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THE LAWYERING PROCESS: MY THANKS FOR THE BOOK AND THE MOVIE

LEAH WORTHAM*

The author's memories of "the movie version" of The Lawyering Process, two courses she took in Gary Bellow's first two years at Harvard Law School (1971-73), are compared to the text and problem supplements published in 1978. The author traces the influence of those courses and books on her externship course and textbook, written with others. She cites the value of Bellow & Moulton's pioneering employment of visual and kinesthetic learning modes and explicit statement to students about educational goals and methods. She identifies paradigms for lawyering tasks that have remained useful to her throughout her career. With twenty-one years as a Professional Responsibility teacher, she marvels at the breadth and depth of the books' treatment of ethical issues and recalls the critical stance toward conventional statements of lawyer's role that suffused the course and book. She finds that the decision-making model, which she now recognizes as a creative problem-solving process, and the emphasis on social justice that she found central to the course are obscured by the complexity and scope of the books. She concludes with "dayenu," a hymn of praise for the course's gifts to her and for the books' contribution to all of us, each of which "would have been enough" and with a final word on the inspiration of Gary Bellow's passion for justice and joy.

INTRODUCTION

I had met only one lawyer prior to my junior year in college, and I came to law school with no strong image of what law school was supposed to be like. I think I assumed it taught one what one needed to be a lawyer—that was why I was going. I recall some "buzz" in my first year of law school about a new teacher coming from the University of Southern California and the new course he would teach, but I did not have enough perspective about American legal education to see what was coming as an attempted vanguard of reform. For me, it was just an opportunity to learn more about what I had come to law school to learn. My second year at Harvard Law School, 1971-72, was

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the same one in which Gary Bellow joined the faculty. Having gone to law school with the intent to become a poverty lawyer, I signed up for his Civil Lawyering Process course. Bea Moulton was a teaching fellow, although she was not my supervising lawyer. Multilith materials purchased at the law school copy center were the antecedents of *The Lawyering Process* (“TLP”) books.¹ Given the profound impact Bellow and the civil course had on me, I took Gary’s Criminal Lawyering Process course in my third year.

Another article in this symposium is entitled *Letters and Postcards We Wished We Had Sent to Gary Bellow and Bea Moulton.*² When the co-authors of the *Learning from Practice* externship textbook³ received an invitation to write, I saw the chance to send the “letter I wished I had written” about how profoundly the Lawyering Process (“TLP”) courses that I took from Gary affected my life. I considered putting down in a Foreword to the externship textbook that I co-authored the origin in Gary’s TLP courses of many of my ideas for my externship seminar, which eventually evolved into the textbook. *Learning from Practice*, however, was a collaborative effort while TLP course link was my personal story. In the final publication flurry, I did not take the time to sort out how I might express the debt and the linkages. When Gary died, I saw a solicitation for former student reflections and wanted to send something but did not find the time. This symposium offered a chance to try to make up for those missed chances to examine the nature of my debt to TLP courses that I took, TLP books, and Gary Bellow.

When students indicate that something from my course affected

¹ GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978) (hard cover) [hereinafter TLP]; GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS, PROBLEM SUPPLEMENT, CRIMINAL* (1978) (soft cover) [hereinafter CRIM. SUPP.]; GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS, PROBLEM SUPPLEMENT, CIVIL* (1978) (soft cover) [hereinafter CIV. SUPP.]. The article text refers to the three books together as TLP books or TLP trilogy. The hard cover alone is referred to in the article body as the “primary text.” Subsequent to the 1978 publication, Foundation Press issued three versions of excerpted material: *THE LAWYERING PROCESS: ETHICS AND PROFESSIONAL RESPONSIBILITY* (1981); *THE LAWYERING PROCESS: NEGOTIATION* (1981); *THE LAWYERING PROCESS: PREPARING AND PRESENTING THE CASE* (1981). In writing this article, I realized that Foundation did not send me a review copy of the *PREPARING THE CASE* volume. While I have copies of the excerpted *ETHICS AND PROFESSIONAL RESPONSIBILITY* and *NEGOTIATION* soft cover books, I do not recall ever looking carefully at them beyond noting that they contained the same material as the works published in 1978. This article’s references to TLP books are to the three volumes published in 1978 (the primary text and two supplements) and not to the 1981 repackaging.

² Marilyn J. Berger, Ronald H. Clark & John B. Mitchell, *Letters and Postcards We Wished We Had Sent to Gary Bellow and Bea Moulton*, 10 CLIN. L. REV. 157 (2003).

³ J. P. OGILVY, LEAH WORTHAM & LISA G. LERMAN, *LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS* (1998) [hereinafter LFP].

something they actually did or even that they remember something I said, I am always a little startled—but happy—since I assume that is an ultimate goal for at least many of us who chose to teach. Surely Gary, who had profound effects on so many, had an idea of his impact on others. In Jeanne Charn's AALS clinical luncheon remarks in May 2003, she commented that Gary did not see humility as a virtue.⁴ But I still wish I had written this before he died.

How I define being a lawyer, how I have approached teaching clinical and classroom courses, and more broadly how I approach the world in things I do every day were shaped by his courses. TLP books, of course, are the product of Gary's collaboration with Bea Moulton, with whom I later had the privilege of working at the Legal Services Corporation. While I missed my chance to tell Gary about his profound influence, Bea at least will be able to read these musings about TLP course and books, which would have been in the letter-foreword-eulogy I did not write.

Bea taught at least once in my Civil TLP course, but I only got to know her at Legal Services Corporation. I do not know what parts of the intellectual conception of the course and the written and video materials that supported it came from each of them, how their ideas were joined, and about contributions of others that might be acknowledged as well. My frequent use of Gary's name in this article is not meant to disregard Bea's joint authorship or contribution from others to the intellectual framework of TLP books. Rather it reflects that I "saw the movie first,"⁵ and Gary had the starring role.

I wrote a first draft of this article without looking at TLP book because I wanted to test what lived in my memory. Those recollections are found in Part I: The Movie in Recall. In searching my memory regarding TLP experience, I heard Gary's voice, saw him in the front of the class, recalled the hotel hall where I had a conversation with him at an AALS conference after I had started teaching, and

⁴ Jeanne Charn, Remarks at a Luncheon Announcement of the Bellow Scholar program at the American Association of Law Schools Clinical Conference in Pittsburgh, Pennsylvania (May 20, 2002).

⁵ I am not aware of audio or video tapes of Gary teaching TLP course. Bea Moulton reports she has almost verbatim notes of both semesters of the 1971-72 civil TLP class so "the script" at least exists. Bea Moulton, *Looking Back at the Lawyering Process*, 10 CLIN. L. REV. 33, 37 (2003). It might be more appropriate to describe the contrast I make in this article as between the stage production and the book since the course was a live performance. I use the movie metaphor because it seems more graphic and because I have replayed certain scenes in my mind often enough that they seem encoded on film. Given Gary's fondness for the analogy of trial performance to the craft of theater, I expect he would have appreciated a characterization of the course and personal exchanges with him as performance. That in no way suggests those exchanges did not reflect his sincere beliefs—indeed much of their effectiveness for me came from the sense that they were "from the heart."

heard him laugh. I have come to appreciate what a visual and experiential learner I am. I often recalled material for a test by remembering where the answer was on the page in the textbook (although this did not always mean I remembered what the reference said). I process history or political events better when I have visited the place where they took place, talked with someone who experienced them, or at least have seen a movie about them to supplement what I have read. As examined in Part I, part of why TLP course worked so well for me was the visual and experiential method that was largely absent from my other courses.

I no longer have a copy of the multilith materials that were used in the civil and criminal TLP courses, which I took five and six years before the books' publication. I did not see the published version of the primary text and the two Problem Supplements until I acquired review copies as a new teacher at Catholic University Law School in the early 1980s. Until writing this article, the first and primary time that I looked carefully at those texts in their entirety was in developing a classroom component for the externship course at Catholic, which became the *Becoming a Lawyer (BAL)* course.⁶ Perhaps a bit like TLP course and books, the BAL course evolved as I taught it, changed further as others joined me at CUA in teaching sections of the course, and eventually spawned into *Learning from Practice: A Text for Legal Externs* ("LFP").⁷ After writing a draft of Part I of this article based on memory, I went back to TLP books, looked at years of materials from my externship course, and reviewed LFP to retrace the debt owed to Bellow and Moulton.

For me *The Lawyering Process* is not just a hard cover book with two soft cover supplements, but a living thing—a profound personal experience, a way of looking at the world that became part of me. I did the readings for the course and even remember reviewing them before the exam. I vaguely recall mostly enjoying them, but I had no recollection of any particular content or passage that I read as a student when I wrote the first draft of Part I. While I looked carefully at TLP books in 1982 to plan my course, and even more carefully at them to prepare this article, my primary version of *The Lawyering Process* is "a visual" and a "live-client" (with student as client) experience—its embodiment in the course and in at least what I saw of Gary's life more generally. The books are a profound intellectual contribution in conceptualizing how to think about lawyering and teach and

⁶ The course title was inspired by ELIZABETH DVORKIN, JACK HIMMELSTEIN, & HOWARD LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981).

⁷ LFP, *supra* note 3.

inspire others regarding it, but I am sorry for those who did not also get to see the movie version.

After law school but before I had seen the book, a classmate from Gary's course with several years in teaching said to me something like, "It hasn't been that successful. Other people have trouble teaching from it." Much younger then, I was surprised since TLP's message and method seemed to me so powerful and "true" that they should almost carry themselves. On looking at the book for potential use in my externship course, however, I had trouble finding materials that I thought would be effective to convey to students what I had found so inspiring in the course. Review for this article caused me to consider how the dazzling scope of the book limited its usefulness, despite its brilliance in so many regards.

Students and clinical teachers often perceive that students learn a great deal from the casework in an in-house clinic and fieldwork in an externship but that they are impatient with classroom sessions meant to enhance the learning from that experience. While I can remember cases I handled in my clinical work at Harvard and application of some things I had to think through to do them, it is the classroom framework of Gary's course—and the way that individual interactions with him reinforced the lessons of the course—that is the "cosmic" experience I recall and feel I internalized. As difficult as it can be to find a classroom component that kindles students' imaginations, writing this article has made me realize that it was my love for Gary's course, and what I feel I learned from it, that has probably kept me stubbornly at the task of working on a useful classroom component for my externship course.

One conclusion in this article is that the intellectual approach and pedagogical method of Gary's course was so powerful for me because of the way it matched so well my learning style and the emotional needs I had at that point as a student. I once commented to a fellow student in Gary's class, who also is now a clinical teacher, about how profound the experience the classroom part of the course was for me, and her reply was, "I don't remember the classroom part very well." My recollections of the course and assessment of the impact doubtless would not be identical to that of any other past student.⁸ Some proba-

⁸ Bea Moulton says students in the first Lawyering Process course were required to take a two-hour seminar on Massachusetts law and procedure taught by their clinical supervisor in addition to sixteen hours in the placement and Gary's three hour course. Moulton, *supra* note 5, at 37. I have no recollection of such a two-hour seminar taught by my teaching fellow, so either it had been dropped by the second semester when I took the course or that is a memory lost to the intervening thirty-one years. If such a seminar was conducted, it did not have the impact on me of the classroom component described in this article.

bly found their casework and supervision conferences most memorable, and there may be some for whom no part of the class had any lasting impact. One humbling thought about teaching is how difficult it is to be a person for all seasons—to teach in ways that reach all students—since the effect on others has much to do with their “frames of mind”⁹ and even with the particular circumstances of that specific time in their life. But this effort stands as my documentation and tribute to what TLP course and books have meant for me.

My memory of how TLP course affected me is set down in Part I. Part II considers TLP books upon a review for this article. Part II discusses how the decision-making model and commitment to social justice that I recall as central and consistent organizing principles of the course are obscured in the books. Part III considers ways that TLP course and books influenced the externship course I have taught at CUA and the textbook that developed from it. In writing about the coverage of professional responsibility issues in the books, I exclaimed to myself, in awe of the undertaking, “Dayenu!” meaning “it would have been enough”—the refrain chanted or sung at the Passover Seder as the blessings God gave the Israelites are listed. Part IV extends that exclamation to a list of TLP contributions to me and to legal education and scholarship generally, each of which “would have been enough.”¹⁰

Part V, a “Closing Word,” considers what may be Gary’s most amazing achievement to the fifty-four-year-old at this writing as distinct from the twenty-four-year-old law student who took his courses and the thirty-four-year-old new teacher who looked at Bellow & Moulton to think about how to design an externship course. By this I mean the passion, determination, and seeming joy that Gary brought to the ideas of being a lawyer and seeking to do better by people otherwise marginalized in the society. The impact of that joy and tenacity for me profoundly answers in the negative whether clinical educa-

⁹ This term refers to the multiple intelligence theories of HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (2nd paper, 10th anniversary ed., 1983).

¹⁰ Fortunate to have a rabbi fluent in Hebrew on my faculty at Catholic University, I consulted Professor Benjamin Mintz to ask whether he saw anything inappropriate in my use of the concept of dayenu in the article and whether I was using it correctly. Passing my usage on those grounds, he told me that the term has come into colloquial usage by some as, “Enough already!”, a pejorative, rather than the hymn of praise from the Seder, the way I have always thought of its usage. My informal survey on the understanding of dayenu revealed some, like me, who knew only the positive connotation, and that was my initial reason for the term’s use. Given, however, my observation in this article that the ambitiousness of the book may have obscured the decision-making model and commitment to social justice that I found central to the course and limited TLP books usefulness as texts, perhaps a bit of the “Enough already!” connotation of dayenu is appropriate as well.

tion's top priority should be a value-muted teaching of professional skills.

I. THE MOVIE IN RECALL

The first section of this part considers how my learning style matched so well with the course's approach. The second examines the specifics of what I remember learning about being a lawyer and how the paradigms that Gary used to teach particular skills have remained part of what I do as a lawyer and how I approach other life tasks. The third outlines my memory of the perspective and philosophy suffusing the course. The fourth recalls Gary's constant stress on probing beyond, below, behind, and around individual cases to see what problems in society they represented and what strategies might address those problems in ways that would benefit similarly situated people.

A. Educational Method

My Myers-Briggs testing shows me to be a "clear intuitive" on the Sensing to Intuitive scale.¹¹ In learning style terms, that suggests someone who is highly conceptual and learns best with a framework on which to fit data such as facts or experiences.¹² Bellow broke the lawyering process into discrete skills each accompanied with particular theoretical constructs, often borrowed from other disciplines and combined this with a decision-making model applied throughout the skill sections. This approach was coherent for me and sparked a recognition of patterns in material to be learned in a way that case briefing, class recitation and Socratic dialogue had not. With a "big picture" and a heuristic, I felt more confident to analyze what to do and how to act.

I also now recognize my strong preference for visual learning. It

¹¹ For an explanation of Myers-Briggs dimensions, see ISABEL BRIGGS MYERS WITH PETER B. MYERS, *GIFTS DIFFERING: UNDERSTANDING PERSONALITY TYPES* (2nd ed. 1995); OTTO KROEGER & JANET M. THUESEN, *TYPE TALK* (1988).

¹² See KROEGER & THUESEN, *supra* note 11, at 28 (referring to the N preference as preferring to look "at the *grand scheme*, the *holistic* aspect of things, and [to] try to put things into some *theoretical* framework."). After reviewing a draft of this article, Martha Peters suggested that my description of "a framework on which to fit data" revealed my intuitive preference, and she challenged me to describe the learning approach to which I referred more specifically in ways helpful to those with the sensing preference. E-mail from Martha M. Peters, Director, Academic Achievement Program, University of Iowa College of Law to Leah Wortham, Associate Professor of Law, Columbus School of Law, The Catholic University of America (August 21, 2003, 6:06 p.m. EST) (on file with the author). Here goes: I needed an overall skeleton or picture of the course of the type provided by table of contents or outline headings, an overview from a commercial study aid, or a visual map of concepts to which I could attach doctrinal rules and case holdings.

is useful for me to see key words or a visual cue while I am listening to a speaker, and when reading, to have a textual format that highlights structure or adds graphic representations. I use rainbows of highlighters, pens, and post-its to color code material. Kinesthetic experiences also are valuable learning tools for me.¹³ I have never figured out how to do something on a computer from reading a manual. A picture helps. Oral directions on what to do go in and out of the proverbial ear without sticking unless I carefully write down each step (and then somehow the computer screen never looks like the written steps). Much better than a manual or abstract instructions is someone sitting with me and guiding my own viewing of the icons and drop-down menus and my stroking of the keys. Simultaneous with the computer task or soon after, I need to write down the steps in my own words annotated by visual cues, such as arrows, colors for symbols, or diagrams.

Some of the material for TLP classes were “pictures”—transcripts of interviews of trial segments, memos from interviews, pleadings. TLP classes focused on activities—a letter to a client, a voir dire, a negotiation, a cross-examination—with concrete content to use for practice. In class, we watched Gary, and other students, try out the lawyering tasks. We reflected on what worked and what did not. We practiced being critical of ourselves and others, feeling that was a constructive way to get better, not a personal attack.¹⁴ The readings provided a framework—a theory—upon which to proceed and a perspective for our critical reflections. The case files, transcripts, and so on that we used in class provided useful experience from which to work as did our own casework to which we could apply the theory studied.¹⁵

¹³ For an overview of visual, auditory, and kinesthetic learning modalities, see BOBBI DEPORTER & MIKE HERNACKI, *QUANTUM LEARNING: UNLEASHING THE GENIUS IN YOU* 112-22 (1992).

¹⁴ While there is not room here for in-depth exploration of how Gary accomplished this feat, Martha Peters has observed how difficult it is to help law students focus on getting better, rather than protecting their egos, and how rarely law school classes seem to achieve this end. E-mail from Martha M. Peters, *supra* note 12. See Bellow's comments on the tensions between self-conscious criticism of his own conduct and its context while dealing with the demands of performance. Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in *WORKING PAPERS PREPARED FOR CLEPR NATIONAL CONFERENCE, BUCK HILL FALLS, PENNSYLVANIA, JUNE 6-9, 1973, CLINICAL EDUCATION FOR THE LAW STUDENT* 374, 390-94 (1973) (hereinafter *CLEPR WORKING PAPERS*).

¹⁵ Martha Peters pointed out that the case file experience likely was valuable to both sensors and intuitives but for different reasons. For intuitives, the case files offer a complete picture showing how pieces fit together. For sensors, they offer concrete experiences to make a theory meaningful. She also suggested that readings might appeal to intuitives for making associations and relationships among concepts while sensors might find them

That combination of big picture, visual image, experience, and reflection was an optimum match with my learning preferences. The approach of most other law school courses seemed to me tedious, circular, inefficient, and atomistic.¹⁶ I had to look at the table of contents of a hornbook or read law review articles to develop a framework on which I could start to hang doctrine and frame arguments before I could learn the material from my other courses effectively. Post-law school I learned to make diagrams and charts for organization and conceptual mapping of a field. Some of today's study aids make use of those tools, but I do not remember anything like that in the outlines and hornbooks of my law student generation.¹⁷

TLP course and books also acknowledged an emotional dimension—that the feelings of the client, the adversary, the fact finder, witnesses, as well of those of the lawyer, are factors in what happens in lawyering. The course and books recognized those feelings mattered, that it was not all a question of “the law.”¹⁸ As somewhat of a Myers-Briggs “T” (thinking preference for information processing), I did not find the absence of that perspective in most other law school courses as alienating as “Fs” (feeling preference) might have,¹⁹ but I think the recognition that lawyering was more than an exercise in logic added to the comfort I felt in TLP course.

Also, while the rest of law school was projecting a message that the really worthy calling for a lawyer was in the hundreds of large law firms that came to the placement office, Gary's apparent enthusiasm

good for the reflections they triggered on concrete experiences, i.e., how to do something. E-mail from Martha M. Peters, *supra* note 12.

¹⁶ Lawrence Tribe's Evidence class was the exception in that he also offered a series of theoretical and visual constructs to explain evidentiary concepts.

¹⁷ The ROADMAP series published by Aspen Publishing offers one example. See, e.g., LAURIE L. LEVINSON, CRIMINAL LAW 94-96 (1997) (tabular summaries of important concepts); *id.* at 121 (graphic icons to direct attention to repeated features of the book); *id.* at 135 (shaded boxes for “study tips”); *id.* at 259-59 (diagrams of case concepts).

