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**Reflecting on the Habits after Ten Years:
Teaching about Race, Identity, Culture, Language and Difference**

*By Susan Bryant and Jean Koh Peters**

INTRODUCTION

What do clinical law students need to know about lawyering across difference to provide excellent service to their clients and to address injustice in the legal system?

This chapter seeks to continue this important conversation, and continue work that we began ten years ago in our *Habits of Cross-Cultural Lawyering*.¹ The chapter has three parts. In the first, we reflect upon a decade of teaching the Habits, first briefly reviewing the Habits, and then illustrating some of the ways we teach and employ them in supervision, rounds and seminar.

In the second, we first extend the Habits, by identifying an additional approach for surfacing assumptions in the lawyer/client relationship: the doubting and believing scale. (a sentence about both the scale and doubting and believing?)

(Something here about challenging assumptions and its relationship to culture language? Six practices)

In part three, we discuss the ways in which approaches like the Habits and the Doubting/Believing Scale alone are inadequate to the critical work of teaching clinical law students about material inequalities based on race, gender, culture, poverty, and other forms of social disparity. The Habits do serve two useful purposes: 1) creating a practice of self-awareness and self-improvement, day-to-day, in cross-cultural lawyering

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- Author's note.
 - We are each thankful for the opportunity to work on these issues with a thoughtful group of colleagues in preparation for the 2010 Clinical Teacher's Conference. Jean's work with Ann Shalleck and Sue's work with Sameer Ashar, Tirien Steinbach, Mary Lynch and Margaret Montoya sharpened our thinking about the issues we discuss here. In the small group on critical theory, in the AALS plenary and in her numerous writings, we learned important lessons from Margaret Montoya both about the substance of critical race theory and its importance for pursuing racial justice. See e.g. xxxxxx

¹ In focusing on race, we also recognize some of the other disparities that effect our clients and complicate analyses based on race.

interactions and 2) creating a common vocabulary for discussion of this practice with others in individual, group and classroom settings. The Habits initiate and entrench life patterns for a professional life post-racism and post-bias, in which professionals and clients come together with surfaced and examined assumptions which can lead us beyond discrimination and prejudice. As such they are useful di-biasing tools.²

Yet, the Habits alone cannot help us understand and contend with the racism and bias which powerfully remain in our society and legal system. Our students continue to enter a profession where poor clients are subject to unequal, unfair treatment by systems that have not yet examined and surfaced their assumptions. In our reflections on the Habits, we have become convinced that our clinical pedagogy must refocus on assuring that our students study, discuss, and confront these remaining inequities, and acquire the skills to do so as they enter practice.

Part Three focuses on this challenge, and offers some initial thoughts about four ways in which teachers and students can learn to discuss and understand persistently salient concerns about race and use those skills in daily life. We will focus particularly on learning more about trends and systems that perpetuate racism and material inequality, the challenge of leading constructive discussions about race, and on two particularly rich concepts in critical race theory: inter-sectionality, and micro-aggression.

I. LOOKING BACK: REFLECTING ON FIVE HABITS OF CROSS-CULTURAL LAWYERING TEN YEARS LATER

In 1999, we developed the Five Habits of Cross-Cultural Lawyering in response to our concerns that clinical education had grown in sophistication in areas like interviewing and counseling but continued to lack substance in the area of cross-cultural lawyering.³ The Five Habits are now taught in clinical curricula around the country.⁴ In this section, we first describe each Habit briefly and then discuss the teaching of the Habits, as a group and one by one and offer some reflections about the Habits and after 10 years of presenting and teaching them.

² Margaret – introduced conference to ladder of inference – thought bubbles, hope they will write about. Tirien’s perception exercise another.

³ refer back to comprehensive footnote on sources about Habits of cross-cultural learning.

⁴ Tim, please search the five Habits (Sue’s article, My chapter, Sue and My names in connection with the word “Habits”) on a number of databases and see what you find. Please highlight any articles you find about the teaching of the Habits.

a. The Habits in Summary

The Habits seek first and foremost to identify assumptions in our daily practice. They grow from three central and essential dynamics of cross-cultural interaction: non-judgmentalism, isomorphic attribution, and daily practice and learnable skill. Non-judgmentalism requires a focus on fact and observable phenomena in the world, deferring interpretation, evaluation, and theory (theorizing?).⁵ Because our culture and language shape what we observe, cross-cultural work requires us to observe more carefully and move to meaning making more deliberately. Isomorphic attribution requires discerning the meaning and intention of the person speaking or acting. While we normally determine meaning through our own cultural lens, isomorphic attribution asks us to create meaning by looking through the eyes and cultural lens of another. Daily practice and learnable skill requires practitioners to commit to micro implementation of the Habits and, initially, minute to minute awareness of these principles. Taken together, the dynamics request of the lawyer suspension of judgment whether negative or positive, dedication to the felt truth of the authentic other, and quotidian attention to concrete techniques of surfacing and challenging assumptions in everyday practice.

The Habits sought to be an alternative to exorcise the ghosts of diversity trainings past, which, despite their good intentions, often inadvertently established a norm of white maleness; focused on teaching about nonwhite culture to white students rather than the learning about culture that all students needed to be better lawyers; and, placed unfair burdens on people of color to educate white students, while subjecting all to a fear of condemnation and shame. The Habits are undergirded by three principles: 1) that all lawyering is cross-cultural; 2) that the competent cross-cultural lawyer remains present with this client, ever respecting her dignity, voice and story; and 3) that the cross-cultural lawyer must know oneself as a cultural being to understand his or her biases and ethnocentric world views. Rather than orient cross-cultural teaching towards an unspoken norm, the Habits sought to identify and reach the cross-cultural difference between any two people factoring in their unique demographics, experience, and values.

Habit One, Degrees of Separation and Connection, creates two ways of mapping the client's and the lawyer's worlds to explore how culture might influence their relationship and fact gathering. The habit of examining the lawyer-client relationship through a cultural lens, Habit One

⁵ Might we want to put ladder of inference reference here ?

Comment [sb1]: Jean I took out first – I actually usually do that second. By leaving it this way people can choose. If we think order matters – we can put this in teaching section.

invites the lawyer to impressionistically map the overlap between the lawyer and the client's worlds using a Venn diagram, with circles representing the lawyer's and client's universes. Habit One also asks the lawyer to inventory differences and similarities that the lawyer perceives between lawyer and client. Using these two methods, the lawyer focuses on the lawyer's and client's multiple identities (the inventory) and on particular identity factors that may heavily influence connection and distance (the Venn diagram.)⁶

(Habit One allows a lawyer to compare his impressionistic views of his commonalities and divergences from his client to specific facts known about the lawyer and the client across various characteristics.) Through this focus on similarities and differences, Habit One allows lawyers to identify hot button issues in their own identity and life experiences, which may play a disproportionate role in the lawyer client relationship especially in negative judgments about clients who are different. Habit One also enables students who see themselves as similar to clients to be alert to assumptions of similarity that cause lawyers to substitute their world view for their clients'. Finally, Habit One helps the lawyer focus on how fact gathering is shaped by assumptions that he is making about similarities and differences between himself and the client.

