solver recognize that creative legal solutions are often invited, expected, and

supported. Attorneys and students who conceive of law as the mechanical application of legal rules to situations are unlikely to recognize that they are expected to reason about legal rules, not just with them. A legal rule may apply but only in form, not in substance as in the NOW example. Applicable legal rules may conflict, or they may be open textured. As a result, one must make, consider and assess reasonable legal arguments interpreting the rules and their application in ways that may open avenues for novel solution. In short, one may play with the legal rules, in the creative sense of that term.

Of course, not all means of satisfying a recognized opportunity are legally or commercially viable. Next, one needs to do some combination of steps 2 through 5. Presumably, there is no strict ordering among these tasks. The creative problem solver moves flexibly among them until either a solution is achieved or not given the potential return and the available resources of time, money, imagination, and will.

In the NOW example, the legal constraints were those imposed by Massachusetts banking laws including the laws governing savings banks and negotiable instruments. Interestingly, the Consumers Savings Bank had one fewer legal constraint than other savings banks. Since its deposits were insured by the state, not by the Federal Deposit Insurance Corp., it was not subject to federal regulation. In fact, the FDIC regulations that prohibited commercial banks from paying interest on checking accounts did not apply to mutual savings banks. Thus, even federally insured savings banks could offer NOW accounts. Perhaps even the mere appearance of being federally regulated inhibited the savings banks in other states from recognizing this opportunity and inventing this solution before Haselton's Bank did.

Haselton's seizing upon the lowly withdrawal slip and adapting it to serve his purpose is a remarkable example of creative invention. Interestingly, it was not the only solution. As mentioned above, the Automatic Transfer System and Automated Teller Machine transactions were alternatives. What these creative adaptations seem to share is a focus on the system(s) in which the thing-to-be-created will function. Here, there was a well-defined check collection system and a well-defined system of interest-bearing savings accounts in thrift institutions; the thing-to-be-created must function within that check collection system while enabling the payment of interest on deposits. The two types of solutions involved different ways of accommodating the two systems. The NOW approach took the means of withdrawing funds from a savings account and turned it into a check-like noncheck. The other approaches enabled the timely transfer of payments from interest-bearing savings to non-interest-bearing checking as needed. Thus, the creative adaptation is not adapting a piece of paper into negotiable form. It is adapting the function of a piece of paper in one system to the function of another type of paper in another system as well. What seems to be important is the need to think systemically as one adapts some parts of the systems to satisfy the goal.

A course on payment systems provides other examples of creative solutions that evidence systemic thinking. Any payment system must allocate losses due to errors and delays. Much of the course is spent teaching students the UCC's rules for allocating such losses in the check collection system. These are conceptual rules that focus on evidentiary determinations of fault or liability often requiring courtroom litigation. Credit card systems such as Visa must allocate such losses, too, but they use a system of centrally administered, operational or management rules designed to minimize such losses, often using market incentives [Rubin & Cooter, 1990, p. 175]. Expensive fault-finding lawsuits are avoided. Credit card disputes among banks in the Visa system are resolved through a system of arbitration so that decisions are inexpensive and impartial if less thorough than a court's. The banks "recognize that small inequities with random causes tend to cancel each other in time. Presumably the same logic would apply to disputes among banks concerning modest losses in check collection," as proposed by the authors [Rubin & Cooter, 1989, pp. 674-5].

Returning to the steps of creative problem-solving, each solution must be evaluated to determine if it satisfies legal and other constraints. In this connection, it is interesting to consider

the standard by which one evaluates each solution. At some point, playing with legal rules may lead to solutions that are not legally defensible. On the other hand, since one is creating something new, something not seen before, the appropriate legal standard would seem to need to be fairly low at least from the viewpoint of the creator. Presumably, the creator will not reject on legal grounds any solution for which there is a reasonable argument that it is not prohibited. The mechanism for assessing if the newly invented solution is prohibited is to perform legal research, generate arguments pro and con, and to determine whether there is a reasonable argument that solution is not prohibited.

An important point to note here is that the negotiable order of withdrawal did not obviously satisfy the legal constraint. In particular, as discussed above, arguably a NOW was *not* negotiable because it was drawn on an account that was not "payable on demand." There were counterarguments, however. To summarize, NOWs did satisfy the literal UCC definition of "payable on demand" as a matter of form, if not substance. In addition, from a practical factual and legal viewpoint, either they were effectively "payable on demand" or it should not matter that they were not negotiable. Haselton and his legal advisors seem to have made a bet that the argument based on form would suffice, especially given the practical factual and legal considerations and the pressing economic opportunity. There is an element of strategy in this evaluation. The bet is that given the need, if not specifically prohibited, then the new thing will be allowed.

Whether that same low standard was the correct one for the Court to apply is debatable. What did Massachusetts banking law mean if not that savings banks could not offer accounts payable on demand? Perhaps that law was designed to afford thrift institutions a measure of stability against precipitous mass demands for withdrawal, "runs on the bank", a purpose that could be frustrated by allowing NOW accounts. On the other hand, the Court may be cognizant of the same economic realities as the creator, and where they are as strong as the threat of, if not a run on the bank, then of longer term disintermediation, the Court may have simply bowed to that reality (though it appears to have done so implicitly and not to have squarely addressed the point.)