¹⁸ Potential clashes in one's feeling as a person versus dictates of the lawyer's traditional paradigm of client service come up frequently in TLP. See, e.g., TLP, *supra* note 1, at 89 (charting what the authors see as the emotional dimensions reflected in excerpts from Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3-12, 15-16, 18-22 (1951) excerpted in *id.* at 80-84); *id.* at 445 (cautioning that “the emotions of anger, fear or distrust that can well up in a negotiation cannot be ignored or denied”).

¹⁹ See MYERS & MYERS, *supra* note 11, at 65-67 on the more impersonal information processing functions of the T (Thinking) preference versus the F (Feeling) approach. The T versus F distinction refers to the process that a person uses in making a decision. KROEGER & THUESEN, *supra* note 11, at 32. In commenting on this point, Martha Peters pointed out that people generally make decisions applying both logic and prioritizing of social values and with a mix of detachment and involvement, and thus that “having both aspects of decision-making as part of the course may have felt more complete.” E-mail from Martha M. Peters, *supra* note 12.

and joy for what he did sent a balancing message.²⁰ I do not recall his saying anything dismissive about large firm practice; it was more that there would be no reason to bother since we were talking about the really exciting and worthwhile aspects of practicing law—trying to do our best for people that the society often otherwise did not do very well by. Law practice as depicted in TLP course was not a dispassionate business. In Part V, I return to the passion for poverty law work that Gary seemed to retain throughout his life.

B. *A Framework for Learning to Be a Lawyer*

In the following section, I describe the examples of how the theory and metaphors used to teach particular skills “worked for me” and remain the way I approach related tasks today.

1. *Decision-Making*

The decision-making model repeated throughout my TLP courses became second-nature to me and structures many of the decisions I make in all facets of my life through today. As described more fully in Part III, because this model had been so useful to me and is applicable to all kinds of lawyering, I wanted to make it a centerpiece of the externship seminar. When I looked for the model in TLP primary text as I was planning that course in 1981-82, I found some sentences applying it,²¹ but the actual model appears only as Problem 4-4 of the Criminal Problem Supplement,²² reprinted in Figure One. I used an adaptation of that model in my externship seminar, with the adaptation shown in Figure Two, for a number of years.

²⁰ See generally, ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* (1992); RICHARD D. KAHLBERG, *BROKEN CONTRACT* (1992); Kirsten Edwards, *Found! The Lost Lawyer*, 70 *FORDHAM L. REV.* 37 (2001); Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 *HARV. L. REV.* 2027 (1998).

²¹ TLP, *supra* note 1, at 297 (decision-making model, similar to that in Fig. One, is summarized in six steps); *id.* at 293-304 (material on decision-making); *id.* at 741 (refers to making the decision to cross-examine “as you would any other decision—with an emphasis on identifying alternatives and projecting possible consequences—[rather] than to search for some ready rule of thumb”); *id.* at 789-93 (decision on the order of cross-examination made starting with articulation of purpose and then offering a number of criteria for judging an order strategy); *id.* at 998-1017 (translating aspects of the decision-making model into use for counseling clients on decisions). Commenting on this article, Bea Moulton acknowledges that “our decision-making model, which was the starting point of the course when [Wortham] took it and even at USC, as I recall, somehow got folded into the complexity of *The Lawyering Process* text lost the centrality it once had.” Moulton, *supra* note 5, at 40, 41 n.14.

²² *CRIM. SUPP.*, *supra* note 1, at 102.

FIGURE ONE: TLP DECISION-MAKING MODEL

Problem 4-4²³

Another way to work through the dynamics of case planning is to identify a case for presentation to others on which you have been actively working over the past 3 or 4 weeks. On one side of the page, list chronologically a series of events in the case that either resulted from or required you to make strategic choices or judgments. For each of these “decision points” be able to discuss the following:

- (1) the general goal you had at that particular time;
- (2) what you hoped to gain as a result of the immediate choice you were faced with;
- (3) what alternatives you saw as available to you;
- (4) what potential benefits and risks you associated with each alternative;
- (5) how you tested your judgments about the risks and benefits you perceived;
- (6) what steps, if any, you took to enhance the potential benefits or minimize the potential risks of attractive options;
- (7) what you chose;
- (8) why you made the choice you did.

You might also find it useful to write out some of your thoughts about the decision points on this list. You should also be prepared to discuss the impact of this series of decisions on your general goal: Did you learn things that caused you to reassess your ultimate objective? Did you close off options that might have led to it more effectively or quickly? Did you enhance the likelihood that you would achieve it?

The purpose of this kind of presentation is to give you a chance to share the problems all lawyers face in case planning. If you prepare for this exercise by trying to keep in mind how you have tried to improve your own lawyer judgments, you should be able to offer helpful suggestions to others. If you can clearly articulate problems you are having (brief examples would be helpful), you are also more likely to get help in resolving them.

²³ *Id.*

FIGURE TWO: 1983 ADAPTATION BY LEAH WORTHAM OF TLP
DECISION-MAKING MODEL FOR USE IN BECOMING
A LAWYER EXTERNSHIP SEMINAR

Identify a choice that you made or observed another lawyer make. It could be something as simple as choosing a particular research strategy. It might be a trial tactic you observed a lawyer taking.

For that choice, identify the following:

- (1) The general goal you had (or you think the other lawyer had) at the time;
- (2) The decision to be made;
- (3) What you (or you think the lawyer) hoped to gain as a result of the immediate choice;
- (4) The alternatives you saw as available;
- (5) What potential benefits and risks you associated with each alternative;
- (6) What you (or the lawyer) chose;
- (7) What happened including how successful you consider the choice to have been;
- (8) How you would handle a similar situation if faced with it in the future.

In practice, it is helpful to add two more steps to this analysis:

5A. How you tested your judgments about the risks and benefits you perceived;

5B. What steps, if any, you took to enhance the potential benefits or minimize the potential risks of attractive options.

In the model, decision-making begins with articulation of the ultimate goal toward which one is working. The desired end (for example, whether a client really cares about money or having some action taken) must be kept in mind not only with regard to major decisions in a case (such as whether to undertake litigation at all or what legal claims to make in an action) but also in making the many other decisions necessary to implement fundamental strategy choices (including how many facts to put in the complaint or in which jurisdiction and court to file the action).²⁴

²⁴ Considerable attention in clinical scholarship has focused on the dynamic between lawyer and client in settling upon the objective for the representation and the sharing of decision-making as the representation proceeds. See, e.g., Kimberly E. O'Leary, *When Context Matters: How to Choose an Appropriate Client Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103, 105-13 (2001) (summarizing differences among client counsel-

Repeated use of the model stressed that each step a lawyer takes is a choice for which possible alternatives should be assessed. For each alternative, pros and cons should be considered as well as potential sources of information to enhance one's ability to predict what might happen under various alternative courses of action. While this approach to decision-making may seem obvious, I repeatedly have seen lawyers seem only to think of a "next step"—to concentrate on a next thing to do without assessment of how likely that step contributes to the end desired and what alternative courses might exist.²⁵ A fellow TLP student, who taught clinically for a number of years, once commented, "The hardest thing is getting students to concentrate on where they want to be at the end and work back rather than their more natural tendency to think one step at a time." As described in Part I.C., TLP course realized that "this is how we do it here" or an automatic "this is what I do in this type of case" is often the decision-making model for lawyers. Instead, TLP insisted on a conscious selection of a course after a weighing of alternatives.²⁶ "Lawyer's lore" and practice manuals were to be considered as one source of information on alternatives, but we were not to assume they provided *the* answer.

The assessment of alternative courses of action pressed in TLP course required a weighing based on more than case law but also factors of economics, organizational behavior, social conditions, and psychological sets of actors.²⁷ TLP course acknowledged that "research" might include inquiry into how particular social workers, court clerks, judges, or others with whom we had to deal were likely to approach the substance on which we would interact with them. We needed to figure out how bureaucracies worked. Now strengths I had when I came to law school—a decent ability to develop rapport with different kinds of people, some training in anthropology and political sci-

ing models advocated in legal scholarship); Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 164 (2002) (emphasizing the centrality of decision-making to lawyering, which "centers and guides" lawyering tasks that rarely separate neatly, and the dynamic nature of that decision-making).

²⁵ Richard K. Neumann, *A Preliminary Inquiry into the Art of Critique*, 40 HAST. L. J. 725, 749 (1989) ("When confronted with the need to develop a strategy, the first response, even of many experienced litigators, is to act on the first 'good' idea that occurs to them" He continues, "Lawyers and law students tend to 'slide' into strategies without knowing the full range of options available and without knowing the value of the few options they do consider.")

²⁶ Scherr, *supra* note 24, at 221, 275 (commenting on the experienced lawyer who can recognize and manage complex decision-making variables and assess alternatives intuitively but not reflexively).

²⁷ *Id.* at 230-31 ("topics of lawyering" comprising the "non-legal realities" that must be taken into account in sound decision making are: narrative, emotion, relationship, power, money and other quantities, and interests.)

ence-seemed useful rather than irrelevant as the prevailing “boot camp” metaphor for law school renders pre-law school knowledge.²⁸

I have a vivid memory of the class Gary taught on writing a letter to a client. I recall a full period of perhaps a couple of hours discussing each sentence and particular words. I recall the constant reminder that the goal at this moment was communicating to the client what she needed to know—within the broader goal of what was being sought in the case—not just “writing a letter.” That day’s lesson cautioned me to think hard about the purpose for the letter, the conceptual frame that the client would bring to reading the letter, and to test whether each word and phrase would be likely to achieve the purpose. Most fundamentally I internalized that everything, both large and small, that a lawyer does in practice—and indeed that one does in life—is a choice, that there almost always are alternatives, and that the course should be directed toward the end sought. Through the class’s relentless practice and reminders, I programmed myself to keep asking: What am I trying to accomplish? What are the possible courses I might take now? I felt prodded to look broadly or differently at situations to be sure there might not be more possibilities than my original instinct. With alternatives identified, what could I predict about pros and cons of each? How could I get more information to enhance my ability to predict how each choice might turn out? We also were programmed to reflect on how each decision worked out and press ourselves to reflect, with this further information, on how an alternative course might have come out and any lessons this suggested for future action. When steps were taken, we were pushed to a constant feedback loop of reflecting on the decision, considering whether another alternative could have had a better result and thinking about what the experience suggested for the future. My TLP friends and I used to call this constant hectoring for reflection and self-critique indoctrination in Maoist criticism, self-criticism, but with a more positive tone.

After I was using the model in my externship course, reading Richard Neumann’s article, *A Preliminary Inquiry into the Art of Critique*, caused me to see the similarity in TLP decision-making model to Neumann’s citation of the way that creativity literature often conceptualizes the creative process.²⁹ Neumann explores how critique is likely to be one of the most effective ways to teach creative process

²⁸ For law school’s characteristic disregard of knowledge and talents bring to the education, see Note, *supra* note 20, at 2032 (“process of identity homogenization in which students are broken down and ‘detached’ from their connections to the lives they lived before”); *id.* at 2036 (“irrelevance of their prior experience”); *id.* at 2044 (pressure to “set aside their prior identities”).

²⁹ Neumann, *supra* note 25, at 745.

and how the legal profession's analytical requirements of diagnosis, prediction and strategy track the stages of creativity, which he identifies as:

- (1) a recognition stage, in which the problem is noticed in the form of a gap in knowledge, a frustration, an impending struggle (such as a negotiation or a cross-examination), or even a need to decide between or among several desirable alternatives;
- (2) a preparation stage, in which the problem is analyzed and information gathered in a fairly open-ended manner;
- (3) an option-generation stage, in which the largest reasonable number of potential solutions are hypothesized;
- (4) an option-evaluation stage, in which potential solutions are tested (either analytically or empirically) for effectiveness; and
- (5) a decisional stage, in which the evaluations are compared and the best option chosen.³⁰

My use of TLP model of decision-making is not limited to things I have done as a lawyer. In talking with students about problems arising in relationships with externship supervisors, other counseling situations with students, and in similar conversations with friends and family, I can hear the Bellow bell going off in my head as I step back and say, "Now what is it you really want to happen? Let's think about the various things you could do," and as I then try to move the conversation through what sources of information might narrow the uncertainty about which choice is most likely to achieve the desired end.

2. *Constructing the Case*³¹

My torts teacher, Robert Keeton, had managed to impress upon me the importance of "theory of the case," both in the need for a legal theory anchoring the case and an appealing narrative.³² Gary's course, however, is the only place I heard in law school, or at least the only place I absorbed, a complementary aspect of constructing the case—that criminal offenses, civil causes of action, defenses to both, and requirements for program eligibility all had elements that a law-

³⁰ *Id.* at 745-46.

³¹ While this topic generated the most specific recollections of things I later found in TLP, *supra* note 1, at Chapter Four, 273-429, I did not recall the title given the section in the book, "Constructing the Case."

³² Robert Keeton, who later became a federal judge, was an active National Institute of Trial Advocacy teacher and the author of a well-known trial advocacy textbook of which several excerpts appear in TLP, *supra* note 1. ROBERT KEETON, TRIAL TACTICS AND METHODS (1973). Citations to material reprinted in TLP appear at xxxiv. Keeton's example from my torts class that "story of the defense of every medical malpractice case is 'The Great Healer'" stayed with me. The commonality of this "stock theme" in medical malpractice actions is cited in GEORGE VETTER, SUCCESSFUL CIVIL LITIGATION, 21, 27, 30-33 (1977), which appears in TLP, *supra* note 1, at 306.

yer seeks to prove or disprove. In TLP, I comprehended that statutes, cases, regulations, and agency circulars had to be read with an efficient method for extracting and defining elements and that client and witness interviews, discovery requests, other fact investigation, and pleadings had to be crafted with such elements in mind.³³

In writing this article, I recognize TLP's influence in my Criminal Law classroom course when I ask class after class of students: What are the elements of this offense? What does that mean the prosecution must prove? What are the elements of the defense? What kind of facts would tend to prove or dispute the element? Who has the burden of proof and by what standard? Who then wins if the jury thinks "maybe" X is what happened? While I had often thought about Gary's legacy in my externship course, until writing this article I had less often considered the way he influenced the way I teach my "stand-up" courses. Given the perpetual difficulty students have in translating what they read in their textbook into answers to these questions, I struggle for ways to make those concepts "real" in a classroom course. Outside the clinical context, it is particularly difficult to help students see how "elementalizing" the law translates into indictments, witness examination, jury instructions, assessment of plea bargains, and the other forms through which the criminal law lives.

I recall Gary harping on the importance of desk manuals, practice manuals, and check lists.³⁴ In writing this article, I recognized the linkage between TLP decision-making model and the use of such sources to expand the "brainstorming" segment of creative lawyering since these materials offer a way to assure that a number of alternatives have been considered.³⁵ I also recall Gary nagging about close

³³ TLP, *supra* note 1, at 358.

³⁴ See *id.* (use of written guides, desk references and annual surveys for giving the organization of large bodies of law needed to make judgments about "what the law is").

³⁵ The TLP book abounds with checklists and lists of criteria suggested to generate or evaluate alternative courses. See *id.* at 306 (features of successful theories of the case reprinted from VETTER, *supra* note 32); *id.* at 321-24 (analytic steps for identifying lines of inquiry for investigation); *id.* at 634-35 (synthesis from trial advocacy literature of possible functions of cross and direct examination); *id.* at 685-686 (inventory of possible distortions in witness testimony taken from Robert S. Redmount, *Handling Perception and Distortion in Testimony*, 5 AM. JUR. TRIALS 807, 816-17 (1966)); *id.* at 718-20 (list of ways to increase the inference of improbability through cross examination taken from Irving Goldstein, *The Cardinal Principles of Cross Examination*, 3 TRIAL LAWYERS GUIDE, 331, 354-58, 380-83 (1959)); *id.* at 883-84 (types of arguments); *id.* at 977 (list of questions a counselor should ask herself taken from CARL ROGERS, ON BECOMING A PERSON 50-55 (1961)). Alexander Scherr describes the work of John Bradway, founder of the first in-house teaching clinic, and, according to Scherr, author of most of the writing on lawyering prior to TLP. Scherr, *supra* note 24, at 176-80 & n. 51. Bradway believed that the relatively complex model of lawyering that he had developed through years of indigent representation and clinical supervision could be reduced to checklists that instructors could use to teach young lawyers. *Id.* at 182. While Scherr describes Bradway as seeing checklists as something to be fol-

reading of important rules and an in-class deconstruction of what an “x days” time period in a procedural statute actually meant for a deadline. His constant focus on considering alternatives would not have let us reflexively use a form pleading, but he urged looking at practice aids as one source of information rather than disdaining them.

3. *Interviewing, Negotiation, and Counseling*

My husband likes to recall when I did not want to be in the room when he haggled for a carpet with the owner of a Washington Oriental rug store. Both he and the proprietor seemed to have a grand time bargaining about the price, but even with my TLP training in negotiation, my small-town, Midwestern WASP instincts left me highly uncomfortable with any kind of overt negotiation, especially about money. When I have to negotiate myself (and in personal circumstances I still often punt that task to my husband), I return to TLP’s framework as a way to get myself through the task. I recall a little about the framework we learned about interviewing and counseling in Gary’s course, but those skills seemed fairly intuitive to me and either reinforced things I already “knew” or were assimilated easily because they were “natural.” On the other hand, our study of negotiation gave me a way to approach a task that was scary, anxiety provoking, and for which I was not sure where to start.

Learning to use the negotiation paradigm from TLP course alleviated my fear a bit by reassuring me that thorough preparation could help. I learned that one prepares for a negotiation as one would prepare for trial; most importantly, that one did not “just wing it.” A framework for writing things down and making a plan made the task seem more doable and provided a way to practice that reduced the anxiety. We learned that to prepare for a lawyering negotiation one had to know the law, the strengths and weaknesses of the live and documentary evidence as to how they might prove or dispute the elements of a claim, and the appeal of the narrative being advanced. One needed to establish (and indeed possibly construct) subcomponents of “the deal” which could be reified into items that might be traded.³⁶ A thought for future negotiation should begin with the initial pleading—adding one more factor to the purposefulness requirement of the decision-making model. One might plead the lawsuit keeping in mind the things that could be given away in a negotiation. The counts of the complaint should consider not only those most

lowed and internalized, TLP offers checklists as a way to expand consideration of alternatives and evaluate their utility rather than protocols to be followed.

³⁶ TLP, *supra* note 1, at 480-95 (addressing valuation in bargaining).

likely to win in court but also those for which the discovery “exposure” might be a sufficient threat to encourage settlement.³⁷ In this vein, one must see a transaction broadly—not just the money that might change hands but the possible exposure costs of publicity from discovery or a trial, the personal interests of the parties, and the relationship dynamics in bureaucracy or other multi-person parties. I learned to see negotiation as not just exploration of possible agreements but also an informal discovery process in which one seeks to gain additional information that might be useful to one’s case while seeking to avoid revealing information that could compromise one’s position in negotiation or at trial.³⁸ Framing negotiation as a personal exchange to get useful information from the other side, while being careful about what was revealed, seemed more congenial to my personality and instincts than the image of haggling in a bazaar.

Making a written negotiation plan reduced the anxiety in something that did not come naturally. Putting negotiation in the broader framework of social systems, with which I had always been interested in undergraduate work in behavioral sciences, also made it seem less scary. It was not just me versus the adversary—but each of us imbedded in a set of constraints and opportunities created by our relationship to our client, our client’s broader situation, and the rest of our worlds.

With the help that this explicit theoretical paradigm gave me in becoming more proficient at an intimidating task, I gained the confidence to say to class after class of students, “We all have things that come more and less naturally. For the aspects of lawyering tasks that you find most difficult, you may not become as good at them as at those tasks that come more naturally, but you certainly can improve at anything.”

4. *Trial Skills*

“Trying a case is like directing a play.” I say it to most classes at least a time or two—and probably more—and see and hear Gary as I say it. As a professional responsibility teacher, I could debate and contextualize the nuances of trying a case as casting and costuming the actors, scripting the dialogue, directing the timing and inflection, and considering the timing and denouement.³⁹ At first hearing, that could

³⁷ *Id.* at 501-06 (possible sources of bargaining power).

³⁸ *Id.* at 508-22 (negotiation as discovery).