Habit Two, the Three Rings, expands the mapping of Habit One to focus on the ways that culture shapes the strengths and weaknesses of the client's legal claim or influences problem solutions for clients in non-litigation setting. Habit Two, the Habit of the Forest and the Trees, maps the lawyer-client similarities and differences in connection with the strength of the client's legal claim or problem approach. Habit Two asks the lawyer to take the lists and diagrams developed in Habit 1 and add a third circle to the Venn diagram, a circle representing all of the things in the universe that the law and legal decision makers reward or consider meritorious in this legal context. The three circles and accompanying lists enable the lawyer at a glance to refocus his attention to refine and strengthen the presentation of the client's legal claim by taking cultural differences and similarities into account. Habit Two helps the lawyer refocus his conscious energy on strengthening the client's legal claim by increasing the overlap between the client's universe and the world of the law. Habit Two is often instructive as lawyers remember the ways in which their universe and the universe of the law powerfully overlap in ways that do not include the client and her world. Habit Two also helps the lawyer take into account the powerful convergent and divergent gravitational pulls from his own universe that may or may not

⁶ Students can use Habit 1 analysis in their work with groups by using the analysis to map similarities and differences between them and the group leaders as well as among the group members.

be helpful to solving the problem or preparing the case.

Habit Three, Parallel Universes, asks the lawyer in dozens of daily work interactions to identify alternative explanations for the phenomena he witnesses. Also known as the Habit of Not Jumping to Conclusions about Behavior, this Habit, which can be done instantaneously, requires brainstorming multiple explanations for a client's, or any other professionally significant person's, words or actions before planning an action strategy. Habit Three thinking is especially important in working across cultures where attribution – creating meaning from behavior and words - may be dramatically different across cultures. Parallel universe thinking does not seek necessarily to determine the correct explanation for speech or behavior; instead, it accomplishes something more significant: it destabilizes a lawyer's premature certainty about the meaning of other people's actions. Habit Three, the paradigmatic habit, exemplifies the critical dynamic of non-judgmentalism, reminding the lawyer to suspend judgment and even interpretation of behavior about which she has insufficient information.

Habit Four, Red Flags and Correctives, focuses on lawyer-client communication.⁷ This Habit of Not Making Habits When Communicating with Clients, takes place both in the moment of client interviewing and counseling, and in retrospect, analyzing those encounters to plan for improved future meetings. Cross-cultural communication is fraught with potential for problematic conversations. Cultural norms influence how we speak, who speaks to whom, when we speak and what we talk about. While knowledge about another culture's communication patterns is helpful, inevitably, a lawyer working across cultures encounters communication difficulties. When this happens, Habit Four asks the lawyer to identify concrete moments of faltering communication in the interactions, to brainstorm parallel universes to explain the faltering, and to brainstorm possible alternative strategies to bridge the gap of communication. Habit Four accustoms the lawyer to reflect on communication in the midst of communicating and in-between client encounters, developing a repertoire for potential responses and overtures to continually better lawyer-client communication as the relationship progresses.

Habit Five, the Camel's Back, addresses the inevitable moments when the lawyer blunders cross culturally. Habit Five, The Sadder but Wiser Habit, looks retrospectively at a problematic moment to determine what factors led to a cross-cultural mishap, to eliminate those factors in the future. Habit Five seeks to give the lawyer a way to look thoughtfully and analytically, without negative self-judgment, at his own actions to seek

⁷ Cite to six practices article from Marjorie Silver, editor, *The Affective Assistance of Counsel*.

future improvement. Habit Five encourages the lawyer to know himself as a cultural being and to explore the biases and stereotypes that he brings to interactions. Habit Five requires non-judgmentalism at home, recognizing that condemnatory self-judgment and shame are not allies in cross-cultural improvement.

b. Teaching the Habits

Over the last decade we have taught and presented the Habits in many fora to many different audiences, including clinical law students, clinical law teachers, legal services attorneys, asylum officers, and judges.. We describe below our observations about teaching the Habits as a group and teaching each one individually. While we do not seek here to catalog all of our thoughts about teaching the Habits, we have chosen for each Habit, and for the task of teaching the Habits as a group, some key tips and insights that we have refined and employed over time.⁸ We offer these to invite conversation from other teachers who have used the Habits at other law schools or in other settings. We invite you to share your ideas, reactions, and teaching tips about the Habits to us by e-mail.⁹

i. Teaching the Habits as a Group & Culture & Language More Generally

Teaching the Habits is improved when students have some general understanding about how culture operates to shape our ways of thinking and reacting to events. We often assign as course reading one of our writings on the habits as a general introduction to the Habits and the role culture plays in their work as lawyers.¹⁰ These writings explore the role culture plays in building or inhibiting trust in the attorney client relationship and influencing the lawyer's capacity to understand and present clients' stories. The writings also introduce students to cultural concepts including: insider/outsider status, role and hierarchy, isomorphic attribution, individual and collective cultures; gender norms, categorization, direct and indirect communication and illustrate how these cultural concepts influence lawyer-client communication and problem solving.¹¹ Finally, the writings identify

⁸ In *The Five Habits*, pp. ---, Sue describes in detail some additional teaching ideas for the Habits.

⁹ Jean can be reached, when not on leave, at jean.peters@yale.edu and by snail mail at P.O. Box 209090, New Haven, CT 06520 -- 9090. Sue can be reached at bryant@mail.law.cuny.edu and by snail mail at CUNY School of Law.

¹⁰ See Jean Koh Peters, *Representing Children In Child Protective Proceedings: Ethical and Practical Dimension* (Supp. 2000); Bryant, *The Five Habits: Building Cross-Cultural Competence In Lawyers*; sage chapter authored by both

¹¹ Should we just refer to these in the other readings or footnote explanation here

some key intercultural communication skills that the habits develop including to listen attentively, to focus on content rather than style, to read verbal and non-verbal behavior, and to adapt conversation management behaviors and style. Most importantly, the readings emphasize the importance doing this work with a non-judgmental approach.

One way we have used to illustrate the nature of culture more generally is to identify the ways in which the law itself is a culture. Students learn essential aspects of culture theory, including the components of culture and the role it plays in determining meaning and shaping values and behavior. For example, in this class, students discovered and with the teacher's help named many cultural concepts¹²:

The teacher asks students to identify examples of their changed thinking, communicating, and valuing after 2 years of law school. To assist their thinking, the teacher reminds students to recall the reaction of the non-lawyers around them to their beginning to think and talk "like a lawyer." As their faces light up in recognition, students begin to name the changes as the teacher lists these on the board. They identify that the law has its own specialized language using words to mean something different. They recall they were more likely to argue than discuss. When involved in arguments, they are more likely to insist that those taking part in the argument support their points more precisely and with evidence. The culture of argument and competition infuse their speech. The learn law in the context of a dispute and are more likely to problem solve through the lens of dispute.

Students identify how their views of fairness change and are influenced by the law's view. For example, students describe how they began to view all behavior through the lens of tort principles, to determine if someone was wronged and to think about causation in precise terms. They also describe how their views about knowing have changed, for example they view distance from the subject as more objective and connection more subjective and objective as a way of knowing was more valued.

As the list grows, the teacher categorizes the ideas into cultural concepts: values, ways of thinking, hierarchy, categories, rules and professional norms. The teacher focuses their attention on speech patterns asking them to think about

¹² This process of the learner constructing theory through reflection on experiences is described in Chapter 3, Designing the Clinical Seminar.

how these factors have influenced the ways they speak as well as interpret and judge behavior. The teacher asks them to think about these changes and whether they created culture clashes for them or the people with whom they interacted.

Finally the teacher analogizes their experiences of stress when entering a courtroom to the stress of working cross-culturally for both them and their clients. Noting that stress occurs when one enters a culture in which the cultural rules are hidden and one does not know how to predict responses, the teacher asks students to identify the courtroom culture by asking them what causes them stress when they go to court? Students recognize that the introductory rituals of the courtroom are not clear and comfortable for them. For example, others seem to have way of introducing themselves and conducting conversation that seems unnatural or different to the students. They identify how stressful it is not to have enough experience to predict how judges will respond and they have some difficulty interpreting the judges' reactions.

