

EPISTEMOLOGY AND ETHICS IN RELATIONSHIP-CENTERED LEGAL EDUCATION AND PRACTICE

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Introduction

Epistemology involves views about knowledge and how it is developed. It is the study of how individuals come to know the truth about given phenomena and it relates to the knowledge generation process: How is knowledge acquired, internalized, and applied to situations? The epistemology and ontology of a discipline affect the type of inquiry and the method of investigation used by professionals in that discipline, which in turn influence the particular phenomena that are the focus and create meaning for the professional. Traditional legal epistemology is based on Enlightenment principles giving reason and objective rationality priority status as pure sources of knowledge. Recent research on how information is obtained and processed by the brain raises important questions about whether pure legal reasoning is possible without attending to underlying emotional and relational variables.

In the discussion that follows, we present a model for enhancing legal education that is premised on changing the culture of the legal profession by adjusting the epistemology. This raises an obvious question: Can the study of social science theories enable a law student to be more professional by moderating some of the values and judgments that can lead to questionable moral positions? Can exposure to real clients

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with real problems help a law student to develop perspectives and techniques that will lead to a deeper understanding of clients' needs and a more fulfilling role in society? What will it take to make a palpable difference in how law is practiced, how lawyers are perceived, and how the dominant societal narrative about the legal profession is expressed?

This analysis draws upon recent research into personal values and how they influence behavior. Researchers have found that individuals are more likely to adhere to socially desirable behaviors supported by normative expectations.¹ The social force of conforming behavior to that which is expected by others within a group is a powerful determinant of behavior. Somewhat counter-intuitively, the more popular or normative a behavior is, the weaker its connection is to *personal* values. This is particularly true for people high in conformism values.² The conclusions from this research are consistent with the realities in current legal practice, where the dominant narrative is adversarialism and many lawyers, regardless of their personal values, tend to conform their behavior to meet this social expectation rather than feeling disconnected from the profession. The necessary extension of this argument, and what we are proposing, is that if the legal epistemology is changed consistent with a relationship-centered, experientially-rich approach, law students and practitioners will adjust their behavior in conformance with the emerging narrative.

¹ Bardi, A. B., & Schwartz, S. H. *Value and Behaviour: Strength and Structure of Relations*. 29 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN, 1207-1220 (2003).

² Jan-Erik Lönnqvist, Gari Walkowitz, Philipp Wichardt, Marjaana Lindeman and Markku Verkasalo. *The Moderating Effect of Conformism Values on the Relations Between other Personal Values, Social Norms, Moral Obligation, and Single Altruistic Behaviours*. 48 BRITISH JOURNAL OF SOCIAL PSYCHOLOGY, 525-546 (2009).

Part I of this article shows that insights from neurobiology and cognitive science lead us to question some fundamental aspects of law school education and how we train lawyers to interact with clients and each other. Part II reviews and critiques traditional narratives in legal education. Recent calls for reform of legal education are examined in Part III. Part IV outlines the core competencies and theoretical foundations of Relationship Centered Lawyering (hereinafter, RCL). Part V highlights three recent and important critiques of legal education that have challenged legal educators to reexamine law school curriculum and instruction. The main themes of these critiques and their implications for the relationship-centered approach are also examined. Part VI reviews the literature specific to Clinical Legal Education in order to situate the RCL approach within this body of scholarship. Parts VII and VIII explore the question of how ethical and professional practice can be taught: first, (Part VII) by looking at the work of clinical legal scholars who have integrated ideas and research from other disciplines, and second, (Part VIII) by building on this accumulated knowledge with additional research from the field of psychology. The latter work reflects recent advances in the field of moral development as informed by neurobiological research. In addition, this section will examine the concept of empathy as a crucial component to professionalism and address questions about whether empathy skills can be enhanced with educational experiences connected with a relational approach to legal practice. The article concludes by examining some of the opportunities and challenges of integrating RCL into the law school curriculum, and identifying the empirical research needed to evaluate relevant outcomes of such a change, including the impact of RCL in developing ethical and professional lawyers.

I. Neurobiology and Cognition: The Role of Experience and Culture

It ain't what you don't know that gets you into trouble.
It's what you know for sure that just ain't so.
–Mark Twain

Through neurobiological and psychological research over the past ten years, there is now general agreement that information processing and decision making occurs not just in the cognitive realm but also in the body's physical responses to a situation, as well as in the perceptions and emotions that are influenced by the life experiences of an individual. What does the research tell us about how humans process information and come to conclusions about what they are experiencing? First, the brain receives information that we are aware of (the conscious) as well as inputs from our bodily systems that, generally, we are oblivious to (the unconscious.) Conscious thought refers to the cognitive and/or affective task-relevant processes one is knowingly aware of while attending to a task. Unconscious thought, on the other hand, refers to cognitive and/or affective task-relevant processes that take place outside conscious awareness.³ Some authors have referred to the mind/body combination, particularly those inputs that emerge from automatic responses to stimuli, as embodied cognition.⁴ The concept of embodied cognition reminds us that human cognitive processes are not limited to those thoughts we can control. More specifically it points out that many cognitive processes serve the broader goal of facilitating action in a specific environment and that cognition is

³ Ap Dijksterhuis. Think Different: The Merits of Unconscious Thought in Preference Development and Decision Making 87 *J. of Pers. and Soc. Psych.* 5, 586, 586 (2004).

⁴ Inge Devoldre, Mark H. Davis, Lesley L. Verhofstadt, & Ann Buysse, Empathy and Social Support Provision in Couples: Social Support and the Need to Study the Underlying Processes, 144 *J. of Psychology*, (3), 259 (2010).

grounded in actual bodily states.⁵

We ourselves are the embodied continuance
Of those who did not live into our time
And others will be and are our immortality on earth.

-Jorge Luis Borges

Many cognitive psychologists theorize that the brain produces mental models based on experience and culture.⁶ These mental models are then tested by direct experiences with the world and adapt accordingly. The unconscious brain provides an expectation or predictive bias to the sensory input which creates probabilistic knowledge that influences perception, judgment and problem solving.⁷ This phenomenon is increasingly being studied in relation to such things as eye witness testimony and awareness of bias errors.⁸ Many early developmental experiences actually create physical responses in the brain. For example, if a child grows up in an environment where the threat of violence is frequent, the experience can become “wired” into the brain (actual physical changes in the brain from repeated incidents), leading to behaviors such as hypervigilance, constant scanning of the environment for risk, and strong reactions to stimuli that might not provoke others to action.⁹

Similarly, the amygdala region of the brain can process traumatic memories.¹⁰ This small central section is the most primitive area of the brain and is essentially

⁵ Barbara A. Spellman, & Simone Schnall. *Emerging Paradigms of Rationality: Embodied Rationality* 35 *Queen's L.J.* 117, 119, 2009.

⁶ Cite to egs.

⁷ For a well articulated summary of recent advances in cognitive studies, See Chris Frith, *Making up the Mind: How the Brain Creates Our Mental World*, Wiley-Blackwell Publishing, 2007

⁸ See, Brian L. Cutler & Gary L. Wells. *Expert Testimony Regarding Eyewitness Identification* (pp. 100-123). In *Psychological Science in the Courtroom: Consensus and Controversy*. Jennifer L. Skeem, Devin s. Douglas & Scott O. Lilienfeld (eds.). Guilford Press, (2009).

⁹ Robin Balbernie, *Circuits and Circumstances: the neurobiological consequences of early relationship experiences and how they shape later behavior*. 27 *J. of Child Psychotherapy*, 3, 237, 246 (2001).

¹⁰ For a review of recent research on Post Traumatic Stress Disorder and brain activity, see, Lisa M. Shin, Scott L. Rauch, & Roger K. Pitman, *Amygdala, Medial Prefrontal Cortex, and Hippocampal Function in PTSD*. 1071 *Ann. N.Y. Acad. Sci.* 67 (2006).

reactive. Rather than processing a memory in the prefrontal cortex where it can be integrated with a person's experiences and rationalized, the memory remains in the automatic, physical-response region.¹¹ Consider the traumatic memory arising from an assault. The victim might be walking in a similar area to where the original assault occurred with similar sensory inputs: isolated, dark location, the sound of approaching footsteps. The amygdala enables the person to react to these sensory inputs without having to go through the more time consuming process of activating the cognitive system.¹² When faced with a danger or threat, the amygdala immediately moves the body into a flight or fight mode because of the encoding of these memories.

Remember, what you are told is really threefold: shaped by the teller, reshaped by the listener, and concealed from them both by the deadman of the tale.

-Vladimir Nabokov *The Real Life of Sebastian Knight*

Often, mental models provide information about an individual based on appearance, status, occupation or other characteristic. For example, an elderly woman in a wheel chair might generate a mental model of diminished intellect in an individual who has had such experiences with grandparents or neighbors or who carries this belief from media or family messaging. The perception one has of this person can be confirmed or contradicted by the sensory inputs such as seeing her appearance and clothing, listening to her speak, or watching her move. With both conscious and unconscious systems sending messages to the brain, the perception can be strongly influenced by the mental model. We attend to those details that are consistent with our mental model of the person.

¹¹ Scott L. Rauch, Paul J. Whalen, Lisa M. Shin, Sean C. McInerney, Michael L. Macklin, Natasha B. Lasko, Scott P. Orr and Roger K. Pitman. *Exaggerated amygdala response to masked facial stimuli in posttraumatic stress disorder: a functional MRI study* 47 *BIOLOGICAL PSYCHIATRY* (9), 769. 1 May 2000,

¹² M.D. BOUNDS, *THE BIOLOGY OF MIND*. Fitzgerald Science Press 1999, p. 248.

In the legal environment, this occurs with regularity. For example, a prosecutor may develop a mental model that establishes an assumption that those suspects brought forward by the police or that suspects of a certain racial or ethnic background or a particular socio-economic background are most likely guilty or innocent. The development of such preconceptions increases the danger of confirmatory bias: looking for and giving more weight to those facts and responses from suspects that confirm the belief they are guilty. Some nonverbal and emotional messages that come from the prosecutor may be received by the accused as judgmental and cause hostile or defensive responses that might further confirm the prosecutor's intuition. Even where no such bias is present on the part of the prosecutor, the client's experiences may lead to the same process of receiving communications through a lens that is influenced by power or class differences, previous experiences, or family/culture/media messaging.