³⁹ *See id.* at 638-49 (using the dramatic metaphor). The TLP authors note that “Despite the general recognition that good trial lawyers are also good actors, however, we have encountered a great deal of resistance from colleagues (and, to a lesser extent students) in discussing trial practice as a problem of acting technique.” *Id.* at 646. The authors speculate possible reasons as fear of distorting the real stakes in a trial, distortion of the truth-

sound like a cynical view that fuels hatred of lawyers and a disregard for “truth.” Gary’s course, however, was the first and only place in law school that I ever heard of the Model Code of Professional Responsibility and where a concern for ethical aspects of what we were doing, both in the micro and macro sense, suffused the course. “Bounds” in what one could do with the “play” were not forgotten in his course, but the notion of the trial as a performance with impact on an audience (the judge or jury) was central to his way of teaching trial preparation.

Gary lectured one day on how the tone in our voice and our body language might suggest to the decision makers what we wanted them to think about the truthfulness of the testimony they were hearing and the amount of respect that we would like to see accorded it. In re-reading the book, I found two impeachment questions on prior criminal convictions that I think were the class exercise to practice communicating the broader message we wished to convey about a witness’ truthfulness through tone, inflection, and pacing.⁴⁰ Indeed, I still remember the spring day in 1973 when a classmate asked those impeachment questions with such effective and measured disdain that Gary gasped with us at his dramatic talent.

I remember another lecture on using individual *voir dire* as a way to start trying our case—how the questions we asked the jury might introduce our theory of the case and educate the jury in how we wanted them to eventually see the facts, law, and just result. I tried to follow this model that every interaction with someone who eventually must be convinced can lay a foundation for later persuasion, not only in the jury *voir dire*s I did after law school, but also in opening communications and questions to others in many contexts. As always, TLP had focused me on—what you do should depend on what are you trying to achieve in this circumstance and that step should be directed toward your ultimate goals.⁴¹

In looking at the book after my “closed book” first draft, I found a wealth of information on trial techniques to which I think I would have referred in the two years after law school when I was a trial lawyer, if I had then owned the book. At a colloquium of symposium authors held in February 2003, Jeanne Charn, Gary Bellow’s co-teacher for many years and wife, recounted an e-mail in 2000 from a

finding aspects of a trial, and discomfort with the notion a trial lawyer may be “playing a part rather than participating in the administration of justice.” *Id.* at 686 (suggesting analysis of the witness as being cast in a play with the lawyer-director “ ‘of the court-room drama . . . [judging] . . . how the witness will look and how he will act his part’ ” (quoting Redmount, *supra* note 35.))

⁴⁰ *Id.* at 648.

⁴¹ *Id.* at 671-76.

past student talking about a conversation with a senior partner in her Washington D.C. firm about taking depositions. The former student recounted the lawyer having said, "Oh, I have something that will help you," pulling TLP off the shelf, and saying, "I found this the most useful thing in 20 years of practice. I use it all the time. It's outdated in some ways but take a look at it." Jeanne went on to say: "And she looked at it and she said, 'Oh, this was my professor and he said, 'Really.' He had never met Gary, didn't meet Bea, didn't know the course, but this practitioner had used the book and found it rich."⁴²

5. *Professional Responsibility*

Having gone to law school during Watergate and before the ABA reaction to it, Professional Responsibility was not a required course, and neither I nor my friends took it as an elective. I have a visual image of the copy of the 1969 ABA Model Code of Professional Responsibility that Gary gave every student, and as previously mentioned, his course was the only place in law school that I recall ethical questions ever being discussed. Gary's references to the Code of Professional Responsibility had communicated to me that one could not really think about teaching a clinical course without knowing the ethical rules.⁴³

I did not leave the course with a comprehensive understanding of the Code.⁴⁴ Indeed, the feeling that I needed such an understanding prompted me to volunteer to teach professional responsibility when I started designing a seminar to accompany CUA's externship fieldwork. Applying "you learn best when you teach," I thought that would prompt me to learn the subject matter—and it did. From the beginning, however, I approached teaching professional responsibility with the critical approach and philosophy from TLP course, some of which is described in the following section on my perception of TLP's value set. As described in Part II, when I reviewed TLP trilogy I was stunned by the depth and comprehensiveness of the books' coverage

⁴² Transcript, Colloquium: Critical Moments in the Conceptualization of Lawyering: Reflections Upon the Quarter Century Since Publication of Bellow's and Moulton's "The Lawyering Process" 47-48 (American University, Washington College of Law Feb. 21, 2003), available at <http://www.wcl.american.edu/clinical/lawyeringprocesstranscript.htm>.

⁴³ For an article about the necessity of teaching professional responsibility in an in-house clinic and providing guidance for law teachers outside the United States on how to go about doing so, see Leah Wortham, *Teaching Professional Responsibility in Legal Clinics Around the World*, KLINIKA 241 (Fall 1999), available at <http://www.juhrc.org/en/articles/wortham.htm>. KLINIKA is published in journal form by Jagiellonian University in Cracow, Poland.

⁴⁴ Bea Moulton confirms that the comprehensive treatment of ethics issues found in the TLP primary text, *supra* note 1, was added after I took the course. Moulton, *supra* note 5, at 41, 53, 58.

of professional responsibility issues. The approach also reflected the wariness of mindless conformity to the predominant conceptions of lawyer role and probing of who benefits from rules as written that I recall from the course.

C. *Conformity, Effectiveness, Purposefulness, and Consequences*

The course's perspective was always a critical one. We were never just to unthinkingly "do" and to be constantly wary of what "this is how we do it here."⁴⁵ We were to ask about conventional practices why things are done that way, who benefits and who loses, whether predominant methods of advocacy are actually effective toward client objectives, and whether, "it isn't done that way here" means that it should not be tried. As repeated several times thus far, we were prodded to work back from client objective rather than reflexively taking a "first step." Yet, these approaches were not limited to a purely instrumental goal of effectiveness in getting what the client wants because we were chided to be mindful of the consequences of a lawyer's work to the client, to others in the process, to the society, and on the lawyer.

One dimension of the reflection we were pressed to do about our choices was inherent suspicion of the normative biases of what ends were furthered by, "this is how we do it here." A second was to question common wisdom on what would be effective lawyering toward the ends sought. I remember Gary's example of, as a young lawyer, testing whether, "We don't file written motions in this court," really meant that written motions would be ineffective.⁴⁶ Gary had strong views about the high standard of practice that those serving indigent clients should seek to reach and ruffled feathers with his allegations that much poverty practice was routinized and insufficiently aggressive.⁴⁷ A third reflection dimension was measurement of all choices against what one was ultimately trying to achieve—back to the decision-making paradigm previously described. A fourth was to broaden

⁴⁵ Bea Moulton also recalls hearing Gary Bellow decry "this is the way we do it here" "countless times." *Id.* at 40.

⁴⁶ TLP, *supra* note 1, at 11 ("We often forget that much of what is accepted as true and unalterable in the legal or any social and particular system is, in fact, provisional and contingent—a product of chance and particular social, economic and historical circumstances rather than immutable laws. Present arrangements and practices are often not even 'the best we can do under the circumstances,' and ideologies often mask realities, legitimate the status quo, and unnecessarily narrow conceptions of what is possible in a given situation. Surprisingly little of this *must* be, if you are willing to question what is given and what is contingent in your situation.")

⁴⁷ See generally Gary Bellow, *Turning Solutions into Problems The Legal Aid Experience*, 34 NLADA Briefcase 106 (1977), available at <http://www.law.harvard.edu/academics/clinical/bellow-sachs/templates/solutions.pdf>.

our perspective on the consequences of our lawyering choices to benefits or “collateral damage” to those beyond our client.

I recall being assigned to do court observation and being told to, “Pay attention to the things that seem odd or disturbing in your first days. After a month you won’t notice them any more. Those are most likely to be good topics for a paper.”⁴⁸ With that assignment still fresh in my consciousness ten years later, I asked my first externship students in conferences, in the year before the seminar came into being, “Was there anything you found surprising, odd, or troubling about the way the placement or the justice system seemed to function in your observation?”

The last day of my Professional Responsibility class, and now of Criminal Law, I save ten minutes for what I call (to myself) my “farewell to the troops” speech. Gary’s admonitions about conformity always have shaped that valedictory. For years, I quoted “the great philosopher Pogo who said, ‘We have seen the enemy and it is us.’” Later on I found a quote about judges, for which I explain to students that I substitute lawyers, “It is not that they are more venal than other men; it is just that they got used to it.”⁴⁹ I usually cannot get through that speech without my voice cracking—which once bothered me. Student comments that they appreciated the show of emotion have caused me to stop worrying about it. Thinking how Gary’s apparent passion for what he taught was inspiring rather than embarrassing reminds me that openness of conviction is a good thing.

D. *Thinking Systemically*

The previous points described my frustration with trying to learn in what I saw as an atomistic, segmented way of teaching about legal doctrine. The intellectual “connecting of dots” in Gary’s course also appealed to my concern for social justice and my intuition that law itself only explained a part of what happened in the legal system.

Gary stressed the importance of seeing to what individual cases “add up.” We were to do the best for individual clients, but there was constant emphasis on what was happening with individual clients sug-

⁴⁸ My classmate Jennifer Bell and I did an empirical study and wrote our third year paper on a topic that was troubling when we first observed criminal court proceedings, the practice of imposing “continued without a finding and payment of costs” as a masked form of fine.

⁴⁹ The original quote is taken from Justice Walter V. Schaefer’s 1956 Holmes Lecture at the Harvard Law School, “ ‘Someone once wisely said that the basic trouble with judges is not that they are incompetent or venal beyond other men; it is just that they get used to it.’ ” Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 681 (1972) (quoting Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956)).

gested about various systems, how decisions were being made in the welfare department, the perceptions of social workers about their jobs, or the economic structure of an industry.⁵⁰

Litigation was just one possible tool to use in an overall goal of making the world a fairer and better place for poor and marginalized people. Looking systemically prodded a decision-making focus on alternatives to look also at legislative change, media strategies, public pressure, and a range of other possibilities that might be used in the alternative or in tandem.⁵¹

I have done considerable work with law teachers and students starting clinical programs and interested in the teaching of legal ethics in Central Europe and the former Soviet Union, and through that work in other regions of the world as well. My TLP introduction to clinical education no doubt shaped my conviction that a central value of clinical programs in other countries, like in the United States, is to expose law students and law teachers to how laws and the justice system work in practice for the poor and marginalized in their societies. Just as I was prodded as a law student, I try to prod people I meet who work in clinics abroad to broaden their reflection from individual cases to the problems they may represent and to consider strategies for attacking such problems that may be broader than those employed in a narrowly defined view of the lawyer's role.

II. REFLECTIONS ON THE BOOKS AND THE MOVIE

After writing an initial draft of Part I, I turned to TLP primary text and two problem supplements to see how their content matched my recall of the courses I took in the spring semesters of 1972 and 1973. Contrary to my fear that this might be one of the instances when "the things I remember best never happened at all," I was pleased to see that all my recollections from Part I "lived" at least somewhere in the books. I also found some additional things that I had not remembered but are so consistent with what I do and believe today that perhaps I absorbed them, despite my lack of specific recall. I also recognized accomplishments in the book that I can better appreciate after twenty-two years of effort at the law teacher's job than I could have as a student.

⁵⁰ See TLP, *supra* note 1, at 324-39 (importance of understanding the larger context, using systems analysis, and mapping techniques); *id.* at 870 (arguments appealing to lower courts based on their bureaucratic imperatives).

⁵¹ See Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555, 570-71 (1980) (describing Bellow's urgings to see patterns in the legal problems presented by individual cases) (citing Bellow, *supra* note 47, at 119-22).

In considering commentary of others on the books,⁵² I can see how the decision-making model that I found to organize the course and provide lasting benefit to me gets somewhat lost in the richness and complexity of the books. One of TLP books' contributions, quite novel at the time, is explicit communication to students of learning objectives, sharing of the practice experience that brought the authors to identify those objectives, and explicit explanation of the learning process that the authors thought would achieve them. On the other hand, the overall goals of the book and priority among them are not stated so clearly. Thus, later readers, including contributors to this symposium, can see increased proficiency in professional skills as a primary goal while the author's introductory goal statement focuses only on a critical stance to role acquisition and a "common understanding" of the "law job" with no mention of increased skill proficiency as a central goal.

A. Teaching Methods that Matched My Preferred Learning Style

The Table of Contents of the primary text shows the clear conceptual framework I recall being a great help to me in the course. Part One of the book introduces the concerns with conformity, role socialization, and values that I recall permeating the course. Part Two divides the lawyer's craft into six component skill areas. Each skill chapter begins with excerpted readings called "Images and Fragments" followed by a suggested paradigm for thinking about the topic along with theoretical material, usually borrowed from another discipline, and a review of related professional responsibility issues for each. Part Three provides a short epilogue called "The Lawyer's Life." The Problem Supplements are organized under the chapter headings of the primary text and provide exercises and documents to illustrate and practice the concepts in each chapter.

In Part I of this article, I mentioned having no specific recall of anything I read for the course although I recall finding the readings interesting overall.⁵³ Although I could see in the book much of the approach I remember from the course, the basis for my recollections in Part I were things that happened in class. Some things, such as the decision-making model, felt like they had just been "absorbed" because I had no particular recollection of when or how they had been presented in TLP class. As mentioned in Part I, the only clear appearance of the decision-making model, which I had found central to the course, appears in the TLP books as Figure One in the Criminal Prob-

⁵² *Infra* Part II.B.

⁵³ Since a number have copyright dates after 1973, I assume many were not in what was distributed to us.

lem Supplement.

When I read through the three books after writing the draft of Part I, the Problem Supplements, with their exercises and practice-based documents, triggered additional memories of class activities. This response to the Problem Supplements matches my self-assessment that I learn best when I both “do” and have a conceptual framework to organize my action and reflection on experience.

I mentioned in Part I that, post law school, I have realized what a visual learner I am and how much graphic representation of ideas help me to think and learn. While I recall the class itself as a visual representation with the use of practice-based documents as examples and almost every class involving some type of live simulation, I do not recall the materials we used as having the flow charts, pictures, and tables that abound in the book. A transcribed discussion among the symposium authors in February 2003 commented on how unusual it was for a book in that era to include visual material, and Bea reported the complexities of working that out with the publisher.⁵⁴ In my review of the book for this article, I counted sixty-two diagrams, flow charts, matrices, and pictures⁵⁵ and twenty-six presentations of textual information in tabular form.⁵⁶ “Real” practice documents abound in the Problem Supplements.⁵⁷

The only one of the orienting metaphors for skills that I recalled being introduced specifically in the book’s terms was the theatrical example for witness examination, and as previously described, that metaphor remains a powerful one for me.⁵⁸ The ideas of interviewing as medical diagnosis,⁵⁹ constructing the case as planning,⁶⁰ negotiation as exchange,⁶¹ and counseling as helping,⁶² however, are consistent with my overall recollection of what I learned although my memory did not attach concepts within them to an overall metaphor. I did not recall any discussion of rhetoric⁶³ as a theory base for argument and

⁵⁴ Transcript, *supra* note 42, at 274-75; Moulton, *supra* note 5, at 63-64.

⁵⁵ TLP, *supra* note 1, at 53, 71, 109, 175, 178, 179, 222, 233, 234, 295, 320, 330, 358, 362, 448, 457, 459, 460, 461, 462, 470, 471 (two matrices), 472 (two matrices), 473, 475, 476, 487, 488, 493, 494, 621, 632, 685, 721, 773, 867, 890, 894, 912, 938, 948, 950, 952, 984, 989, 991, 998, 1001, 1010, 1012, 1013, 1014, 1016, 1042, 1049, 1054, 1055, 1056, 1060 (two charts).

⁵⁶ *Id.* at 32-33, 89, 156, 192-95, 208, 302, 314-15, 325-26, 404-05, 494, 498, 572, 576, 636-37, 654, 701, 726, 731, 760, 775, 883-84, 886-88, 919-20, 980, 1020-21 1066-67.

⁵⁷ *See id.* at 132-33, 697 in primary text. The TLP primary text also includes considerable material presented in dialogue. *Id.* at 736, 755-56, 799-803.

⁵⁸ *Id.* at 638-49.

⁵⁹ *Id.* at 140-56.

⁶⁰ *Id.* at 292-304.

⁶¹ *Id.* at 445-64.

⁶² *Id.* at 978-97.

⁶³ *Id.* at 844-54. While working on this piece, I received a copy of an article by a professor of Legal Rhetoric, Legal History, and Roman Law at the University of Belgrade, whom

indeed do not remember classroom discussion about argument of law and facts to a court.

B. *Decision-Making and Creative Problem-Solving*

Alexander Scherr has noted that most of the many citations to TLP primary text in legal scholarship “refer to (a) particular passages or arguments presented in discrete sections of the text or (b) the general significance of the text as an influence.”⁶⁴ Scherr’s recent article on lawyer decision-making and Carrie Menkel-Meadow’s 1980 work on the contribution of clinical education to theories about lawyering at that time are two exceptions that make more general assessments of TLP book.⁶⁵

As acknowledged in Part I, in my memory of the course decision-making occupied center stage. Each choice in pursuing a case and each exercise of a lawyering skill passed through the decision-making model. Post law school, I came to see a major dimension of that decision-making model as its prod to creativity—to consider conventional lawyer protocols as inventories of possibilities but not automatic choices, to look within oneself and without to a variety of sources for inspiration for multiple ways to look at a problem.

Scherr finds in TLP books the centrality of decision-making that I recalled.⁶⁶ Appraising TLP books, Scherr sees TLP’s contribution to the theory of lawyer decision-making as adding the lawyer’s own subjectivity into what Scherr terms the “by-then traditional view of decision-making in lawyering: the synthesis of the conceptual material of legal rules with the often subjective realities of the situation which calls for a decision.”⁶⁷ He sees in TLP a complex challenge for law-

I had met at a Balkan Legal Initiative conference in Skopje, Macedonia in December 2002. Sima Avramovic, *Simulation of Athenian Court, A New Teaching Method: Clinic Legal History*, DIKE, RIVISTA DI STORIA DEL DIRITTO GRECO ED ELLENICTICO 187 (May, 2002) (also printed in ABACEELI Balkan Law School Linkage Initiative Newsletter, Vol. 2, Issue 2 (2003)). He describes an exercise in his two-semester course required in the first year of study with a considerable segment on Ancient Greek Law in which students act as the litigants in one of the twelve preserved speeches of Isaeus. Among the benefits he reports with the experience, he includes the requirement to think about strong proof and arrangement of argument and the benefit in cultivating rhetorical skills in the students. I sent him a copy of TLP, *supra* note 1, at Chapter Seven, 826-965, including the excerpts from DONALD CLARK, *The Precepts of Rhetoric*, in RHETORIC IN GRECO-ROMAN EDUCATION (1957) found in TLP at *id.* at 845-51.

⁶⁴ Scherr, *supra* note 24, at 183 n.82.

⁶⁵ *Id.* at 183-88; Menkel-Meadow, *supra* note 51, at 558-60, 570-71.

⁶⁶ Scherr, *supra* note 24, at 184-85 (speaking of TLP’s closing skill chapter on counseling: “Decision-making process remains central to lawyering. Decision-making between lawyer and client occurs in an integrated fashion throughout each of the earlier phases of lawyering. The anticipated legal action (negotiation, planning, dispute resolution) strongly affects both how lawyering tasks occur and what decisions will result.”).