We have also used a critical incident of a brother and sister who appear in the lawyer's office to illustrate legal culture. The sister is the client and the brother has accompanied her. The lawyer asks the brother to remain outside while the lawyer interviews the sister. We ask students why the lawyer does this. This conversation, which starts with ideas about protecting confidentiality and developing trust, allows a rich conversation about the laws' culturally-based assumptions about confidentiality. For example, these rules depend on norms of a highly individualized culture and presume that a client is more likely to build trust with a lawyer and tell the truth if no one else is present.

The legal culture is not quite as hidden to students as the cultures in which they have been raised; they recall a time when they were not part of the legal culture and when they and others felt culture clashes with their new culture. Thus, exploring the legal culture presents an opportunity for students to learn about culture generally. Additionally, this conversation about the legal culture creates empathy with clients who are crossing legal and other cultures and makes students more conscious when making choices about how to think and talk with clients about the law.

We both teach in clinics that have clients from different ethnic and racial groups. Accordingly, we are less likely to focus on a particular culture as part of our cross-cultural training. However, if a clinic works with clients from a particular culture, the teachers should introduce students

to that culture.¹³ Fiction, movies, history, geography, food, customs and language are all roads into the client's culture. Where we partner with community organizations, we also invite speakers to develop the student's understanding of a particular group's experiences in the United States or with a court system or police department. Because culture is very complex and cannot be used to perfectly predict behaviors of individuals, students should be encouraged to gingerly use the new knowledge they are acquiring about specific cultures. We are careful to remind students that even when they know a culture well, they should not think of it as determinative.¹⁴ For example, one only needs to think about one's family members who share a common culture and yet can behave quite differently and make different decisions. We suggest that this new knowledge be used for parallel universe thinking, i.e. suggesting new hypotheses for explaining behavior or meaning but not suggesting conclusions. If the clinic works with clients from different cultures, each student should be encouraged to learn about his or her client's specific culture and background as a way of promoting connection to and understanding of the client.

How much time a teacher should allocate to the skills and knowledge of cross-cultural competence will be answered differently depending on the overall goals of that teacher's specific clinic and the amount of time for class and supervision. Cross-cultural trainers are clear that a one-class session may raise awareness of cultural differences, but that true cultural sensitivity can only take place with practice and reflection over time. Jean has taught the Habits in as little as 20 minutes to students working in the clinic in the summer and we both have introduced them to practitioners in as little as 15 minutes. Sue who has 5.5 class hours per week introduces them in two classes. However much time a teacher uses to introduce the Habits, we know that the skills that are needed to fully implement them must be practiced and honed to approach these becoming true "Habits." Thus, the skills that the Habits seek to introduce and develop need additional attention in supervision.

At the time that we wrote about the Habits, we knew that learning about language and working with interpreters was also important for students to build trusting relationships with clients and communities and to communicate effectively.¹⁵ We left our thinking about that to a later day. In a later writing, *Connecting With Clients Across Culture*, we explored six practices that could be used to communicate more effectively with clients

¹³ Cite Zuni Cruz

¹⁴ Describe how students might learn of client's culture.

¹⁵ As we noted then, Bill Hing's article that research shows that shared language even more important than shared culture.

across culture and language including working with interpreters.¹⁶ In addition to teaching the Habits, we each teach about how language shapes communication and how to work with interpreters to build trust and enhance communication.. In our description of teaching the Habits, we also describe how we teach students about working with interpreters.

i. Teaching the Habits One by One

1. Teaching Habit One

Habit One requires a student to pay attention to both his or her own cultural markers or identity characteristics and another person's. Habit One asks students to brainstorm long lists of these markers to see their clients as individuals who have personal, cultural and social experiences that shape their behavior and communications.¹⁷ In the materials they have read for class, we describe a broad range of identity factors that effect culture, including ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, religion, accent, skin color or a variety of other characteristics.¹⁸

We introduce students to Habit One in class, using a variety of approaches. Sometimes we ask them to generate lists using mythical clients that they see in a video shown in class, sometimes in pairs with their classmates and most often with their own clients. We encourage students to make lists honestly and non-judgmentally, thinking about what similarities and differences might affect their ability to hear and understand their clients' stories as well as what similarities and differences that might affect the clients' willingness to form relationships with them as lawyers. If we have the time, we like students to apply Habit One at least twice during the class with different comparison subjects. When students do this, they often describe themselves differently. This allows students to see that the characteristics and identities that shape interactions can change depending on the context.

We also ask the students to illustrate the degrees of connection and separation between themselves and their clients through the use of a simple Venn diagram by imagining impressionistically the worlds of lawyer and client as two circles. Before we ask them to draw the diagram, we illustrate this Venn diagram on the board for them to visualize, explaining they

¹⁶ The other practices: employ narrative, listen mindfully, use parallel universe thinking, speak mindfully, apply Habit 4.

¹⁷ Long lists help avoid essentialism but may fail to recognize in certain situations identity factors are not all equal.

¹⁸ Habits article between footnote 20 – 21.

should overlap the circles broadly if the worlds of the client and lawyer largely coincide and overlap narrowly if they largely diverge. After they draw the circles, we ask what insights they get from the diagram. They often note ones distinct from those gained by making lists. For example, a list of similarities may be small and yet a student indicates that they feel very similar to the client because of one shared similarity such as race or ethnicity or, alternatively, the student may have many similarities and yet, for other reasons, find herself feeling very distant from the client as result of class or gender. Sometimes, we ask them to imagine how their client might draw these circles. While dangerous in some ways, as the lists maybe more likely to be based on stereotype than knowledge, the exercise causes them to remember that other similarities or differences that are important to the client may be influencing the relationship.

After the students have done the lists and diagramming, we also ask them if they have noticed anything new about their relationship with their clients. In every class, we have students who see something new about their cases. Some understand why they have a particular reaction or judgment about a client or why they emphasize one aspect of the client's case over another. If we have the students do this list making and diagramming using a colleague as the person they are relating to and then with their clients, students will often observe how seeing themselves in relation to another sometimes alters how they see themselves. For example, two white students in a pair identifying similarities and differences will often not identify race as a similarity.¹⁹

When we teach or use Habit One in supervision, we ask students to engage in similar activities as a way to teach students to pay attention to culture and its influence on two aspects of the lawyer-client relationship: first, at the effect on professional distance and second, at the effect on information gathering. Habit One helps students balance appropriately empathy and professional distance. For example, in teaching Habit One, in class and in supervision, we encourage students who have long lists of similarities or whose circles overlap broadly to ask themselves what, if any, differences they may be overlooking. By pondering this question, students can recognize that even though similarities promote understanding, misunderstanding may also flow from an assumption of precise congruence and the student needs some distance from the client to provide professional judgment.²⁰

Habit One also encourages students who have long lists of differences to question if there are any similarities that they may be overlooking. By recognizing that negative judgments are more likely to

¹⁹ Refer to white privilege

²⁰ Arenson empathy and judgement and doubting and believing below

occur when a client or lawyer sees the other as an “outsider,” this identification of similarities may help students judge their clients less negatively. Even if negative judgments persist, this list making activity can often assist students to identify the source and to remain alert to the necessity of bridging the huge gap between the clients’ experiences and their own. Finally, in analyzing the effect of similarities and differences, Habit One allows students to examine ways in which these factors affect clients’ senses of closeness to and distance from their lawyers.