Emotion and the unconscious must be viewed as important components of human cognition rather than as processes that detract from rationality.¹³ Importantly, contextual or situational factors do not simply modify what action, and thus, what cognitive process is appropriate, but rather they define the action.¹⁴ Recognizing and integrating the data from emotions is a critical process in effective legal practice.¹⁵ In addition, recognizing and integrating the data from our own perceptions as influenced by our unconscious are essential both to add clarity to information input and to improve self-awareness leading to more accurate judgments and communications.

II. Traditional Narratives in Legal Education

¹³ Spellman & Schnall, *supra* note ____ at 133.

¹⁴ *Id.*, at 135.

¹⁵ See, e.g., Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231 (2005) (add cite to Terry Maroney, others).

The scripts legal educators use to communicate legal knowledge and skills, as well as the myths created about the law serve to reinforce the dominant narratives of the legal profession and legal thinking. For example, the case method can be described as the process of discerning legal doctrine or theories from a series of cases in which appellate judges apply legal principles to particular fact situations.¹⁶ A law student is taught to use the case method to develop a level of certainty or truth about the law in a particular area. In addition, law students are taught to examine each side of a case and to construct the most favorable interpretation of the law, to identify analogous cases or competing statutes to support their argument. The construction of legal knowledge is designed for the adversarial system where a theoretically impartial judge can independently examine the arguments of each side and render a winning verdict. The facts that many, if not most, legal cases never go to trial and are settled in negotiation or some form of dispute resolution, and that many lawyers never litigate a case are not reflected in current legal education. The adversarial preparation built into the education and enculturation of lawyers may actually create impediments to many of the processes fundamental to legal practice.

Reasoning from legal principles carries a presumption that the application will be value neutral.¹⁷ Pure legal reasoning directs the lawyer to focus on legally-relevant facts, spot the legal issue and apply the rule of law to arrive at conclusions about legal strategy and argument. This objectivist position leads to the epistemology that has dominated

¹⁶ See Catharine Pierce Wells, *LANGDELL AND THE INVENTION OF LEGAL DOCTRINE* 58 *Buff. L. Rev.* 551, 2010. for a discussion of the contributions of Langdell to the development of the case method in legal education.

¹⁷ F. Stephen Knippenberg *FUTURE NONADVANCE OBLIGATIONS: PREFERENCES LOST IN METAPHOR THE ROLE OF METAPHOR IN HUMAN COGNITION* 72 *Wash. U. L.Q.* 1537 (1994).

legal thinking.¹⁸ The resulting ontology (the common terms and prioritized categorizations, principles, etc. that reflect disciplinary meaning) is focused on traditional sources of law such as which statute, regulation, case, decision, etc. contains the answer to the legal issue. But as important as legal reasoning is, this type of response fails on two levels of sufficiency. First, in the categorization of what is important, the lawyer may not be fully aware of a client's needs and wishes (they may be inaudible to the lawyer listening only for the facts relevant to the legal issue.) Secondly, the lawyer who is focused on objective legal information may be unaware of the perceptions, biases, and emotions she/he is experiencing and that are influencing the perception of the client and the narrative being disclosed. This can lead to communication and trust issues within the lawyer-client relationship, judgmental messages, and missed information. What is being argued here is that an experientialist epistemology¹⁹ or an emotional epistemology²⁰ would be practical and effective supplements to the traditional rational legal epistemology that has characterized most of legal education.

Signature pedagogy has been defined as a teaching and learning model that is distinctive to a profession and one that functions as a window into the priorities and, moreover, the very essence of a profession's work.²¹ Beyond the need to prepare students for practice, the signature pedagogies of the professions serve a role as cultural markers, instilling critical ideas, language, behaviors, customs, beliefs, and values of a professional group. Culture is often referred to as the totality of ways being passed on from

¹⁸ Id at 1556-1557.

¹⁹ Steven L. Winter, TRANSCENDENTAL NONSENSE, METAPHORIC REASONING, AND THE COGNITIVE STAKES FOR LAW 137 U. Pa. L. Rev. 1105, (1989).

²⁰ Erin Ryan, The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation. 10 HARV. NEGOT. L. REV. 231, 276 (2005).

²¹ CHARLES R. FOSTER, LISA DAHILL, LARRY GOLEMON & BARBARA WANG TOLENTINO, EDUCATING CLERGY: TEACHING PRACTICES AND PASTORAL IMAGINATION 33 (2005).

generation to generation.²² The experiences of students in professional education socialize them to these subtle but influential characteristics common to the practice of their chosen field.

This professional acculturation process is embedded in the very interactions of the teaching/learning process. Flavio Marsiglia and Stephen Kulis describe acculturation as occurring in two distinct dimensions. Behavioral acculturation involves the adoption of the external aspects of the culture such as language and skills that allow the individual to assimilate. Psychological acculturation involves the adoption of the ideologies of the culture or the way the group sees the world.²³ In law school, competition over grades, a focus on the intellectual skills of legal analysis and the contest skills of legal argument provide students with the foundation of legal culture they take with them into practice.²⁴

Depending on the qualities of the supervising attorney, an externship or in-house clinic experience may reinforce this culture or challenge its relevance to legal practice. In the former case, students head into practice secure in the first principles of their discipline. In the latter case, students may well lack the opportunity to work through these conflicting messages. What is the legal knowledge or theoretical foundation in law schools that students can rely upon to analyze and inform questions of practice and standards for professional behavior?

²² NATIONAL ASSOCIATION OF SOCIAL WORKERS, NASW STANDARDS FOR CULTURAL COMPETENCE IN SOCIAL WORK PRACTICE 7 (2001).

²³ FLAVIO FRANCISCO MARSIGLIA & STEPHEN KULIS, DIVERSITY, OPPRESSION, AND CHANGE 6 (2009).

²⁴ For a detailed discussion on the extent to which legal education inculcates in students “a culture of competition and conformity”, see Susan Sturm and Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515 (2007). According to Sturm and Guinier, “[l]aw school culture emerges from the adversarial idea of law that is inscribed in the dominant pedagogy. It is reinforced by the prevailing metrics of success, which rank students through relentless public competitions (for grades, jobs, law journals, moot court, and clerkships) and provide very little opportunity for feedback that encourages students to develop more contextually defined or internally generated measures of accomplishment.” *Id.* at 519-20 (citations omitted).

In the traditional education of lawyers, legal epistemology is generally delivered through the signature pedagogy of the Socratic Method, and is often limited to cognitive analytic processes: reviewing appellate decisions and their specific legal reasoning, mastering legal principles and the language/style of legal analysis and communication. This method is extended into most lawyers' practice beginning with a set of facts, spotting the legal issues, applying relevant legal rules and cases, employing analogical thinking, and based on this construction of legal knowledge, determining guilt/innocence, liability of a client, or exposure/risk of a particular course of action or behavior. However, legal issue spotting creates a tendency in lawyers to objectify their clients by seeing clients not as people but as legal issues.²⁵ As Katherine Kruse argues, "Consonant with their professional training, lawyers "issue-spot" their clients as they would the facts in a law school exam, reducing client objectives to bundles of legal rights and interests. Lawyers then pursue those legal interests in disregard of both their clients' actual wishes and the harm caused to others. In the process, lawyers disregard their clients' inclinations to be cooperative, moral and socially responsible and encourage the self seeking behavior that accompanies legal interest maximization."²⁶

Susan Haack makes the important point that there is a difference between inquiry and advocacy in the construction of legal knowledge and the development of legal truths.²⁷ Knowledge produced by the advocate may be "self-convinced" to support a desired outcome and may be lacking in ethical and contextual implications. Such legal knowledge is often weaponized and purposefully interpreted to advance perceived client

²⁵ Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEORGETOWN J. LEGAL ETHICS 103, 124 (2010).

²⁶ *Id.*

²⁷ Susan Haack, *What's Wrong with Litigation-Driven Science? An Essay in Legal Epistemology*, 38 SETON HALL L. REV. 1053, 1070-1071 (2008).

interests. Law school curriculum and pedagogy thus tend to focus the student's attention on the legal question at the expense of the broader inquiry into client interests or the impact of pursuing a particular legal strategy. This construction of legal knowledge has the potential to produce legal professionals who undervalue ethical and humanistic factors in client situations.

To be clear, we are not arguing for an abandonment of traditional legal education. It is evident that the benefits produced by rigorous development of analytical and analogical skills are essential to effective legal practice. What we are putting forward is that these skills are insufficient for effective legal representation of clients, particularly in those legal issues that involve personal or ongoing relationships. We envision the social science theories and high quality practice experiences to supplement and complete the foundational elements of current legal education.

III. Legal Education Reform

Repeated calls to reform legal education have focused on a number of these issues, including the gap between legal education and practice,²⁸ and the need for more humanistic approaches to improve law teaching and the institutional culture of law schools.²⁹ Central to all of these concerns are the questions of *whether* and *how* we can teach law students to be ethical and self-reflective professionals. Although the legal academy as a whole may be faulted for ignoring these questions to a large extent, clinical legal scholars have grappled with these issues for well over two decades, and have come up with a wide range of responses. These responses include theories developed largely by clinicians, such as “client-centered counseling,” “case theory” and “narrative theory”,

²⁸ Cites to Crampton Report, MacCrate Report, Carnegie Report, and Best Practices....

²⁹ Best Practices, Humanizing Legal Education literature....

to clinical teaching methods, such as “rounds,” or “case plans,” to concepts imported from other disciplines (including education, cognitive and social psychology, and philosophy), such as “adult learning theory,” “ecological learning” and “reflection-in-action.”

In all of these instances, the scholarship has mainly emphasized the processes by which we teach and students learn.³⁰ These contributions are undoubtedly necessary and useful to the achievement of the goal of graduating reflective and ethical professionals. At the same time, the processes themselves can only get us part of the way toward this goal.