⁶⁷ *Id.* at 187.

yers to “bring their own values and emotions into their lawyering, while simultaneously managing the cognitive complexity which legal rules and situational realities demand.”⁶⁸

In contrast, Menkel-Meadow identifies Anthony Amsterdam as the clinical educator to have considered lawyer’s decisions as the unit of analysis.⁶⁹ She identifies TLP’s central contribution to “micro theory” of lawyering as attention to role.⁷⁰ “Micro theories” are defined as those concerning the individual lawyer while she uses “macro theories,” to describe those concerning the purposes, power, structure, and substance of lawyering.⁷¹ Menkel-Meadow describes TLP’s approach to a role-based micro theory as separating “the professional functions of a lawyer into discrete areas of processes” which permits an analysis of the different roles that a lawyer plays in distinct capacities, “such as the interviewer, planner, investigator, debater and counselor.”⁷²

While Scherr rhapsodizes about TLP trilogy as a “complex, challenging modern symphony, rich with dissonance and compelling improvisational riffs,” he also terms the book as “something like an encyclopedic account of lawyering . . . [whose] . . . very ambition makes the book difficult to read, to absorb and especially to emulate.”⁷³ He finds some of that difficulty in what he sees as “diverse, often contradictory, texts in the book . . . consistently suggest[ing] contradictory views of core tasks and of how to accomplish them, much in the style of a traditional doctrinal case-book—leaving the reader (especially the student) to the hard task of synthesis.”⁷⁴ He further describes the book as “suggestions, tangents, outbursts, metaphors, methods, analogies, analyses and narratives.”⁷⁵

Scherr’s article overall laments how “fractionaliz[ing] lawyering

⁶⁸ *Id.* at 188.

⁶⁹ Menkel-Meadow, *supra* note 51, at 562.

⁷⁰ *Id.* at 558. Menkel-Meadow refers to Gary Bellow as “generally regarded as the theoretical father of clinical education.” *Id.* While citing TLP’s major theoretical contribution as attention to role and Amsterdam’s as focus on decision-making as the unit of analysis, *id.* at 562, she also cites contributions of others in this symposium and the Harvard program more generally. *Id.* at 560. For instance, she cites David Binder as the major person to conceptualize lawyer’s skills to that date. *Id.* at 565 & n.57. She cites Michael Meltner, along with others, as focusing interpersonal processes. *Id.* at 568. She also discusses a concentration in the Harvard clinical program, in conjunction with the Harvard School of Education, on how the learning mode in law school may contribute to the way lawyers practice. *Id.* at 568.

⁷¹ *Id.* at 556.

⁷² *Id.* at 559.

⁷³ Scherr, *supra* note 24, at 183. This musical metaphor contrasts TLP to the work of John Bradway which he terms a “simple, compelling song worked out in plan (albeit subtle) harmonies.” *Id.*

⁷⁴ *Id.* at 183-84.

⁷⁵ *Id.* at 184.

into discrete tasks” diverts the focus in lawyering theory from decision-making—which he believes to be at the heart of the enterprise.⁷⁶ He considers fractionalizing to distort “the experience of lawyering” and miss the “coherence” in “[l]awyering as a lived experience . . . which split-out descriptions of component tasks conve[y] only poorly.”⁷⁷ I think that lament may explain how TLP course focus on decision-making, that I saw as central and enormously valuable, gets lost for a reader of the books. The TLP primary text’s sophisticated disaggregation of lawyering tasks and exploration of each through metaphor, cross-disciplinary approaches, and detailed analysis of ethical issues loses in its complexity the unifying thread that I saw in the course—that all lawyering tasks were to be undertaken by an assessment of alternatives through the decision-making model.

While I believe that complexity diverted Menkel-Meadow from the importance of decision-making in TLP as a micro theory of lawyering, her analysis of the contributions of TLP text to “macro theories” regarding the purposes, power, structure, and substance of lawyering matches my recollections in Part I.⁷⁸ She cites Bellow’s vision of promoting more justice in our world, which is the subject of the closing word of this article, as well as his emphasis on looking systemically.⁷⁹ She identifies the contribution of TLP books and Bellow’s other writings as challenging one to step back from the micro view of the individual lawyer and “consider what purpose is served by what lawyers do.”⁸⁰ In a footnote to her description of TLP book’s “scheme of dividing the lawyering process into constituent roles, skills, models and issues . . . for all of the attorney functions,” she notes:

Conversations I have had with Gary Bellow and Beatrice Moulton subsequent to the publication of their book have led me to believe they would prefer to be considered as expressing a more macro-societal and substance-oriented perspective and would now write a different book.⁸¹

Where Scherr found contradictions in TLP approach akin to those of the “no answer” school of conventional law teaching, I found coherence and consistency in my student experience.⁸² I do not recall

⁷⁶ *Id.* at 207.

⁷⁷ *Id.* at 220.

⁷⁸ Menkel-Meadow, *supra* note 51, at 570-71.

⁷⁹ *Id.* at 570.

⁸⁰ *Id.* at 571.

⁸¹ *Id.* at 560 n.33.

⁸² TLP, *supra* note 1, at 297-98 (quoting LOUISE BERMAN, *NEW PRIORITIES IN THE CURRICULUM* 102-04 (1968) on the importance of studying decision-making). The first of Berman’s quoted reasons for studying decision-making is that knowledge of the complexity of the process “may lead to increased tolerance for ambiguity and to increased ability to accept the consequences of an occasional poorly made decision.” *Id.* at 297.

finding course or my individual work with Gary as frustrating and contradictory.⁸³ The decision-making model, Bellow's wariness of mindless conformity, and his admonition to consider practitioner's traditional wisdom as one factor to be considered but not the automatic answer to what to do, cast what might otherwise be considered contradictions as alternative sources of information to consider in making complex decisions.

In comparing Scherr's tribute to and frustrations with *The Lawyering Process* to my feelings about rereading the book with prior familiarity with the "movie version," a metaphor came to mind to explain our difference in perspective. I felt that we both had seen and loved a vast and complex territory of varied topography and ecosystems, much of which was relatively unexplored and uncharted by outsiders, but that I had had the advantage of a native guide so I had a more comprehensible map of the terrain.

Even with my map from the course and my thirty years of experience as a lawyer, I find some readings in the book obscure and the energy required to connect them to the theoretical framework of the book more than I could summon in my recent rereading.⁸⁴ Still, by skipping over the readings I found too frustrating, with an overlay of the decision-making model, and concentration on the structure provided by the table of contents, I found the book quite consistent with valuable lessons I felt I learned in the course that had served me well in "real life."

To me, the various advice and heuristics presented in TLP were just possibilities to try out in the context of the consistent decision-making model. Scherr contrasts TLP with John Bradway's approach of protocols for how to do tasks. TLP embraces practitioners' checklists but presents them as cross-checks for creativity—a source for brainstorming and a cross-check against which to be sure that one has considered all possibilities. Gary, however, always lectured against reflexive choice of any one approach, quite different from Bradway's notion that lawyering for types of cases could be systematized.⁸⁵

As previously mentioned, Richard Neumann's 1989 article con-

⁸³ For part of my clinical fieldwork, Gary arranged for me and three of my classmates (Jennifer Bell, Ronald Simon, and Michael Lehr) to work at the Roxbury office of the Boston Legal Assistance Project, and we worked directly with him on some cases.

⁸⁴ See, e.g., *infra*, Part II.E. (discussing Part III of TLP Primary Text).

⁸⁵ TLP, *supra* note 1, at 207 ("be cautious about 'good' or 'bad,' correct' or 'incorrect' approaches to such issues as question form or word choice. Obviously the wording chosen, the mix of broad and narrow questions—indeed almost every aspect of question formulation—varies with personality, circumstances, and the type of problem presented."). *Id.* at 794 ("There are too many nuances in each situation to make a pre-selected technique precisely applicable, or to give the kind of guidance needed to fit advice to circumstances.").

siders how critique may be an effective method to teach creativity and the importance of creative process to effective, expert lawyering.⁸⁶ Earlier I pointed out the similarity in his recounting of the stages of creative process identified in creativity literature to TLP decision-making model.⁸⁷ Looking back on law school, I have often described Gary Bellow and Lawrence Tribe as the two teachers I experienced who had minds that seemed to be on a different plane from the norm, even among a faculty and student body of very smart people. I have described that difference as Bellow's extraordinary horizontal intelligence that moved across planes in contrast with a "vertical intelligence" in Tribe that pushed the extensions and nuances of particular ideas.

In part, that metaphor related to Gary's borrowing from other disciplines, but it also matches Edward De Bono's labeling of creative thinking as "lateral" thinking.⁸⁸ In their article on creative thinking in problem-solving in legal education, Janet Weinstein and Linda Morton quote DeBono in saying that lateral thinking "involves an understanding of how the mind uses patterns and the need to escape from an established pattern in order to switch to a better one."⁸⁹ To me, that describes the approach I saw over and over in TLP course and reflected in TLP book—Gary's dread of accepting "this is how we do it here" without a consideration of particular goals in this situation, alternatives, and analysis of chances for success always pushed for the possibility of a better course. TLP moves beyond the confines of law literature to look for new ways of thinking to apply to legal practice. Recently, legal education has begun to focus on the promise of teaching creative thinking in legal education,⁹⁰ but since first reading Neu-

⁸⁶ See *supra*, text accompanying notes 29 & 30.

⁸⁷ Neumann, *supra* note 25.

⁸⁸ EDWARD DE BONO, *SERIOUS CREATIVITY: USING THE POWER OF LATERAL THINKING TO CREATE NEW IDEAS* 15, 54-55 (1992) cited in Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in and Legal Education*, 9 CLIN. L. REV. 835, 840 (2003).

⁸⁹ Weinstein & Morton, *supra* note 88.

⁹⁰ See sources cited in Weinstein & Morton. *Id.* at 837 n.4: Comments of Diane Yu, *Plenary III: Mobilizing Creative Problem Solvers*, 37 CAL. W. L. REV. 83, 92 (2000); Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 GONZ. L. REV. 1, 7 (1998); Alan M. Lerner, *Law & Lawyering in the Workplace: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 109 (1999); David R. Culp, *Law School: A Mortuary for Poets and Moral Reason*, 16 CAMPBELL L. REV. 61 (1994). *Id.* at 843 n. 25: Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem-Solving and Teachable in Legal Education*, 6 HARV. NEGOT. L. REV. 97, 114-119 (2000). *Id.* at 852 n. 55: Janeen Kerper, *Legal Education: Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351 (1998). *Id.* at 853 n. 57: Thomas Michael McDonnell, *Playing Beyond the Rules*, 67 U.M.K.C.L.REV. 285, 306-11 (1998). *Id.* at 868 n. 95:

mann's article,⁹¹ I saw TLP approach as centrally directed to that objective.

After the most explicit statement of the decision-making model to be found in primary text,⁹² Bellow and Moulton go on to say, "What is left out of all of this, of course, is the role of intuition, creativity and imagination in the decision process itself."⁹³ They term work on creative thought process as "still very underdeveloped"⁹⁴ and acknowledge "the visual and verbal enter into decisions in ways that are vaguely understood." In numerous places, they provide lists of considerations and techniques that look very much like those offered in creativity literature for expanding and shifting the focus in problem-solving.⁹⁵ One of the book's pictures illustrates a creativity problem in which a person must consider how to tie the end of two strings together when they are suspended too far apart for a person to grab both simultaneously. The solution lies in employing one or more of a number of familiar objects in the room in ways other than their normal use.⁹⁶ The closing paragraph of the section in which the problem appears cites the value of this type of problem and other suggested techniques in avoiding "functional fixedness" (the tendency to see only routine, stereotyped ways of solving problems).⁹⁷

C. Pioneering Work in Teaching Legal Ethics

In Part I, I reported that TLP's ingrained notion that one had to integrate professional responsibility in a clinical course prompted me to volunteer to teach the required classroom course for 1983-84, the year after I commenced teaching an externship seminar. While my first versions of the externship seminar aspired to the comprehensive

Paula Lustbader, *Construction Sites, Building Types, and Building Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315 (1997). *Id.* at 874-75 n. 114; Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMPLE L. REV. 812 (1999).

⁹¹ Neumann, *supra* note 25.

⁹² TLP, *supra* note 1, at 297-303.

⁹³ *Id.* at 303.

⁹⁴ *Id.* (citing ARTHUR KOESTLER, *THE ACT OF CREATION* (1964); HANNES SACHS, *THE CREATIVE UNCONSCIOUS* (1942)).

⁹⁵ *Id.* at 321 (identifying lines of inquiry); *id.* at 359 (suggestions for "being creative about information" sources); *id.* at 363 (counteracting blocks in considering possible uses of procedural devices).

⁹⁶ *Id.* at 362. Bea Moulton identifies herself as the artist for this illustration at Moulton, *supra* note 5, at 52 n.26.

⁹⁷ TLP, *supra* note 1, at 364. Janet Weinstein and Linda Morton title their article on creative thinking, "Stuck in a Rut" and begin with a poem of that title. Weinstein & Morton, *supra* note 88, at 835. See Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 CLIN. L. REV. 623 (2003) (describing the authors' efforts to devise methods to move students beyond "stuckness").

and critical perspective on the lawyer's role reflected in TLP trilogy's approach, my externship seminar now has humbler aspirations with regard to ethical issues. Even with twenty percent of the classroom time in my bi-weekly classes devoted to ethical issues, I feel I can only accomplish highlighting ethical issues most likely to come up in externships, the applicable rules, and doing some practice in ethical decision-making on how those rules might be applied in context. Talking with individual students about their externships or a particular student's classroom presentation topic sometimes focuses a more critical and deeper discussion on a particular ethical issue, but the critical approach of TLP course and book to legal ethics shows their imprint most consistently in my three-credit professional responsibility course.

From my first professional responsibility class in 1983, I now have taught the course twenty-nine times and, from that experience, became active in professional responsibility activities of the D.C. Bar.⁹⁸ I also have developed an interest in comparative legal ethics and spent considerable time working with law teachers from other countries on teaching legal ethics in clinics and otherwise. From the outset of teaching the required course, I sought to model the critical perspective that I recall pervading everything we did in TLP. I assumed the professional responsibility course should question who benefits from a particular rule, what values a rule reflects, to what do the ethical rules and their application add up, and what effect the rules have on the lawyers who adopt them.

In my course, each topic is grounded in an assessment of the law's content—what the relevant conduct rules and any other law governing lawyers say. My TLP formed perspective, however, does not let me stop there. Within the limitations of a classroom course, we look at what those rules would suggest when applied in the complexities of real life, where facts are not “found” as they are in the appellate cases in casebooks but rather must be sought in the shaded and often contradictory things that one's client and others involved say and what physical evidence suggests. Sometimes “the rules” and “the facts” offer a clear “yes” or “no” on a professional responsibility issue but more often the answer is an “it depends,” with varying assessments of the facts shifting the lawyer from a “may” to a “must” or a “shall not.” I also press students to aggregate the various professional responsibility rules and consider the paradigms about lawyering that emerge.

⁹⁸ I also have authored the materials given to each new bar member on differences in the D.C. and Model Rules, regularly teach the D.C. Rules segment of the mandatory course for new admittees, chaired the D.C. Bar Legal Ethics Committee, teach Professional Responsibility Continuing Legal Education courses, am Vice-Chair of the Rules Review Committee, and sit as a Hearing Committee Chair in disciplinary cases.

One of the primary forces in the growth of clinical legal education in the United States was the Ford Foundation funded Council on Legal Education in Professional Responsibility (CLEPR).⁹⁹ I agree with CLEPR's original premise that important things about professional responsibility—taking appropriate responsibility for representation and ethical decision-making—are best taught when the student is responsible for individual client representation, and a supervisor can work with the student to recognize ethical issues in that practice and consider decisions to be made.¹⁰⁰ Given time constraints with all that must be done in an in-house clinic, however, I see the benefit of a complementary classroom course that provides sufficient time for comprehensive coverage of professional responsibility law and discussion of the broad questions of lawyer's role reflected in that law across a range of types of lawyering.

Ethics materials and problems make up 220 of the 1121 pages of the primary text,¹⁰¹ 75 of the 192 pages of the Civil Problem Supplement without Appendices,¹⁰² and 85 of the 312 pages of the Criminal Problem Supplement without Appendices.¹⁰³ Looking at this volume and its content from my perspective as an experienced professional responsibility teacher, I was "blown away" by their complexity and comprehensiveness, which offer enough material for a three or four credit course by themselves. My instinctive muttering of "Dayenu," led me to use that expression in summarizing the contributions of TLP course and book in Part IV. As the Passover Seder leads its participants through the blessings of God to the Israelites, each of which "would have been enough," I thought of the things that TLP course achieved for me and additional contributions of TLP books—any one of which "would have been enough."

⁹⁹ Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLIN. L. REV. 1, 18-19 (2000). For a history of CLEPR, see CLEPR WORKING PAPERS, *supra* note 14, at 5-11.

¹⁰⁰ See Maynard J. Toll, *Viewpoint of Legal Aid and Legal Services*, in CLEPR WORKING PAPERS, *id.* at 25 (primacy of professional responsibility as a CLEPR objective).

¹⁰¹ TLP, *supra* note 1, at 35-121, 240-272, 407-429, 586-606, 956-965, 1080-1105. This does not include the numerous references throughout other sections of the text to ethical questions. See *e.g.*, *id.* at 292 (ethical boundaries in witness investigation); *id.* at 404-07 (transcript of interview with undercover police officer that the lawyer hopes to impeach at trial with his treatment for drug addiction). See Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 601-03 (1987) (considering the transcript at TLP, *supra* note 1 at 404-07 for the multiple questions of normative theory that it raises).

¹⁰² CIV. SUPP., *supra* note 1, at 23-67, 80-83, 97-105, 129-136, 149-153, 165, 184-192

¹⁰³ CRIM. SUPP., *supra* note 1, at 13-62, 85-88, 106-113, 144-153, 200-213, 260-67, 304-12.

D. Values

An important message in the book—as I recalled from the class—is that values matter, as the title of Chapter Two, *Being a Lawyer: The Problem of Values*, reflects.¹⁰⁴ Lawyers, like all human beings, have values, and those values inevitably come with them to their law practice. Reciprocally, decisions one makes on conforming to conventional norms in becoming a lawyer and in the practice shape the lawyer's values.

The era of construction of the book coincides with the flowering of postmodern perspectives on law.¹⁰⁵ In Part One's Preliminary Perspectives, the authors confront the postmodern view that values are arbitrary and personal, and there is no *a priori* basis for a hierarchy of better and worse values and good and bad acts. The authors acknowledge skepticism as a "pervasive characteristic of modern experience" but remain resolute in continuing "to ask you to make moral judgments about lawyer behavior."¹⁰⁶ They ask, "If you are convinced that there is no standard by which a given act or choice can be judged . . . what more can we say to each other?"¹⁰⁷ They suggest instead "(i) that standards for and discourse on moral action can be built from shared experience; and (ii) that it is as irrational to question every value premise as it is to accept without question."¹⁰⁸ They move to the body of the book asking students to "reserve your skepticism, when you can, and at least consider the possibility that some reasons for your actions are better than others. There may be more basis for value judgments in our common experience than either cynicism or handwringing about relativism is likely to reveal."¹⁰⁹

Previously, I discussed Carrie Menkel-Meadow's citation of Gary Bellow's vision as lawyering toward promoting economic, political, and social justice in the world, and a comment from Gary and Bea which suggested they might have preferred to write a book in which that message was more central.¹¹⁰ TLP's concern for mindless conformity to conventional definitions of lawyer's role and conventions in

¹⁰⁴ TLP, *supra* note 1, at 35.

¹⁰⁵ For definition and discussion of postmodern legal movements and their antecedents, see GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* (1995).

¹⁰⁶ TLP, *supra* note 1, at 121.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *supra* text accompanying note 81. The message is not completely absent but somewhat secondary. For example, a reminder that the top twenty percent of the population of the U.S. received ten times the share of national income as that received by the bottom twenty percent at the time of the book's publication is included as an aside in a paragraph on stratification of the legal profession. TLP, *supra* note 1, at 23.

practice is central to the book's structure and often repeated. The passion for social and economic justice reflected in the Closing Word of this article is not so explicit in TLP books—and perhaps that is what the authors would have emphasized differently if writing the book again.