Each solution represents a trade-off among realizing the opportunity and satisfying the legal, economic, and other constraints. Interestingly, given the low legal standard the creator may have used to evaluate the invention, there remained significant uncertainties as to whether the NOW account would be legal. Presumably, solutions involving more or less automated transfers of funds from interest-bearing savings accounts into checking accounts as needed involved considerably less problematic legal objections. On the other hand, they involved considerably more inconvenience for the depositor. Nothing is easier than simply writing a negotiable order of withdrawal and having it be treated by the check collection system just as if it were a check.

Haselton took some steps to control the legal risks. His initial move was to submit the NOW plan to the banking commissioner. When that resulted in denial, he sued for a declaratory judgment declaring the plan to be appropriate. As an apparently innovative savings bank president, he may have had a canny expectation, given the strong consumer demand and economic incentives, that the bank regulatory system would ultimately approve the plan one way or another, even if he could not predict exactly how it might work out. In this respect, the creative legal problem-solver is a risk taker, conservative but still courageous.

4.0 Prospects for Modeling Creative Legal Problem Solving

The kind of creative legal problem solving exemplified by the invention of the NOW account is very complex. AI & Law research has tended to shy away from tackling legal planning, even of the least creative kind. There are some exceptions (see, e.g., [Sanders, 2001; Schlobohm & McCarty, 1989]), but none of these programs has tackled a task of this magnitude.

In considering whether and how an AI & Law program could solve such problems, it is helpful to consider goals and assumptions. If the goal were to assist practicing attorneys to solve a problem like, "How can a bank get around the prohibition of offering interest-bearing checking

accounts?" many simplifying assumptions would be necessary to get the program to work, but few could be made without seriously limiting the program's utility. In other words, the goal is much too ambitious.

Nevertheless, one might focus on applying AI techniques to particular steps in the problem-solving process, including case-based planning and assessing whether a proposed solution is not legally prohibited.

Haselton's adaptation of a savings bank withdrawal slip into a negotiated order of withdrawal is a kind of case-based planning with adaptation. A program could achieve a creative solution like this only if it had an appropriate representation scheme, set of adaptation operators, and control mechanism. The representation would comprise detailed descriptions of the two major systems involved, the check collection system and the savings account system, in terms of their components, the roles those components play in achieving the systems' various goals and subgoals, the global and local dependencies of those components on other components, etc. The descriptions would be represented as models with which a planning program could reason. The models would capture explanations of the components' roles in achieving system goals in a way that could be adapted as a component is lifted from one system and fitted into another. A case-based planner could interpret Haselton's query how checks might be drawn on an interest-bearing savings account as a query concerning what part of the savings account system could serve the function of a check or, alternatively, what part of the check payment system could serve the interest-bearing function of a savings account. The first query might lead a program to reason by analogy from a check's function as a means of withdrawing funds from a checking account to a search for the means of withdrawing funds from a savings account, namely the withdrawal slip. It might then identify the similarities and differences between checks and withdrawal slips. They are similar in that both slips of paper serve analogous functions as a means of withdrawal from accounts. The differences include:

> 1a. A check enables a drawer to identify a payee who may withdraw the funds from the account at the drawee bank. Versus:
>
> 1b. A withdrawal slip enables a drawer to withdraw the funds himself from the account at the drawee bank.
>
> 2a. A check has a "magic" status as a negotiable instrument by virtue of its form which also enables a payee to negotiate the check to a holder in due course who may withdraw the funds or further negotiate the check. Arguably, this quality of negotiability plays a role in the system of check collection. Versus:
>
> 2b. A withdrawal slip is not a negotiable instrument.

Consideration of the roles, similarities and differences might trigger the program to attempt to adapt the withdrawal slip to make it look like a check with the formal properties of a negotiable instrument. Alternatively, the second query might lead the program to compare checking accounts and savings accounts, to note that the former is convenient for making payments to third parties and the latter for earning interest, and that an easy way to pass funds from the savings account into the checking account just in time to make payments to third parties might suffice.

While no AI work on case-based design, planning, and adaptation has focused on quite this task, some have employed detailed causal and functional explanatory models, difference-driven adaptation operators, and control structures that might serve as a starting point for this task, such as KRITIK [Goel, 1989] and CASEY [Koton, 1989] (See discussion in [Kolodner, 1993, pp. 168-170; 174-179; 423-431]). If a program could construct alternative solutions to Haselton's problem, it would be counted a great success.

Assessment of whether a proposed solution is not legally prohibited is akin to the task of many AI & Law programs whose tasks are to construct legal arguments for and against conclusions like whether a plaintiff should win a claim or an issue. Assessing the legality of the NOW account involved assessing such legal issues as whether:

1) Massachusetts banking laws forbade savings banks from offering checking accounts or demand accounts.
2) a Massachusetts savings bank is subject to a federal banking regulation prohibiting interest on checking accounts.
3) savings banks in other states could legally offer checking accounts even without paying interest.
4) the negotiated order of withdrawal actually satisfied the requirements of negotiability, including the payable-on-demand requirement, or whether it really needed to.