The key element that is missing, and yet, seems to be problematic to most clinical legal scholars (and legal scholars in general), is the idea of openly embracing a normative framework upon which to ground our teaching and students’ learning experiences. Nevertheless, it can be argued that the law does indeed operate with a normative framework, albeit a hidden one, and one that is based on faulty assumptions. The “hidden norms” are based on a legalistic framework, which is premised on the idea that lawyers practice their profession as detached, neutral, and rational beings, and that they (and their clients) can be strictly guided by legal precedent and statutory interpretation. As argued above, the framework is simply false, as it is based on incorrect assumptions, such as the idea that emotion does not play a role in legal representation or legal decision-making. This fallacy has been dispelled by the growing number of legal scholars who have written about the role of emotion in the law.³¹

³⁰ Most of the literature focuses on how we teach; there is also a smaller body of work that addresses how students learn.

³¹ *See, e.g.,* Erin Ryan, etc.

Other flaws with the legalistic framework have been identified by scholars from the globally-significant Therapeutic Jurisprudence movement³², as well as other vectors of the Comprehensive Law Movement³³, which have gained increasing momentum in recent years. These and other developments point out the need for the legal educators and practitioners to adopt a more holistic and humanistic approach. At the same time, there are legitimate concerns with simply stating that the law needs to be more “therapeutic” or “humanistic”: who gets to decide? And, what ethics or values inform those decisions? If the normative framework amounts to lawyers or judges using their “gut feelings,” the approach would certainly be problematic. And if the framework amounts to the lawyer doing whatever the client says under any circumstances, most would agree that this model would be problematic as well.

What is needed, then, is a normative framework that provides some other grounding to guide the ethical conduct of law students and practitioners. The framework must have some empirically tested (and testable) basis in knowledge that has accumulated over time. It must go beyond gut feelings, and not be easily vulnerable to personal biases. It must be “client-centered” *and* it must also take account of the real world limitations of many clients’ ability to use rational thinking to analyze the legal matters in which they become embroiled.

Susan Brooks and Robert Madden (co-authors of this article), both of whom are credentialed in the fields of social work and law, have articulated such a framework,

³² For additional information about Therapeutic Jurisprudence, including a detailed bibliography, *see* www.therapeuticjurisprudence.org (last visited on September 16, 2010).

³³ Susan Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. L. REV. 1 (2006). The completed list of vectors includes collaborative law, creative problem solving, holistic justice, preventive law, problem solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation. These approaches are all interdisciplinary and rely upon social science research to a large extent

which they refer to as “Relationship-Centered Lawyering (“RCL”).”³⁴ Relationship-centeredness builds upon and enhances the client-centered approach, as well as the Comprehensive Law Movement approaches, by adopting a normative framework drawn principally from the mental health fields that focuses on understanding and relating to the client ‘in context.’ Relationship-centered lawyering thus contemplates a narrative that goes beyond the legal controversy and includes the many people and systems with which the client interacts. As such, relationship-centeredness draws attention to the significance of the entire range of professional relationships, including those involving co-counsel, other associates/partners, judges, witnesses, opposing counsel and non-lawyers who may be involved in legal matters. It also includes the lawyer’s self-awareness of extra-legal concerns that may affect his or her own effectiveness

The relationship-centered approach calls upon lawyers to gain competency in three important and distinct areas: (1) substantive theory related to a contextualized understanding of human development; (2) principles of just and effective legal process; and (3) perspectives on affective and interpersonal competence, including cultural competence and emotional intelligence. This relational framework provides a scientific base for its notions surrounding professionalism, by relying heavily on empirically tested theoretical approaches principally drawn from the mental health fields of social work and psychology. These include theories of human development and social interaction, particularly family systems and attachment theories. They also include approaches to

³⁴ For a detailed description of the framework, *see* RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE (Susan L. Brooks & Robert G. Madden, eds., 2010). Significant portions of this article describing the Relationship-Centered approach and its components have been taken directly from the book.

procedural justice, and practice approaches, such as those focused on strengths and empowerment, as well as cultural competence.

IV. Relationship-Centered Lawyering: Three Areas of Competency

Relationship-Centered Lawyering offers an organized three-part framework that is based on a wealth of accumulated social science knowledge, most of which has been empirically tested over many decades. At the same time, this complex set of theories can easily be translated into concrete applications that are useful to clinical law teachers as well as other types of legal practitioners facing day-to-day challenges.

The three components, or as Brooks and Madden refer to them, areas of competency, include: (a) substantive theory, (b) process-oriented considerations, and (c) interpersonal and cultural considerations.

A. Substantive Theory-Contextualized Approaches to Human Development

Western legal systems, particularly the American legal system, stress individualism. Nevertheless, the social sciences, which essentially study what makes humans behave as they do, recognize that all of us are truly social beings, and we live our lives as a part of many systems. Immediate and extended families, neighbors, networks of friends, and work colleagues, are examples of social systems that provide each of us with support, resources, and identity. When faced with stress or when changes to membership occur in a system, each member of that system must adapt. In addition, what happens to individual members has a ripple effect on the larger systems to which they belong. These interpersonal dynamics help explain the need for legal professionals to consider context and environment in order to understand individual clients and to improve their own decisions and strategies.

In the relationship-centered approach, lawyers must be prepared to understand clients and others they will encounter in their professional lives *in context*. This contextualized understanding requires an appreciation of extra-legal issues, such as the complex life circumstances facing clients, or struggles within a law office culture. Most lawyers, however, lack a theoretical model from which to operate when assessing these types of needs and interests. Three theoretical perspectives provide the most up-to-date and useful research-based knowledge for this contextualized knowledge: family systems theory, developmental theory, and attachment theory

Before discussing these theories, it may be useful to explain how we selected these particular approaches from among the vast number of theoretical models that exist in the social sciences, and even within the mental health fields (by which we mean psychology, psychiatry, and social work.) This exploration originated with the authors' shared interest in Therapeutic Jurisprudence (TJ), a field of inquiry that examines the extent to which the law may have helpful or deleterious effects on the well-being of its subjects. As scholars and practitioners trained in the field of social work now engaged in the field of law, both of us were constantly struck by the gap between law as it was being practiced, and fundamental principles we had learned and had integrated as social workers. We observed this gap starkly in family law, the area in which both of us were practicing and teaching. Once we were introduced to the critical lens of TJ, it gave us the language with which to express the bases of our critique of the law, as well as the invitation to introduce the normative framework drawn from social work to provide its content. Although our initial thinking was focused solely on family law, the more we thought about the teaching and practice of law more broadly, the more we became

convinced that these well-grounded social work theories can be useful to lawyers across all areas of practice.

In considering what social work elements were most essential and yet most lacking in the field of law, we kept coming back to the theories and principles that provide a theoretical understanding of the person in context. Lawyers, regardless of whether they practice law as prosecutors or defense counsel in a criminal court, or provide legal advice and do deals with corporate executives, need to appreciate the broader contexts in which they and their clients are situated. Yet, for many reasons, including the legal system's tendency to focus on the individual, as well as the historical absence of any serious attention to the interpersonal dimensions of practice in legal education and training, lawyers lack both the recognition of these contextual elements and the tools, in terms of substantive knowledge, with which to apply them to improve the effectiveness of their work.

The three substantive theoretical perspectives we have chosen reflect current and useful knowledge to which law students and legal practitioners should at least be exposed. The content of these theories directs lawyers to appreciate the importance of context, and also directs them to be non-judgmental, and to recognize and give voice to client strengths, autonomy and dignity. Thus, the theories provide "scientific" grounding for professional values that probably most, if not all lawyers would agree are essential to competent representation.

Family systems theory is an organizing theoretical perspective to structure a lawyer's thinking about the life circumstances of individuals, such as herself, her client,

her co-workers, and her opponents.³⁵ This theory explains basic systems concepts including family communication and transactional patterns, relationship factors, human development within the context of the family's experiences, and the adaptability of systems to stress and change.³⁶

Knowledge of human development across the lifespan is central to effective assessment of behavior and emotions. For instance, a lawyer who understands her client's life context is better able to counsel her client and to work for outcomes that support healthy development. This knowledge also pertains to other professional relationships, such as understanding one's opponent in a litigation context or even in a transactional context. Developmental theory placed within family systems thinking allows the practitioner to appreciate both the stability of structure and the fluidity of change within a system.³⁷

The third foundational social science theory is attachment theory, one of the most significant developments in psychological research over the past fifty years. It is not enough for a lawyer to understand the current family system context and developmental stage of clients if they experienced early problems with attachment relationships to caregivers. Attachment problems can impact long term functioning although the effects of disrupted attachments can be overcome with a supportive environment.³⁸ Early attachment problems can create a powerful and enduring narrative, an internal

³⁵ Robert G. Madden, *From Theory to Practice: A Family Systems Approach to the Law*. 30 THOMAS JEFFERSON L. REV. 429, 431 (2008).

³⁶ Karen L. Fingerman & Eric Bermann, *Applications of Family Systems Theory to the Study of Adulthood*, 51 INT'L J. OF AGING AND DEVELOPMENT 5 (2000).

³⁷ Fingerman & Bermann, *Applications of Family Systems Theory to the Study of Adulthood supra* note ___, at ___.

³⁸ Fingerman & Bermann, *Applications of Family Systems Theory to the Study of Adulthood supra* note ___, at ___.

representation about self that influences future relationships, including the lawyer client relationship.³⁹

All of these theoretical approaches are interconnected and build upon each other in significant ways. These theories are also normative in that they pertain to all individuals and families across a wide range of circumstances and are somewhat prescriptive in terms of how to approach and understand clients. Most importantly perhaps, all of these approaches focus on interdependency in human relationships.

A basic understanding of these important social science perspectives is not only valuable to individual client representation and other types of direct legal services. It is also valuable from the standpoint of legal policy development and law reform. Although law generally can be viewed as a set of rules governing the relationships of people in a society, there is much more substance to the law than a codification of morals and values. Law is deeply embedded in and reflective of its own context--the culture in which it is situated. As a result, the social sciences are essential to our understanding of the creation and construction of the law. By focusing on systems, lawyers can gain insight into the social context of the case and will be more likely to act in ways that are relevant to a client's experience.