A value I recall and find in the book, however, is the humane concern for other people generally. While my image of Gary was always as a tenacious advocate for poor clients, I felt in him a genuine regard for the other people in the process and an unwillingness to demonize even those adversaries entrenched in an opposed position. I recall his talking one day about the mindset of the social worker who might be one's practical adversary in a matter, but the analysis was a sympathetic one. In my memory, he prodded us to consider the pressures upon her that might lead to particular ways of thinking and behaviors but not to consider her as an enemy—rather instead to consider approaches that might have a chance to persuade her and bring success in our objective. In rereading the book, I found repeated references to ambivalence about the lawyer's role when it might permit or arguably require manipulation and exploitation of other people.¹¹¹ Reading the TLP book through the lens of the TLP course generally did not leave me with the sense of contradiction that Alex Scherr finds in the primary text,¹¹² but I see that contradiction with no path to “an answer” in regard to treatment of people beyond the client. I see in the book an appreciation of the need to sometimes do things for clients that may be hurtful to others and to be, at least in a broad sense, deceptive in doing so. On the other hand, I did not hear from Gary personally or see in TLP, “That's the way it is kid—get over it.” Rather the message I hear is, “Acting in that way is troubling, isn't it? That could use some thought—both as to what you do as an individual in a particular situation and as to the rules of the profession. The answers aren't simple, but the questions are worth asking.”¹¹³

E. Constructing a Life

In my recollection, the decision-making choices on which we

¹¹¹ See *id.* at 292 (reflecting how readings on calculation toward goal in investigative interactions may seem “unnatural or morally questionable”); *id.* at 407 (reflections on a previous transcript with an undercover police officer in which the lawyer uses apparent sympathy for his racist treatment in the police force to get the officer to admit treatment for drug addiction that could be useful in impeaching him as a witness); *id.* at 599-606 (section on “Power, Vulnerability, and Regard for Adversaries).

¹¹² See *supra* notes 73-75 and accompanying text.

¹¹³ See, e.g., *supra* note 100 (discussing the ethics of appearing sympathetic to a police officer in order to get him to admit drug treatment, which could be used for impeachment of his testimony).

were asked to focus in TLP course were instrumental ones toward client goals.¹¹⁴ I recalled the integration of emotional dimensions into that instrumental goal orientation—how the lawyer’s own feelings might impede or otherwise be a factor in carrying out the lawyer’s obligations to the client. In looking at TLP books, however, I was surprised to see how much they focused on a different goal question—thinking about one’s “life as a lawyer”—the integration of performance of lawyer’s role with one’s life overall.

As described in Part III of this article, the question of what kind of life one wants as a lawyer in the broadest sense is a central theme of my externship course and an important feature of our externship book.¹¹⁵ Perhaps TLP book evolved to a greater emphasis in that regard after I graduated and TLP’s emphasis on integration of the lawyering role with one’s life was not there in the 1972 and 1973 courses. If it was and it did not register in my memory, this supports a hypothesis developed in my years of working with students in externship and the classroom that law students in their early twenties are so consumed by their concern with “learning to be a lawyer” that it is difficult for them to broaden their perspective to the even more difficult questions about what kind of life they want to lead.¹¹⁶

TLP text repeatedly emphasizes individual potential and responsibility for how one’s life “comes out.” Chapter One tells the student that “if you can strike a balance—between what can be learned from committing oneself to [society’s prescribed] role and what is lost unless one continually reflects upon the causes and consequences of one’s actions—you may find yourself with far more control (and more responsibility) than any simple view of social determinism might imply.”¹¹⁷ Similarly, the book’s opening quote is:

In this life we prepare for things, for moments and events and situations . . . [.] We worry about things, think about injustices, read what Tolstoi or Ruskin . . . has to say . . . [.] Then, all of a sudden the issue

¹¹⁴ As acknowledged in *supra* note 24 and *infra* note 210, much debate in clinical scholarship concerns how the goals of client service should be determined in the counseling relationship. This debate includes questions regarding, whether the lawyer should express any view on client goals, the scope for lawyer autonomy, and if and how broader goals of the community should be considered.

¹¹⁵ See *infra* Part III.C.-E.; Leah Wortham, *Balancing Personal Life and Professional Life*, in LFP, *supra* note 3, at 229-70.

¹¹⁶ See Linda Morton, Janet Weinstein, & Mark Weinstein, *Not Quite Grown Up: The Difficulty of Applying an Adult Education Model to Legal Externs*, 5 CLIN. L. REV. 469, 505-510 (1999) (finding many law students at a stage of development in which they are preoccupied with learning basic lawyering and other survival skills to feel competent, “fit in” at an externship placement, please their supervisor, and thus are resistant to broader or more long-term questions).

¹¹⁷ TLP, *supra* note 1, at 11.

is not whether we agree with what we have heard and read and studied . . . [.] The issue is *us*, and what we have become.¹¹⁸

TLP trilogy places considerable emphasis on the effect of traditional lawyers' roles on one's life and addresses integration with one's life. The text material, however, concentrates on comfort in the lawyer's role and one's general notion of how people should behave—consistency of the lawyer's role with how one believes people should be treated more generally. The book less addresses the questions of integration of being a lawyer with one's life that are the central focus of much contemporary discussion of the lawyering life such as questions of sufficient time for family and friends, time for pursuit of other types of activities beyond work, what kind of life goals will provide a feeling of satisfaction, why lawyers seem to suffer depression, substance dependency and other maladies at a higher rate than the general population.¹¹⁹

The opening reading of Part III of TLP titled, "The Lawyer's Life: An Epilogue" begins with an excerpt from a philosophy journal called "*Work*" and "*Play*."¹²⁰ The excerpt concerns the "freedom and plasticity of play" versus the "purposeful and disciplined" nature of work.¹²¹ The excerpted author concludes, "My formula for utopia is simple: it is a community in which everyone plays at work and works at play."¹²² The excerpt contrasts the work of one's job with the play of hobbies and pastimes but does not say much of anything about the relationships with other people. The formula for utopia does not address who takes the children to day care, who stays home with the sick child, preserving adequate emotional energy to devote to a relationship, and finding time to offer support to a friend going through hard times.¹²³

¹¹⁸ *Id.* at 1 (quoting ROBERT COLES, ERIK H. ERIKSON, *THE GROWTH OF HIS WORK* 39 (1970)). Rediscovering this quote prompted me to put it as the first item in the materials given to my Professional Responsibility students this fall. Before inserting it, I reviewed six books of quotes looking for others on our own control of what we become and found nothing I thought better.

¹¹⁹ See generally Wortham, *supra* note 110; Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002) [hereinafter Krieger, *Institutional Denial*]; Lawrence S. Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots*, 13 J. L. & HEALTH 1 (1998); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

¹²⁰ TLP, *supra* note 1, at 1105-11 (excerpting Richard Burke, "*Work*" and "*Play*", 82 ETHICS 33, 37-47 (1971)).

¹²¹ *Id.* at 1105.

¹²² *Id.* at 1111.

¹²³ See Moulton, *supra* note 5, at 73 (describing an epilogue that she might write today

The subheadings for the Notes to Part III, following the passages from “*Work*” and “*Play*,” are Autonomy, Intrinsic Satisfaction, and Consequences. The first note includes excerpts from a book review by Jerold Auerbach of *Autobiographical Notes* by Charles Evan Hughes and William Harbaugh’s biography of John W. Davis.¹²⁴ Auerbach’s review touches on the relationship and life goal questions that seem absent from the opening selection. Auerbach recounts that: Hughes was Governor of New York, Associate Justice of the Supreme Court, Secretary of State, and Chief Justice of the United States; Davis was a congressman from West Virginia, Solicitor General, and Ambassador to England; both were presidents of the American Bar Association; both were potential candidates for President of the United States. Auerbach describes both as consumed by work—Hughes from a sense of duty and Davis from a love of money.¹²⁵ Hughes is described as “nervously depressed because of the steady grind,” subject to “fits of depression,” and having seen his professional life as “unrequited drudgery.”¹²⁶ Davis is reported to have found that his work “consumed his energies and required stringent control over his emotions, yet left him feeling ‘peevish & fretful.’”¹²⁷ Auerbach quotes Davis’ daughter’s lament, “What I wanted from him was his time, and he had little to spare.”¹²⁸ Hughes faced criticism for his corporate counseling when he was nominated for Chief Justice, and Davis when he edged toward the 1924 Presidential nomination.¹²⁹ Both plead professional duty and claimed no accountability for the outcomes of their counseling.¹³⁰ This excerpt came closest to raising the questions of integrating lawyers’ careers with the rest of their lives and finding satisfaction in the life created, which I seek to raise with externs. Aside from the Auerbach excerpt, the Epilogue not readily engage my attention and easily elicit the reflection about the direction of one’s life that I think the authors were seeking.

F. Pedagogy, Educational Goals, and Theory versus Practice

1. Explicit Statements of Learning Objectives and Metacognitive Processes to Attain Them

In reviewing TLP books from my perspective today as a law

that would consider issues more like these).

¹²⁴ TLP, *supra* note 1, at 1112-1116 (excerpting Jerold Auerbach, *Book Review*, 87 HARV. L. REV. 1100-1105, 1108-11 (1974)).

¹²⁵ *Id.* at 1114.

¹²⁶ *Id.* at 1113.

¹²⁷ *Id.* at 1114.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1114-15.

teacher, I was struck by the explicitness of the statements on learning objectives, sharing with students of reasons those objectives were selected, and direct advice to students about methods to learn. The study of how someone acquires and processes information is called metacognition.¹³¹ Current writing on education encourages such transparency about goals and metacognitive processes, but such sharing with students was novel in legal education of the 1970's. While I do not recall thinking about TLP's transparency when I wrote the statements of learning goals printed in Part III, I speculate there that I may have emulated TLP's statement of goals without making a conscious connection.

The book consistently speaks in the first and second person. The authors "own" their opinions and advice: "[O]ur hunch is that this separation [of theory and practice] renders the would-be lawyer more vulnerable to the socializing forces of both law school and practice."¹³² They speak directly to the student reader, "You should think hard about your own law school experience and whether these observations are correct."¹³³

After description of a thirty or forty-five hour model for coverage of the text, the authors tell the student they envision a "rather 'traditional' educational process to achieve their goals in the belief that "lawyer work can be analyzed and discussed in much the same way as a piece of literature or an appellate case, and that reasoning from analogy offers a useful way to connect theory with practice."¹³⁴

The authors offer three caveats regarding ways use of this text is different from those they use in other parts of the law school:

First, the text is to provide only "background and focus" and "add to the analysis and suggest themes and concerns that should be discussed," but the major focus is to be the student's experience in the lawyer's role in actual or simulated cases, which will afford practice in "describing, evaluating, and solving problems" connected with the students' lawyering experience and encouragement for the student to generalize what they have learned from the experience.¹³⁵

Second, readings are not to be "learned" but rather are to "suggest ways [of] looking at the particular tasks or relationships involved and to raise issues and concerns relevant to describing, evaluating and

¹³¹ Morin & Howells, *supra* note 97, at 650 n.148. See generally John M.A. DiPippa & Martha M. Peters, *The Lawyering Process: An Example of Metacognition at its Best*, 10 CLIN. L. REV. 311 (2003).

¹³² TLP, *supra* note 1, at 28.

¹³³ *Id.* at 29.

¹³⁴ *Id.* at xxiii.

¹³⁵ *Id.* at xxiii-iv.

doing them.”¹³⁶ The goal is not to persuade the student to accept any model in the book but rather for the student “to clarify and make explicit your own images of what ‘good lawyering’ seems to be about.”¹³⁷

Third, out-of-class experience needs to be captured so it can be observed and discussed, for example, through documents like those in the problem supplement or similar materials or tapes from the students themselves. Information on local practice and rules must be added and more “how-to-do-it” materials may be added.¹³⁸

The authors acknowledge a “patience and effort” required to connect materials in the text to a student’s own experience and acknowledge “some of the readings will seem too abstract, others too obvious.”¹³⁹ But they express their hope that the choice of materials from other disciplines will challenge the student “to reach beyond legal material to find insight into your experience as a lawyer.”¹⁴⁰

The primary text’s first chapter begins with responses from past clinical students to an assignment in which the students were asked to draw examples from literature regarding “first confrontations with the demands of practice” in which “[t]he lawyer, like the writer, must try to make sense of the world.”¹⁴¹ At the close of the first section, the authors suggest to students, “You might want to experiment with more than one way to ‘be’ in this process.”¹⁴²

In both its title “The Problem of Conformity,” and in its content, Chapter One sets out the book’s objective to prod young lawyers to consciousness of the norms and values they are being pressed to adopt in socialization to a lawyer’s role in a particular type of practice. They make the case that the then conventional law school pattern of suspending contact with practice until after graduation, with its divorce of

¹³⁶ *Id.* at xxiv.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *supra* notes 120-30 and accompanying text for a discussion of why I found most of the material in *Part Three: The Lawyer’s Life an Epilogue*, *id.* at 1105-21 too obscure to engage my interest and too distant from the points that I think the authors sought to raise. Bea Moulton comments that Marge Piercy’s poem, at the beginning of the Epilogue, does not resonate for her in the way that she thinks it did for Gary. Moulton, *supra* note 5, at 69. She recounts that she thinks the Epilogue was written primarily by Bellow, *id.*, and that she thinks she would write something quite different herself if doing so today. *Id.* Moulton concludes her article in this symposium with *III. My Own Epilogue*, in which she describes questions of integration of work with the rest of one’s life in her own life and the Roles and Ethics in Practice course that she has developed with others at Hastings, which focuses in part on choices in one’s life as a lawyer that are similar to those I seek to raise in my extern course. *Id.* at 69-74; see *supra* Part III.D.1.d., III.D.2.b., III.E.

¹⁴⁰ TLP, *supra* note 1, at xxv.

¹⁴¹ *Id.* at 2.

¹⁴² *Id.* at 14.

theory and practice, rendered law students “more vulnerable to the socializing forces of *both* law school and practice.”¹⁴³ While the book itself seeks to link theory and practice to hone students’ critical skills, Chapter One also surveys critiques of law school to raise whether the competitive norm of the grading system maximizes faculty control and dampens support and reinforcement that might be gained from other students.¹⁴⁴

The authors give candid advice to students and link materials in the text to shortcomings they have seen in past students:

– Interviewing clients requires organizing, memorizing, and understanding legal categories. Do not take too literally the advice of first-year instructors not to memorize doctrine.¹⁴⁵

– Students are not trained in law school to perform the kind of legal research and analysis necessary for preliminary legal research to consider how to “construct the case.”¹⁴⁶

–Students know only how to do complete, painstaking legal research necessary in briefing an issue for an appellate court but do not know how to do twenty to sixty minute visits to the library that will provide enough background to know what to seek in interviewing the client, drafting pleadings, and questioning witnesses.¹⁴⁷

–Students do not know how to handle statutes and regulations and do not have the needed skills to parse a statute and break it into elements.¹⁴⁸

–Students have trouble organizing large bodies of law in their head. Written guides, desk references and annual surveys can help to make judgments at stages about “what the law is.”¹⁴⁹

–Students do not know when to stop researching, thus do not develop usable research skills, and hence are less willing and able to do relatively simple research jobs.¹⁵⁰

¹⁴³ *Id.* at 28.

¹⁴⁴ *Id.* at 31.

¹⁴⁵ *Id.* at 152.

¹⁴⁶ *Id.* at 357.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 357-58.

¹⁴⁹ *Id.* at 358.

¹⁵⁰ *Id.* at 359. The text suggests that students track two or more pieces of research setting out the steps they took, the references they used, and the amount of time spent and then compare the results with another student or with an experienced practitioner if possible. Although I do not recall getting the idea from the TLP course or book, one of my efforts to teach the TLP decision-making model in my externship seminar used a research strategy problem in which students had to keep a research log. Almost all the students in multiple classes began and almost exclusively used full text LEXIS and WESTLAW searches, which retrieved little or nothing of use to the problem. CUA librarians, who taught a research strategy class on what could have been found in our library, found a comprehensive answer in two treatises available in our library. No student ever found

Harking back to objectives in creativity, the authors discuss with student readers the need to avoid “functional fixedness”—the tendency to see only routine stereotyped ways of solving problems.¹⁵¹

The authors are candid with students about the emotional dimension of “feeling of helplessness or betrayal” when a witness “leaves out significant testimony, becomes hostile under cross examination, gives contradictory testimony or otherwise undermines counsel’s careful pretrial planning.”¹⁵² They acknowledge that conventional advice “to remain calm enough to quickly and accurately diagnose the difficulty—and respond to it” is of little help to a novice and offer instead “a range of techniques which can be developed in advance to minimize and/or deal with such surprises.”¹⁵³

TLP advocates memorizing “typical patterns” for common lawyering questions directed toward the problem of witness surprise, cross examination,¹⁵⁴ and testimony sequences such as refreshing recollection, introducing business records, eliciting testimony regarding the character trait of truth and veracity, and establishing an alibi defense.¹⁵⁵ From TLP course and book, however, I understood a critical distinction between memorizing typical patterns “to know what to do” versus memorizing them to have in one’s repertoire if one *decided that their use* was the best alternative in the circumstance. Using the theater analogy, I saw this as akin to the actor who learns stage combat or mannerisms denoting an emotion or type of person so these can be pulled from the actor’s repertoire if the actor or director thinks they will be effective for a new role.

2. *Less Explicit Statement of Overall Goals to Which Clinical Method is Addressed*

Bellow defined clinical education as a methodology that entails no particular educational objective and can be directed toward a variety of objectives.¹⁵⁶ This, to me, has always been a fundamental premise of clinical education theory. The previous section lists a number of statements from the primary text regarding particular learning objectives for students expressed in terms of what the authors want

them, and almost none looked at any secondary source.

¹⁵¹ *Id.* at 364.

¹⁵² *Id.* at 691.

¹⁵³ *Id.* at 691-92 (first establish a “good working relationship with the witness” through “repetition rather than rehearsal, discussion rather than warnings, and support rather than allusion to danger” and second “an adaptable, but learned and standardized set of responses to typical surprises” including leading questions, recalling the witness, and use of a backup memorandum).

¹⁵⁴ *Id.* at 728.

¹⁵⁵ *Id.* at 748.

¹⁵⁶ Bellow, *supra* note 14, at 376.

students be able to do or motivated to do after TLP's use, as well as the learning process to be employed in achieving them. TLP, however, is not so explicit about the overall behavioral goals for students to which the books are addressed and the priority among those goals. As Menkel-Meadow identified,¹⁵⁷ contemplation of role identification is central to TLP's goals statement in the Introduction to the primary text. Increased proficiency in professional skills is not included in the Introduction's statement of goals although I think many have seen TLP's materials on professional skills as evidencing their teaching as a central goal of the book.

TLP's first paragraph of the Introduction asks the student practitioner "to describe and generalize from his or her practice" and "make lawyering a subject of inquiry."¹⁵⁸ The Introduction is not so clear about to what goals this description, generalization, and inquiry is directed. The Introduction's second paragraph says that Parts One and Three of the book "explore the general question of how one learns (or conforms to) a professional role, and whether the values and attitudes that are embraced in this process are satisfying or justifiable."¹⁵⁹ It goes on to say that Part Two, with its six skill chapters, examines these same questions of learning a professional role (with a critical perspective on whether it will provide satisfaction or can be justified) in the context of particular tasks and that it attempts to provide "some common understanding about what the 'law job' actually involves."¹⁶⁰ The closing paragraph of the Introduction says the work from which TLP emerged offered "new vistas on the lawyer's role, and a new appreciation of the possibilities inherent in learning from doing," as well as reflecting a dialogue with others "about how and what one learns when one learns from experience."¹⁶¹

Nowhere does the Introduction include increased proficiency in professional skills as an overall goal.¹⁶² In the next paragraph, I set down the goals for TLP course as they appeared to me as a student. That articulation includes increased proficiency in professional skills, which seemed a part of the enterprise to me, although certainly not the sole one. Perhaps my inclusion of proficiency in skills reflects that I, as I think is true of most law students (at least the young ones), most immediately are concerned with "learning how to be a lawyer." Perhaps the authors would have said their desire to increase proficiency

¹⁵⁷ *Supra* note 70 and accompanying text.

¹⁵⁸ TLP, *supra* note 1, at xix.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at xxv.

¹⁶² For Bea Moulton's account of goals of TLP course and book, see Moulton, *supra* note 5, at 38-39 & 42.

depended on the ends to which that proficiency would be used.¹⁶³

In my reflection on the course, the course goals that came across to me were that students achieve the following:

- (1) Students learn a decision-making model that equips the lawyer-to-be to learn from experience post-graduation.
- (2) Students be armed to resist a mindless conformity to conventional role expectations, aware of pressures to conform to those expectations, and motivated to decide for themselves whether or not they wish to conform to particular role expectations in each aspect of their work as a lawyer. Students also should be able and motivated to assess the overall conception of lawyer's role to which a lawyer's individual choices in lawyering sum.
- (3) Students emerge able and motivated to exercise a critical facility regarding what ends are furthered by law, the actions lawyers take in conventional roles, and the operation of the legal system.
- (4) Students achieve some proficiency in lawyering skills through exercise of the previous approach to decision-making and application of theoretical models on effective exercise of each skill.