All of these issues involve reasoning with regulatory provisions. Presumably, a logic-oriented approach to statutory reasoning could be used to model the deductive reasoning involved [Sergot, et al., 1986].

The question is, however, whether deductive reasoning is sufficient. As we have seen, a negotiated order of withdrawal is a solution that depends on a semantic trick, a check for purposes of negotiability and collection, a non-check for purposes of accumulating interest on savings. One might conclude as a matter of statutory deduction that a NOW satisfies the literal requirements of negotiability but miss the deeper questions presented by the facts that a savings account is not a demand account or and that negotiability may not really be necessary to function in the check collection system. Can a logical model distinguish between form and substance?

A related issue is that assessing whether a NOW account is prohibited involves reasoning not only with a range of regulations but a system of regulations. The Court treated it as a question of whether the negotiated order of withdrawal was negotiable under the UCC Art. 3 and whether presentation of a NOW slip for collection by a third party satisfied the legal regulations concerning savings bank withdrawal. In addition, we have seen that questions arise whether a NOW slip or account satisfies the requirement of "payable on demand", which arguably involves savings bank regulations as well as the UCC Art. 3 definition. These are questions attorneys and judges answer with an eye to the whole system of banking regulation and check collection. As far as I know, no deductive system reasons about the relations of a particular regulation within a system of regulation.

Some AI & Law programs tackle statutory interpretation by integrating deductive and case-based reasoning (e.g., [Rissland & Skalak, 1991]). So far, however, the case-based component has been designed primarily to address open-textured legal predicates. Ambiguous legal rules, of course, can present occasions for creative legal problem solving. An example of that appears in another part of the Commercial Paper course [Rubin & Cooter, 1994, pp. 491-2] concerning the UCC's rule for determining when a bank customer is entitled to withdraw funds from a deposited check. In an example of creative consumer-oriented legal scholarship, Prof. Emma Jordan wrote,

> The U.C.C. provides that customers can withdraw funds as a matter of right only after final settlement has been made and 'the bank has had a reasonable time to learn that the settlement is final.' This second qualification sets up a zone of ambiguity that can be used to thwart customers' efforts to withdraw the deposit. The operative maxim of the check collection system is that 'no news is good news.' No notice is given when an item is finally paid. Therefore, the language of section 4-213(4)(a) is at best inartful and at worst actively deceptive. The depositary bank will never learn directly that an item has been finally paid. Thus, it does not need 'a reasonable time to learn' of the fact of final payment. The only reliable confirmation of the disposition of a check is the returned check itself and any notice which might accompany it. Section 4-213, however, permits banks absolute discretion to determine when the risk of return is minimal or nonexistent. There are no standards for determining whether the depositary banker's assessment of the risk is reasonable. Under the U.C.C., a bank may hold a depositor's money for an indefinite period in anticipation of delays attributable to

> the financial community's own refusal to use modern methods for returning checks. [Jordan, 1985, pp. 534f.]

This creative and insightful analysis and others like it led regulators to overhaul the rule with an extensive regulatory scheme designed to enable customers to get at their funds much sooner. (Or perhaps the real creativity was that of the original banking industry drafters who inserted into the UCC the ambiguous standard in the first place!)

It is interesting, however, that the legal issue presented by NOW accounts was *not* a matter of interpreting a substantively ambiguous legal rule or predicate. The negotiable order of withdrawal unambiguously satisfied the definition of "payable on demand." Rather, the question was whether that should be enough, given the reality that the account was not a demand account.

5.0 Conclusions

In sum, AI & Law programs will have difficulty in modeling even only selected steps in the NOW example of legal problem-solving. Nevertheless, I hope AI & Law can make some contribution in the area in which such examples are most important, namely legal pedagogy. As noted, it was in a law school textbook that I encountered the three examples of creative legal problem solving discussed here, Haselton's creation of NOW accounts, the invention of the credit card payment system's rules for loss allocation, and Emma Jordan's UCC critique. The examples were offered as interesting devices for teaching concepts in the law of payment systems; their creativity added to their interest, but was not the author's primary focus.

The creative aspect of these examples may be, however, the most important lessons we can teach law school students: that the legal system invites and supports creative problem-solving, that legal rules are things to reason about, not just with, and that there are steps and techniques for discovering and assessing novel legal solutions to meet practical needs.

The questions, then for AI & Law are these. Can a program assist students in learning from such examples of creative problem-solving? Can it help students have an authentic experience of creative problem-solving? Can pieces of the task be modeled and then integrated to help students solve problems on their own?

Perhaps a program can present a database of cases and rules and a context for problem-solving that leads students to recognize an opportunity for creative legal problem solving, identify some relevant legal and practical constraints, create potential solutions perhaps by adapting past case solutions, evaluate the alternatives in light of the constraints and legal arguments, and implement a solution in some way. It certainly seems worth trying, especially given the alternative. My impression from teaching Commercial Paper to successions of law students from year to year is that reading and even discussing examples of creative problem solving alone do not empower them to be creative legal problem solvers.

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