HEINONLINE

ON TEACHING PROFESSIONAL JUDGMENT

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One very unwelcome change for most law school denizens and graduates is that there is now much more widespread hostility to lawyers, the prices they charge, the laws and processes with which they are associated, and the prospect of an increase in their number. Against this hostile background, the law schools have new incentives to re-think their cultures and systems in the hope of improving.

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I. INTRODUCTION

To answer the question posed by the conveners of this symposium, of course there is a gap between legal education and the legal profession. There has always been one, and quite possibly it has widened somewhat in recent years, if for no other reason than that the world in which lawyers practice has changed so much while legal education has changed relatively little. The external changes include the internationalization of legal transactions, the centrality of technology to many aspects of practice, increased specialization driven by the proliferation and complexity of statutory and regulatory schemes, and the overloading of traditional systems of civil and criminal justice. Perhaps more significant than any of these is the unhappy fact that today's law school graduates will enter a society that views them with hostility and suspicion and regards their impact on our national culture and economy as often more negative than positive.[1]

Within the bar there is a sense that the practice of law as a profession is declining: that it is devolving into a business;[2] that personal trust and

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1. *See, e.g.,* R. Samborn, *Anti-Lawyer Sentiment Up,* Nat'l L.J., Aug. 9, 1993, at 1.

2. Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective,* 49 Md. L. Rev. 869 (1990); *see also* Anthony T. Kronman, *The Lost Lawyer* (1993).

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institutional loyalty among lawyers and between lawyers and their clients has deteriorated; and that the mentoring of junior lawyers by their more experienced seniors has declined in the face of economic pressures. Bar journals brim with articles reflecting a decline in the personal and professional satisfactions of being a lawyer. Unhappy lawyers are changing jobs at an escalating rate.[3] Granted that invocations of halcyon days should be taken with more than a grain of salt, there is nonetheless good reason to be concerned about the profession's current situation.

The bar's response has ranged from the ludicrous to the constructive—from a proposal by the president of the California State Bar to add lawyers to the list of minorities protected by a hate crime statute,[4] to designing special programs for new lawyers. The legal academy's response has also been mixed. While some law schools have seriously reconsidered their curricula in light of the changing demands of the profession, many others seem quite indifferent to those changes and, more fundamentally, to what their students do after graduation. An astute lawyer-businessman recently observed that "law school progress is still disgracefully short of what it should be—exactly as we might expect in institutions enjoying great worldly success and perceiving no external threat . . . ."[5]

If there is an external threat looming, it is not from market competition but from the American Bar Association, which seems headed toward requiring law schools to provide more clinical instruction in trial practice and other practical lawyering skills.[6] Of course, law schools bear an important responsibility for the quality of the profession. But a rush to "close the gap" between legal education and the legal profession makes little sense without understanding what the gap is. Indeed, it seems a mistake to set our sights on preparing law students for the profession as it is today, rather than for the profession that our society wants and needs. The goal, to put it most ambitiously, should be to give today's law students the skills and values to reclaim the profession's

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3. Deborah L. Arron, *Running From the Law* 2–3 (1989).

4. Vicki Torres, *Chief of Bar Association Asks End to Lawyer-Bashing,* L.A. Times, July 6, 1993, at A1.

5. Munger, *supra* note **.

6. *See* Section on Legal Educ. and Admissions to the Bar, American Bar Ass'n, *Legal Education and Professional Development—An Educational Continuum* (Report of the ABA Task Force on Law Schools and the Profession: Narrowing the Gap, 1992) [hereinafter *MacCrate Report*]; ABA Standard 301(a) (amended 1994). *See also* Paul Brest, *When Should a Lawyer Learn the Way to the Courthouse?,* Stan. Law., Fall 1993, at 2; John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education,* 43 J. Legal Educ. 157 (1993).

ideals and, concomitantly, to gain the trust of clients and the larger public.

This essay focuses on a set of qualities and skills that we believe to be important across the entire range of careers that lawyers pursue—whether as legal services lawyers, business litigators and dealmakers, city attorneys, corporate general counsel, or public interest advocates. The qualities are sometimes defined in terms of judgment or practical wisdom; the skills in terms of problem solving and decisionmaking.

A client comes to a lawyer rather than, say, a psychologist, investment counselor, or business advisor because he perceives his problem to have a significant legal component. Most real world problems do not conform to the neat boundaries that define and divide different disciplines, however, and a good lawyer will be able to counsel clients beyond the confines of her technical legal expertise.[7] Indeed, most clients do not want lawyers to confine themselves to "the law," but rather expect them to integrate legal considerations with the other components of the matter. Thus, much of a lawyer's work involves assisting clients in solving non-legal problems. The solutions may be constrained, facilitated, or even driven by the law, but they often call for judgment, common sense, and even expertise not of a particularly legal nature. Lawyers are called upon to counsel clients about strategic decisions, to help them define and at times choose among competing values and goals, to design processes and institutions, to negotiate and draft agreements, and to persuade administrative, legislative, and judicial decisionmakers to take particular actions.

At their best, lawyers serve as society's general problem solvers, skilled in avoiding as well as resolving disputes and in facilitating public and private ordering. They help their clients approach and solve problems flexibly and economically, not restricting themselves to the cramped decision frames that "legal thinking" tends to impose on a client's predicament. The good lawyer brings more to bear on a problem than legal knowledge and lawyering skills. She brings creativity, common sense, practical wisdom, and that most precious of all commodities, good judgment. In his recent book, *The Lost Lawyer,* Anthony Kronman describes this role eloquently and ambitiously:

> [O]ften the client's objective is hazy, or in conflict with other
> objectives, or clear but impetuously conceived. . . . [The lawyer's]

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7. For reasons of clarity and economy, we will generally refer to lawyers as women and to their clients as men.

job in such cases is to help clarify the client's goal by pointing out ambiguities in its conception and by identifying latent conflicts between it and other of the client's goals. . . . [Indeed, the lawyer's] responsibilities to a client go beyond the preliminary clarification of his goals and include helping him to make a deliberatively wise choice among them. . . . [H]is duty [is] not merely to implement a client's decision . . . but also to help him assess its wisdom through a process of cooperative deliberation in which the lawyer examines the decision with sympathy and detachment from the client's point of view.[8]

The foundations for the qualities necessary to the lawyer's craft lie in character traits and deep knowledge that one would not characterize as "skills" at all—personal integrity, an inner moral compass, and a perception of one's work as embedded in broad social, economic, political, historical, and for some, spiritual contexts. Dean Kronman rightly observes:

[Judgment] is more than a clever knack or skill. It is, most fundamentally, . . . an ensemble of settled dispositions—of habitual feelings and desires. . . . Prominent among these [is] the trait of prudence or practical wisdom. . . . When we attribute good judgment to a person, we imply more than that he has broad knowledge and a quick intelligence. We mean also to suggest that he has a certain calmness in his deliberations, together with a balanced sympathy toward the various concerns of which his situation (or the situation of his client) requires that he take account.[9]

Indeed, echoing Robert Gordon and William Rehnquist, Dean Kronman argues that a lawyer's judgment is inextricably tied up with her commitment to the public good: The good lawyer is a lawyer-statesperson.[10]

Legal education cannot create good judgment, let alone good character or a commitment to the public good, out of whole cloth. It can, however, reinforce those traits and attitudes, and teach the counseling, deliberative, and communicative skills and attendant values that are part and parcel of

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8. Kronman, *supra* note 2, at 128–29, 131.

9. *Id.* at 72–73.

10. *Id.* at 11–12. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1 (1988); William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 Harv. J. L. & Pub. Pol'y 537 (1985).

the exercise of judgment. In our view, this would go a long way toward closing the gap between legal education and the profession.