¹⁶³ TLP seems, in many ways, to take the critical stance suggested by critical legal studies and further developed by other critical theories, such as critical race theory and feminist jurisprudence. Four articles authored by Gary Bellow appear in Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L. J. 461, 488 (1984). David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974) is acknowledged to be an early work articulating the CLS perspective. Richard Bilder & Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L. L. 470, 474 & n.21 (1995) (book review). Trubek and Galanter's article arose from questioning of their work and that of others in the 1960s law and development effort to improve the quality of legal practice through reform in legal education in developing countries. Their reappraisal asked whether "an expanded and modernized legal profession might not increase social inequality," whether better-trained lawyers who go to work for technocratic elites in authoritarian regimes might not weaken rather than strengthen individual rights, and whether better trained lawyers representing the better off might actually "delay, distort, or halt developmental efforts." *Id.* at 1076. See JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 5-6 (1980) (general conclusions on technocratic views of law and lawyering being vulnerable to ordering by governments and authoritarian abuse); *id.* at 99-125 (on ways the Brazilian rule of law movement may have "facilitated the ability of an authoritarian government selectively to control, avoid, and coexist either the formal legal system, and use it to its own ends"); *id.* at 126-90 (concluding Chilean lawyers adoption of the model of lawyer as proficient state engineer and state instrumentalism furthered the authoritarianism of the Pinochet regime); *id.* at 247-281 (questioning export of value-neutral models of American legal education); *id.* at 253 (suggesting what legal education directed toward " 'analytical skills,' and 'thinking like a lawyer' . . . might suggest for professionals confronting rapid and massive change processes, as well as difficult ideological and ethical choices.") While the legal education reform efforts of the law and development movement focused on addition of the case method to the lecture based methods employed in civil law countries as well as the broader conception of the American lawyer, e.g., "lawyer as engineer," the basic criticism that increased competency, in itself, is a desirable end could also be applied to skills training.

3. Theory Versus Practice

Whether one considers TLP's treatment of role identification, systemic forces in law practice, models for teaching professional skills, treatment of ethics issues, or many other features of TLP books, all must be recognized as relentlessly grounded in theory. Gary Bellow's classic work, *Some Preliminary Reflections on Clinical Education Methodology*, addresses the theory and practice distinction with a quote from Rene Dubos that, "the only knowledge of permanent value is theoretical knowledge; and the broader it is, the greater the chance it will prove useful in practice."¹⁶⁴ TLP speculates that "the radical separation of theory and practice in law training . . . renders the would-be lawyer more vulnerable to the socializing forces of *both* law school and practice."¹⁶⁵

For the last seven years, I have spent considerable time working with students and faculty interested in adding law school clinics and the teaching of legal ethics to the curriculum of law schools in other parts of the world, most of which follow the "civil law tradition" rather than that of the common law. In the civil law world, the academic seeks to present a highly developed coherent theory of law establishing a "vocabulary" and "grammar" for the law.¹⁶⁶ While the senior civil law academic often is much more influential in interpretation of law by judges and practitioners than her American counterpart, the traditional civil law classroom approach is much less concerned with what happens in the practice of law than American professors, both clinical and non-clinical. Any teaching of ethics in law school is pure philosophy with little relationship to application to the practice of law.

In many civil law countries, students become licensed to practice in a legal profession through entry into an apprenticeship post-law school, which in at least some countries is completely controlled by the profession. Law school teaching assumes all obligations to teach practice skills are fulfilled elsewhere—in the apprenticeship period or later "on the job."

Against this backdrop, the dichotomy often expressed in the United States between "theory" and "practice" takes on even greater resonance. The civil law professor, who traditionally has taught primarily by lecture, often explains herself as solely teaching theory. Rationales for the American Langdellian case method normally claim it achieves both teaching of theory and skills of analysis that are impor-

¹⁶⁴ Bellow, *supra* note 14.

¹⁶⁵ TLP, *supra* note 1, at 28.

¹⁶⁶ Mirjan Damaška, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 154 U. PA. L. REV. 1363, 1365-70 (1968).

tant to law practice.¹⁶⁷ Civil law professors proudly teach theory, and indeed they teach considerably more theory than practitioners of the case method. In this context, arguments about whether to include “training for practice” in law school are even more charged than that debate within the United States.

TLP, and the educational premises upon which it rests, have given me a useful set of responses to such civil law faculty regarding the appropriateness of clinical education in the university. Bellow's *Teaching the Teachers* emphasizes that clinical education is a methodology, which is distinct from the educational objectives for which the method should be employed.¹⁶⁸ The purpose of teacher-guided learning “beyond merely transmitting units of information or habituating skills” is said to involve the “recovery of meaning.”¹⁶⁹ TLP indubitably is theoretical; it, however, concerns theory regarding practice rather than theory regarding doctrine.¹⁷⁰ TLP relentlessly employs theory in its clinical teaching method so this theory can be employed in the students' future practice to provide the kind of knowledge of permanent value of which Dubos speaks. With this TLP perspective, I have a ready answer for why the university, whose mission is to teach theory and further knowledge, should institute clinical programs, and I repeat like a mantra, “It is not theory versus practice but rather theory about practice.”

III. FROM THE LAWYERING PROCESS TO LEARNING FROM PRACTICE

A. *The CUA Extern Program in Context*

In 1981, I took over an externship program at The Catholic University of America (CUA) Law School that, until then, had been a “go find a placement, demonstrate to a secretary in the dean's office that you did the required hours, and get two or three credits” experience. I approached revision of CUA's program inductively rather than deductively in that I began by gathering information on what students were getting from the current program rather than any particular preconceived notion about what they should get.¹⁷¹ I also had been

¹⁶⁷ Spiegel, *supra* note 101, at 581-86.

¹⁶⁸ Bellow, *supra* note 14, at 376, 379. According to Bellow, the three main features of the clinical teaching method are: “1) the student's assumption and performance of a recognized role within the legal system; 2) the teacher's reliance on this experience as the focal point for intellectual inquiry and speculation; and 3) a number of identifiable tensions which arise out of ordering the teaching-learning process in this way.” *Id.* at 379.

¹⁶⁹ *Id.* at 387.

¹⁷⁰ Much doctrinal writing and teaching is not appropriately classified as theoretical because it represents only a synthesis of cases with at most some categorization of them.

¹⁷¹ At first reading, this might sound like a contradiction of my claim that a notion of

appointed Clinical Coordinator with responsibility for student counseling and curriculum review functions for all the clinical programs that CUA offered. Those programs included a well-established in-house clinic and a consortium program that functioned like an in-house clinic with lawyers hired as full-time supervisors and educators. CUA's full-time faculty also included excellent trial and appellate advocacy professors as well as a number of experienced adjuncts teaching trial and appellate practice.

Both the in-house and consortium clinical programs at CUA put students in the role of counsel of record for indigent clients with major responsibility for the cases, including the potential for court appearance, under supervision of full-time educators. The CUA externship program then, and now, places students in role on the staff of legal placements, but externship students are not lead counsel for clients and do not assume the degree of responsibility expected in the in-house and consortium programs. The "student as lead counsel with major client responsibility under supervision" model can be achieved through externships with close cooperation of placements serving clients willing to be represented by students, careful supervisor selection within those placements, training of supervisors, and coordination between supervisors and law school faculty on what kind of instruction is expected to be provided by each.¹⁷² When law school faculty assume full or partial responsibility for case supervision in an external placement, the clinic is sometimes referred to as a "hybrid," as it blends features of an in-house and external clinic. For the purposes of this article, I refer to "full representation" clinics to mean those employing the "student as lead counsel with major client responsibility under supervision" model typical to most in-house clinics and hybrid clinics and some (but probably the minority) of externship clinics. When I refer to externships in this section, I mean the CUA externship model in which students do legal work under the supervision of lawyers in external placements but are not lead counsel and do not have primary responsibility for client matters. This is probably the more typical externship model nationally.

As Clinical Coordinator, I considered what each type of program could do well and what it could not, sought to help students see the

purposefulness had become second nature to me. I saw my purpose as enhancing the educational benefit of externships to students, but I thought a good place to begin was to see what kind of educational benefits they were receiving in the program "as is" before deciding whether interventions should be more value added toward those benefits or a switch or addition of other educational goals.

¹⁷² The early years of TLP course included supervision by some "Bellow-fellows" who were placed as supervisors in existing legal services offices while in other instances existing public defender and legal services staff were recruited to serve as supervisors.

differences in the courses offered in these models at CUA, and assisted students in thinking about which type of course was most likely to meet their learning objectives in a particular semester. From my review of past externship records and my conferences with existing externs in my first year, I concluded that CUA offered well-supervised professional skills development programs in full representation clinics and simulation programs that in at least most semesters had been accommodating student demand, although I thought that demand needed to be stimulated through better publicity to the student body. In talking with students, I was concerned that many seemed to view externships, full representation clinics, and simulation programs as somewhat interchangeable roads to the same goals. Given my own law school experience, I saw full representation clinics as providing some experiences impossible to duplicate, and others difficult to duplicate, in a more limited responsibility externship or simulation program.

After consideration of the CUA externship program, I concluded that it had a comparative advantage for other purposes over full representation and simulation programs. Given the varied aspirations of CUA students, the diverse lawyering opportunities in Washington both as to externships and what students staying in the area might do after graduation, and the other clinical opportunities in our curriculum, I did not see the externship as a primary vehicle for teaching lawyering skills through full representation of indigent clients. On the other hand, our in-house clinic and simulation programs could not provide students the experience of working in a labor union, in a federal agency, doing legal journalism, or seeing how the process works from the judge's side of the bench.

An extensive discussion of the comparative advantages and limitations of the full representation, limited responsibility externship, and simulation models of clinical education is beyond the scope of this article. I mean only to explain the premises that have shaped CUA's externship program in order to explain the influences of TLP course and book on its design and the *Learning from Practice* (LFP) text that emerged. I assume TLP authors primarily envisioned their book's use in a full representation clinic handling criminal or civil cases for indigent clients. As described more fully later, this renders some parts of TLP of limited applicability to the work of externs in limited responsibility externships with placements doing a variety of kinds of work different from indigent representation. At the same time, much of TLP's general approach to the lawyering process is quite applicable to a course putting students in a more limited role and in lawyering settings beyond appointed defender and civil poverty practice.

TLP course, like most law school courses, focuses on the author-teachers' learning goals for students, although one of TLP's teacher-set goals is equipping and motivating students to think for themselves about adoption of conventional lawyer roles. I set the student learning goals for the Professional Responsibility and Criminal Law classroom courses that I teach. From the outset, however, I saw the externship course as structured at CUA as a way for students to pursue their own individual learning goals based on the students' assessment of gaps in what they knew thus far, their wish to press further in areas of particular interest, and their desire to work toward their individual career aspirations. As later discussed, I also prod students to devise and pursue their individual goals as a path to my teacher-set goal that students leave the course with an enhanced perception of themselves as autonomous actors working toward life goals that are intrinsically rather than extrinsically set.¹⁷³

I told, and continue to tell, students that—regardless of particular career aspiration—I believe everyone should take a full representation clinic to have the first scary experience of that degree of responsibility for a client and for forming an approach and strategy from the chaos of real life done with the back-up of a supervisor whose job it is to teach.¹⁷⁴ I contrast for students a full representation clinic in which the student sees the whole picture and is required to figure out the strategy and tasks to be done in contrast with a limited responsibility externship in which the supervisor develops the strategy and the extern is assigned tasks to implement it. I encourage externship supervisors to share that “whole picture” and strategy development with students, but even at best, the process will be somewhat different than when the student is lead counsel. For some students, I see the limited responsibility externship as a good “first step” toward the greater responsibility of an in-house clinic. But the limited responsibility externship also offers a chance to practice lawyering tasks and see applications of substantive law in contexts quite different than a full responsibility clinic can provide. In addition to the career aspirations that students articulate, my “teacher-set goal” is to press students to think about the kind of lawyer they wish to become, both in the narrower job choice sense and the larger values sense. Each individual intern's choice of placement opens that inquiry, and the presence of

¹⁷³ For a discussion of intrinsic versus extrinsic goals, see Krieger, *Institutional Denial*, *supra* note 119, at 114, 120-22.

¹⁷⁴ Even for students who do not see any kind of client representation as involved in their future work, I still see the full representation clinic as a valuable experience in understanding the most commonly understand paradigm of lawyer as advocate. In addition, I believe it valuable for students to see first hand how poor people fare with the law and legal system.

students in a variety of placements in the externship class broadens the dialogue.

B. Designing a Law School "Value Added"

As just described, from the beginning of my work with the CUA externship program I saw it as directed to pursuit of a student's individual learning goals and a place where students would be pressed to consider questions about what kind of lawyer they wished to become. Within that framework, I considered the kinds of "value added" that I thought the law school could provide. Looking back at the material from my first two years in working with CUA externs, I see how profoundly they were influenced by TLP courses. In individual conferences in the first year, I "tried out" various concepts borrowed directly from TLP. I asked students what they found "surprising, odd, or troubling about the way the placement or the justice system seems to function" soon after they got to a placement. From answers to that question and otherwise, I talked with them about the norms operating in their placements and the systemic dynamics in which their work and individual office functioned. In individual conferences, I sought to encourage a critical perspective on how things functioned in their placement and the broader practice context. I tried to elicit their thinking about their own values and encourage their thinking of themselves as autonomous actors with choice about how they will function in their own careers. Over the years, I have tried to refine a message to students that:

Yes, as an extern, you may have limited scope for choice in how a workplace functions and the system in which it operates more generally, but you will not always be a junior lawyer. If one does not acquire the habit of thinking about why things are as they are and the consequences, you may go through your career just saying, "Well, that's the way it is" or worse yet not even noticing how it is. Eventually you will be sufficiently "in charge" to determine at least some things about what happens.¹⁷⁵

From the beginning, I asked students about their goals for the externship. Throughout my twenty-two years of work with externs, I have found it rewarding to talk with them about their reasons for wanting an externship, to help them think about gauging whether a particular externship is likely to fulfill their goals, and to consider what they can do in initial negotiation with the placement and day-to-day exchange to seek fulfillment of their goals. In that first year, I also started to develop an inventory of the kinds of problems that

¹⁷⁵ See LFP, *supra* note 3, at 27.

arose in legal externships.

At some point in the first year, I began thinking about offering a seminar for externship students that might more efficiently raise some of the educational points that I had been discussing individually with students. I do not recall any feeling that I had to do so because of accreditation or faculty pressure.¹⁷⁶ Perhaps I have just repressed that, but my recollection is that I thought working with a group of students in a seminar could more efficiently and effectively raise the educational questions that I saw as the law school's "value added" than solely doing so through one-on-one exchanges. It seemed more efficient to present some ideas in writing and to a group and more effective to have people in a variety of placements in conversation on some of the topics.

The first place I turned to decide the focus of the seminar was to TLP primary text and problem supplements that I had by then received from Foundation Press. Before seeing them, I had assumed that I might be able to use them as texts, and I recall being surprised that I did not find more in them that I wanted to use in the externship seminar. When I reviewed the books for this article, I saw the penciled notations I made in TLP trilogy when considering what to use and realized that most passages highlighted were articulations of perspectives and philosophy that I had taken from the course rather than particular readings or exercises. Since most extern students were not doing client interviewing, counseling, and court representation, some of the skill chapters were distant from their work. I also found many of the excerpts on the broader questions of general approach to lawyering, values, and lawyers' role to require more leaps of abstraction than I thought law students would, or perhaps even could, make. Still, as indicated below, the foundations of the course were based in TLP approach.

My first externship class had eight two-hour class periods.¹⁷⁷ I divided the twenty-seven students who signed up into two groups, and

¹⁷⁶ ABA Accreditation Standard 305(f)(4) says that "[a] contemporaneous classroom or tutorial component taught by a faculty member is preferred" in field placement (externship) programs and such a component is required for programs awarding more than six credits. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS, 2002-03 (2002). For history of regulation of externships by the ABA including the push for classroom components, see Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLIN L. REV. 413, 440-41 (1996).

¹⁷⁷ The extern seminar added a one-credit seminar to the two or three hours of fieldwork credit that students received for legal externships. From the beginning through today, the crediting for the course considers one credit of "effort" for the course commensurate to the sixty hours of fieldwork for each fieldwork credit, but credit for the course is a total package of three or four credits rather than a separate award of credit for the seminar and the fieldwork.

met with each group bi-weekly. Students were assigned journals to turn in at each class period. The review of syllabi, class notes, and student submissions from those first years tempts me to track in some detail how my initial vision evolved, which goals proved difficult, and alternative teaching methods I tried. Given space limitations and the focus of this symposium, however, I will talk in broad brush only about TLP influences at the outset, where the stamp of TLP course and book persist, and how those influences carried forward to the *Learning from Practice* book.

C. TLP Influence on the Initial Design for the Becoming a Lawyer Course

Figure Three reprints the Goals and Objectives that I distributed to my first externship class the spring semester of 1983. Part II discusses TLP's explicit sharing with students of learning goals for them based on the authors' reflection of what lawyers need to know and gaps and misdirected thinking they had seen in lawyers and law students as well as their coaching of students on the metacognitive processes that the authors believed would help students achieve these goals. Planning teaching against an articulation in behavioral terms of what learners can or are motivated to do and the usefulness of helping students learn how to learn is much in vogue today. In my law school career, however, I felt considerable confusion in non-TLP classes about what I was supposed to learn, and I do not recall any professor giving me a statement about the objectives of the course or much guidance about learning to learn aside from general admonitions like "make an outline and join a study group."

My engrained TLP decision-making framework that all must relate to what one seeks to achieve pushed me to write a goals statement for my initial externship seminar. I do not recall my thought process on sharing a goals statement with students except a general idea that it would be helpful if they knew what I was trying to do. I now realize that TLP course modeled explicit statement of goals to students with an explanation of how various assignments might help in their achievement and that may have helped me to see this as a "normal" thing to do although it was not a very normal thing to do in early 1980s legal education generally. With some recent coaching in education theory, today I would state goals and objectives in terms of learner outcomes rather than stopping with what I would "provide" or "present." My current reminder to myself and mantra I have used in workshops for law teachers in other countries is, "The measure of a teacher's success is not what you teach but what they learn."

In addition to TLP influence in making a goals statement, Figure

FIGURE THREE: LEAH WORTHAM'S GOALS DISTRIBUTED TO STUDENTS IN HER FIRST BECOMING A LAWYER SEMINAR (1983)

GOALS	OBJECTIVES
<p>I. Provide conceptual frameworks through which students can reflect on their internship experiences and enhance the learning gained.</p> <p>A. Present the paradigm of strategic case planning using decision making as a conceptual framework</p>	<p>—Accustom students to a framework of: 1) articulating ones objectives; 2) considering alternate means for achieving a particular objective; 3) evaluating outcomes; 4) feeding back experience as a means for improved practice</p> <p>—Use strategic case planning to introduce students to the knowledge and level of preparation necessary for competent practice</p>
<p>B. Present the approach of mapping the context and culture of practice settings to recognize the way the functioning of social systems affects outcomes and establishes norms for lawyer behavior using social science literature as a conceptual framework</p>	<p>—Accustom students to recognizing and analyzing the dynamics and structure of the social systems in which clients' problems arise and are resolved in order that they: 1) learn to use the information to predict outcomes; 2) learn to use the information to manipulate the system to affect outcomes; 3) recognize pressures to conform to particular norms of lawyer behavior; 4) will make conscious choices with regard to conformity rather than acting automatically</p>
<p>C. Present the paradigm of the lawyer's role and the lawyer client relationship found in the Code of Professional Responsibility and other legal commentary</p>	<p>—Make students aware of the profession's ideal statements and urge them to consider this ideal against their observation</p> <p>—Encourage students to acknowledge tensions they feel with the role given their personality and values</p> <p>—Make students aware of the debate on how much and what kind of control the lawyer should have in the lawyer/client relationship and urge them to compare the ideal statements to their observation</p>
<p>II. Students be able to recognize their own feelings, strengths, and limitations as they are likely to affect their performance as lawyers</p>	<p>—Learn to recognize situations where personality and feelings may affect an attorney's behavior but be disguised as based on rational judgment if unacknowledged</p> <p>—Identify situations where one's own personality is likely to mean that an aspect of lawyering will be particularly difficult or troubling and consider ways of coping</p>
<p>III. Encourage students to recognize what practice in various areas of the law requires in terms of tasks performed and skills and competencies</p>	<p>—Provide students an opportunity to consider which types of law practice they are most likely to enjoy and in which they are likely to be most successful</p>
<p>IV. Provide an opportunity for discussion of the placement experience and a place to work on solving problems that arise</p>	<p>—Encourage students to seek projects that are adequately challenging</p> <p>—Encourage students to formulate their own objectives for internships and seek to meet them</p> <p>—Encourage students to seek evaluation and feedback</p>

Three shows TLP imprint in its content. Goal I talks about “providing conceptual frameworks” and offering “paradigms” and an “approach to mapping.” The paradigms to be presented for Goals I.A. (strategic case planning and decision-making) and I.C. (lawyer’s role and the lawyer-client relationship as found in the Code of Professional Responsibility and elsewhere) came directly from TLP course and book. For I.A., I wanted students to internalize the decision-making model that had become a part of me and that I had found so useful. For I.C., I anticipated TLP approach of students knowing ethical rules but also considering the values they reflect, the contrast in rules and ideal statements with reality, and the potential conflicts with students’ individual values. For Goal I.B., I drew on TLP’s attention to social systems and norms for social behavior, both as to how those insights might be used instrumentally to assist a client in a particular case but also as to how they exert pressures on the lawyer to conform to conventional practice, which in some instances may be antithetical to a client’s interests. My materials on these topics melded TLP approach with a dose of anthropological field method that I had learned as an undergraduate.