We also ask students to reflect on how similarities and differences influence their approach to obtaining information and developing a case theory. For example, when lawyers probe for clarification in interviews, they usually ask questions based on differences that they perceive between themselves and their clients and fail to fully explore client behavior or thinking based on perceived similarities. One way to teach this insight is to show an interview clip and ask students what information they want to follow-up and what questions they will ask. When different students propose different questions, the teacher can begin to explore why we inquire about some information but not other. We usually uncover concrete examples where students question because clients are making different choices than they would or where the lawyers perceive an inconsistency between what the clients are saying and doing and what the student knows based on their experience. Often different students will want to gather different information. Exploring these differences in class provide an opportunity to show how our experiences cause us to fill-in and question differently.

By introducing students to the effects of culture on our view of what we perceive as normal and how it drives questioning, we give students additional insight for evaluating the thoroughness and accuracy of their interviews. However, Habit One does not really provide the student with the tools necessary to elicit an authentic client narrative. For that reason, we often teach narrative theory and narrative information gathering techniques alongside the Habits.²¹ As described in Section II below, a systematic approach to believing and doubting also allows the interviewer to get

²¹ In *Six Practices For Connecting with Client’s Across Culture: Habit Four, Working With Interpreters and Other Mindful Approaches*. Chapter xx, *Affective Assistance of Counsel*, Majorie Silver, editor., we identify narrative inquiry as a way to promote a gathering of a more authentic client-focused narrative and give several tips for ensuring that we stay focused on the client narrative rather than our own. In *Interviewing and Counseling*, Chapter xxx, title, Ann Shalleck details how the lawyer can use the narrative elements to elicit a full and rich story from clients. As we note in the *Six Practices* chapter, these kinds of approaches are valuable for all of law practice; they are essential when we work across cultures as we are less likely to fill the client narrative with pieces from our own sometimes very different story.

outside his intuitive, culturally-bounded, information-gathering process. Habit One gives us insights into why questioning driven by the lawyer's experience and culture is insufficient and motivates the student to apply doubting and believing and narrative inquiry to interviewing.

2. Teaching Habit Two

Habit Two, the only Habit that explores how culture influences a client matter beyond its effect on the attorney-client interaction, focuses on how culture might shape a decision maker's response to the client or the client's issue. The list and the Venn diagrams are similar to Habit One but involve linking comparisons between client, lawyer and court or others.²² Because Habit Two involves a complex interplay between the problem being solved, the decision makers and the attorney and client, we usually teach this didactically, illustrating how it works. If we teach it in class, we use a "canned example" or a case that the students know well from rounds or simulation work. This in-class introduction enables the students to later apply Habit Two to one of their cases for our review in supervision.

In the class, we demonstrate the different inquiry points of Habit Two's three rings, identifying and analyzing the possible effects of similarities and differences on the interaction between the three – the client, the legal decision-maker and the lawyer. Habit Two asks the student first to identify the differences and similarities between the client and the legal system and between the lawyer and the legal system. After identifying and analyzing this information, Habit Two links this analysis to the Habit One analysis to explore all the ways in which culture may influence a case.

To pinpoint and record similarities and differences in the legal system-client dyad, students identify cultural differences that may lead to different values or biases, causing legal decision-makers to negatively judge the client and the similarities that may establish connections and understanding. What does a successful client look like to this decision-maker? Are the Venn diagrams overlapping circles or widely divergent? What does this tell us about how similar or different this client is from the prototype of a successful client? What are the cultural values and norms implicit in the law that will be applied to the client? Does the client share these values and norms or do differences exist?²³

²² We have conceptualized and used Habit Two in litigation settings. If a teacher wants to teach it in a non-litigation setting, students need to identify who are the people or legal principles that govern the solution to meeting the clients request and identify similarities and differences between lawyers, clients and this third player – whether it be the law or some other decision maker.

²³ As we describe in section three, the Habits need to be supplemented with additional learning for the students to be able to fully engage the insights developed by Habit Two

In focusing on the lawyer-legal system dyad, the student is asked to compare him or herself to the legal system examining which values and norms of the law and legal decision-makers the student shares? What are the similarities and differences between the student and these decision-makers? To what extent has the student become acculturated to the law and legal culture? How much overlap is there between the student's view of the "successful" client and the views of the law and legal decision-makers?

After preparing the diagrams and/or making lists of the three different dyads, the students are encouraged to search the information for insights about the impact of culture on the attorney-client relationship, the case, and potential successful strategies. In this process students may identify influences that may be invisible, and yet nonetheless affect the case. We ask students to explore a series of questions that explore how culture might affect: (1) the legal claim; (2) the client's and witnesses' credibility; (3) legal strategies; and (4) hot button issues for client or lawyer?

We have found Habit Two particularly helpful when the students or we are troubled by a case or client. Habit Two analysis helps identify why a focus on a particular aspect of a case can assume preeminence even though that aspect may not be critical to the success of the case or why a judge is bothered by a particular issue, or a client is uncomfortable with the lawyer's advice. Students might also begin to understand why clients are prone to view the lawyer as part of a hostile legal system when there is a high degree of overlap between the lawyer and the legal system but only a small degree of overlap between the client and legal system.

Like Habit One, these lists alert students to search for possible biases and stereotypical thinking that may influence the outcome. However, this searching and reflective process alone may not be enough; students may need additional information about how bias functions in the law, legal system and with legal decision makers. Hopefully, Habit Two opens them up to exploring these issues in service of clients.

3. Teaching Habit Three

Teaching Habit Three is easy. We usually introduce this Habit by connecting it to the concept of attribution, explaining that cross-cultural interactions often result in lawyer and client ascribing different meaning to the same behaviors. Habit Three invites students to imagine alternative explanations for the client's behavior. Students grasp the concept readily and its use reinforces the critical skill of remaining flexible and making isomorphic attributions, those intended by the person who is acting or

analysis. See also the description of the "ideal asylee" class.

speaking.

We teach Habit Three by using critical incidents shown in video clips or from the students' cases. We look for scenarios that are subject to multiple interpretations. For example, we use a clip of a deaf client in a custody dispute who keeps coming up with reasons why it is difficult to take her children to be seen by an forensic evaluator. We ask what is going on? How do we interpret the client's behavior and words? In brainstorming the many explanations, we always ask for at least one explanation based in culture. For example here, if students fail to raise as they sometimes do, the possibility that the client fears that she will be judged negatively because the expert will fail to understand deaf culture, we might ask explicitly about deaf culture. After we identify the various possibilities, we ask how our answer to the questions influences our lawyering choices.

In our trainings and classes, we often teach Habit Three by asking the participants to recall a negative judgment that they made about a client's behavior. In a quick write, we ask them to write down the behavior and their interpretation of the behavior. Then, we ask them to use parallel universe thinking to identify at least three other possible explanations or interpretations of the behavior. Next, we ask the participants to join a group of two or three and take one person's list and add to the list of possible explanations. This exercise always illustrates that behaviors have many different interpretations. Sometimes connecting Habit Three to Habit Five, we ask students to think about why they interpreted the behavior one way when others saw other possible interpretations. This technique of exploring alternative explanations is commonly used in clinical teaching to expose students to the limitations of relying on their own experiences to interpret client behavior. By teaching the technique as a cross-cultural lawyering skill, and naming it Habit Three, students learn the importance of routinely searching for alternative explanations. They learn to hold off making judgments until they have considered what additional information may be needed to make sense of the behavior.