We start from the proposition that the appellate case method—the core of legal education for over a century—provides an important foundation for teaching these skills and values by requiring students to engage in continual exercises in deliberation. As Dean Kronman writes:

> The case method of law teaching presents students with a series of concrete disputes and compels them to reenact these disputes by playing the roles of the original contestants or their lawyers. It thus forces them to see things from a range of different points of view and to entertain the claims associated with each, broadening their capacity for sympathy by taxing it in unexpected ways. But it also works in the opposite direction. For the student who has been assigned a partisan position and required to defend it is likely to be asked a moment later for his views regarding the wisdom of the judge's decision in the case. To answer, he must disengage himself from the sympathetic attachments he may have formed as a committed, if imaginary, participant and reexamine the case from a disinterested judicial point of view. . . . One aim of this complex exercise in advocacy and detachment is the cultivation of those perceptual habits that lawyers need in practice.[11]

Dean Kronman goes on to argue that the case method's emphasis on the disinterested judicial point of view cultivates a civic-minded, public-spirited perspective; it induces students to care about "the good of the legal system and the community it represents."[12]

Dean Kronman captures much of what is valuable about the appellate case method. But we disagree with his further suggestion that it is the only way—or even the best way—to help students develop legal judgment.[13] We imagine that this view stems partly from his surprising assertion that appellate cases allow students to "reenact . . . disputes by playing the roles of the original contestants or their lawyers." In fact, if one looks back to the origin of many cases, the parties were not

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11. Kronman, *supra* note 2 at 113, 116.

12. *Id.* at 119.

13. Kronman does not discuss the clinical method of teaching at all. He dismisses case studies of the sort used in business schools because "[t]he managerial perspective mixes communitarian and self-interested attitudes, and to that extent encourages less forcefully than the judicial point of view the spirit of civic-mindedness . . . ." *Id.* at 119. By the same token, instructing law students "from the point of view of a legislator, rather than a judge, . . . would be less well suited to the cultivation of civic-mindedness," because the actions of legislators are often directed toward private or partisan ends. *Id.* at 116.

contestants at all. Rather, they were individuals or entities seeking counsel in arranging their personal or business affairs or resolving a nascent dispute. In many instances, the very fact that litigation ensued signals a failure of their or their lawyers' judgment or skill. Appellate cases, with the facts neatly bundled in a few paragraphs and the legal issues already identified, are as far from those origins as one could be; they offer students little opportunity to develop the skills of the legal counselor. Moreover, appellate cases necessarily focus on matters of legal policy and doctrine, while lawyers are expected to apply their judgment and decisionmaking skills in many situations where legal issues are secondary or quite peripheral.

Thus, not to substitute for the appellate case method but to supplement it, we have spent the past year beginning to identify skills, values, and bodies of knowledge relevant to professional judgment. We have included some of them in a new course, entitled "Problem Solving, Decisionmaking, and Professional Judgment." What follows, however, is not the syllabus for that course, but the tentative outline for a curriculum in professional judgment and decisionmaking—a curriculum that must necessarily be distributed among a number of courses. Although portions of this curriculum exist at many law schools— typically in courses focusing on counseling or "preventive lawyering"— they do not play a central role in contemporary legal education. By contrast, many of the skills and bodies of knowledge described in sections III and IV are taken up in business, engineering, and even medical schools,[14] and we have borrowed heavily from some of these other disciplines.

The basic structure of the counseling and decisionmaking process, from the lawyer's point of view, involves understanding the client's objectives and working with him (and often with others) to gather information, strategize, and choose and implement courses of action to satisfy those objectives. We divide the relevant domains of skills and knowledge into three general categories: (1) The lawyer's relationships and communications with clients, professionals, and others; (2) the decisionmaking process; and (3) the world in which decisionmaking takes place.

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14. *See, e.g.,* Howard S. Barrows et al., *Developing Clinical Problem-Solving Skills* (1991); Harold C. Sox et al., *Medical Decision Making* (1988); Steven Schwartz & Timothy Griffin, *Medical Thinking: The Psychology of Medical Judgment and Decision Making* (1986).

II. WORKING AND COMMUNICATING WITH CLIENTS AND OTHERS

A. Counseling

The lawyer's role in a client's decisionmaking process almost always begins with a consultation. The lawyer's task, in broad outline, is to understand the client's problem and to work with or for him in solving it. The dominant contemporary approach is captured by the subtitle of a leading textbook in the field: "A Client-Centered Approach."[15] The authors define counseling as

> the process by which lawyers help clients decide what course of action to adopt in order to resolve a problem. The process begins with identifying a problem and clarifying a client's objectives. Thereafter, the process entails identifying and evaluating the probable positive and negative consequences of potential solutions in order to decide which alternative is most likely to achieve a client's aims.[16]

A client-centered approach is premised on the client's "autonomy, intelligence, dignity, and basic morality,"[17] and aims to enhance his self-determination. It recognizes that many legal problems are intertwined with and motivated by economic, social, psychological, political, and moral concerns. It assumes that clients often have expertise in these nonlegal aspects of the problem, and also assumes—perhaps somewhat heroically—that "because any solution to a problem involves a balancing of legal and nonlegal concerns, clients are usually better able than lawyers to choose satisfactory solutions."[18]

For students who have been immersed in appellate cases, an introduction to counseling serves to demonstrate the importance of the client's nonlegal concerns and their relationship to legal issues. Such a curriculum also provides an opportunity to examine ethical issues involving the boundaries of the lawyer-client relationship and, indeed, the ideology of the client-centered approach itself: What decisions may or should a lawyer make for the client without consultation? Under what

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15. David A. Binder et al., *Lawyers As Counselors: A Client-Centered Approach* (1991).

16. *Id.* at 259–60. The authors distinguish "counseling" from "advice-giving": informing clients "about what consequences (legal and/or nonlegal) are likely to flow from alternative courses of action or about which alternatives a client should adopt." *Id.* at 260.

17. *Id.* at 18.

18. *Id.* at 17.

circumstances should a lawyer offer the client her own advice with
respect to nonlegal issues, strategies, or decisions—or urge a client to
pursue or refrain from pursuing a particular course of action? How does
the client-centered approach play out in counseling relatively uneducated
clients?[19] Should the ideal of the lawyer-client relationship be one of
"cooperative deliberation"[20] rather than client-centeredness? Are
lawyers—by virtue of training, experience, or professional distance—
sometimes better decisionmakers than their clients, and what
implications does this have for the client-centered model?

B. Collaboration and Other Interpersonal Aspects of Decisionmaking

From the moment they enter practice, lawyers spend much of their
time working collaboratively with clients, other lawyers and legal
assistants, and professionals in other fields. The forms of collaborative
work include brainstorming and group decisionmaking; engaging in
complex multi-task projects; and writing, editing, and being edited. At
its best, collaboration is efficient as well as professionally and personally
rewarding; at its worst, it is pathologically destructive.[21]

Law school curricula typically offer students few opportunities to
work collaboratively, and none in which the process of collaboration is
itself examined. Most class assignments, exams, and papers are
individual endeavors. Though moot court is often done in teams, it is not
uncommon for two students to divide the issues and paste the brief
together at the end. The greatest opportunities for collaboration occur in
the editing and management of law journals. Students typically receive
little guidance in meeting the managerial demands of these
extracurricular activities, however, and some flounder quite painfully.

In addition to increasing students' opportunities for collaboration in
the mainstream curriculum—for example, through joint research projects
and papers—law schools could learn much from business schools by
making group decisionmaking and group dynamics part of the explicit
subject of study. In our course this year we used an exercise of a sort
common in business schools and executive training: Groups of students
were placed in the situation of the survivors of a plane crash in the

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19. *See* Ann Southworth, *Taking the Lawyer out of Progressive Lawyering*, 46 Stan. L. Rev. 213
(1993) (reviewing Gerald P. López, *Rebellious Lawyering: One Chicano's Vision of Progressive
Law Practice* (1992)).

20. *See* Kronman, *supra* note 8 and accompanying text.