Goal II took an idea from TLP but expanded it through use of Andrew Watson’s work on the psychological dynamics of lawyering.¹⁷⁸ Goal III recognizes the comparative advantage that I saw CUA’s program could offer students to consider the types of law practice that would suit them best and strategies for enhancing that kind of learning setting. Goal IV was directed to helping students get the most from their externships.

While Goals III and IV largely reflect differing circumstances of a limited responsibility externship rather than a full representation clinic, the legacy of TLP is implicit within them. The articulation of purpose and decision-making model that TLP taught for work on client cases provides the model for the way I press students to approach their externships. In subsequent evolutions of the course, I started to require a learning agenda articulating goals for the externship and listing the kinds of experiences the students thought might fulfill those goals, which would then be discussed and negotiated with supervisors.¹⁷⁹ This is one of the devices that I use toward my effort to turn students into seeing themselves as “actors rather than being acted upon.” From the beginning, I began almost all discussions about a particular externship placement with a question about why the student

¹⁷⁸ Andrew S. Watson, *The Quest for Professional Competency: Psychological Aspects of Legal Education*, 37 J. LEGAL ED. 93 (1968); Andrew S. Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL ED. 1 (1963).

¹⁷⁹ LFP, *supra* note 3, at 24.

wanted to go there. When the answer was, "because they want me" my response was always, "Lots of places want you. The question is where you will be able to achieve the goals you have for your legal education at this point." With the wealth of opportunities in Washington and the relatively small number of school-year externs available, this response had the virtue of truth in the externship context although it unfortunately is not so true of paying employment even in the best of economic times. In Goals III and IV with respect to future choices about career and current choices about placement work, I took TLP approach of trying to get students to see themselves as people who have choice and the opportunity to shape their own destinies.

With these goals in mind, the topics for the eight original classes were as follows. Footnotes indicate the reading assignments and some of the class activities.

I. Introduction to the Course. A Preliminary Discussion of Standards for Lawyer Competence.¹⁸⁰

II. Strategic Case Planning: A Feedback Model for Practice¹⁸¹

III. The Internship Experience: Getting the Most from It¹⁸²

IV. Understanding the Non-Legal "Rules": The Social and Cultural Patterns That Govern Behavior and Affect Outcomes in Legal Settings¹⁸³

V. Competency and Conformity: The Advocate's Role¹⁸⁴

¹⁸⁰ The decision-making model from CRIM. SUPP., *supra* note 1, at 102, is reprinted in this article as Fig. One and my adaptation, which was distributed in my first class, is shown as Fig. Two. Two letters from a supervisor to a clinical student, printed in both TLP PROBLEM SUPPLEMENTS, were distributed for use as a class exercise on norms used to evaluate lawyering performance. CIV. SUPP., *supra* note 1, at 13-17; CRIM. SUPP., *supra* note 1, at 4-7. For later classes, I wrote two memoranda from a supervisor to a student, more like those that an extern would receive, and broadened the discussion of them from norms for evaluation to also include what makes feedback effective and differences in how individuals react to feedback. Those memoranda appear at LFP, *supra* note 3, at 37-39. See also J. P. OGILVY, LEAH WORTHAM, LISA G. LERMAN, TEACHER'S MANUAL TO ACCOMPANY LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS 43-49 (1998) [hereinafter LFP TEACHER'S MANUAL] at 43-49 discussing use of the memoranda in class.

¹⁸¹ TLP, *supra* note 1, at 298-307 (material on decision-making); *id.* at 356-59 (problems students have with research, using statutes, and organizing bodies of law described in this article at *supra* notes 144-49 and accompanying text).

¹⁸² This class focused on a handout I wrote regarding problems that might arise in an externship. Exercise III. (Spring 1983) (on file with author).

¹⁸³ TLP, *supra* note 1, at 66-69 (traditional conception of the lawyer's role and informal norms); *id.* at 72-80 (relationship of social organization of the bar to ethical conduct); JAMES P. SPRADLEY, PARTICIPANT OBSERVATION 152-53 (1980); James P. Spradley, *Beating the Drunk Charge in CONFORMITY AND CONFLICT: READINGS IN CULTURAL ANTHROPOLOGY* 351-58 (James P. Spradley & David W. McCurdy, eds., 1971); George F. Cole, *The Decision to Prosecute in ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS* 123-36 (John A. Robertson ed., 1974).

¹⁸⁴ The Valdez tape of negotiation on an insurance settlement regarding a child who was

VI. The Lawyer-Client Relationship¹⁸⁵VII. The Demands of the Lawyer's Role and Your Values and Personality¹⁸⁶VIII. How Do Areas of Practice Differ? How Should I Think about What Would Be Best for Me?¹⁸⁷

While I sometimes found ways to use experiences that students had in particular externships as a basis for class discussion, discussion of individual experience was more often the focus of journal exchanges and individual conferences. I looked for ways to provide a common experience to the class as a basis for class discussion, again probably looking back to TLP class model that usually focused class periods on a live teacher or student demonstration, an exercise, or videotape.¹⁸⁸

killed while not wearing a seat belt was the subject of class discussion, and the reading assignment was ethical rules and opinions relevant to the situation. This tape was from the "Dilemmas in Legal Ethics" series produced by the ABA Consortium on Professional Responsibility. The "story line" for this videotape and others in the series was provided by Gary Bellow and Jeanne Charn. Moulton, *supra* note 5, at 49.

¹⁸⁵ TLP, *supra* note 1, at 1018-33 (allocation of responsibility and decision-making authority between lawyer and client); *id.* at 995-97 (note on the nature of counseling skills); *id.* at 998-1017 (excerpt on framing choices in counseling); *id.* at 977-78 (questions for a counselor to ask herself); DVORKIN, ET. AL., *supra* note 6, at 200-02 (on the importance of "caring" about the client in deciding how to allocate decision-making authority); JAMES D. FELLERS, BRUCE S. ROGOW, MARVIN S. KAYNE, HOWARD R. SACKS, ANDREW S. WATSON, *A Psychological Taxonomy of Lawyer Conflicts*, in *LAWYERS, CLIENTS AND ETHICS* 119-23 (Murray Teigh Bloom ed., 1974).

¹⁸⁶ TLP, *supra* note 1, at 1076-82 (the need for self-awareness of the lawyer's own feelings and needs); *id.* at 32-33 (common assumptions about the benefits of predominant modes of legal education with contradictory counter assumptions); *id.* at 89-91 (emotional dimensions of the traditional lawyer paradigm); L. BROWN & E. DAUER, *PLANNING FOR LAWYERS* 80-87 (1978) (excerpt on attorney personalities and psychological aspects of legal consultation); Christina Maslach, *Burned-Out*, *HUMAN BEHAVIOR* 17-21 (September 1976); Seymour Wishman, *A Lawyer's Guilty Secrets*, *NEWSWEEK*, November 9, 1981 at 25.

¹⁸⁷ ERWIN SMIGEL, *THE WALL STREET LAWYER* 140-69 (1964); E. Clinton Bamberger, *Of Lawyers, Law Firms, and Law Practice for People: Ideas for New Lawyers*, 12 *COL. HUMAN RTS. L. REV.* 57, 57-63 (1980); Jerome Carlin, *Lawyers on their Own* (1962), *excerpted in* VERN COUNTRYMAN & TED FINMAN, *THE LAWYER IN MODERN SOCIETY* 17-27 (1966); Morton Halpern, *The Public Interest Bar: An Audit*, in RALPH NADER & MARK GREEN (EDS.), *VERDICTS ON LAWYERS* 160-67 (1977); Abner Mikva, *Interest Representation in Congress: The Social Responsibilities of the Washington Lawyer*, 38 *GEO. WASH. L. REV.* 650, 653-56 (1970); George Szaad & Daniel Gersen, *Inside vs. Outside Counsel*, 28 *BUS. LAW* 235, 245-49 (1972) *excerpted in* MURRAY SCHWARTZ (ED.), *LAWYERS AND THE LEGAL PROFESSION* 231-35 (1979). Students also were provided with a bibliography with a number of references on types of lawyering.

¹⁸⁸ I used the Valdez tape developed, *supra* note 184, as well as two additional tapes produced by the ABA and a tape produced by Andrew Watson on psychological dynamics in the lawyer client relationship.

D. *TLP Imprints on the LFP Book, Evolution of My BAL Course, and Other Aspects of My Teaching*

In 1990, I was asked to become an Associate Dean and requested that someone be hired to take the position I had filled for nine years as clinical coordinator and director of the extern program. Sandy Ogilvy assumed that position, and I continued to teach in the externship program. Over time, the Becoming a Lawyer externship with the classroom component became required for a first externship,¹⁸⁹ and additional people started teaching sections of the course. All teachers shared materials they were using, and discussions about readings and method lead those involved to contemplate collaboration on an externship textbook, which became *Learning from Practice*.¹⁹⁰ The following lists ways in which I see the influence of TLP on LFP, as well as noting instances when LFP's approach differs somewhat.

1. *TLP Influences on the LFP Book*

a. *The Teacher Should be Explicit About Course Goals and Course Content Should Flow from Those Goals*

As TLP modeled being explicit about learning objectives, LFP presses externship teachers to decide what their particular externship programs seek to achieve in the context of their law schools. The book is meant to be adaptable for externship courses with a variety of educational goals, but the Teacher's Manual stresses that teachers must make those goal choices in order to design a coherent course.¹⁹¹ The LFP book is designed as a menu with each chapter envisioned as a possible topic for one or more classroom foci.¹⁹² The Teacher's Manual provides six sample syllabi for courses with different emphases.¹⁹³ A course that seeks to achieve too many goals risks achieving none. As outlined in Part II, TLP course goals seemed relatively clear to me as a student. Commentary on the TLP book, however, suggests a divergence in those who read it on the educational goals to which it is directed.¹⁹⁴

¹⁸⁹ Students are allowed to take a second externship, and with special permission a third, in a course called Supervised Fieldwork.

¹⁹⁰ LFP, *supra* note 3.

¹⁹¹ LFP TEACHER'S MANUAL, *supra* note 180, at 3-5.

¹⁹² *Id.* at 1-2. Chapters also might be assigned as background reading or as resource for a student with a particular interest.

¹⁹³ *Id.* at 8-20.

¹⁹⁴ That, of course, may reflect the same philosophy as LFP—that there is scope within the book to use it achieve a variety of educational goals that might be chosen by individual teachers.

b. *Communicating Directly with Students About Models for Learning*

Like TLP, the LFP authors generally speak in the first person and talk to students in the second person. LFP seeks to be direct about presenting learning models and what a student needs to do to employ them. Chapter One explains the theory of experiential learning.¹⁹⁵ Chapter Two guides students in setting learning goals and considers how to monitor progress toward them.¹⁹⁶

An overall goal suggested by LFP for any externship teacher is enhancing students' ability to learn from experience. The book provides models to assist that learning in a number of respects. Chapter Three considers how one learns from supervision including how to clarify assignments, what makes feedback a useful learning tool, and how the supervisee can affect the quality of feedback and supervision received.¹⁹⁷ Chapter Five explains and applies Donald Schön's concept of reflective practice.¹⁹⁸ Chapter Six presents the educational theory behind journals as a powerful tool in learning from experience and offers guidance on assigning and writing journals.¹⁹⁹ Chapter Seven describes the theory behind learning from participant observation and offers guidance on enhancing observation skills.²⁰⁰ Chapter Eight guides a student through considerations in self-learning for skill development with particular emphasis on writing and research.²⁰¹ Chapter Thirteen provides direction for the student to undertake a process of life-long review of career planning.²⁰² Chapter Fourteen offers guidance for students on class presentations, which as described later, I have found a useful way to foster student reflection and model application of the TLP decision-making model.²⁰³ Chapter Fifteen presents some models for reflection on the externship experience at its close.²⁰⁴

Some chapters provide both substantive information and "lenses" through which to view the externship experience. Chapter Four reviews professional responsibility concepts most likely to come up in externship settings.²⁰⁵ Chapter Eight considers bias in the legal pro-

¹⁹⁵ LFP, *supra* note 3, at 1-9.

¹⁹⁶ *Id.* at 11-27.

¹⁹⁷ *Id.* at 29-48.

¹⁹⁸ *Id.* at 79-96. DONALD SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS (1987).

¹⁹⁹ LFP, *supra* note 3, at 97-111.

²⁰⁰ *Id.* at 113-35.

²⁰¹ *Id.* at 137-71.

²⁰² *Id.* at 271-98.

²⁰³ *Id.* at 299-309.

²⁰⁴ *Id.* at 311-17.

²⁰⁵ *Id.* at 49-78.

fession.²⁰⁶ Chapter Ten discusses management skills important to lawyering success. These skills include time management, delegation, working collaboratively, communication, and creativity.²⁰⁷ Chapter Eleven focuses on norms operating in work places. Chapter Twelve raises concerns regarding balancing personal and professional life.²⁰⁸

c. *Visual Learning Cues*

We had three publishers' offers for LFP. Our final selection of publisher was based on West Publishing's agreement to use color type, broad margins, and icons. To shape our ideas about format for the book, my co-author Lisa Lerman did a survey of textbooks from a variety of disciplines that could be purchased in our university book store and found that they commonly employed visual organization and cues quite different from the typical page after page full of black and white type found in a law text.

LFP uses visual cues throughout the book. Exercises are blocked with shaded purple type. Suggestions for journal topics have a pencil icon. Role-play possibilities are denoted with a dramatic mask symbol. Arrows in the margins direct students to related material in other chapters in the book. Rodin's Thinker appears when students are encouraged to stop and reflect, and these topics are suggested for journals or class presentations. Broad margins are meant to encourage students to note their thoughts. In some chapters, notes about the author's thought process behind the text appear in color type in the margin.

d. *Encouraging Student Consideration of What They Want to Achieve and Whom They Want to Become*

LFP puts a major focus on a student's internal determination of a direction, offers advice about how to proceed in that direction, and provides cautions about varying from one's internal compass. Unlike TLP, however, LFP does not discuss sociological theories of role acquisition and socialization. LFP does not include TLP's extensive materials on the pressures upon law students to accept external goals without thought about whether these goals reflect their individual values and are likely to lead to personal satisfaction for them.

LFP offers the possibility that a teacher may choose course goals that do not emphasize student contemplation of life choice questions. For instance, a course could focus on institutional critique²⁰⁹ or on

²⁰⁶ *Id.* at 137-71.

²⁰⁷ *Id.* at 199-213.

²⁰⁸ *Id.* at 229-70.

²⁰⁹ See Robert Condlin, "Tastes Great Less Filling": *The Law School and Political Cri-*

skills acquisition. LFP's content, however, presses teachers to consider setting as one goal for the class the prodding of students to consider the kind of lawyer they want to be in both the micro and macro sense.

As previously mentioned, my recollection of purposefulness from TLP course focused primarily on instrumental purposefulness toward client goals,²¹⁰ and I did not recall the TLP course to stress broader questions of integration of the lawyering role with one's life that I see raised by TLP book. I do not know whether that is because: Bellow evolved to that broader focus in the intervening five to six years; there was so much going on in the course that the class, or at least I, never got that far; I was not yet at an adult developmental stage at which I was able to process that question.²¹¹

e. Stressing Purposefulness in Action

As LFP presses the externship teacher to articulate goals for the course, most aspects of the book press the student to articulate goals in a particular circumstance. Chapter Two is concentrated on setting goals for the externship.²¹² Chapter Three offers guidance for getting from supervisors the kind of supervision and feedback useful to further the student's learning goals.²¹³ Chapter Seven, on learning from observation, stresses planning for an observation with the goals of what one seeks to consider in mind.²¹⁴ Chapter Nine, on skill development, begins by pressing the student to a self-assessment of the skills they need to improve.²¹⁵ Chapter Ten similarly offers self-as-

tique, 35 J. LEGAL EDUC., 45, 50 (1986) (advocating political critique as "the most important clinical objective"); William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 488-89, 558 (1980) (criticizing a focus in legal education on practical tasks of lawyering and interaction between lawyers and clients, which he terms the "Psychological Vision" as opposed to a "Political Vision" acknowledging the law as a reflection and embodiment of the "struggle for scarce resources and conflict of opposed ends"); Linda F. Smith, *Designing an Extern Clinical Program: Or As You Sow, So Shall You Reap*, 5 CLIN. L. REV. 527, 536 (1999) (suggesting any externship program should offer opportunity for "critique of legal institutions and lawyering roles and practices").

²¹⁰ I do not recall from the course much discussion of the complex and controversial questions of whether and how the lawyer's own view of the morality of various courses that might be taken should enter the discussion of client goals and course of action to be taken. See Robert F. Cochran, Jr., Deborah L. Rhode, Paul R. Tremblay, & Thomas L. Shaffer, *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591 (2003); O'Leary, *supra* note 24. The first topic discussed at the Colloquium of authors for this symposium was how the views of TLP authors fit in the debate on lawyers' influence on client goals. Transcript, Colloquium, *supra* note 42, at 4-6.

²¹¹ *Supra* note 116 and accompanying text.

²¹² LFP, *supra* note 3, at 11-27.

²¹³ *Id.* at 43-45.

²¹⁴ *Id.* at 116-17.

²¹⁵ *Id.* at 174-76, 180.

essment tools for time management and planning, delegation, working collaboration, communication, and creativity.²¹⁶ Chapter Twelve presses students to think about how goals for their personal lives can be reconciled with their professional lives.²¹⁷ Chapter Thirteen begins with self-assessment as a first step in career planning.²¹⁸ Chapter Fourteen on classroom presentations begins with a prod that topic choice support the student's goals for the externship and for the student to identify what the presentation should achieve.²¹⁹ Chapter Fifteen presses reflection on how initial objectives for externships matched with the experience.²²⁰

f. Integrating Professional Responsibility Concerns

LFP acknowledges that a clinical course must address the professional responsibility issues involved. LFP, however, is considerably less ambitious than TLP. LFP focuses only on professional responsibility issues particularly likely to come up in externships and does not attempt much in the way of discussion of lawyer's role or critique of ethical rules. As previously mentioned, even with spending twenty percent of my classroom sessions on legal ethics, I find this modest application of professional responsibility is about all I can do in a one-credit seminar. Conversely, TLP approach to legal ethics is much like the one I use in my classroom course.

g. LFP's Primary Focus is the Experiential Learning Cycle Rather Than the Lawyer Decision-Making Model

LFP and my recent version of the BAL course focus students on the experiential learning cycle of Plan → Do → Integrate → Reflect → and then repeat.²²¹ In my current course, I do not introduce the TLP decision-making model at the outset as I did in my original course. Accounts of my efforts to teach the decision-making model in earlier versions of the externship seminar lay on the cutting room floor of this article. Writing this article makes me consider, for the next edition of LFP, a focus on decision-making as central to the lawyering enterprise and on creative problem-solving to expand the emphasis of the Experiential Learning Cycle.