4. Teaching Habit Four

The practice of Habit Four increases students' skills at cross-cultural communication.²⁴ We teach Habit Four primarily through watching and interpreting videotapes, conducting simulated role-plays in class and engaging in reflection in supervision of client meetings. These teaching methods mirror the ones we use to teach client-meeting skills. We design short exercises, simulations or videos to focus on parts of an interview for

²⁴ Insert stuff from Six Practices Chapter

demonstration and analysis. For example, focusing on the beginning of the interview, we identify the different introductory rituals that cultures use and we role-play the integration of these into the attorney-client interview.

To help students acquire the deep listening skills that cross-cultural interaction requires, we expose students to exercises that help the student become mindful of the interviewing process. Deep cross-cultural listening, especially if the communication occurs with the help of an interpreter, is exhausting and difficult for students to master. Additionally, western cultures undervalue listening. Most students who were encouraged in their childhood to pursue a legal career probably received this advice because they displayed a tendency to argue, not because they were good listeners.

In watching videotapes or reflecting on case interviewing, we ask whether we are correctly interpreting the client and she us. Especially when we are using interpreters or working cross-culturally, the lawyer must prepare for the possibility of some misunderstanding. For example, one way to teach attention to body language is to turn off the sound on a video excerpt and use the slowest fast forward speed that allows the students to quickly see client's and lawyer's body language. Students identify when the client or lawyer is most engaged and disengaged by identifying visual cues. Discussion follows evaluating whether these interpretations are accurate. We play the same snippet and ask students questions designed to surface additional cues that the students are using to understand the client and assess the interview. These include: What evidence do we have for our evaluation? Is the client's style different from our own and can we separate content from style when the style is so different from our own? What other steps could we take to confirm that our interpretation is the correct one?²⁵

Learning deep listening skills proves difficult for students trying to accomplish many new and different tasks in client interactions. Thus, one key component of Habit Four's call for deep listening is to alert students to look for red flags - clues that something is going wrong in the interview. By teaching students this, we implicitly acknowledge that these interviews are difficult and that we often make mistakes. Recognizing and responding to red flags, which is a complicated task in any interview, requires even greater attention and skill in a cross-cultural interview. Students can be taught to look for red flags by reviewing simulated interviews and by making flag notations in their client interview notes.

In talking with students about their red flag analyses of tapes of cross-cultural interviews, the teacher can encourage the student to engage in parallel universe thinking about why the red flag is occurring, encouraging the kind of reflection that Professor Jacobs suggests for effective client-

²⁵ Listening mindfully is one of Six Practices in Six Practices for Working Across Culture

centered lawyering. For example, Professor Jacobs notes that students may be sending non-verbal cues to a client they label difficult or uncooperative thus causing the very difficulty the student is experiencing. The red flag may also alert the student to consider how their clients' experiences with other lawyers or others from the lawyer's cultural group may complicate the interviewing process. For example, Professor Jabobs notes that as a result of prior interactions, African-American clients may have racial mistrust for white lawyers.

For six practices add these:

- (1) Employ narrative as a way of seeing the client within her own context;
- (2) Listen mindfully to promote and understand the client's narrative;
- (3) Use parallel universe thinking to explain client behavior and stories;
- (4) Speak mindfully, taking into account the client's culture, especially as it relates to how she expects to interact with the lawyer and the legal system;
- (5) Work with interpreters in ways that enable the development of genuine communication between lawyers and clients; and
- (6) Apply the Habit Four analytical process continuously to identify red flags that the interaction is not working and corrective measures that the lawyer might take.

5. Teaching Habit Five

Habit One and Habit Five go hand in hand – Habit One identifies elements that may shape our reactions and understandings of clients and Habit Five asks students to engage in careful self-examination to service assumptions and recognize some of the more pernicious effects of bias and stereotyped thinking. Students need to understand concepts like implicit bias and ethnocentric thinking to comprehend the ways that all people can misjudge, mishear and use their power inappropriately. In our materials we discussed these concepts and we discuss them when we teach Habit Five. Lawyers of all identities have privilege and those with white privilege, male privilege, hetero-privilege, class privilege may fail to see how this shapes their views.²⁶ Just as culture is invisible so is privilege. Habit Five encourages students to monitor for biased thinking. Once the framework for Habit Five is laid in the classroom, Habit Five conversations are more insightful for students when they are applied to the student's fieldwork. This exploration might be accomplished by discussing whether the student's behavior or thinking would be different if the characteristics of

²⁶ Again we need more than just the Habits to teach these concepts.

the client changed. The challenge here is to strike the right balance of support and challenge in the conversation with the student. The goal is to provide the students with sufficient support and information so that they can challenge themselves. One way to do so is to acknowledge our own assumptions and biases when they occur.

ii. Teaching about Working with Interpreters

We use exercises,²⁷ role-plays, critical incidents and discussion to build the students' knowledge about how language functions in communication and the challenge of interpreting and translating from one language to the other as well as developing the skills needed to work with interpreters. We also use excerpts from Muneer Ahmad's *Interpreting Communities: Lawyering Across Language* to introduce students to the concept of community interpreters and the roles they may play in the attorney-client interactions.²⁸ (MORE TO BE ADDED HERE)

II. MOVING AHEAD: METHODOLOGICAL BELIEF, METHODOLOGICAL DOUBT, AND THE DOUBTING/BELIEVING SCALE

We remain fascinated by the many ways that reflective practitioners can identify additional practices like the Five Habits to assist in lawyering across cultures. This section offers another practice which, like the Habits, offers concrete and revealing ways for the practitioner and the clinical law student to observe their thought processes in practice and surface assumptions, particularly about race, gender, sexuality and other forms of difference, which affect their day-to-day lawyering.

This additional practice offers lawyers ways both to reflect more on their patterns of doubting and believing, as they currently manifest in daily work, and also to make conscious adjustments of those patterns of doubting and believing in service of better self-understanding and greater transparency with collaborators and clients. The practice rejects the idea that doubt and belief in any given context is a fixed, unchanging, and unmovable part of the lawyer's mind, and invites a playful investigation and tinkering with doubt and belief in many daily life contexts. By asking the doubting mind to believe, or the believing mind to doubt, the lawyer can identify assumptions which might be contributing to doubt and belief, as well as expanding her understanding of those who assess credibility differently that she does. By suggesting that at all times, we can find

²⁷ Cite Muneer, *Interpreting Communities*

²⁸

ourselves assessing experiences, data, or behavior on a doubting/believing scale, we can name and observe in the foreground what has often been hidden: the ways in which we credit and discount the thousands of experiences and inputs of our days, and the ways in which bias may contribute to those crediting or discounting conclusions.