21. *See, e.g.,* Irving L. Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascos*
(2d ed. 1983).

desert, and had to determine strategies for survival.[22] The class sessions that followed focused both on the structure of decisionmaking and the dynamics of the collaborative process. Written materials on how to benefit from group decisionmaking and avoid the hazards of "groupthink"[23] were supplemented by a poorly acted but nonetheless vivid videotape, which showed how dysfunctional group dynamics led Morton Thiokol (the manufacturer of space shuttle booster rockets) to support NASA's decision to launch the Challenger despite expressed reservations raised by Morton Thiokol engineers.[24]

C. Negotiation

Almost all collaboration involves informal negotiation. The activity that is formally characterized as "negotiation" is simply a special case of collaboration among parties whose interests converge and diverge in various ways. Because the curriculum in negotiation is fairly well defined,[25] we do not elaborate on it here, but make only two observations. First, while such a curriculum appropriately begins by focusing on direct negotiation between interested parties, it is also valuable to introduce students to the various roles that *lawyers* may play in negotiation.[26] Second, the great challenge for this field is to strengthen connections between the practical side of negotiation and theoretical work being done in game theory and psychology.[27]

D. Ethical and Broader Social Concerns

The lawyer's relationships with clients and others present ethical issues that are, if anything, more complex than those encountered in formal advocacy, where her role is relatively constrained by professional rules and conventions. Whatever the value of separate courses on legal ethics and the legal profession, ethical issues relating to the lawyer's

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22. Human Synergistics International, *Desert II Survival Situation* (1988).

23. *See generally,* Janis, *supra* note 21.

24. *Groupthink* (CRM Productions 1991).

25. The modern curriculum is strongly influenced by the interest-oriented approach exemplified by Roger Fisher et al., *Getting to Yes* (2d ed. 1991).

26. The students in our course acted as lawyers for business school students in a negotiation exercise designed by Professors Jeanne M. Brett and Stephen B. Goldberg, respectively of Northwestern University's Kellogg Graduate School of Management and Law School.

27. This is an important part of the agenda of the Stanford Center on Conflict and Negotiation and the Harvard Negotiation Project.

roles as counselor and decisionmaker are best studied in connection with the skills related to those roles.

The central dilemma, of course, is that the lawyer is professionally committed to acting on the client's behalf, but also has her own conception of what is right, just, or in the public interest. This conception can conflict with what the client (rightly or wrongly) perceives to be in his own best interest. The lawyer may face this conflict in counseling and advising the client, and in taking actions on the client's behalf, including negotiating and drafting agreements, influencing administrative and legislative actions, and engaging in litigation. These issues are usefully explored through case studies, illuminated by readings from history, sociology, and philosophy. Among the finest pieces of scholarship in the field are Robert Gordon's *The Independence of Lawyers*[28] and William Simon's *Ethical Discretion in Lawyering.*[29] Gordon considers the lawyer's role from an historical as well as normative perspective and develops a "purposive" model of lawyering as an alternative to the traditional advocacy model; Simon argues that lawyers should act so as to promote justice, taking into account all the relevant circumstances in a particular situation.

Real life provides endless material for case studies: What should Ford's general counsel have done when he discovered that the company was distributing a model of the Pinto that was highly susceptible to explosion in a rear end collision?[30] What should Salomon Brothers' chief legal officer have done with the knowledge that senior managers had acted criminally in submitting false bids in an auction of U.S. Treasury securities?[31] What should the associate in the Kodak-Berkey litigation have done when the partner for whom he was working misled the court about documents requested in discovery?[32] At what point did John Dean's conduct as Richard Nixon's White House Counsel become criminal, and what led him to that point?[33] The last two case studies present a problem especially salient for law students—the dynamics of the relationships between young lawyers and their seniors in potentially compromising situations.

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28. 68 B.U. L. Rev. 1 (1988).

29. 101 Harv. L. Rev. 1083 (1988).

30. Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* 291–315 (1994).

31. *See In re* John H. Gutfreund, SEC Exchange Act Release No 34-3'.554 (Dec. 3, 1992).

32. Rhode, *supra* note 30, at 92–101.

33. *See* John W. Dean, *Blind Ambition* (1976).

E.   Legal Writing in a Counseling and Decisionmaking Context

Most writing done in law school, including law review notes, is either in a nonprofessional genre—papers not different in kind from those the students wrote as undergraduates—or else focuses on appellate cases. While a good writer in one genre is likely to pick up others quite easily, there are some distinctively legal forms in which even accomplished writers can benefit from instruction.

The form distinctive to counseling and legal decisionmaking is the memorandum to a client or senior lawyer analyzing the client's problem and then setting out and evaluating alternative courses of action. By requiring students to integrate a set of facts (not already homogenized, as they typically are in appellate writing assignments) with legal and non-legal considerations, and to present options and recommendations in non-technical language, the memorandum teaches clarity of analysis and exposition.

Legal decisionmaking often culminates in the drafting of a contract or other document.   Drafting is an important legal form often not emphasized in legal education. It requires thinking about how to control the future through language, and thus demands the use of imagination in predicting different ways in which the future may unfold and calls for strategic choices about the precision or open-endedness of language.[34] Most fundamentally, drafting provides students with a sense of the inherent ambiguity and vagueness of language and, indeed, of what H.L.A. Hart called the "indeterminacy of aim" that characterizes the human condition.[35] Methods for teaching students how to draft and write memoranda, contracts, and other legal documents are well-developed, if not widely used.

III.   PROCESSES OF DECISIONMAKING AND PROBLEM SOLVING

Problem solving and decisionmaking will pervade our students' professional work in whatever careers they choose. Although these tasks are performed "in the shadow of the law,"[36] they encompass and are often dominated by nonlegal considerations.   Imagine the range of

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34. *See* Charles P. Curtis, *A Better Theory of Legal Interpretation,* 3 Vand. L. Rev. 407 (1950).

35. H.L.A. Hart, *The Concept of Law* 125–26 (1961).

36. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 Yale L.J. 950 (1979).

nonlegal issues faced by a corporate lawyer helping structure a joint venture among engineering companies building a dam in a foreign country; or by a legal services lawyer working with a low income community to develop and implement an economic development plan; or by counsel for an airline company working with management to determine what to do in the light of reports that inadequate fresh air in some aircraft presents a serious health threat to passengers and crew members.

The standard law school curriculum does little to prepare law students to be effective decisionmakers in these situations. For all of its great value, the study of appellate cases induces students to frame every problem as: "given these facts, what are the rights and liabilities of the parties?" This inevitably limits the range of solutions that law students are likely to consider.

The following puzzle provides a familiar but vivid demonstration of the limiting effects of the frames with which we approach problems.[37] Without lifting your pencil from the paper, draw four or fewer straight lines connecting all nine dots.[38]
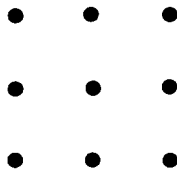
Many people are unable to solve the puzzle because they unconsciously draw boundaries around the situation presented and thus limit the range of permissible solutions. The boundaries that lawyers draw are constructed of rights and liabilities: The tendency to put one's head down and "lawyer" a problem is among the chief occupational hazards of our profession. A curriculum in professional judgment should therefore be concerned with helping students develop a broader approach to problem solving and should consider questions of these sorts: What are the criteria for optimal decisionmaking? How and why does actual decisionmaking fall short of this ideal? How can we improve our decisionmaking abilities?

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37. We are not sure who created the Nine-Dot Problem. It can be found in James L. Adams, *Conceptual Blockbusting: A Guide to Better Ideas* 24–25 (3d ed. 1986).