Social science considerations lead to a reexamination of many aspects of legal practice. These perspectives raise questions about how we educate and train lawyers, judges, and other court personnel.

B. Process-Oriented Considerations-Fairness, Justice, and ADR

³⁹ Fingerman & Bermann, *Applications of Family Systems Theory to the Study of Adulthood* *supra* note __, at ____.

The second competency area explores the qualities that are necessary to provide clients with a sense of trust and respect for the law and its actors, as well as the underlying values that guide the analysis of issues and decision-making. In making this argument for building trust in the legal system, we recognize that in some cases, those in positions of legal authority and those who practice law may not deserve the respect of the public. However, this factor should not be a disincentive to the work of reconstructing a positive narrative about legal practice. Otherwise, the unprofessional behavior becomes self-perpetuating as it leads those lawyers who wish to practice in more collaborative ways unable to risk trusting in their adversaries or the system. In those cases where power is being yielded to deny a client rights or manipulate the system, more adversarial tactics are available but this should be a strategic decision rather than a standard response.

All encounters with the legal system, whether or not they are voluntary, involve process issues such as questions of trust, respect, fair-mindedness, judgment, and perceptions around the opportunity to be heard. Relationship-centeredness requires attending to psychological factors, enhancing positive feelings and minimizing anti-therapeutic costs, all of which generally support alternatives to traditional adversarialism. Empirical research supports the importance of fair and just process inasmuch as when people are treated fairly, they are more likely to have respect for the system, leading to increased compliance with decisions of legal authorities.⁴⁰ This important research calls into question the efficacy of many parts of the judicial system. Social science researchers

⁴⁰ Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 BOSTON UNIVERSITY L. REV. 361 (2001).

offer the opportunity to evaluate legal policy based on studies of human motivation and behavior.

Communication plays an important role in the development of trust in legal authorities and procedures. It is important to consider how the communication between legal professionals and clients influences clients' perceptions of fairness. One perspective is that the sense of being treated fairly is largely dependent on a process where clients are fully informed in accessible language about the procedures and criteria for legal decisions and are shown respect in the way they are treated by the legal professionals.

C. Interpersonal and Cultural Considerations

Knowledge of systems and human development alone does not make one an effective practitioner. The social science theories also direct lawyers' attitude and behavior toward clients. Effective client interactions require specialized skills and perspectives to arrive at positive client outcomes. The relational approach focuses on four key dimensions for approaching clients to build positive relationships consistent with a family systems perspective: (1) culture; (2) empowerment; (3) strengths; and (4) emotion. None of these perspectives is monolithic, but rather each reflects a rich and diverse body of research.

Clinical legal scholars have made rich contributions to our understanding of the role of cultural considerations in the teaching and practice of law.⁴¹ A relatively new field worth noting is the increasingly studied phenomenon of "racial microaggression": day-to-day verbal, behavioral, or environmental indignities, which may be intentional or

⁴¹ See, e.g., Sue Bryant & Jean Koh Peters, Paul Tremblay, Carwina Weng, Christine Zuni-Cruz, Bill Ong-Hing, Michele Jacobs.....

unintentional, but which nonetheless communicate racial slights or insults toward people of color or other historically oppressed groups.⁴² Although the recognition of the existence of this phenomenon is not new, social scientists have recently found innovative ways to categorize and study these seemingly invisible and innocuous interpersonal dynamics.

The next two components, the *empowerment* and *strengths* perspectives, represent two practice models that have become fundamental components of social work training and education. The common and consistent theme of the empowerment perspective⁴³ is one of facilitating the empowerment of clients against a socio-political and historical backdrop of understanding and critiquing oppression in all of its forms. This perspective is particularly useful with client populations that have traditionally been lacking in any kind of political power, yet it is also useful for clients that might otherwise be perceived as powerful in society. The point is that a fundamental aspect of the lawyer's work is to ensure that the client is able to give voice to his or her unique perspective, and to remind the lawyer that no matter how much the lawyer empathizes or believes she understands the client's situation, every client's situation is unique.

The strengths perspective focuses on the notion that all people and environments have significant strengths that can be marshaled to improve the quality of clients' lives.⁴⁴ This shift toward a deeper respect for a particular client's frame of reference is especially important in the context of practicing with diverse groups. As such, this approach is

⁴² See Wing Sue, et al., 272-73.

⁴³ This perspective is comprised of ethics and values defined by the field of professional social work combined with political-economic theory focused on the significance of power in social relationships, and a highly collaborative practice framework.

⁴⁴ Other important aspects include the need to partner with clients to define their strengths, and the notion that a consistent emphasis on strengths will improve the client's motivation to make changes tailored to his or her specific needs.

consonant with and reinforces both the cultural competence and empowerment perspectives.

Finally, as noted elsewhere in this article⁴⁵, analytical thinking is only one subset of what is needed to make a successful lawyer.⁴⁶ Lawyer satisfaction depends on inter and intrapersonal capacities and thus argues for the cultivation of emotional intelligence for lawyers. High levels of emotional intelligence can lead to greater competencies in professional skills such as all forms of communication and persuasion.⁴⁷ Emotional intelligence also allows lawyers to have increased capacity for empathy, which supports their ability to be sensitive to and accepting of the emotional lives of others.⁴⁸

Legal thinking tends to be linear, based on sequential steps that move in some logical order. For these tasks, traditional analytical skills are necessary. Relationship-centered lawyering requires a more nuanced form of analysis that includes the personal, social, cultural and psychological aspects of a situation. For these tasks, new theoretical and psychological/emotional ‘skills’ are required.

The investigation of emotion by legal scholars has recently moved into a more theoretical and conceptual and realm with respect to the role of emotion in legal decision making and negotiation. Alongside the ascendance of these esoteric endeavors, there is a persistent ‘drumbeat’ to try to teach lawyers how to perform better at interviewing and counseling their clients using well-tested and proven knowledge drawn from the mental health professions. Mental health professionals have come forward to offer lawyers

⁴⁵ See discussions in Parts I- III, *supra*, and Part V *infra*.

⁴⁶ Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL’Y & L. 1173-1180, (1999).

⁴⁷ John Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students*, 39 TOL. L. REV. 323 (2008).

⁴⁸ See Marjorie A. Silver, *Emotional Intelligence and Legal Education*, *supra* note __, at 1178; see also text accompanying notes ____ *infra*.

concrete guidance about incorporating knowledge drawn from the mental health fields to carry out their day-to-day work as counselors and interviewers of clients more effectively.

V. Legal Education Critiques

Two recent high-profile reports, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (“**CARNEGIE REPORT**”)⁴⁹ and BEST PRACTICES FOR LEGAL EDUCATION (“**BEST PRACTICES REPORT**”)⁵⁰ support the need for Relationship-Centered Lawyering as an organized theoretical framework that can be used to educate future lawyers as well as current practitioners in a more holistic and humanistic manner. The highly influential Carnegie Report emphasizes the need for legal education to focus more attention on the formation of professional identity along with teaching theory and practice.⁵¹ The Report refers to three “apprenticeships” that are essential components of legal education: (1) intellectual or cognitive; (2) practice-based/performance skills; and (3) identity and purpose.⁵² The Report’s concern is the lack of a body of theory or science for the third apprenticeship. The Carnegie Report therefore advocates that the apprenticeships related to practice and to the ethics and values of the profession be “scientificed”, or articulated in terms of theories and principles that can be taught and applied to different contexts.⁵³

Relationship-Centered Lawyering represents an important first step in the development of a ‘science’ of legal professionalism, as captured by the “components of

⁴⁹ WILLIAM M. SULLIVAN, ET AL. EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 1 (2007) [hereinafter **CARNEGIE REPORT**].

⁵⁰ ROY T. STUCKEY, ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 1 (2007) [hereinafter **BEST PRACTICES REPORT**]

⁵¹ **CARNEGIE REPORT**, *supra* note __, at 13.

⁵² **CARNEGIE REPORT**, *supra* note __, at 27-29.

⁵³ **CARNEGIE REPORT**, *supra* note __, at 104.

expert practice” as mentioned in the Report. When viewed as a cohesive body of theory, this relational model can, in the words of the Carnegie’s authors, “serv[e] to legitimate the construction of new forms of recognized competence.⁵⁴ One element of this model, which is highlighted within the report, is the role of lawyer as “cooperative problem-solver,” which is described as a new normative model of professionalism for the student, and could equally be presented as a new normative model for the practice of law.⁵⁵

The Best Practices Report advocates the development of competence—the ability to resolve legal problems effectively and responsibly—as a primary goal for legal education.⁵⁶ Competence requires the integrative application of knowledge, skills, and values—similar to Carnegie’s three apprenticeships. The Best Practice authors point out that competence is “context-dependent” in that it represents the interplay between the lawyer, the lawyer’s task, and the legal framework in which the tasks must take place.⁵⁷ Best Practices thus advocates the need for “context-based” education in order to develop practical wisdom or practical judgment, which is identified as essential to creative problem solving.

This notion of the need for “contextualization” of legal education and practice, or “context-based education”⁵⁸ is an essential aspect of a relational approach, as reflected in the systems-based approaches that are central to this framework. Both reports recognize that the expert legal professional needs to comprehend fully a highly contextualized understanding of the client, case, and situation.⁵⁹ Contextualization also means the

⁵⁴ CARNEGIE REPORT, *supra* note __, at 113.

⁵⁵ CARNEGIE REPORT, *supra* note __, at 102.

⁵⁶ BEST PRACTICES REPORT, *supra* note __, at. 60.

⁵⁷ BEST PRACTICES REPORT, *supra* note __, at. 60.

⁵⁸ CARNEGIE REPORT, *supra* note __, at 95, *citing* BEST PRACTICES REPORT.