These ideas have evolved in conversations with two other (beloved) close collaborators. Jean was first introduced to the concepts of Methodological Belief and Methodological Doubt, phrases coined by writer and English teacher Peter Elbow,²⁹ by her collaborator, Mark Weisberg, with whom she has worked on presentations, retreats, and, soon, a book for teachers reflecting on their teaching.³⁰ Jean began using the Doubting/Believing Scale, described below, in her clinical teaching with her students representing refugee and child clients, and, in our weekly conversations, Jean and Sue regularly began to incorporate some of these ideas into their presentations relating to the Habits. In 2007, Jean, Sue, and our colleague, Muneer Ahmad, presented Methodological Doubt and Methodological Belief at a plenary session entitled “*Teaching Our Students to Challenge Assumptions: Six Practices for Surfacing and Exploring Assumptions, and Designing Action*” at the annual AALS Conference on Clinical Legal Education held in New Orleans, Louisiana. Sue and Muneer have continued to present these ideas at other Clinical Legal Education venues since 2007. Jean and Mark have published related materials in their article “Experiments in Listening”.³¹

This section introduces both 1) Elbow’s concepts of Methodological Doubt and Methodological Belief,³² along with 2) the Doubting/Believing scale. Throughout our discussion, we will refer to the general practice of using either or both of these two framings as “Doubting and Believing.” The section then discusses the specific connection of doubt and belief to

²⁹ Peter Elbow is a Professor of English Emeritus at the University of Massachusetts at Amherst. He has written numerous books and articles on writing including *Writing Without Teachers* and *Writing With Power*. Mark first introduced Elbow’s methodological doubt and belief to Jean through Elbow’s book *Embracing Contraries: Explorations in Learning and Teaching*.

³⁰ Cite: JLE Listening article; forthcoming book; two retreats, with original one Mark taught alone.

³¹ citation

³² In an article written for the 2008 New Orleans Conference on College Composition and Communication, Elbow describes how the development of these concepts came from an attempt to justify his teacherless classrooms envisioned in *Writing Without Teachers* where the rule of not allowing arguing went against the common view of what good thinking involves. In an appendix to that book, Elbow discusses “The Believing Game” which would be described as Methodological Belief in (either “The Doubting Game and the Believing Game” or “Methodological Doubting and Believing: Contraries in Inquiry” not sure which – can’t seem to find the former.).

cross-cultural lawyering, and briefly outlines various teaching contexts in which we have used these doubting and believing concepts. Before concluding, this section briefly ponders the relationship between doubting and believing and the Five Habits.

a. Elbow's concepts of Methodological Doubt and Belief

In his essay entitled "Methodological Doubting and Believing: Two Kinds of Inquiry" in *EMBRACING CONTRARIES: EXPLORATIONS IN LEARNING AND TEACHING* 254 (Oxford: Oxford University Press, 1986), Elbow provocatively asks "How shall we describe the mental activity that permits us while operating alone to see that we are wrong and come to a new and better conclusion?" He argues that "we can improve our understanding of careful thinking or reasoned inquiry (and therefore improve our practice) if we see it as involving two central ingredients: what I am calling methodological doubt and methodological belief."³³

Elbow defines *methodological doubt* as the systematic, disciplined, and conscious attempt to criticize everything no matter how compelling it might seem--to find flaws or contradictions, we might otherwise miss." But this "serious intellectual work"³⁴ also "helps explain the tendency towards critical warfare and intellectual and academic world -- the fact that intellectuals often find it surprisingly difficult simply to hear and understand positions they disagree with."³⁵ Thus, methodological doubt is "only half of what we need."³⁶ For "thinking is not trustworthy unless it also includes *methodological belief* : "the . . . systematic, disciplined, and conscious attempt to *believe* everything, no matter how unlikely or repellent it might seem -- to find virtues or strengths we might otherwise miss."³⁷ These are both "methods, [because] they help us see what we would miss if we only used our minds naturally or spontaneously."³⁸

Because methodological doubt pervades the intellectual life, Elbow as we will do, focuses more on methodological belief. "Indeed I cannot resist sometimes arguing *against* methodological doubt."³⁹ Elbow regrets that "[w]e tend to assume that the ability to criticize the claim that we disagree with counts as more serious intellectual work than the ability to enter into

³³ Elbow, 255

³⁴ 258

³⁵ 258

³⁶ 257

³⁷ *Id.* at 257.

³⁸ 258

³⁹ 258

temporarily assent.”⁴⁰ Methodological belief is a process in which “we are not trying to construct or defend an argument, but rather to transmit an experience or enlarge a vision.”⁴¹ Methodological belief “forc(es) us genuinely to enter into unfamiliar or threatening ideas instead of just arguing against them without experiencing them or feeling their force. It thus carries us *further* in our developmental journey away from mere credulity.”⁴² Elbow finds methodological believing to provide a safeguard for trustworthy knowledge: “A belief is a lens and one of the best ways to test it is to look through it.”⁴³

Elbow describes “the believing game:”⁴⁴ the disciplined procedure of not just listening but also trying to believe any view or hypothesis that participants seriously wants to advance.” Elbow proposes that a group adopt a quote five minute rule” in which quote a group can simply agree that whenever any participant feels that some idea or view is not getting a fair hearing, she can invoke the rule: for five minutes no criticism of the idea is permitted, and everyone should try to believe it.”⁴⁵ Elbow suggests three questions are useful in the believing game:

- “What’s interesting or helpful about the view? What are some intriguing features that others might not have noticed?”
- What would you notice if you believe this view? If it were true?”
- In what sense is for under what conditions might this idea be true?”⁴⁶

b. The Doubting and Believing Scale

Along with Mark Weisberg, Jean has described a “Doubting and Believing Scale” in teaching and writing about teaching and listening. In Jean and Mark’s earlier article, we proposed to move from Elbow’s poles of methodological doubt and methodological belief to a scale that we call the doubting/believing scale. This is related to, but conceptually distinct in

⁴⁰ 258

⁴¹ *Id.* at 261.

⁴² *Id.* at 263.

⁴³ *Id.* at 283.

⁴⁴ 260, 273 to 76

⁴⁵ 274

⁴⁶ 274 to 275

important ways from Elbow's methodology. Related to the same core ideas of doubting and believing, it, for now, abandons Elbow's *methodology* and creates poles, instead, of "pure doubt" and "pure belief", as they may appear in the world. While the content of both "methodological" and "pure" doubt are the same, the doubting and believing scale can be used to track non-methodological doubt/belief occurring in the world, especially retrospectively. Here is the scale, and then a few examples:

Complete/Pure Doubt	Complete/Pure Belief
---------------------	----------------------

If you prefer, you can add units to the scale:

0	100
<i>Pure Doubt</i>	<i>Pure Belief</i>

Think about your own life experience: When do you encounter pure doubt and pure belief in your life? Which do you encounter more often? Here are some examples of pure belief, gathered in our conversations and presentations.

- sympathetic conversations with a grandparent
- listening on a crisis hotline
- listening by a therapist
- early lawyer client or doctor patient interviews
- a student attempting to learn a brand new theory or material from a teacher
- a friend listening to another friend in a time of utter distress
- listening to an expert consultant like an accountant, financial planner, etc.

And examples of pure doubt:

- law teaching through the Socratic method
- teachers listening to colleagues at a workshop on a paper in progress

- listening to a politician you do not trust
- listening to someone with a credibility problem
- arguing the negative side in a debate tournament
- when a friend comes and asks you specifically to be a reality tester and asks you to find everything wrong with something they're thinking or have written
- cross-examining a witness who is doing you harm

Below, we will describe in more detail concrete applications of all of these concepts. But here, the terms methodological doubt and belief will be used in their extreme forms only; for instance, that a teacher conduct a portion of a class requiring methodological doubt about a new or perhaps provocative idea, brooking during that period no skepticism or critique. The scale is used retroactively or in the moment to track the lawyer's or law student's current level of *actual* belief or doubt, which may be graduated along a continuum, and generally will never be used at the extreme poles. It is also used prospectively or in the moment to **choose** a mixed level of doubt and belief to experience and/or display, for instance, at a moot event of a client's testimony or administrative interview.

c. How do methodological doubt and methodological belief, and the doubting and believing scale, relate to cross-cultural lawyering?