38. If you can't solve it, turn to the end of the article for one of a number of possible solutions.

Both the business and engineering literatures abound with models of decisionmaking processes. The following outline is drawn from several sources. We present it not as a recipe for decisionmaking, but as a useful scheme for organizing aspects of the curriculum:[39]

Step 1. Define the problem or decision;

Step 2. Identify the client's (and other relevant parties') underlying objectives, assign priorities or weights to those objectives, and specify the criteria in terms of which solutions will be evaluated;

Step 3. Generate alternative solutions or courses of action;

Step 4. Assess the alternatives: Evaluate possible courses of action according to how well they satisfy the underlying objectives; explore the positive and negative consequences of each plausible alternative; identify the key uncertainties surrounding each alternative and gather the information necessary to resolve them;

Step 5. Select the optimal course of action according to its expected effectiveness in meeting the underlying objectives and the relative importance of those objectives; and

Step 6. Implement the decision and monitor its implementation, being prepared to re-engage in the decisionmaking process as unforeseen problems are encountered.

Each of these steps presents a range of tasks for decisionmakers and suggests issues to be considered in a curriculum on professional judgment.

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39. We have relied particularly on Max H. Bazerman, *Judgment in Managerial Decision Making* (3rd ed. 1994) and Robin M. Hogarth, *Judgment and Choice* (2d ed. 1987). For the suggestion of a quite different model drawn from the tradition of pragmatism, *see* Catherine Wells, *Situated Decisionmaking,* in *Pragmatism in Law & Society* 275 (Michael Brint & William Weaver, eds. 1991).

A.   Framing Problems and Identifying Objectives

People often solve the wrong problem: They mistake symptoms for the problem itself, define the problem too narrowly, or define it in terms of a salient solution. The story is told of a farmer whose car gets a flat tire on a deserted road right next to a barn. Finding no jack in the trunk, he begins a long walk to the nearest town, failing to notice that the barn's hay lift pulley is positioned to lift up the car.[40] His error was in framing the problem too narrowly. He confused the problem ("How can I lift my car?") with one particular solution ("Find a jack!").

Clients and lawyers, no less than drivers on lonely roads, are prone to myopia in framing problems, with profound effects on the potential solutions that are considered and ultimately chosen. A client often comes to a lawyer without a clear sense of his underlying objectives or interests, but with his mind fixed on a particular solution. A good lawyer will assist a client in articulating his interests and ordering his objectives, and help the client see a problem through different frames.

Consider, for example, the founder and sole owner of a business who wishes to give it to his three children as equal partners; he asks a lawyer to create a partnership and transfer his interest to the children so as to minimize the gift tax consequences. In the course of the consultation, the lawyer learns that two of the children hold different positions in the family enterprise, reflecting their different interests and talents, and that the third has not been involved at all. The lawyer concludes that the partnership and tax issues are relatively minor compared to questions about how the children will participate in the governance of the business and share in its profits. She knows from experience with other family businesses that whatever stability in family relations may exist while the father is actively running the enterprise may well dissolve on his retirement or death.

By asking "why" until a client's deepest practical goals and objectives are recognized, a lawyer helps her client generate the variety of frames needed to assure that the right problem will be solved. Through case studies and background readings, a curriculum in professional judgment can help students develop such problem-framing competencies.[41]

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40. J.W. Getzels, *Problem Finding and the Inventiveness of Solutions*, 9 J. Creative Behav. 12, 15–16 (1975).

41. J.E. Russo & Paul J.H. Shoemaker, *Decision Traps: The Ten Barriers to Brilliant Decision-Making and How to Overcome Them* (1989) provides an excellent, informal introduction to problem framing. *See also* Adams, *supra* note 37; Bazerman, *supra* note 39; Hogarth, *supra* note 39; Scott Plous, *The Psychology of Judgment and Decisionmaking* (1993).

B. Generating Alternatives: Creativity in Legal Problem Solving and Decisionmaking

As the foregoing discussion suggests, the best problem frame is not necessarily the first one that comes to mind. The same is true of potential solutions. Problem solving benefits from a period of "divergent" thinking, during which a variety of potential solutions are generated before any are critically evaluated, let alone adopted. Imagination and creativity thus play central roles in effective decisionmaking. Yet "creative" is not the first adjective that comes to mind when people think of lawyers. We are viewed—perhaps by ourselves as well as by others—as conservative, risk-averse, precedent-bound, and wedded to a narrow, legalistic range of problem solving strategies. There may be substance to this view. The appellate case method and adversarial legal processes in general train lawyers to be more adept at criticizing ideas than at creating them. The tendency to criticize ideas prematurely inhibits generating a rich and varied array of potential solutions or alternative courses of action.

A curriculum in professional judgment should therefore teach aspiring lawyers to improve their divergent thinking skills. Although people's willingness to take imaginative risks varies greatly, and doubtless is influenced by their development well before law school, creativity can be cultivated. The modern classic on the subject is *Conceptual Blockbusting*, written by a James L. Adams, an engineering professor at Stanford.[42] Through myriad examples, the book identifies blocks to creativity and techniques for enhancing it. These are some of the blocks that seem relevant to lawyers:

Perceptual Blocks: Seeing the expected (stereotyping); an inability to see the problem from various viewpoints; a tendency to delimit the problem area too closely.

Emotional Blocks: Fear of taking a risk (i.e. of appearing foolish); judging rather than generating ideas; inability to tolerate ambiguity; inability to incubate ideas; obsessiveness about reaching a conclusion.

Cultural Blocks: Taboos; exalting reason, logic, numbers, and practicality over intuition, qualitative judgments, and pleasure; thinking that fantasy or imagination is a waste of time; humorlessness; exalting tradition over change.

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42. Adams, *supra* note 37; *See also* James L. Adams, *The Care and Feeding of Ideas: A Guide to Encouraging Creativity* (1986); Hogarth, *supra* note 39, at 153–76; Bazerman, *supra* note 39, at 91–111.

Environmental Blocks: Lack of cooperation and trust among colleagues; autocratic leadership; overextension and chronic overwork at the expense of other activities.

Many of Adams's examples are taken from everyday life, and none directly involves law practice. However, readings of this sort provide a useful background for case studies through which students can explore and develop their own creativity in legal contexts.

Many legal problems present no obvious or entirely satisfactory course of action. For example, in our course we asked students to assume the role of an employment lawyer whose corporate client finds itself trapped among three apparently conflicting legal obligations: a possible duty under the Americans with Disabilities Act (A.D.A.) to accommodate an employee who may be mentally disabled; a duty to protect a fellow employee from harassment under state and federal sex discrimination laws; and a duty to protect a supervisor from the employee's potential violence. In working through this exercise, students were asked to reflect on any habits of thought that seemed to block their creativity, and to engage in "brainstorming," an effective collaborative procedure for generating an array of potential solutions. Brainstorming is designed to encourage participants to put forward uncensored ideas and to produce a creative chain reaction in which participants build on each others' ideas. The principal ground rule is that no idea, however bizarre or outrageous, is to be criticized; judgment is postponed to a later stage.

In considering the employment problem, some students found themselves stuck in a frame that made it difficult to do more than speculate about the merits of the parties' legal claims. Others described the tendency to criticize ideas prematurely, or their fear of losing face should they offer a "bad" idea. Nonetheless, some groups came up with innovative solutions, including accommodating the putatively disabled employee by having him telecommute from home, pending an investigation whether his behavior would remove him from protection by the A.D.A. The student who came up with the telecommuting solution said that he arrived at it through visual thinking: He imagined the workspace requested by the employee's psychiatrist (sunlit, and away from other employees and noise) and then mentally "moved" it around from place to place until he realized that he could move it to the employee's home.

Jerome S. Bruner describes a creative act as one that produces "effective surprise."[43] If so, good lawyering is creative in many ways. Old things are combined in new ways, new things combined in old ways. Unexpected connections are made and mobilized to solve a problem. The challenge for a curriculum in professional judgment is to encourage law students to develop their creative thinking skills in law-related contexts. We were struck that many students thought of themselves as non-creative, and wonder whether this self image may be self-fulfilling.