⁵⁹ CARNEGIE REPORT, *supra* note __, at 115.

exploration of moral and ethical-social issues as integral elements of legal representation, including the qualities of compassion, respectfulness, and commitment.⁶⁰

Similar to the Carnegie Report, Best Practices makes the case for greater emphasis and intentionality connected to the teaching of what it calls “affective skills.”⁶¹ These skills include values, attitudes, and beliefs such as how students related to clients, how they respond to ethical concerns, and how their values inform their role.⁶² Roy Stuckey and the other contributors to this report strongly support “supervised practice” as more effective than classroom instruction for purposes of teaching the standards and values of the legal profession and for inculcating a commitment to professionalism. “[S]upervised practice is more effective than classroom instruction for teaching the standards and values of the legal profession and instilling in students a commitment to professionalism.”⁶³ At the same time, this Report cautions that there are a number of important criteria for achieving these goals through externships. These criteria include the need for high-quality supervision; high level of engagement between the institution and the field placement; and significant student preparedness and interaction with faculty as well as field supervisors.

In addition to these two highly influential publications, a third source of critique has been the Humanizing Legal Education (“HLE”) movement. The rapid growth and increasing popularity⁶⁴ of this movement lends further support to the case for a relational

⁶⁰ CARNEGIE REPORT, *supra* note __, at 144, 146.

⁶¹ BEST PRACTICES REPORT, *supra* note __, at 167.

⁶² BEST PRACTICES REPORT, *supra* note __, at 167.

⁶³ BEST PRACTICES REPORT, *supra* note __, at 154.

⁶⁴ At the two most recent Annual Meetings of the Association of American Law Schools, which took place in January 2009 and January 2010, the session sponsored by this Section (known as “Section on Balance in Legal Education”) were delivered to a packed audience. Information on the Section and its activities can be found at:

approach to the teaching and practice of law. Part of the impetus for this movement has been the recognition that bringing about changes in the legal culture needs to begin with focusing on how we educate emerging legal professionals. Professor Barbara Glesner Fines, a leading voice in this movement, describes three components: (1) eliminating or minimizing unnecessary stressors; (2) assisting students in becoming “confident, caring, reflective professionals;” and (3) aiming toward humanizing the profession by recapturing the essential professional values of peacemaking, problem-solving and justice work.⁶⁵ The HLE movement has quickly grown in popularity within the legal academy to the point that in 2006 the AALS established a new section focused on “Balance in Legal Education.”

The HLE movement has drawn much of its momentum from the Carnegie and Best Practices Reports, which in turn have reinforced the concerns raised by the HLE movement—that is, they focus on the extent to which legal education has not given sufficient attention or emphasis to the inculcation of professional identity and values among law students. These reports invite legal educators and practitioners to consider normative theories that address contextualized approaches to human development, as well as other important considerations to the development of a professional identity and values, which arguably should include extra-legal considerations that are interpersonal and/or cultural.

http://memberaccess.aals.org/eWeb/dynamicpage.aspx?webcode=ChpDetail&chp_cst_key=9fb324e8-e515-4fd3-b6db-a1723feeb799 (last visited on June 1, 2010).

⁶⁵ Barbara Glesner Fines, *Fundamental Principles and Challenges of Humanizing Legal Education*, cited by Michael Hunter Schwartz, *An Introduction to a Symposium Whose Time Came*, 47 Washburn L.J. 2, 239-240. Other leading voices include Professors Michael Hunter Schwartz, Gerry Hess, Larry Krieger, Bob Schuwerk, Susan Daicoff, Marjorie Silver, and Bruce Winick. For additional information, see: http://www.law.fsu.edu/academic_programs/humanizing_lawschool/humanizing_lawschool.html (last visited on June 1, 2010).

Further, these developments related to legal education amplify the need to develop an organized framework for presenting this wealth of knowledge in ways that are useful to a wide range of individuals working in the legal system. The relational model delineates three areas of competency, each of which is heavily supported by a body of empirical research. Taken together, these competencies offer a simple framework that, as we hope to demonstrate, can provide the necessary grounding upon which clinicians can teach, and students can build, critical understanding about ethical and professional conduct in legal practice.

VI. Highlights of Relevant Clinical Scholarship

A. How Relationship-Centeredness Enhances Client Client-Centeredness

Since its development, the dominant approach to legal counseling has been the client-centered approach. Relationship-centeredness specifically and directly builds upon and enhances client-centered lawyering, and is in no way a departure from it. In contrasting relationship-centeredness with client-centeredness, it needs to be kept in mind that these approaches are entirely *consistent*. Indeed, client-centered representation is a subset of the relationship-centered approach, and a visual depiction of the two models could easily be concentric circles, with the relational model as the outer circle. By illuminating the broader context in which the lawyer-client relationship exists, the elements of relationship-centeredness sharpen the lawyer's ability to counsel and advise the client more effectively. On the other hand, a lawyer who is not an effective counselor and advisor may be genuinely client-centered, but will nonetheless be ineffective.

An example of this contrast would be an attorney whose client is extremely angry toward the opposing party, perhaps one of two divorcing spouses. This client wants to

litigate the divorce to the bitter end, regardless of the fact that the couple has two school-aged children who are already upset about their parents' divorce. The parties come before the judge, who refers them to mediation and urges them to try to resolve as many issues as possible through mediation—at least for the sake of their children. Despite the judge's urging, a purely client-centered attorney might simply let the client go through the motions of the mediation without exerting any real effort if that is the client's inclination, and instead take the entire case to trial. Does the economic model we use to pay lawyers in the current adversarial system create incentives for lawyers to simply accept a client's bluster as a rationale for increasing the conflict within the case by filing motions and negotiating using threats or intimidation since doing so is compatible with the lawyer's own pecuniary interests?

Using the RCL framework the family lawyer would not only examine the client's motives, she would also examine her own motives and consider with the client the implications of each strategy in the case. Litigating the entire case is almost certainly contrary to the children's best interests and may also anger the judge and backfire on the client in terms of best outcomes. The lawyer, informed by RCL, might use interpersonal skills to explore with the client the relative importance of the issues in the case in order to more completely and accurately represent the client's needs.

A lawyer who practices in a relationship-centered manner will counsel the client on a number of issues, including educating the client about the impact of divorce, particularly high-conflict divorces on children, as well as the potential legal consequences of ignoring the judge's guidance. Such a lawyer will try to assist the client in determining the client's genuine interests, and in thinking through whether mediation

may be a more advantageous route to achieving the client's broader goals than adversarial litigation. The relationship-centered lawyer will also try to gain a better understanding of the basis for the client's anger, and will try to help the client to separate out the angry feelings such that they do not interfere with the client's ability to focus on the true interests related to the legal matter at hand, such as the children's needs or the protection of the parenting relationship. The lawyer may also counsel the client to seek professional or informal help to address the client's angry feelings in order to distinguish them from the legal process.

Another example of this contrast would be an attorney whose client, a petitioner in a civil case, is extremely angry toward the respondent, and wants to litigate the matter to its fullest potential. The parties come before the judge at the settlement conference and the judge urges them to settle the entire case, and certainly to settle as many issues as possible. Despite the judge's urging, a pure-client-centered attorney might easily and unapologetically end up litigating every possible issue if that is what the client wishes. Litigating the entire case, though, will likely irritate the judge and may jeopardize the success of the case. A lawyer who practices in more of a relationship-centered manner will pay more attention to the importance of the settlement negotiation process as well as the judge's input in counseling the client. Such a lawyer will try to ascertain her client's interests and assist the client in viewing the process as a potential opportunity to maximize the client's goals in a more constructive manner than adversarial litigation. The relationship-centered lawyer will also try to gain a better understanding of the basis for the client's anger, and will try to help the client to separate out her angry feelings such that they do not interfere with the client's ability to focus on her genuine interests related

to the legal matter at hand. Again, the lawyer may counsel the client to seek outside help as well.

These examples demonstrate that a pure “client-centered” rubric simply does not go far enough in taking account of the wealth of knowledge our profession has gained since that approach was first introduced.⁶⁶ Relationship-centeredness is not merely a new term—it reflects a comprehensive framework that reshapes lawyers’ perspectives on how best and most effectively to serve our clients. The relational approach provides the theory and skills to assess the client, the client’s systems, the context of the case, and many other factors that lead to enhanced client-centered practice. As such, relationship-centeredness can greatly enhance attorney-client relationships at the micro-level, and ultimately has the potential to transform the professional culture of lawyers and their role in society.

Some scholars might argue that the approach articulated above, which takes account of the client’s context as well as the other relationships involved, *is* essentially a client-centered approach. One of the difficulties with this admittedly popular and influential model is that it has come to mean different things to different people. Katherine Kruse, in a 2006 *CLINICAL LAW REVIEW* article summarizing the development of the client-centered model, acknowledges that rather than representing a single, coherent approach, client-centered representation “has evolved naturally into what might be called a plurality of approaches, which expand aspects of the original client-centered approach in different directions.”⁶⁷ Kruse goes on to say that while perhaps the common

⁶⁶ Indeed, recent scholarship on client-centered counseling draws a similar distinction between a “pure” client-centered approach and “engaged client-centeredness.” See Stephen Ellman, Robert Dinerstein, Ann Shalleck, Isabelle Gunning and Katherine Kruse, *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* [need specific pages] (2009) (

⁶⁷ Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 *CLINICAL L. REV.* 369, 371 (2006).

thread among interpretations of this model is an emphasis on lawyer neutrality, different proponents have emphasized a wide range of values, including lawyer-client collaboration, narrative theory, holistic lawyering, client empowerment, and even traditional zealous adversarialism.⁶⁸ Although Kruse's article makes a valiant attempt to reconcile these disparate approaches, her nearly 100-page article is itself a testament to the timeliness of introducing a new rubric and new terminology to capture the important influences on our work as lawyers, judges and law teachers as well as changes within the legal profession within the past three decades.

Kruse articulates this viewpoint in highlighting critiques of the orthodoxy of client-centeredness as synonymous with lawyer neutrality:

[T]he client-centered approach to problem-solving can obscure important factors such as the client's personal connections and responsibilities toward others; the larger context of the systems within which the client operates; and the connections between the client's individual problems and social justice issues at stake in the representation.⁶⁹

She goes on to state that "by limiting lawyer intervention to a strategy of last resort, the client-centered approach misses the opportunity to theorize the more subtle, interactive, collaborative, and client-empowering interventions that have arisen in its wake."⁷⁰ Yet, even if we acknowledge, as does Kruse, that client-centered representation is under-theorized and is more pluralistic than it was at its conception, critiques such as hers that limit themselves to the same terminology do not reflect the current state of knowledge within our profession.⁷¹

⁶⁸ See *Id.* at 371-72.