²¹⁶ *Id.* at 200-01, 203-04, 208, 209-10.

²¹⁷ *Id.* at 232, 247-57.

²¹⁸ *Id.* at 271-82.

²¹⁹ *Id.* at 300-02. For materials on classroom presentations prepared for a March 7-8, 2003 Externship Conference at Catholic University, see <http://law.cua.edu/News/conference/externships/>.

²²⁰ *Id.* at 311-12.

²²¹ *Id.* at 1-9. The graphic for the experiential learning cycle first appears as Fig. 1.1 at 4.

By nature, I am a fairly introspective person.²²² TLP's emphasis on reflection and self-critique came comfortably to me. Regardless of the individual student's inclinations, it seems to me easier to encourage reflection in students as the supervisor in a full representation clinic than in an externship. The supervisor often is there when decisions are contemplated and will have observed some of the student's experience firsthand. The limited responsibility externship supervisor is distant from the lawyering decisions in which a student was involved, or the student observed, and from the dynamics of the placement, and this presents difficulties in engaging student reflection.²²³

That contrast, however, may reflect that I have never tried to be a supervisor in a full representation clinic. It may be that the students in whom I find it difficult to prod reflection would present the same challenges if I were their in-house faculty supervisor. Externship teachers spend considerable effort thinking about how to prod reflection in students because reflection is assumed to be a critical component of learning from experience. Much of LFP is directed toward offering models to stimulate student reflection including journals, structured observation, comparison of supervision experience with a heuristic of good supervision, and class presentations.

2. *Evolution of My BAL Course*

a. *More Emphasis on Individually Set Student Goals*

Fast forwarding my spring 1983 externship class to my spring 2002 externship class and the parts of the LFP "menu" that I serve to students in the course's most recent form, I can recognize some overall shifts. The most central one is a shift in the balance between pursuit of individual student-learning goals versus my teacher-set goals. Chapter Two of the book and the accompanying Teacher Manual chapter lay out the approach I take with students to prodding them to articulate goals. Students are required to bring a rough draft of a learning agenda listing individual goals and a listing the experiences

²²² Howard Gardner's theory of multiple intelligences posits one to be "intrapersonal intelligence" defined as "a capacity to form an accurate, veridical model of oneself and to be able to use that model to operate effectively in life." HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE, A READER*, 9 (1993). While I cannot self-certify an intelligence on this dimension nor for the accuracy of my model of myself, I can attest a learning style preference for looking inward. See RONALD GROSS, *PEAK LEARNING* 97-104 (1991) (considering personal intelligences from Gardner's theory and using that information, along with other information about learning style, to find effective ways of learning for an individual).

²²³ *But see* Condlin, *supra* note 209, at 53-59, 63-72 (arguing that the in-house supervisor's relationship to the student as both teacher and lawyer makes critical commentary on the supervisor difficult and thus arguing for advantages in the externship model).

that they think would lead to fulfilling those goals to a conference with me. The learning agenda usually emerges in a somewhat different form after my probing. The student's revised version is discussed and negotiated with the supervisor. Throughout the semester, students fill out timesheets that require a break out of time spent showing allocation to legal research, non legal research, observation, client contact, writing, discovery, organization in support of legal work, conversation, clerical, and other (with request for explanation).²²⁴ Over the semester, I compare these time sheets to a student's initial goals, make written observations about consistency of time spent with goals stated, and consider answers to assigned reflection questions. I also make progress toward goals a focus of my mid-semester conference with students and review the learning agenda in the final conference.²²⁵

b. Some Teacher Set Goals for the Class Remain

Support for student's individually set goals now occupies more of my time in the course than in its original version. Consistent with that end, I spend more time in individual conferences with students than in some past versions. I still, however, pursue some teacher-set goals. I currently announce two broad goals for all externs: (1) enhancing their ability to learn from experience in a work setting, the mode in which they are likely to have the greatest opportunity to learn after graduation; (2) pressing reflection on what students want in their lives as lawyers including not only the type of lawyering jobs they may wish to have but also the relationship of those jobs to their values and the integration of those jobs with the rest of their lives. I see both of these as educational goals of TLP books.

The starting questions ingrained in me from TLP course—"What do you want (in that context usually what does the client want)? What are you trying to accomplish?"—remain the starting point for many of the BAL course's directions such as the focus on a student's individual goals, pressing models for effective learning from experience, and urging reflection on pursuit of career and life goals.

²²⁴ The Time Sheet Instructions and a sample Time Sheet are available in the materials related to my presentation at the March 2003 Externship Conference held at Catholic University available at <http://law.cua.edu/News/conference/externships/>.

²²⁵ J.P. Ogilvy recognizes that goals and objectives sometimes change in the course of an externship making it appropriate to revise the list of goals, objectives, or tasks and that many unanticipated outcomes may occur in context-specific experiential learning. J.P. Ogilvy, *Guidelines with Commentary for the Evaluation of Legal Externship Programs*, 38 GONZ. L. REV. 155, 175, 180-81 (2002/03). As he points out, externship programs should "value and credit" such unanticipated outcomes and "encourage the student participants to recognize them." *Id.* at 180-81.

In TLP courses, we were all doing individual client representation in civil legal services or public defender work. Thus, appropriately, considerable emphasis needed to be addressed to purposefulness toward client goals. In the CUA externship program where students are involved in many kinds of lawyering and rarely are involved in determination of the client's goal[s], the central question of purposefulness is directed toward the students' goals for the experience. Instead of lawyering task examples, the experiences that most often serve as the basis for inquiry with students in class and individual conferences are the tasks a student seeks in the externship (as well as choice of the externship itself), how externship tasks are approached, the nature of interaction with the supervisor and co-workers, and observations about the work setting and legal system.

c. Class Presentations

I assigned class presentations for awhile, stopped, and then returned to them about four years ago. In their current iteration, I find conferencing with students about their class presentations a useful way to push further with students on their goals for the externship, employ the TLP decision-making model, and elicit student reflection on their placement experience. I press that the choice of topic should further the goals of the externship or some other goal of the student. Our discussion of alternative possibilities for presentation topics usually generates reflection in the student on the externship because students are forced to think about the placement and what they do in it with regard to what might be of interest to other students. Rather than asking for reflection for its own sake, the student now is reflecting on the externship toward the purpose of a class assignment that must be completed and toward sharing the experience with others.

At a March 2003 on externships held at CUA, I made a presentation on student presentations that now comprise about half my group meeting time for the course. The class presentations require significant time to prepare and serve some of the same reflection purposes as journals. Thus, when I assign them, I limit the journaling assignments to some short "reflection questions," which accompany the time sheets to be turned in.

I also see class presentations as an opportunity to coach students in effective presentations of types that probably form more of lawyers' total work than trial or appellate advocacy or even of client interviewing, counseling, and negotiation. By this, I mean lawyer activities such as trying to convince a prospective client to hire the lawyer, briefing a supervisor on a matter, training non-lawyers of a client or employees of an in-house lawyer's employer with an objective of legal compli-

ance, or continuing legal education of other lawyers. As previously mentioned, I require students to prepare written objectives in behavioral outcomes for the other students who are required to attend all class presentations. If the presentation is a simulation, those objectives may be in two levels—the objective for the participants if this were a “real” setting and for the class in their role as students.²²⁶

I usually have two meetings with students of thirty to sixty minutes in which I see myself as working side-by-side with the student, as a colleague would, in helping them to think about what an effective presentation would be. This allows me a vehicle to press the TLP decision-making model. I start and continually return to the articulation of objective. I force students to consider a variety of alternatives for structuring the presentation and try to take them through pros and cons of how likely one mode versus another would be in achieving the desired end. Not surprisingly, a large number of students begin by assuming they will present some kind of lecture. This opens the door for discussion of whether lecture is likely to engage and retain the attention of other students, be effective for a goal to persuade or motivate, and so on.

E. A Different Path to Goals Shared with TLP

Like TLP, I ask each extern “to describe and generalize from his or her practice” and “make lawyering a subject of inquiry.”²²⁷ While I do not use sociological theory on role acquisition, I want students to consider whether the values and attitudes in the type of lawyering life to which they aspire are likely to be “satisfying or justifiable.”²²⁸ Through the individual fieldwork experiences and sharing of experiences among externs, I hope to provide class members with some greater “understanding about what the ‘law job’ actually involves” and variations among different kinds of law jobs.²²⁹ These aspirations fall within my teacher-set goal of students’ contemplation of the kind

²²⁶ For example, a student working in the in-house counsel’s office of a software company simulated a management meeting with heads of various departments in the company in which he, as the general counsel, briefed the managers on a new export control law, compliance with which would be somewhat of a headache for the sales department. Some class members were assigned roles as department heads, which included an explanation of their responsibilities in the company and the perspective they likely would bring to the issue at hand. The objective “in role” was to secure willing compliance with the law from the managers who would have to see that this compliance actually occurred. The objective for the class was to show some of the organizational dynamics of the job of an in-house counsel, consider effective explanation of a complicated law to non-lawyers, and stimulate thinking on what kind of presentation is most effective in motivating law compliance.

²²⁷ TLP, *supra* note 1, at xix.

²²⁸ *Id.*

²²⁹ *Id.*

of lawyer they want to be in a narrow career as well as broader life and values sense. Like TLP, a second teacher-set goal is "appreciation of the possibilities inherent in learning from doing"²³⁰ and "about how and what one learns when one learns from experience."²³¹

Enhanced professional skills are not a teacher-set goal that I hold for every extern. Many individual externs have some skill goals. When they do, the learning agenda conference seeks to give greater specificity to what it is the student wants to learn, the type of placement that might provide opportunities for that type of learning, the kinds of tasks that would support such learning, and other paths to skill improvement.

The diversity of CUA extern placements means many are not focused on poor people's treatment in the social and justice systems of poor people, to which I think a law school should expose every student in their law school experience.²³² One clinical course cannot be expected to meet all the educational goals unmet by the rest of the curriculum. The CUA externship model puts students in role in the many settings in which lawyers work, which allows pursuit of goals akin to those furthered for me by TLP—reflection on the lawyering life, internalizing models for learning from experience, and encouragement of purposefulness in pursuing individual, intrinsically set goals.

IV. DAYENU—ANY ONE OF THESE WOULD HAVE BEEN ENOUGH

In the Introduction, I explain how I came to the organizing device for this section—my spontaneous muttering to myself of "Dayenu," meaning, "It would have been enough" as I considered one aspect of TLP's scope. In a footnote, I recount my consultation with a rabbi and Hebrew scholar on my faculty regarding the accuracy and appropriateness of using dayenu in this context.²³³ My colleague's reservation was that sometimes in modern usage dayenu is used to mean "Enough already!" rather than the praise and wonder that I have always understood the word to express. The following lists my exclamations of dayenu in praise for the things that TLP course provided to me, each of which would have been enough. I also add dayenu for additional contributions of the TLP books to legal education and

²³⁰ *Id.* at xxv.

²³¹ *Id.*

²³² For description of a course called "Child, Parent, and State" using simulation method to explore family policy and state intervention in the family in the context of child protective services and apparently raising such questions, see Barbara Bennett Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine and Practice to Life*, 91 MICH. L. REV. 1977 (1993).

²³³ *Supra* note 10.

scholarship. Thus, my use of dayenu primarily offers praise for the extraordinary contribution of the movie and the book. Given, however, my reflections in this article that some of what I found profound in the “movie” may be obscured by the ambition and scope of the books, I realized that a bit of the alternative meaning of dayenu—“Enough already!” might also be appropriate regarding the amazing scope of the books. In the sheer magnitude and majesty of the TLP books’ reach and ambition, it is easy to be overwhelmed and lose the impact of central messages.²³⁴

Dayenu—it would have been enough—to provide a rich and challenging framework for the work of a lawyer incorporating task, social context, thought development, values, psychological processes of the lawyer and client, and much more.

Dayenu to articulate a decision-making model that has served me well for more than thirty years and to pioneer in applying creative problem-solving techniques to lawyering.

Dayenu to crystallize a theory of legal pedagogy based on the integration of the experience of lawyering for poor people with theory from many disciplines to develop a model to operationalize that pedagogical method.

Dayenu to develop teaching methods adaptable to a wider range of learning preferences than the traditional Langdellian²³⁵ method of the legal classroom by including an explicit conceptual framework, experience-based learning, visual components, and acknowledgement of emotional and relational dimensions.

Dayenu for reinforcing the multiple types of intelligence necessary to be a good lawyer and the relevance of what one brings to law school as well as what one learns there.

Dayenu to conceptualize the tasks of lawyers with explanatory metaphors that provide a framework for student reflection and a vehicle to learn by analogy.

Dayenu to formulate explicit goals for what students need to learn based on reflections from practice, to share those goals with students and other teachers, and to be explicit about the metacognitive

²³⁴ The TLP Introduction says a thirty hour classroom component cannot give “satisfactory treatment” to all topics. TLP, *supra* note 1, at xix. Addressing the comprehensive sweep of TLP in a forty-five to sixty hour component, as the Introduction suggests, seems impossible from my teaching perspective of how long it takes for concepts to be absorbed by students. The Introduction acknowledges “we have covered a great many subjects and still feel that we have covered too few.” *Id.* at xxiv.

²³⁵ Neumann, *supra* note 25, at 728-30 (cautioning against the defamation of Socrates in confusing his techniques toward the objectives of analysis and self-knowledge with the conventional law school application that he finds more akin to Protagoras, “the leading Sophist and Socrates’ rival” whose objective was teaching the skills of rhetoric rather than self-knowledge).

process useful to achieve the learning goals.

Dayenu to stress the integral place of legal ethics in every aspect of lawyering and to provide a comprehensive analysis of legal ethics rules as applied to lawyering tasks, a rich stock of practical ethics teaching materials, and a reminder that “learning the rules” should be only the beginning of a normative inquiry of the values those rules reflect.

Dayenu to make me eternally wary of “this is how we do it here.”

Dayenu to balance the tendency of legal education and lawyers to reduce issues of fact and law to individual cases, thus obscuring the patterns concerning inequality in social conditions and treatment in the justice system that might emerge in looking more systemically.

Dayenu to stress and offer materials showing that lawyering is an important subject of academic inquiry and that developing theory about practice is a challenging intellectual and essential practical task for legal education.

Dayenu to stress—even if I was too young to see it in the course—that choices about one’s life as a lawyer are choices about who one becomes.

Dayenu to produce a humane legal textbook concerned with how one reconciles duty to client with impact on others and a refusal to demonize those on the other side.

Dayenu to exhibit the passion, joy, and persistence that I saw in Gary Bellow’s life, which is the subject of the Closing Word.

A CLOSING WORD ON PASSION FOR JUSTICE AND JOY

When I first knew Gary, he was thirty-six years old.²³⁶ I did some work with him at the Legal Services Corporation when the Legal Services Center was being established. I saw him from time to time after that until a few years before he died, too young, at sixty-four. There must have been times that he was tired and discouraged, but I have no memory of seeing him that way. I may romanticize, and people who knew him better may well have seen another side. However, in my recollection of a lot of contact in two years of law school and occasional contact thereafter, Gary never seemed tired or beaten and always seemed to have the zest to keep fighting while avoiding a demonization of those on the other side. He seemed, at least in my memory, to always crackle with enthusiasm and energy. After the

²³⁶ Gary Bellow was born June 9, 1935. Press Release, Harvard Law School, Professor Gary Bellow, 64. Pioneering Public Service Lawyer, Founder of Harvard Law School’s Clinical Legal Education Programs (April 13, 2000), available at <http://www/law/harvard.edu/new/bellowleaves.html> As I type this at fifty-four, I am startled to realize he was so young when he was my teacher.

draft in which I chose the words “crackle” and “energy,” I read Gerald Frug’s eulogy for Gary, which likened friendship with him to electricity.²³⁷

Efforts to use the law to make the world a better place for people at the bottom of the economic heap saw a number of reverses in the forty or so years of Gary Bellow’s legal career. My own decision to go to law school was rooted in a college professor’s diagnosis that my desire to “help people” ought to be matched to some tangible tools for doing so. I cannot recall if, as a law student, I had any particular vision of whether the recently launched but already waning “war on poverty” could be won or a vision of the direction, speed, and trajectory that a quest for greater social justice was likely to take. Even if I did not have a particularly crystallized vision of the future, I do not think I would have anticipated a world where three steps forward and two and one-half steps back seems a fairly optimistic assessment of “progress.” I often enough have seen “warriors” in the fight against poverty and for greater social justice discouraged and disheartened.

In my first draft of this piece, I speculated that perhaps the consistently upbeat persona that I recall in Gary might have been possible because of the theoretical bent lavishly displayed in TLP books. When things were going badly, he could turn to abstracting a theory for why that might be happening and what constellation of factors might be brought to bear to turn things around. Perhaps a unique combination of Gary’s lack of humility, immense personal charm, and optimistic belief that others could be influenced if one but found the right lever, allowed him to believe that he could really make, if not “the” difference, at least “a” difference.

While perhaps these explanations are accurate in part, I found another explanation when, post first draft, I read things written about Gary and more of his own writings. The footnote to the title of *Steady Work: A Practitioner’s Reflection on Political Lawyering* gave me another possible answer.²³⁸ Gary explained the title with this story:

A man, sitting on a box outside the gates of a Jewish ghetto in sixteenth century Poland, was approached by a recent visitor to the settlement: “Every day I see you sitting here,” the visitor said, “are you waiting for someone?” “Oh yes,” the man replied, “I’m waiting for the Messiah. It is my job here.” “Your job?,” said the visitor. “Are you happy with your job?” “Well, the man replied, “the job

²³⁷ Gerald E. Frug, *In Memoriam: Gary Bellow*, 114 Harv. L. Rev. 409, 409 (2000) (Gary’s friendship “provided you an enormous amount of warmth, along with a lot of light . . . was a powerful, stimulating source of energy . . . gave you energy so much that it felt like an electric shock.”).

²³⁸ Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996).

has its ups and downs. But it's steady work, you know."²³⁹

I have sometimes thought about an appropriate metaphor for trying to continue to work for social justice and inspire others to do so in the face of a more "mature" vision of the obstacles to that task. Until reading Gary's article, I had only thought of Sisyphus rolling his boulder up the hill. Gary's article title provided me with the more appealing concept of "steady work."

A young Polish advocate who had worked with students at the Jagiellonian Human Rights Clinic once described an attraction of working with clinical students as, "The students do not yet know what cannot be done." He acknowledged that sometimes in that "ignorance" they are willing to try something new and find the impossible can be done after all. In TLP terms, we could say they had not yet conformed to the conventional lawyer's role so were willing to approach the problem from a different perspective. Perhaps why Gary chose law school teaching for a substantial part of his endeavors was to work with lawyers-to-be whose faces had not yet "grown to fit the mask."²⁴⁰ While TLP book is less explicit about the goal than I experienced in the TLP course, I assume a central objective of Gary and Bea's was to inspire more recruits for "steady work."²⁴¹

²³⁹ *Id.* at 297 n.1 (quoting IRVING HOWE, *STEADY WORK: ESSAYS IN THE POLITICS OF DEMOCRATIC RADICALIZATION, 1953-1966* (1966)).

²⁴⁰ TLP's closing pages excerpt George Orwell's essay, *Shooting an Elephant*, in which Orwell realizes that, as a police officer in lower Burma, he had not killed an elephant of enormous value to his owner as a working animal because the elephant had killed a man when it got loose in a bazaar or because the elephant was a danger. Rather Orwell admits the death was a pretext and that he had shot the elephant "solely to avoid looking a fool." TLP, *supra* note 1, at 1111-12 (excerpting G. ORWELL, *SHOOTING AN ELEPHANT AND OTHER ESSAYS* (1950)). TLP then comments:

This story has often come to mind in those moments in practice when we find ourselves thinking: "a lawyer has got to act like a lawyer." Perhaps we too "wear a mask" which our faces grow to fit. There is much we lose as well as gain in "doing our job" in the world.

TLP, *supra* note 1, at 1112.

²⁴¹ For Bea Moulton's affirmation of her and Bellow's goal with regard to new lawyers, see Moulton, *supra* note 5, at 43.