C. Assessing Alternatives: Cognitive Process Errors in Explanatory and Predictive Judgment

In understanding a problem and assessing possible solutions, decisionmakers must attribute the causes of events and predict the effects of alternative courses of action. Explanation and prediction are subject to considerable uncertainty, and fall prey to certain systematic biases or errors. A curriculum in decisionmaking should help students identify these errors and develop strategies and tools to improve the processes of causal attribution, inference, and prediction.

The curriculum can draw on an extensive and quite accessible literature in decision theory, cognitive psychology, and applied statistics. Much of the literature is premised on the observations that decisionmakers inevitably have incomplete knowledge; that they have limited time and resources to devote to the decision process; and that they are prone to systematic errors of judgment. Paradoxically, many of these errors stem from the same cognitive tools that produce our striking success in making intuitive inferences: "judgmental heuristics," which reduce complicated inferential tasks to relatively simple, automatic operations; and "knowledge structures," such as categories, prototypes, and theories, which allow us to sort and interpret incoming information about the physical and social environment.[44] These strategies are essential to effective cognitive functioning, but they also lead the "intuitive scientist" into systematic, predictable, and often avoidable judgment errors.

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43. Jerome S. Bruner, *On Knowing: Essays for the Left Hand* 18 (1962).

44. Richard Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* 6–7 (1980).

1. The Psychology of Misjudgment

Herbert Simon observed that our ability to engage in rational decisionmaking is necessarily bounded by limitations on our ability to process information: Even when it would be theoretically possible, given enough time and resources, to amass all the relevant information, the benefits of completely informed decisionmaking are often outweighed by the costs and limited by our ability to take the information into account. As Robin Hogarth notes, "choice can be thought of as a process of conflict resolution where conflict reflects not only trading values on different dimensions of alternatives but also the mental costs of engaging in the decision process itself."[45] This means that we cannot make the optimal decisions assumed in most normative decisionmaking models; we cannot maximize utility. Rather, we must "satisfice," forgoing the "best" decision in favor of one that "will do."[46]

During the 1970s, Daniel Kahneman and Amos Tversky began to examine the psychology of judgment under conditions of uncertainty.[47] They observed that we rely on a variety of simplifying cognitive strategies, or "heuristics," in performing inferential tasks. These heuristics make it possible to cope with an otherwise overwhelmingly complex environment; but they also lead us into systematic inferential errors.

Imagine that you are a lawyer in a rural California town. You represent a plaintiff in a sexual harassment case set for trial in two weeks. It is a fairly good case, although there are some factual issues as to which a reasonable jury could go either way. You are preparing for a settlement conference when your client arrives at your office and hands you a newspaper article reporting a $1,000,000 verdict rendered in a sexual harassment case just yesterday by a Los Angeles jury. Ebullient, she exclaims that she's not going to settle her case for anything less.

As this client's lawyer, you may find that the timing of the article was less than propitious. It says little about the range of jury verdicts awarded in successful sexual harassment cases, let alone the value of this particular case. Nonetheless, it may profoundly influence your client's settlement expectations, and once set, you may find those expectations

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45. Hogarth, *supra* note 39, at 28.

46. Herbert A. Simon, *Models of Man* 204–05 (1957); James G. March & Herbert A. Simon, *Organizations* 140–41 (1958).

47. Much of the work representing this research program is collected in *Judgment Under Uncertainty: Heuristics and Biases* (Daniel Kahneman & Amos Tversky, eds., 1982).

quite difficult to moderate. The article may have triggered in your client certain systematic judgment errors involving the "availability heuristic," "anchoring and adjustment bias," and "the representativeness heuristic."

Under the availability heuristic, we judge events or objects as frequent, typical, probable, or causally determinative because they are ready to mind. In other words, to the extent that a fact or phenomenon is highly available to a decisionmaker, it is likely to be overvalued in explaining the past or predicting the future.[48] The vividness of an event, which may be influenced by factors such as media coverage, can affect the ease with which information is retrieved from memory. Because the factors that make events memorable are often not in fact positively correlated with frequency or causal efficacy, availability may bias the decisionmaking process.

Anchoring and adjustment bias[49] describes our tendency to develop estimates and expectations by starting from an initial "anchor"—a suggestion presented to us or a piece of information that is readily available. Once the anchor is set, we find it difficult to adjust adequately away from it. In the example used above, the $1,000,000 verdict will likely serve to anchor your client's subjective assessment of a fair settlement. In the context of a negotiation, a party who does not have a clear conception of his monetary objectives may end up anchoring them to the other party's opening offer. By the same token, a litigant who uses a decision tree to estimate the risk of a large verdict may be strongly anchored by the outcome even while knowing that the probabilities attached to each branch are highly speculative.

The representativeness heuristic[50] operates whenever we are called upon to generalize—to draw conclusions from small samples of data about characteristics of the larger data set from which that sample is drawn, or to estimate the likelihood that a particular person, object, or event belongs to a category or class. Errors arise when we fail to take account of the law of large numbers and assume too readily that small samples are representative of the larger population. Consider this problem:[51]

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48. Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability,* 5 Cognitive Psychol. 207 (1973).

49. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases,* 185 Science 1124, 1128–1130 (1974).

50. Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers,* 76 Psychol. Bull. 105 (1971).

51. Tversky & Kahneman, *supra* note 49, at 1125.

A small city has two hospitals. About 45 babies are born each day in the larger hospital, and about 15 babies are born in the smaller one. Approximately 50 percent of all babies are boys. For a period of one year, each hospital recorded the days in which more than 60 percent of the babies born were boys. Which of the hospitals do you think recorded more such days? (a) The larger hospital? (b) The smaller hospital? (c) About the same?

Most people answer (c), assuming that a 10 percentage point deviation from the mean will be equally unusual in a large or a small sample. In fact, deviations from the mean are much more likely to occur in the smaller of two samples. Basic statistical tools for measuring the significance of differences between the sample and overall population indicate how large the sample need be before we can reliably infer that the proportion of male to female births is changing, or that births of girls are going unreported (as some believe occurs in China).

Human beings have an impressive cognitive ability to perceive patterns in apparently random events and to develop implicit and explicit theories that explain the past and predict the future. However, we tend to overinterpret data—to see patterns where none actually exist—and to filter perception through the sieves of schemas, stereotypes, and theories, which let in confirming data but re-interpret or exclude data that do not conform to our prior expectations.[52] In making judgments involving categorization, we match the salient attributes of the person being assessed with the attributes assumed to characterize the category. This can combine with our tendency to ignore base rates to create systematic misjudgments. Consider the following question:

[We] have a friend who is a professor. He likes to write poetry, is rather shy, and is small in stature. Which of the following is his field: (a) Chinese studies; or (b) psychology?[53]

If you chose "psychology," it is probably because you took account of base rates, and recognized that there are substantially more psychologists than sinologists in the academic population. Many respondents choose "Chinese studies," however, because the description of the colleague in question so closely matches their cognitive prototype of a sinologist. They fall prey to the representativeness heuristic.

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52. The leading text on this subject is Richard Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (1980).

53. *Id.* at 25.

The preceding example also exemplifies the cognitive process of stereotyping. Because memory can not possibly retain all of the raw information that enters through the senses, the mind screens out information perceived to be of minimal utility and interprets the rest to be as consistent as possible with information already in memory. The result is a network of highly stable cognitive structures, termed prototypes or stereotypes. Once in place, these structures help us quickly identify and categorize phenomena, but they also operate as perceptual blocks that prevent us from noticing attributes of a person or thing that are inconsistent with the preconception. Understanding how stereotypes operate, how they can distort judgment, and how they can become self-fulfilling is important to many aspects of law practice, employment law being only the most obvious.