⁶⁹ *Id.* at 392.

⁷⁰ *Id.* at 399.

⁷¹ Kruse's ultimately uses the notion of "client autonomy" as a unifying principle to organize the disparate threads she has identified within the evolved client-centered model. While we support the importance of

B. How a Relational Model Informs Experiential Pedagogy: the Debate over “Ecological Learning”

The reframing from client-centeredness to relationship-centeredness also requires a rethinking of what, how, and where we teach certain competencies within the law school curriculum. For the purposes of answering the question as to whether we can teach students to be ethical professionals, it is useful to examine the question of what we know about how students learn. As stated earlier, there is a small, yet significant body of work within clinical scholarship focused on how students learn. Within that literature, there has been some exploration about how exactly students learn “experientially.” Much of this discussion has been framed in terms of the curricular structure or clinical model that has been used: in other words, whether the course is an “in-house” clinic, or some sort of field placement or externship. Pursuing that discussion or, as it is often framed, debate, on conventional terms may well be misguided, particularly for the purposes of this article.⁷² Nevertheless, another perhaps more useful thread of this discussion is about whether students’ learning needs to be more “top-down”, meaning that the learning is driven by the person directly supervising their work, or whether students can learn more effectively from exposure to colleagues and the many other inputs that are part of a real-world work environment. This debate, which is captured by the work of two prominent legal scholars, Brook Baker and Robert Condlin, provides a helpful illustration of how the organized and comprehensive normative framework of Relationship-Centered Lawyering can contribute significantly toward filling in the gaps,

autonomy as an aspect of client empowerment, relationship-centered lawyering also emphasizes the importance of appreciating the client-in-context, including the context of and those surrounding the attorney-client relationship.

⁷² In a forthcoming article, Susan Brooks will set out an alternative pedagogical scheme for contrasting different experiential modalities (i.e., simulations, field placements, and in-house clinics). See Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education Through the Experiential Curriculum* (work-in-progress).

meaning that it can aid in providing the needed foundation for student learning, and that its value transcends the particular structure or modality through which the learning is experienced. Thus, a relational approach can inform experiential learning regardless of whether the educational experience is structured as an in-house clinic or a field placement.

Professor Brook Baker and others representing the Northeastern Law School have been proponents of what they refer to as the “ecological learning model.” They developed this pedagogical model based on their school’s unique co-op model⁷³, which is in many ways akin to a more typical work experience than most clinical programs. Indeed, Baker’s ecological model focuses mainly on the value of the work experience itself—apart from any input that may be provided by law school faculty. Baker contrasts the clinical model, which he describes as “role-centered, education-focused, and supervisor-centric”⁷⁴ with the ecological model, which he describes as participatory, contextualized, and collaborative.⁷⁵ He goes on to describe his preferred model as follows:

[i]n the complex interpersonal ecology of practice, students can learn, and learn well, through the central, fluid dyad involving the supervisor/expert and the student/novice—a dyad emphasized in current clinical theory. However, they can also learn from participation itself and from collaborative interaction with [a] [sic] broader array of legal workers and peers—additional social resources emphasized by a theory of ecological learning.⁷⁶

⁷³ For a list of the key features of Northeastern’s co-op model, see Daniel J. Givelber, et al., *Learning Through Work: An Empirical Study of Legal Internship*, *supra* note __, at 7 (“The most important points about Northeastern’s program are these: the school requires successful completion of four different internships (‘co-ops’) for graduation; each co-op involves three months of full-time legal work in a law office under the supervision of a legal practitioner; and the school’s co-op office provides extensive guidance and administrative support to keep the process working but does not ‘place’ the students.”) (citation omitted).

⁷⁴ Baker, *Learning to Fish*, *supra* note __, at 8.

⁷⁵ Baker, *Learning to Fish*, *supra* note __, at 23-40.

⁷⁶ Baker, *Learning to Fish*, *supra* note __, at 23.

Baker's model provides an extensive analysis of how students learn through participation in a law office, irrespective of the particular strengths and weaknesses of their supervising attorneys. Nevertheless, he describes his model as incomplete, and acknowledges the need to develop further guidance related to self-directiveness, self-realization, and identity formation, which he calls the "personal dimension" of ecological learning, as well as other workplace or societal barriers to participation.⁷⁷

It is these potential hazards of learning from participation itself and from the social milieu of the workplace with which Robert Condlin has taken issue. A few years after Baker and his colleagues presented their ecological learning model, Condlin conducted what he termed a "modest" empirical study of students' reflections on their externship experiences. After finding that "students—and supervisors—frequently were more secretive than open, more controlling than curious, more indirect than candid, more locked into pre-set views than interested in discovering new perspectives, and more intent on taking unilateral control than on sharing authority,"⁷⁸ Condlin concluded that "legal education's longstanding nervousness about apprenticeship or externship instruction has a basis in fact."⁷⁹ More importantly for our purposes, Condlin was worried that the communication patterns in the practice world might end up discouraging student reflection rather than enhancing it, because of the persistence of students' fear of "looking stupid," in the face of supervisors who, at least from the students' perception, were *not* their colleagues, and could not be trusted with their candid criticisms or

⁷⁷ Baker, *Learning to Fish*, *supra* note __, at 81.

⁷⁸ Robert J Condlin, *Learning from Colleagues: A Case Study in the Relationship Between "Academic" and "Ecological" Clinical Legal Education*, 3 CLIN. L. REV. 337, 416-17 (1997) [hereinafter, Condlin, *Learning from Colleagues*] (citation omitted).

⁷⁹ Robert J Condlin, *Learning from Colleagues: A Case Study in the Relationship Between "Academic" and "Ecological" Clinical Legal Education*, 3 CLIN. L. REV. 337, 417 (1997.)

questions.⁸⁰ He was also concerned that potential solutions, such as trying to teach students interpersonal skills, or as he refers to them, the skills of “relational agency” might not succeed because “the obligations of relational agency are complicated, occasionally work at cross purposes, and differ from one setting to the next.”

It would probably surprise both Baker and Condlin to hear that Relationship-Centered Lawyering offers a framework that can assist in addressing their contrasting views. What may be even more surprising is that under a relational model the optimal approach would likely incorporate elements of both of their perspectives. Baker and Condlin both seek to provide students with meaningful learning opportunities—specifically, learning experiences that will allow students to appreciate the importance of context and fair and just processes, and also interpersonal skills and values, such as non-judgmentalism and respect for cultural and other difference. What they both seem to acknowledge as missing from these programs is a normative theoretical grounding that can inform and guide students in connection with their work experiences. Relationship-centered lawyering can potentially help to provide that normative guidance. The relational model shares with Baker’s approach an emphasis on the importance of contextualized learning, and offers specific theories to assist students in gaining a basic grasp of how human beings and human systems operate. Like Condlin’s approach, the relational model is also concerned with teaching critical thinking about fair and just legal processes, so that students can view their field experiences and the legal institutions they are exposed to with a curious and, in some cases, appropriately critical lens.

Additionally, despite their misgivings about whether interpersonal competencies can be taught, both scholars recognize the need to teach them to law students in order to

⁸⁰ Condlin, *Learning from Colleagues*, *supra* note ___, at 414-22.

help the students become caring and ethical professionals. The relational model provides specific guidance that, if taught effectively, can enlighten students about the interpersonal and affective aspects of legal practice. In addressing all of these aspects, relationship-centered lawyering offers students highly useful tools for navigating many of the issues that often arise in legal practice given the generally complex web of relationships that permeate any legal setting. The remaining variable is the quality of training and level of commitment of supervising attorneys in the field to providing a safe learning environment for students to explore ethical and practice dilemmas, and to ask questions and reflect on their practice. This can be impacted through increased training and support from clinical legal educators and the creation of opportunities for students to supplement site supervision with campus-based groups and seminars facilitated by faculty.

VII. Strategies for Teaching Ethical and Professional Conduct

In addition to the work of Baker and Condlin, many other clinical scholars have introduced useful perspectives on how to inculcate ethical and professional conduct in students in the context of experiential learning, particularly with respect to “live client” clinics.⁸¹ This section highlights five salient concepts drawn mainly from the field of education that have been well accepted by clinicians, and are compatible with the relational framework. Taken as a whole, they offer guidance about effective places in the curriculum, as well as techniques and methods for teaching ethics and professionalism through the content of relationship-centered lawyering.

⁸¹ In addition to the literature discussed below, *see, e.g.*, Gary Blasi, Stephen Ellman, Robert Dinerstein, Jane Aiken.... Since the publication of the Carnegie and Best Practices Reports, there has been a proliferation of writing on teaching ethics and professionalism throughout the legal academy, notably including law school deans and directors of legal writing programs. The latter group in particular stresses the importance of beginning this teaching in the first year, and focuses on opportunities to do so using creative methods, such as simulation-based exercises and literature drawn from the humanities.

A. Andragogy vs. Pedagogy

What we know from these scholars is that adults learn differently than children. The term “andragogy”, which refers to adult education, has become part of the lexicon of clinicians, thanks to scholars such as Frank Bloch and Fran Quigley, who imported the work of Malcolm Knowles and others in that field.⁸² The distinctive qualities of adult learners include an interest in being self-directed, an ability to draw on their personal experiences, an inclination toward learning subject matter that is relevant to their social roles, and an interest in being able to apply their learning immediately to solve problems.⁸³ Knowles’ approach supports teaching ethical and professional conduct using methods that involve law students in decision making and planning, and that create learning experiences in which students are actively engaged and can relate their own life experiences to helping to resolve the issues at hand.⁸⁴ Bloch and Quigley share the view that an andragogically-based model would emphasize actual client representation with close supervision.⁸⁵ Both also agree that simulations are less effective as a teaching method, although they may have some value if they are sufficiently connected to real experiences.