Lawyers have long treated their own levels of doubt and belief in witnesses and clients, and client credibility, as a fixed and objective reality in the world. Methodological doubt and belief, and the doubting and believing scale, confront lawyers with the reality that doubt and belief are subjective, part of the lawyer's inner process, and as such, potentially fraught with assumption and bias. The methods and the scale equip the lawyer to treat doubt and belief as items of reflection retrospectively, objects of choice in the moment, and complementaries to be balanced out in the future, helping lawyers to destabilize the rigidity of their spontaneous doubting and believing. This matters even more in cross-cultural encounters, where privilege, stereotype, class and the like can easily shape what narratives we find credible or dubious.

Jean remembers vividly a meeting with a West African asylum client who mentioned, as part of her narrative of captivity, an incident of cannibalism by her captors. Jean's immediate reaction was doubt and denial—surely this was outlandish, impossible—and she began to wonder

about the credibility of her client's story, both in this detail, and globally. Later that week, the students showed Jean US government reports clearly and extensively documenting cannibalism in the very context described by the client. In retrospect, Jean is sure that her doubt was a shield, protecting her for a world of violence that she was not ready to confront. Left unchecked, that doubt would certainly have poisoned the lawyer-client relationship, and compounded the client's isolation and trauma.

One special note on the critical nature of *believing*, and the balance of doubting and believing, in clinical law teaching: Methodological doubt closely resembles the default style of academic discourse in many of our law schools, reflecting the value that "rigor" can only be achieved by subjecting ideas to the white-hot fire of aggressive negative scrutiny. Lawyers often agree that the conflict of ideas, and the intensity of hostile cross-examination, is the way to surface the finest strongest ideas and stories. For clinical law students, this double-barreled endorsement of methodological doubt alone risks skewing their entire approach to balanced legal thinking and thorough legal representation. This is particularly insidious, because doubt can also dovetail with our desires to confirm our comfortable views and reject others. In doing so, we would miss the learning which comes from suspending disbelief and believing an idea and broadening our universe of imagination to include narratives foreign or troubling to our own.

d. Concrete uses of Methodological Doubt and Belief and The Doubting and Believing Scale in the Law School Clinic

So far, we have had fruitful conversations with students and clients using these two Doubting/Believing methods to monitor and reflect on spontaneous doubt and belief; choosing a mode of doubt and belief during a particular event; and seeking to refine ideas through methods of doubt and belief. In general, we love to consider Doubting and Believing like a classic child's toy, perhaps a ball—something to explore endlessly, and as many ways as possible, with as much fun as possible. Elbow himself has alternately called methodological doubting and believing the "doubting and believing" game, and that playfulness is the essence of the practice. Encourage your students to play with doubt and belief on multiple levels: in tracking their own spontaneous reactions; in complementing those tendencies with disciplined undertaking of what they do not gravitate to; in listening; in projecting skepticism or credulity to another; in assessing credibility and gullibility. We have so far explored retrospective, in the moment, and prospective analysis of doubt and belief; systematic attempts at methodological belief and doubt; group engagement in one or the other;

individual self-reflection about doubting and believing tendencies. We hope to continue expanding this list to make Doubting and Believing comfortable and quotidian inquiries and modes of conversation in our clinics and practices.

Here are a number of examples of use of these methods in the clinic:

i. With the client

Jean has used Doubting and Believing as a thread throughout discussions of client interviewing and mooting. Of course, these same methods can be adapted for other non-client (e.g., witness preparation, collateral party interviewing) contexts.

1. Client Interviewing

Jean introduces the doubting and believing scale in the first discussion of client interviewing, which takes place in the first week of the semester, hours or days before the first client meeting. In class discussion, the students ponder where they want to locate themselves on the Doubting/Believing scale in their first encounters with their clients, on a number of levels. First, how do they externally project themselves to the client when hearing the client's account of her concerns and life experience? Many students conclude that they want to build trust by adopting a believing posture (often around 80%) with their clients, to make sure they fully understand and embrace the client's narrative. The students generally agree, also, that this believing posture must be balanced out later in the semester with equally vehement doubting, when mooting for court, asylum interviews, and negotiation takes place. Second, Jean asks the students to reflect on how this highly believing posture compares to what they might characterize as their own personal default tendencies about doubting and believing, in all aspects of their daily life? This reflection and discussion is often helpful for students and teachers in partnership, who can be alerted to the variety of default postures on doubting and believing within their working group. For groups with diverse defaults, we can identify which of us might be more comfortable and uncomfortable during the highly believing initial phase; we can also be confident that, in our debriefing, a variety of doubting and believing perspectives will be demonstrated, perhaps spontaneously achieving much of the balance Elbow advocates. For groups with common defaults lacking that variety, we can strategize ways to balance out the unopposed doubting or believing, by deploying the methodological version of the missing attribute, involving complementary others from the firm, or other strategies. A group of believers might make sure a more spontaneous doubter is involved in early

decisions; a group of doubters might recruit a default believer onto their email string or early drafts.

Over the course of the representation, Jean and the students return to the scale regularly. After the first couple of meetings, it often makes sense to move to a more central location on the scale, seeking clarification, probing puzzling parts of the story without the default of strong belief. We also discuss the way in which extremely sensitive, traumatic, or dramatic events may require particular care, often more sustained believing over a longer period of time.

2. *Mooting*

Jean now regularly uses the Doubting/Believing scale in mooting of clients. For instance, in preparation of asylum clients for asylum interviews or court testimony, we regularly moot our clients multiple times, simulating the interview based on our now nearly one hundred previous asylum interview experiences. At the first moot, wherever the client can participate in this decision, we present the doubting and believing scale, along with a number of other scales (cold – warm; unfamiliar with their home country – unfamiliar with their home country; odd – normal seeming; impolite – polite; disrespectful – respectful).⁴⁷ Our clients participate readily in defining the kind of simulated official they want to practice in front of. The vast majority of the time, the clients request the hardest on every scale, even when we ourselves observe that, in one context, the large majority of adjudicators are relatively polite, respectful, relatively knowledgeable about a country, etc. In general, we honor the client’s choices; often the clients find it interesting to “dial up and down” levels of skepticism, respectfulness, and the like. We sometimes suggest to clients that we do the grueling, heavily doubting and interpersonally very uncomfortable moot that they requested this time, and that a later moot might feature an officer closer to the norm we’ve observed.

For some clients, this transparency of mooting design, and even the simulations themselves, can be very confusing. Still, in our experience, nearly all of our clients believe that practicing “what they are going to do on

⁴⁷A note from Jean I see now how judgmental, value laden and culturally complicated these are; my African clients may construe odd social skills or politesse very differently from me. I also now see how the scales may send the subtle message that “doubting” is bad, and “believing” is good, when compared to the other scales. In the future, I will seek more nonjudgmental poles for these other scales. (TIM CAN YOU SUGGEST SOME? PLEASE EMAIL MIKE—HE’S BEEN IN ON SEVERAL SUCH MOOTS) Since in some of the contexts, I can literally imitate adjudicators whom I have observed on multiple occasions, I can take more responsibility in these discussions for my interpretation of these contexts and how I have sought to mimic the behavior of officials whom they may face.

that day” would be helpful, and a similar majority feel relieved after surviving a very negatively judgmental moot. This of course leads to a familiar refrain the day of the actual interview, in which Jean’s clients regularly tease her for being “so much harder than the real thing!”

ii. In the Classroom

We offer here two ideas for classroom use of Doubting and Believing, and, again, invite readers to refine these concepts for their own classroom use.