A theory is a different type of knowledge structure through which we interpret incoming information. Sir Francis Bacon observed:

> The human understanding when it has once adopted an opinion draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects, in order that by this great and pernicious predetermination the authority of its former conclusion may remain inviolate.[54]

Once a decisionmaker has developed even an implicit theory, he tends to discount disconfirming evidence and to over-rely on confirming evidence, so that the theory overwhelms relevant data. We tend to use theory-confirming strategies to evaluate tentative hypotheses. We recognize theory-confirming evidence more readily than theory-disconfirming evidence, and we favor theory-consistent interpretations of ambiguous information.

The initial framing of a problem may itself function as an implicit theory and affect the way events are interpreted and predictions formulated. The federal agents' framing of the Branch Davidian standoff as a "hostage" rather than a "cult" problem provides a recent example. It may well have influenced the types of experts consulted, how competing expert opinions were weighed, the inferences drawn from ambiguous events, and predictions about how the Branch Davidians would respond

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54. Francis Bacon, *The New Organon and Related Writings* (1620), *quoted in* Nisbett & Ross, *supra* note 52, at 167.

to various police actions.[55]   The film, *The Thin Blue Line,* provides another example of the biasing effects of prior expectations: Once the authorities had identified a suspect, they pieced together questionable bits of inculpatory evidence while ignoring strong exculpatory evidence.

Our efforts to attribute the causation of events to people or phenomena are prone to cognitive biases referred to as "attribution errors."   For instance, people tend to attribute their own actions to situational factors (such as adverse work conditions) and the actions of others to stable personal traits (such as lack of ability).[56] Lee Ross dubbed this tendency "the fundamental attribution error."[57] Research in this area also suggests:

1. The availability heuristic profoundly affects the causes we attribute to events. The more salient a person, thing, or event is in our memory, the more apt it is to appear causally efficacious.

2. Causal attribution is also influenced by the representativeness heuristic. We tend to favor causal explanations that resemble the phenomenon being explained.   So, for example, we prefer causal theories involving invidious intent or heroism, respectively, in explaining events with profound negative or positive implications.

3. We prefer simple causal theories over complex ones. Indeed, we tend to favor explanations involving only one causal factor, even when seeking the cause of complex events.

4. We prefer causal explanations that correspond to our preconceived notions. So, for example, in explaining the causes of others' success or failure, we favor dispositional theories to explain stereotype-consistent behavior and

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55. *See, e.g.,* A.A. Stone, M.D., *Report and Recommendations Concerning the Handling of Incidents Such as the Branch Davidian Standoff in Waco, Texas* (1993).

56. Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior,* in *Attribution: Perceiving the Causes of Behavior* (Edward E. Jones et al. eds., 1971).

57. Lee Ross, *The Intuitive Psychologist and His Shortcomings,* in 10 *Advances in Experimental Social Psychology* 174, 183 (Leonard Berkowitz ed., 1977).

situational theories to explain stereotype-inconsistent behavior.[58]

5. We are often unable accurately to identify the (subjective) reasons why we have made a particular choice or decision. Rather, we rely on plausible a priori theories as to the "reasonable" bases for the decision. In attributing causation to our own actions, we have a penchant for "telling more than we can know" about the processes leading to our decisions.[59]

2. What Every Lawyer Should Know About Statistics

Lawyers are frequently called upon to make or assist their clients in making strategic decisions under conditions of uncertainty. While understanding the psychological phenomena that bias statistical judgments should improve such decisionmaking, a basic knowledge of probability and statistics are even more helpful. Lawyers should have some understanding of the concepts of samples and populations, levels of significance and adequacy of sample size, margins of error, when and how data may be aggregated, standard deviations and other measures of variance, the normal distribution, conditional probability, chi square and other tests of correlation, and multiple regression analysis to determine the amount of variance accounted for by different predictive variables.[60] Perhaps the two most important things lawyers should know are that statistical tools exist to help assess the strength of perceived correlations and that statistics alone cannot bridge the gap between correlation and the attribution of causation. Whether or not lawyers can do the statistics themselves, they should know when to call for expert help—whether to inform their own conclusions or to evaluate those of others.

D. Making a Decision

Expected utility theory assumes that a decisionmaker has a utility function, which describes how he or she values alternative choices under conditions of uncertainty. An individual's utility function reflects his

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58. Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice,* 5 Personality and Social Psychol. Bull. 461 (1979).

59. Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Process,* 84 Psychol. Rev. 231 (1977).

60. *See, e.g.,* Michael O. Finkelstein & Bruce Levin, *Statistics for Lawyers* (1990).

attitudes toward risk—neutral, averse, or seeking. It assumes that individuals are capable of holding consistent beliefs and preferences, and that beliefs and preferences are independent of each other. Consistent preferences are transitive, which implies that in the decisionmaking process some alternatives will dominate others. A consistent preference order is also invariant, that is, not affected by the order or manner in which alternatives are presented. It is rational to choose the alternative with the greatest expected utility, where expected utility is the utility of a particular outcome discounted by the probability that it will occur.[61] The lawyer-counselor's ultimate role, in these terms, is to assist her client in making a decision that makes sense in terms of his—and not the lawyer's —utility function.

1. Prospect Theory and Other Dilemmas of Rationality

In an important series of studies[62] Kahneman and Tversky demonstrated that real people do not, and perhaps cannot, adhere to the tenets of expected utility theory. As a more accurate description of decisionmaking, they proposed "prospect theory," which, among other things, takes account of the fact that we value gains and losses quite differently even under circumstances where there is no rational distinction between them. In what has become a classic experiment, the two psychologists posed the following question to a group of respondents:[63]

> The nation is preparing for an outbreak of a disease that is expected to kill 600 people. Of two alternative programs that have been proposed, which would you choose?

> (a) If Program A is adopted, 200 lives will be saved; (b) If Program B is adopted, there is a 1/3 probability that 600 people will be saved and 2/3 probability that none will be saved.

A second group of respondents was given exactly the same choices, but worded in terms of deaths rather than lives saved:

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61. *See generally* Hogarth, *supra* note 39, at 86–98.

62. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 Econometrica 263 (1979). For an overall review of this and related work, *see generally*, Plous, *supra* note 37, at 64–76, 84–93.

63. Plous, *supra* note 41, at 72.

(c) If program C is adopted 400 people will die; (d) If Program D is adopted there is a 1/3 probability that nobody will die, and a 2/3 probability that 600 people will die.

The large majority (72%) of respondents in the first group refused to gamble and chose Program A. An even larger number (78%) in the second group took the gamble and choose Program D.

This and other experiments tend to show that we are risk averse with respect to perceived gains, but risk taking with respect to perceived losses, and that our displeasure in losing a certain amount is greater than the pleasure in gaining the same amount.[64] Indeed, actual decisionmaking contradicts virtually all of the tenets of expected utility theory and deviates in other respects as well from the model of rational decisionmaking.[65] It would be troubling if the decision about how to respond to an epidemic depended on how the issue was posed. But when different ways of framing a question yield different answers, how *does* one decide which frame is correct?

These dilemmas affect almost any decision made under conditions of uncertainty—decisions concerning business deals, litigation risks, and settlement values. A lawyer cannot resolve such dilemmas any more than can a client. But a lawyer who is aware of them always can induce her client to examine a problem in multiple frames—focusing on the downside as well as possible gains—with the goal of helping the client understand his own utility function as well as possible.

2. The Social Psychology of Decision Errors[66]

Many of the problems of rationality described immediately above and in the preceding section are downsides of judgmental heuristics— intuitive rules of thumb that make it possible to understand and deal with the world around us. Our decisions can also be influenced by the way we view ourselves and relate to others. The influences may well be part of what makes us social animals, able to live in harmony and cooperate with each other—at least with some others some of the time. They also have downsides, however: They can induce us to make decisions that we later regret. These phenomena lie in the academic domain of social psychology; some are instances of the concept of cognitive dissonance,

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64. Bazerman, *supra* note 39, at 57.

65. *See generally*, Plous, *supra* note 41, at 84–93; Bazerman, *supra* note 39, ch. 3.