B. Democratic Teaching

⁸² See Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982) citing MALCOLM KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION* (1970). Bloch points out that Knowles relied on the work of clinical psychologists, Abraham Maslow and Carl Rogers. See also Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995), citing MALCOLM KNOWLES, *THE ADULT LEARNER: A NEGLECTED SPECIES* (1990).

⁸³ Bloch at ___; Quigley at 46-47.

⁸⁴ Bloch at ___.

⁸⁵ Bloch at ___; Quigley at 69.

Quigley's work highlights the idea of "democratic teaching," drawing upon "critical theorists of adult learning" such as Paulo Freire and Jack Mezirow.⁸⁶ Democratic teaching builds upon Knowles' emphasis on involving students in decision making and planning, and is "based on adults' capacity to learn through critical scrutiny of both, their own, and their culture's values, assumptions and beliefs."⁸⁷ His understanding of democratic teaching also draws upon the work of John Dewey, whose "philosophy of adult education focuses on the extension of the skills of deliberation, civic awareness, and public advocacy to learners previously shut out of the democratic process."⁸⁸ Democratic teaching emphasizes "self-directed learning," an idea that has become familiar in clinical legal education, and is a common refrain in externship programs around the country in which students' "clinical" supervision is provided by practitioners in the field. Self-directed learning, according to Quigley, suggests that legal educators should "loosen the reins" both in and outside of the clinic, and allow students to be involved in the selection of their clinical and other educational experiences. This approach is consistent with another well-accepted notion among educators, which is that different students learn in different ways.⁸⁹

C. Disorienting Moments

Quigley's other major contribution to the clinical lexicon is the idea of the "disorienting moment," which also draws upon adult learning theory, specifically the work of Jack Mezirow.⁹⁰ The idea of the disorienting moment is that opportunities for

⁸⁶ Quigley at 47.

⁸⁷ Quigley at 47.

⁸⁸ Quigley at 48, citing

⁸⁹ Quigley at 65.....Cites also to Michael Hunter Schwartz and Sophie Sparrow, etc.?

⁹⁰ Quigley at 51, *citing* JACK MEZIROW, ET AL., FOSTERING CRITICAL REFLECTION IN ADULTHOOD: A GUIDE TO TRANSFORMATIVE AND EMANCIPATORY LEARNING 12 (1990).

significant—“transformative”—learning arise when the learner confronts an experience that is unsettling or disturbing because it cannot be easily explained by reference to the learner’s prior knowledge.⁹¹ The change that can result from such moments is known as “perspective transformation” insofar as a single trigger event may cause the learner critically to reassess societal and personal beliefs, values, and norms.⁹² Disorienting moments have three stages: first, the experience, second, the exploration and reflection, and third, the reorientation.⁹³ This theory has been tested and proven empirically, and those of us who have been teaching for a long time, particularly in clinical settings, know it to be true as part of our felt experience with students.

Quigley focuses on “seizing” disorienting moments experienced by students in clinical settings as a tool for teaching social justice, although it seems like he could just as easily have been talking about teaching ethics and professionalism. He emphasizes the importance of providing the environment for exploration and reflection, and providing the opportunity for re-orientation, as necessary conditions for such transformative experiences to occur. The array of methods for facilitating this type of process in the classroom will be familiar to many of us, including student-to-student discussions, such as case rounds, student self-evaluation, such as the use of reflective journals, and supervision sessions with individual students.⁹⁴

D. Parallel Universe Thinking

Sue Bryant and Jean Koh Peters have given us what might be interpreted as another lens on disorienting or disturbing moments that student experience: “parallel

⁹¹ Quigley at 51.

⁹² Quigley at 52, citing Mezirow....

⁹³ Quigley at 52.

⁹⁴ Quigley, at 57-62

universe thinking.”⁹⁵ Parallel universe thinking is one of the six “habits” they suggest can be inculcated in students that will help student achieve better cultural proficiency.⁹⁶ It requires the learner to seek “other possible explanations or meanings for clients’ words and actions.”⁹⁷ Parallel universe thinking bears a strong resemblance to “reframing,” a fundamental technique in social work practice.⁹⁸ Reframing is defined as viewing a problem or an issue with a new outlook or understanding it in a new way. Both of these concepts provide useful tools for helping a student who has experienced a disorienting moment reflect on that experience in a way that promotes ethical and professional behavior.

Bryant and Peters also describe three dynamics that help to contribute to a student’s cross-cultural sensitivity, which is a subset of ethical and professional conduct. These dynamics are: (1) nonjudgment; (2) isomorphic attribution; and (3) daily practice and learnable skill.⁹⁹ Isomorphic attribution asks the learner to try to attribute the same meaning to the client’s conduct that was intended by the client, rather than solely as understood from the lawyer’s perspective. This dynamic requires an understanding of countertransference, as well as an appreciation of one’s own cultural biases. Further, it is significant that Bryant and Peters emphasize the importance of daily application of the

⁹⁵ See Sue Bryant & Jean Koh Peters, *Six Habits*.....

⁹⁶ Note the use of proficiency rather than competence—borrowing from Christine Zuni Cruz.... The six practices are essentially: (1) employ narrative as a way of seeing the client in context; (2) listen mindfully; (3) use parallel universe thinking; (4) speak mindfully, taking into account the client’s culture; (5) work effectively with interpreters; and (6) apply the Habit Four analytical process continuously to identify miscommunication and appropriate corrective measures.

⁹⁷ *Id.* at 4. They identify this habit as playing a “vital role in cross-cultural communication.” *Id.* at p. [ms 4 n.7].

⁹⁸ See KIRST-ASHMAN & HULL, at 333, 336-37; COMPTON ET AL. at 412. KIRST-ASHMAN & HULL at 337. Social workers often use reframing to try to offer a more positive perspective on something that is seemingly negative. In this way, reframing can potentially help one person--the lawyer--to empathize more effectively with another person—the client—or to understand content more clearly from the client’s perspective. *Id.*

⁹⁹ Bryant & Peters, *supra* note ____, at ____.

skills and dynamics they discuss. Their work reminds us that genuine student learning can only effectively be integrated through constant reinforcement as well as thoughtful and reflective practice.

E. Reflection- in-Action

Another highly regarded set of ideas that complement and build upon what has already been discussed come from Donald Schon's work on educating the reflective practitioner. Schon is a scholar of educational theory and his ideas on inculcating professional confidence and judgment, published in the *CLINICAL LAW REVIEW*, have become a must-read for every new clinician.¹⁰⁰ He discusses "indeterminate zones of practice," problematic situations in which the learner experiences uncertainty, including situations that are unique to the learner or in which the learner experiences some conflict in trying to come up with a workable solution. These indeterminate zones may well be the kinds of experiences that produce disorienting moments as described earlier.

Similar to Quigley, Schon emphasizes that indeterminacy can potentially be a rich source of professional education. Schon emphasizes that the ability to navigate a problematic situation requires acting and reflecting essentially simultaneously, and that this "reflection-in-action" is what seasoned professionals do, and what we need to inculcate in our students.¹⁰¹ Essential to that process is "reflection on reflection-in-action," meaning that learning professional competence requires discussions after the fact that help generate an understanding of what occurred in that disorienting moment. Schon calls this "educating for artistry," and suggests that it can best be taught in a reflective practicum, which has the elements of learning by doing: close supervision, group process,

¹⁰⁰ Donald Schon, **EDUCATING THE REFLECTIVE LEGAL PRACTITIONER**.

¹⁰¹ Schon, *supra* note __, at __.

and a context that is representative of the professional practice to which students aspire. Like Quigley (and those he borrows from), Schon also emphasizes that to be successful, education must be a self-directed, self-learning process.

VIII. Psychological Research to Support an Experiential Epistemology

A. Moral Development: Nature, Nurture, or Both?

The view here is that we have lost our sense of how to foster virtue because we have neglected to develop intuitions for being present in the here and now, interdependently engaged with one another and deeply related to the natural ecosystem in which we live.¹⁰²

One important practical issue to be addressed in this paper is the question of whether a relationship based approach to the law and experiential learning can enhance the development of professionalism in law students. In other words, are ethical lawyers born, made, or some combination of both? Can the epistemological approach in the curriculum and pedagogy of law school create practitioners with a different moral view and a higher level of professionalism in practice? How does the educational process produce attitude change and/or ethical professional practice? We have argued that through education in specific social science theories, law students can be taught principles of relationship building which can enhance attention to and understanding of the context of a client's life and empathic connection with the client's feelings. Then, through guided experiential education, students can have opportunities to apply the theory, practice relationship-building techniques, and explore the ethical issues that emerge in clinical practice. What is the evidence that an education guided by such an epistemology will create a generation of lawyers that is more ethical and professional in dealing with client situations?

¹⁰² SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE._(1989).

As discussed in Part I, the way people interpret particular situations is related to underlying moral character, which is informed by their background, experiences and education. Furthermore, individuals will differ in their ability to recognize particular aspects of a situation and will evaluate and judge those situations as informed by their understanding of particular moral concepts.¹⁰³ Narvaez argues that cultural practices actually shape the physical brain in child development,¹⁰⁴ and further, the child's cultural narratives establish what is considered normal.¹⁰⁵

Recent literature from the branch of psychology known as moral development provides further support for the positions taken in this paper. Ariel Knafo and colleagues explored the factors that create a disposition toward empathy and the pro-social behaviors associated with it. They identify compassion, an enhanced concern for the well-being of others in distress as an important aspect of interpersonal responsibility and ethical behavior.¹⁰⁶ Darcia Narvaez has explored the processes by which professionals develop ethical expertise integrating the enhanced understanding of human cognition based on the principle discussed earlier in this paper that emotions precede thought and action. She argues for a “novice to expert” approach that provides opportunities to experience ethical dilemmas in examples and actual practice.¹⁰⁷ While acknowledging that morality is self-authored, moral development can be facilitated with immersion experiences accompanied by a mentor who can guide the learner by offering discernment, explanation and support

¹⁰³ LAWRENCE BLUM. MORAL PERCEPTION AND PARTICULARITY (1994).