66. *See generally*, Robert B. Cialdini, *Influence: Science and Practice* (3d ed. 1993); Philip G. Zimbardo & Michael R. Leippe, *The Psychology of Attitude Change and Social Influence* (1991).

which describes the need to bring our beliefs into alignment with each other and with our actions.[67] Many of the phenomena are part of the "industry knowledge" of enterprises ranging from selling cars, to enlisting people to join religious and civic causes, to negotiation and fundraising.

Reciprocation: Our social inclination to reciprocate makes us prone to accede to requests from people who do favors for us—even when the favors are uninvited and trivial and the requests are substantial. By the same token, we tend to reciprocate concessions, with the consequence that we are more likely to accede to a smaller request by someone who first makes an extreme request than if the smaller request is made in the first instance. These phenomena occur regardless of whether the request or concession is explicit or implicit. Savvy negotiators know how to manipulate the reciprocation tendency—and how to defend against it.[68]

Consistency and escalation of commitment: Once we have taken a position, we tend to act in a manner consistent with that position and to accede to requests that are in keeping with our implicit commitment to it. The phenomenon makes us vulnerable to influence by others, who seek a small initial commitment on our part—often a statement of our views or an inconsequential act—as the foundation for requesting and obtaining greater commitments. Even when there is no external influence, the phenomenon may distort our judgment in monitoring decisions we have made, such as hiring an employee after an exhaustive search or starting a new enterprise: We tend, among other things, to discount evidence that the decision is not working out, and to escalate our commitment in situations where it would be best to cut our losses.[69]

Liking/disliking distortion and reactive devaluation: We tend to favor views expressed by people we like and disfavor those of people we dislike or who are our formal adversaries. For example, in a negotiation we are prone to discount a proposal put forward by an opposing party even when we would have favorably received the same proposal if it had been put forward by an ally or neutral party.

Incentive-caused bias: We readily align our perceptions and beliefs to accord with behavior that is in our self interest. This is the psychological

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67. Zimbardo & Leippe, *supra* note 66, at 108–20.

68. One of the authors recently met with a disgruntled alumnus—in part to bring him back into the fold of annual donors—and offered to buy him a sandwich. The alumnus demurred, remarking that he was aware of the reciprocation tendency.

69. *See* Barry M. Staw & Jerry Ross, *Knowing When to Pull the Plug,* Harv. Bus. Rev., Mar.–Apr. 1987, at 68.

phenomenon inherent in most conflicts of interest. A car mechanic or surgeon may genuinely believe that a car needs a new carburetor, or a patient an operation, in circumstances where a neutral observer would be skeptical. One might consider, in this context, the practice of hourly billing common within the legal profession.

Obedience to authority: We tend to comply with the requests of people we perceive to be in authority by virtue of their expertise or position of power, even when compliance contradicts our strongly held moral beliefs. In the classic experiment, conducted by Stanley Milgram, participants in a supposed learning experiment were willing to administer (what they believed to be) severe and painful electric shocks to students who answered questions incorrectly; most participants who hesitated went on to administer the shocks when instructed to do so by the white-smocked scientist in authority.[70] Understanding this tendency and knowing how to deal with it may be particularly important for law school graduates who will be entering environments with many people in authority over them, and who themselves may be perceived as authorities by clients.

Overconfidence and overoptimism: Lynn Baker and Robert Emery conducted a study in which they asked marriage license applicants about their perceptions of the frequency and effects of divorce in general and their expectations for themselves.[71] When asked what percent of couples who get married today will be divorced at some point, the median response was 50%; when asked about the likelihood of their getting divorced, virtually none of the respondents thought that they themselves would become divorced. Women respondents estimated that 80% of children of divorced families are in the mother's primary custody, but 95% of them thought that *they* would have custody in the event of a divorce. For men, the responses were 20% and 40% respectively. When asked about child support, the median response was that only 40% of parents who are awarded support receive all of the payments, but 98% of the respondents expected that their spouse would fully comply with the court order.

The respondents were somewhat optimistic, but not very far off the mark, about divorce and support statistics in general, but were wildly optimistic about their own relationships. Baker and Emery believe that

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70. Stanley Milgram, *Behavioral Study of Obedience,* 67 J. Abnormal and Soc. Psychol. 371 (1963).

71. Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage,* 17 Law & Hum. Behav. 439 (1993).

the respondents "apparently considered themselves to be unrepresentative of the population of people who marry."[72] Whatever its explanation, overconfidence about the prospects in particular situations seems to be widespread.[73] Not just with respect to antenuptial agreements, but in counseling clients who are about to start almost any venture, lawyers may play an important role in providing a "reality check."[74]

Whether to learn how to perceive and defend against these social psychological phenomena, or to make offensive use of them, lawyers should be aware of the dynamics of "influence" that may affect their own behavior and that of their clients. A curriculum concerned with professional judgment should also attend to the ethics of influence.

3. Decisionmaking Aids

The quest for aids for deciding among possible courses of action is not a new one. In 1772, Benjamin Franklin thus described his "moral or prudential algebra":

> When . . . difficult cases occur . . . they are difficult chiefly because while we have them under consideration, all the reasons pro and con are not present to the mind at the same time; but sometimes one set present themselves, and at other times another, the first being out of sight. Hence the various purposes or inclinations that alternatively prevail, and the uncertainty that perplexes us. To get over this, my way is to divide half a sheet of paper by a line into two columns; writing over the one Pro and over the other Con. Then, during three or four days consideration, I put down under the different heads short hints of the different motives, that at different times, occur to me, for or against the measure. When I have thus got them all together in one view, I endeavor to estimate their respective weights; and where I find two, one on each side, that seem equal, I strike them both out. . . . [A]nd thus proceeding I find at length where the balance lies; and, if after a day or two of further consideration, nothing new that is of importance occurs on either side, I come to a determination accordingly.[75]

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72. *Id.* at 447.

73. *See, e.g.,* Bazerman, *supra* note 39, at 37–38.

74. Wise counsel might, however, result in many fewer restaurants being opened.

75. Letter to Joseph Priestly in 1772, in 4 *The Complete Works of Benjamin Franklin* 522 (J. Bigelow ed., 1887), *quoted in* Hogarth, *supra* note 39, at 189–90.

The intervening centuries have produced some modest improvements on Franklin's approach. These include decision trees, which graphically display alternatives and allow the decisionmaker to assign them weights or probabilities, and more formal techniques for making decisions under conditions of uncertainty.[76] While a curriculum in decisionmaking need not be mathematically sophisticated, it should make students aware of the existence of decisionmaking aids.

E. Implementing and Monitoring the Decision

Reaching and implementing a decision does not end the decisionmaking process. It may turn out that the decision does not adequately address the problems or objectives to which it was designed to respond, or that it creates unforeseen problems of its own. Thus, implementation must be monitored, and the decisionmakers must be alert to information that suggests the need for corrections or even abandoning the chosen course of action. Nowhere are the dangers of the escalation of commitment[77] greater than in this final stage of the decisionmaking process.

IV. THE ECONOMICS, PSYCHOLOGY, AND SOCIOLOGY OF RELATIONSHIPS AND ORGANIZATIONS

Virtually all legal decisions involve relationships among individuals or organizations—spouses, neighbors, purchasers, renters, investors, employees, business enterprises. Many decisions also involve the internal functioning of organizations—for example, designing compensation schemes or sexual harassment programs, or discharging incompetent employees. Such decisions often call for context- or industry-specific knowledge, which is typically possessed by the client. However, there are approaches to thinking about relationships and organizations that apply across many contexts and that ought to be part of the repertoire of the lawyer as generalist decisionmaker and problem solver. In this section, we mention three areas that seem particularly important: economics, social psychology, and organization theory.

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76. See, e.g., Charles A. Holloway, Decision Making Under Uncertainty: Models and Choices (1979).