¹⁰⁴ Darcia Narvaez, *The neurobiology of Moral Formation*, in AFTER YOU. THE ETHICS OF THE PASTORAL COUNSELLING PROCESS 7 (M. Riemsdagh, R. Burggraeve, J. Corveleyn, & A. Liégeois, Eds.) (forthcoming).

¹⁰⁵ Narvaez, *supra* note __, at 5.

¹⁰⁶ Ariel Knafo, Carolyn Zahn-Waxler, Carol Van Hulle, JoAnn L. Robinson, & Soo Hyun Rhee. *The Developmental Origins of a Disposition Toward Empathy: Genetic and Environmental Contributions*, 8 EMOTION, 6, 737 (2008).

¹⁰⁷ Darcia Narvaez, *Integrative Ethical Education*, in HANDBOOK OF MORAL DEVELOPMENT, 703–733 (M. Killen & J. Smetana, Eds., 2006).

reflective experiences.¹⁰⁸ The mentor can provide facts and skills that the student internalizes and that become patterned responses. She goes on to conclude that cultivating the right affect toward others creates an enhanced motivation towards helping that person¹⁰⁹ and this takes the learner beyond the ability to manage hypothetical situations to include managing real emotions and responses to actual clients.

Consistent with the ecological learning approach, as well as Quigley's discussion of disorienting moments, attitudinal change can even occur implicitly through the experience alone, and without conscious awareness.¹¹⁰ For example, when students experience discrepancy between closely held attitudes or beliefs and events that contradict them, they can respond to the cognitive dissonance with either changed attitudes and beliefs or judgmental self-justifying interpretations.¹¹¹ While either response can reduce the discomfort caused by the dissonance, the social science foundation combined with a reflective practice approach would be more likely to produce the former response, even where the student has the experience without the level of supervision we would hope for in an optimal experiential learning environment.

B. The Reasons Empathy Matters

In exploring the connections among professional roles, relationship experiences, and professional practice, we must address the concept of empathy. How is empathy developed, and is empathy an essential component of effective legal practice? Can empathy be influenced by education and experience, or is it more likely that self-selection

¹⁰⁸ Darcia Narvaez, *The Neurobiology of Moral Formation*, in AFTER YOU: THE ETHICS OF THE PASTORAL COUNSELLING PROCESS (M. Riemslagh, R. Burggraeve, J. Corveleyn & A. Liégeois Eds.) (forthcoming).

¹⁰⁹ Darcia Narvaez, *Moral Complexity: The Fatal Attraction of Truthiness and the Importance of Mature Moral Functioning*, 5 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 163, 172 (2010).

¹¹⁰ Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*. 56 AMERICAN PSYCHOLOGIST, 717, 721. (2001).

¹¹¹ LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

in professional education drives those more attuned to the emotions to professions like social work and psychology, and those attuned to intellectual/cognitive analysis to fields such as law and accounting?¹¹² Recent cognitive/brain research has provided empirical understanding of how we develop empathy and learn from interactions with other people. For example, most psychologists now accept the presence of mirror neurons, which can be described as the corresponding firing of neurons in one person (in the same regions of the brain where they would be if the person had experienced the event personally) by observing or listening to the experience of another person. As Cristian Keysers and Valerie Gazzola write, this process involves “...the actions, emotions and sensations of others are ‘translated’ into the neural language of our own actions, emotions and sensations. By doing so, they have been transformed into what are called primary representations of these states. This could generate an implicit sharing and hence understanding of the states of others.”¹¹³ It is reasonable to conclude from this research that increased opportunities for law students to personally experience client stories first-hand would create more empathy, especially when the experience is enhanced by skill development and personal insights gained as students reflect on the experience,

Can being more empathic lead to improvement in legal practice? Research over the past twenty years documents a number of areas of interpersonal relationships that are improved with the presence of empathy.¹¹⁴ We empathize more with those people we have formed an affective link with and who we perceive are acting in a fair and non-

¹¹² J. D. TROUT, WHY EMPATHY MATTERS: THE SCIENCE AND PSYCHOLOGY OF BETTER JUDGMENT (2009).

¹¹³ Christian Keysers & Valeria Gazzola, *Towards a Unifying Neural Theory of Social Cognition*. 156 PROGRESS IN BRAIN RESEARCH, 379, 396 (Anders, Ende, Junghofer, Kissler & Wildgruber, Eds., 2006).

¹¹⁴ For a detailed review, see M. H. Davis, *Empathy: Negotiating the Border Between Self and Other*, in THE SOCIAL LIFE OF EMOTIONS 19–42 (L. Z. Tiedens & C. W. Leach, Eds., 2004). Davis reviews studies, for example, that perspective taking has been linked with acting in less aggressive ways, experiencing less interpersonal conflict, and being more helpful to those in need, and providing supportive responses to peers.

biased manner towards us. This process is not random or imagined but is actually managed by a series of neural responses in the brain.¹¹⁵ It follows that the development of trusting professional relationships characterized by improved empathy between lawyers and clients would add to the effectiveness of the representation. Compassion, the concern for the well being of others in distress, is an important aspect of interpersonal responsibility and ethical behavior.¹¹⁶

Empathy can be defined as an affective state that is elicited by the observation or imagination of another person's affective state.¹¹⁷ Ariel Knafo and colleagues add to the definition by distinguishing the cognitive and emotional components of empathy. The cognitive aspect of empathy entails an ability to comprehend a distressing situation and to recognize another's emotions and assume that person's perspective. The affective aspect of empathy requires an individual to experience a vicarious emotional response to others' expressed emotions.¹¹⁸ Training and supervised practice helps law students and emerging legal professionals to recognize and articulate the expressed emotion, and to formulate supportive statements and follow-up questions. In addition, through high quality training and supervision, students can manage the felt experience of the expressed emotion, and communicate, verbally or nonverbally a sense of understanding to the client.¹¹⁹

IX. Concluding Thoughts and Recommendations

¹¹⁵ Tania Singer, Ben Seymour, John P. O'Doherty, Klass E. Stephan, Raymond J. Dolan & Chris D. Frith, *Empathetic Neural Responses Are Modulated by the Perceived Fairness of Others*, 439 NATURE 466, 467 (2006)

¹¹⁶ Ariel Knafo, Carolyn Zahn-Waxler, Carol Van Hulle, JoAnn L. Robinson, & Soo Hyun Rhee. *The Developmental Origins of a Disposition Toward Empathy: Genetic and Environmental Contributions*. 8 EMOTION, 6, 737,737. (2008).

¹¹⁷ F. De Vignemont, & T. Singer, *The Empathic Brain: How, When and Why?* 10 TRENDS IN COGNITIVE SCIENCES, 435, 435-436. (2006).

¹¹⁸ Knafo, et al., *supra* note ____, at 737.

¹¹⁹ For other discussions of teaching empathy in the law school context, *see* Kristin Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1 (2008); Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225 (2004).

This discussion paves the way for the law school curriculum to be reformed and/or refocused to teach RCL and to enhance the value of experiential learning at both the macro- and micro-levels.

At the macro-level, law schools must undertake a close examination the entire curriculum, beginning with the first year. Even without altering the core content of the first year (which is often treated as sacred), there are undoubtedly rich opportunities for experiential and other creative teaching methods to be used so that students are engaged in the ways described above, and are encouraged to experience disorienting moments upon which they can reflect and begin to acculturate in the direction for RCL. Part of this examination needs to include re-thinking our teaching methods to encourage more democratic teaching, in which faculty to loosen the reins and to give students more of a voice in decision making and planning.

Perhaps beginning in the first year and certainly in the upper level curriculum, we also need to maximize the opportunities for meaningful experiential learning in non-clinical courses by connecting them up with service learning projects or other real-world experiences wherever possible. We also need to incorporate multiple methods, including the use of literature drawn from the humanities, film, etc. to build students' capacity for insight into the human condition and their ability to feel as well as think as they engage experiences.

Not surprisingly, the most effective teaching vehicles based on the research presented here will be actual clinical experiences—supervised practice, both in the externships and other field placements and clinics. “Reflection on reflection in action” is a key, so the effectiveness of these experiences will depend on the quality of the

supervision and other opportunities for student reflection. As described (and as well-known to this audience), the use of individual supervision sessions, peer learning, such as through case rounds discussions, and opportunities for student self-reflection, such as through journals, are all useful methods.

Reform at this level cannot begin and end with the formal curriculum. We must also re-examine the competitive and adversarial culture that pervades law schools through many of the extra-curricular activities and even the career development and on-campus interviewing processes. Instead, we must endeavor in as many ways as possible to instill a culture of mutual support, collaboration, and community-building within our institutions. It is worth noting that if we can succeed in this level of curricular and cultural change, we will be taking meaningful steps toward helping students to develop the same relational competencies as we want them to demonstrate in their professional lives.

At the micro-level, the content of the discussions that take place, whether one-on-one or in a group setting, can be guided and informed through exploration of the core competencies within the RCL framework. What can be learned from an understanding of the client in context—be that the family system, neighborhood, or community? How do procedural justice issues affect the client and/or the situation? What is the interplay of cultural and interpersonal issues, including those that arise between (student) lawyer and client, and in other contexts, such as the student's encounters with co-counsel or opposing counsel, and the client's encounters with others in the legal system?

As we begin to re-think these aspects of our legal institutions and to implement changes, we must develop fair, accurate, and reliable mechanisms for assessing whether

and to what extent we succeed in accomplishing our goals. Specifically, we need to figure out the most effective ways of evaluating students' achievements regarding the competencies within RCL, both at the individual student level, and at the curricular and programmatic level. The assessment at all levels should include the effectiveness of the processes, meaning what takes place in and outside the classroom, as well as identifying ways to measure our outcomes.

Just as many of the ideas encompassed by RCL are not new, the ideas outlined above are at least somewhat familiar in the scheme of legal education generally, and even more familiar within clinical legal education. Yet, in the same vein as RCL offers a way of grounding, as well as organizing important ideas into a normative framework, we need a more grounded and organized approach to how we go about inculcating ethical and professional conduct in our students and, by doing so, in our next generation of practicing lawyers.