77. See supra, note 69 and accompanying text.

A.   Economics

A good lawyer should be able to "think like an economist" without falling prey to the economic reductionism that has seduced many legal academics (but, fortunately, few practicing lawyers). What this involves, most fundamentally, is understanding: (a) the ways in which individual self-interest plays out in relational settings; and (b) the nature of markets.

Economic thinking is premised on the notion of a rational actor who seeks to maximize his interests as he subjectively perceives them. The actor's self interest plays a significant role in most relational issues, and lawyers should have a sense of the incentives and disincentives that motivate the parties to relationships. The basic economic relationship is the transaction: From an economic point of view, "organizations are designed to minimize the costs of transacting; they coordinate the actions of the various individual actors so that they form a coherent plan and motivate the actors to act in accordance with the plan."[78] Lawyers should have some understanding of transaction-costs economics. They should also be familiar with the phenomena related to self-interested behavior (e.g., principal-agent and free-rider problems, adverse selection, and moral hazard), and with mechanisms for addressing them (e.g., screening, monitoring, reputation, and various incentive schemes).

Legal decisionmaking takes place against the background of markets and their regulation, and often involves using market mechanisms to affect the behavior of private parties. Lawyers should therefore have some appreciation of how markets operate, of elasticity of demand, externalities, public goods, how costs imposed on one party may be shifted to others, and the economics of regulatory alternatives (negligence, strict liability, and direct regulation).

Many law students will have encountered these economic concepts in undergraduate courses. Students are less likely to have been exposed to their operations in the sorts of institutional settings in which lawyers work. This can be done effectively by combining theoretical readings with case studies. For example, the recent savings and loan crisis provides a vivid example of moral hazard: the owners of S&Ls benefitted from risky investments when they did well, while the costs of failure were borne by FSLIC.[79]

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78. Paul Milgrom & John Roberts, *Economics, Organization & Management* 49 (1992).

79. *Id.* at 170–77.

B.   Social Psychology

The model of the self-interested rational actor is an abstraction. Most of us have myriad opportunities to engage in opportunistic behavior, which we resist or do not even notice for reasons of personal morality, institutional loyalty, law-abidingness, altruism, or socialization. Our behavior in relationships and organizations is also shaped by psychological dynamics. We outlined some of these in section III (D)(2), and refer to them here as a reminder that they affect not only the process of decisionmaking but also the institutions and systems that are created and modified by decisions. Incentive-caused bias is nicely illustrated by Sears' scheme for compensating their automobile mechanics, which led to systematic over-repair,[80] and by the controversy over physicians' ordering diagnostic tests when they have a financial interest in the equipment and clinics performing the tests.[81]

C.   Organizational Behavior

Lawyers are often asked to assist in creating new organizations or to help solve problems arising in existing ones. Effectively performing these roles requires some understanding of organizational dynamics.

[O]rganizations have characteristics of their own distinct from the characteristics of the people that make them up. For example, organizations have distinct structures; they have rules, organizational norms, and cultures that have developed over time; they have life cycles of their own that go beyond the lives of individuals; and they have goals, policies, procedures, and practices.[82]

Organization theory is concerned with the structure and functioning of organizations, the behavior of the individuals who perform roles in them, and the mobilization of resources and the coordination of efforts that contribute to their survival.[83] It is concerned with the flows of authority and control within organizations, and views decisionmakers not as

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80. Lawrence M. Fisher, *Sears Auto Centers Halt Commissions After Flap*, N.Y. Times, June 23, 1992, at D1.

81. *See* Robert Pear, *Inquiry Challenges Doctors on Ordering Diagnostic Tests*, N.Y. Times, Apr. 13, 1994, at A11.

82. John H. Jackson et al., *Organization Theory: A Macro Perspective for Management* 17 (1986).

83. *Organization Theory* 9 (D.S. Pugh ed., 1984).

autonomous individuals, but as actors embedded in an organizational structure. James March and Herbert Simon, the founders of modern organization theory, observe:

> Organization members are social persons, whose knowledge, beliefs, preferences, and loyalties are all products of the social environments in which they grew up, and the environments in which they now live and work. Because of these complex loyalties to a variety of groups and subgroups—including the self and family, organizations and their subunits—intrapersonal and interpersonal conflicts are omnipresent features of organizational life.[84]

The Salomon Brothers case referred to above[85] provides a vivid example of the problems that a particular organizational structure may present to in-house counsel. Robert Jackall's *Moral Mazes* contains rich case studies and a sophisticated analysis of the actual decisionmaking of corporate managers facing difficult decisions.[86]

V. THE PEDAGOGY OF JUDGMENT, PROBLEM SOLVING, AND DECISIONMAKING

The reading materials for the decisionmaking curriculum we have described are eclectic, drawn from a variety of disciplines. The primary methods of teaching are case studies of the sort used in business schools, role-playing exercises or simulations, and vivid short examples (often of decisionmaking errors). Business school-type case studies offer students the detailed knowledge about a problem that a lawyer might have gained after interviewing a client and engaging in further factual investigation. Simulations place students in the roles of lawyers counseling clients or advocating or negotiating on their behalves: Students are required to make decisions, which can then be critiqued individually or in groups. There is no more vivid way to learn than from one's mistakes, and simulations permit mistakes in forgiving circumstances.

Ideally, students should confront problems in many different substantive legal contexts and from the viewpoints of lawyers in various roles, ranging from the individual lawyer counseling individual clients

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84. James G March & Herbert A. Simon, *Organizations* 13 (2d ed. 1993).

85. *See supra* note 31 and accompanying text.

86. Robert Jackall, *Moral Mazes: The World of Corporate Managers* (1988).

with relatively simple problems, to lawyers working in teams with public and corporate clients on complex transactions and crisis management.

As we mentioned above, the curriculum outlined in this article is too extensive for any one course. The aspects least likely to be covered in existing law school courses are collaboration and group dynamics, problem-solving and decisionmaking, statistics, and the economics, psychology, and sociology of relationships and organizations. Collaborative skills could usefully become a part of almost every part of the standard law school curriculum, and might also be the subject of specialized advanced courses, as they are in business schools. Problem-solving and decisionmaking form a reasonably coherent whole that can be taught in a single course. While that same course can introduce students to statistical concepts, a real foundation in statistics demands a course of its own. The same is true of the economics of relationships and organizations.[87]

VI. CONCLUSION: LEARNING FROM EXPERIENCE

When all is said and done, a large component of professional judgment involves attitudes, character traits, and life experiences that resist reduction to any body of knowledge or set of techniques. Perhaps even more than most skills, problem solving and judgment are developed largely through trial and error in practice. Such is the case with any art, craft, or profession. It is also true that some people are more talented than others. Legal education can neither compensate for character defects nor substitute for experience, but it can help develop the habits of thought and analysis conducive to problem solving and good judgment.

Perhaps the single most important skill that we can help students acquire is learning from experience—that is, the skill of making every transaction an occasion to reflect on their own processes of judgment, analyzing what went right and wrong and how they might have improved the one and avoided the other. Henry Petroski observed that to understand engineering one must "understand how failures can happen and how they can contribute more than successes to advance technology."[88] In a sense, the curriculum we have outlined is premised on the assumption that lawyers are called upon to be legal engineers, and

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87. In light of the current move within the American Bar Association to require law schools to teach certain lawyering skills through clinical methods, *see supra* note 6, we hasten to express our belief that law schools should be allowed to determine what parts, if any, of the proposed curriculum to teach and should be free to experiment with different ways of teaching them.

88. Henry Petroski, *To Engineer is Human: The Role of Failure in Successful Design* xii (1985).

that this requires a degree of social, economic, transactional, and organizational engineering as well.

The curriculum itself is an experiment in educational engineering. In our first attempt to implement a portion of it, we have made our share of errors, but have also learned enough and had enough successes to believe the project is worth continuing. We hope this article encourages others to experiment along similar lines.

APPENDIX