1. Introduction of new theory

We have usefully employed Methodological Doubt and Methodological Belief in classroom discussion in the seminar portion of our clinics, in much the way that Elbow originally described in his articulations of this method. Jean’s students, for instance, regularly read Goldstein, Solnit, Goldstein and Freud’s *Best Interests of the Child* book which contains both foundational and deeply provocative views about child placement after state intervention. Asking students who object vehemently to some parts of the framework to engage in methodological belief for some portion of the class discussion allows a full understanding of the author’s ideas; the discussion then moves out of methodological doubt into a discussion of the students’ spontaneous reactions to and assessment of the ideas. In another context, during the Elian Gonzales controversy involving a young child both applying for asylum and subject to a complex custody dispute between family members, Jean led a class whose explicit purpose was to equip students with as full an understanding as possible of all of the perspectives in this hotly contested and emotion case. This required various students to take on roles and engage for a portion of the class in methodological belief of the position they found most repugnant.

[Sue example here?]

In Jean’s recent study of Critical Race Theory and its potential in the clinical classroom (discussed at more length in Section III, *infra*), she has resolved to make sure that a methodologically believing classroom discussion of Critical Race Theory be part of every semester of her clinical teaching in both her child protective and asylum clinics. To link many ideas in this article at once, Jean’s current view of the proper place of Critical Race Theory in her clinical teaching is this: Critical Race Theory is a parallel universe explanation of many of the phenomena we witness in the two clinics, and must be regularly raised. To ground the students in Critical Race Theory, methodological belief in the early discussions will be important, to ensure that all of us deeply understand CRT on its own terms, before we individually begin to assess its ongoing utility in our own minds.

2. *Case Rounds*

Sue and Elliott Milstein have written about⁴⁸ and convened many clinicians to discuss issues related to a staple of the clinical method: case rounds, or the case discussion class. Both Sue and Jean regularly use Doubting and Believing in structuring case rounds. Jean draws the Doubting/Believing Scale on the board before every case presentation and asks the students who are presenting case materials, including draft briefs, affidavits, and similar documents, to specify what level of mixed doubt/belief about the merits of the clients case that they are requesting that their classmates and teachers show during this presentation. For instance, a confident student on the eve of trial may ask for highly pointed doubting, with very little belief; a student presenting her first draft of an affidavit may ask for heavy believing as she seeks to fully inhabit and understand her client's narrative. At least once, a student changed her request in mid class; as she sat through her classmate's presentation and the doubting reaction, she realized that she was not yet ready to subject her fragile drafting to that level of critique. At the end of a discussion which the presenter wished to be highly doubting, a number of listeners asked to come out from under the request to express their spontaneous high level of belief in the claim.

iii. In Supervision

Doubting and Believing is also a useful tool in supervision, between student partners, and among all team members during case discussion and planning. Like parallel universe thinking, it can be undertaken at any time to take conversations out of stuck places, or ruts, when various team members feel entrenched in fixed viewpoints. For instance, a team fielding an array of reactions about a client's puzzling behavior could engage together, or individually, in methodological belief about the client's explanation for the behavior. Believers on the team could be asked, or ask themselves, to engage in methodological doubt concerning the client's case prospects before planning action strategy. Making Doubting and Believing a normal, regularly expected part of the supervision conversation can promote Elbow's overall goal: to make sure that important considerations are always only after consideration through methodological doubting and believing. We believe in the clinical context that this further translates into a need to consider important questions and facts along the full range of the

⁴⁸ Tim/Simon—please add cite to Sue/Elliott's Case Rounds article in the Clinical Law Review last year.

doubting and believing spectrum

An openness to, and valuing, of doubting and believing can change relationships. For instance, Jean has found one valued interdisciplinary colleague to regularly inhabit complementary parts of the doubting and believing spectrum to her. Earlier in the collaboration, this was confusing; we always saw things differently; we never agreed; and it could get frustrating. Now, I see him as a wonderful asset to my client—one who will often see arguments, pro and con, that I would naturally miss. As a person who will round out my doubting and believing, I seek out his counsel more and more!

e. How D/B connect to the other Habits

Doubting and Believing methodologies, like the Habits, name strategies that we suspect thoughtful clinical law teachers have been using in various forms for years. They are independent of the Habits and can be used productively even by teachers who for any reason decline to use the Habits.

They can also function usefully with the Habits. Perhaps, as with the Habits, the naming alone can allow us to deepen discussion, identify common approaches and techniques, and refine these ideas in conversation with each other. Doubting and believing analysis practices nonjudgment, by converting doubting and believing experienced by the lawyer into a fact to be observed in the world, or into adopted action from their previous status (and perhaps, inordinate power) as judgment, conclusion, or spontaneous and unshakeable truth. Disciplined believing can open possibilities, spark new insights, and assist different perspectives, generating creative ideas for arguing for extension of the law or asking for legal remedies that reflect deeply held truths held by the client. Disciplined believing can also grow greater empathy for the client and her situation and move the lawyer closer to the client's authentic story. The discipline of regularly examining and reflecting on one's doubting and believing can also keep either extreme doubt or extreme belief in check.

Believing and doubting pair well with each of the Habits. For instance, in Habit One, a student who finds very little overlap with or commonality with the client's world should treat his own doubts with some skepticism, recognizing that the client's largely divergent life experience could easily and wrongly look unmeritorious through the lawyer's unaccustomed eyes. Similarly, a student who identifies closely with the client should treat his belief in the client with skepticism, aware that he may be invested in crediting a story with so many resonances to his own. In Habit Two, lawyers representing clients with weak legal claims must understand fully the perspectives of a totally doubting forum; this is a

critical complement to a stint of methodological belief, in which the lawyer explores deeply claims to extend or alter the law's view of merit.⁴⁹ Habit Three can be enriched by demanding BOTH doubting and believing parallel universes in times of minimal information. Similarly, Habit Four brainstorming, which is so steeped in parallel universe thinking, would benefit from a balanced strategizing about communication; communication styles of the client that provoke negative instinctual responses should be explored with explicitly client believing parallel universes, and correctives should be brainstormed in that spirit. In Habit Five, a lawyer struggling to think non-judgmentally about himself after a cross-cultural breakdown can engage in methodological belief about his commitment to cross-cultural respect and his attempts to do his best in complex cultural situations, to help generate constructive ideas for bettering his conduct in the future.

Like the Habits, the Doubting and Believing Scale and Methodological Doubt/Methodological Belief are practices that we believe many thoughtful and cross-culturally competent practitioners already use in their daily work. We continue to invite scholars and practitioners to name other useful practices for the benefit of new lawyers. We strongly believe that naming these practices, discussing them, refining them in conversation and use, and making them part of quotidian lawyering remains a key priority for cross-cultural practitioners.

III. MOVING BEYOND THE HABITS AND DOUBTING AND BELIEVING: RE-LEARNING HOW TO INITIATE, CONDUCT AND LEARN FROM CONSTRUCTIVE CONVERSATIONS ABOUT RACE.

As we have reflected upon a decade of the Habits, and even as we have expanded through further examination of Habit Four (cite) and Doubting and Believing, we understand the need for a parallel inquiry to improve our students', and our own, competence at addressing important remaining issues concerning racism, sexism, class bias, heterosexism, and bias stemming from other vestigial discrimination and prejudice based on presumed conventional norms. In this section, we propose four key areas for future study, by ourselves and by other clinical colleagues, all four part of a larger mission: re-conceiving the endeavor of conversing constructively about race, in the classroom and in practice settings. By equipping our students and ourselves with the ability to discuss, initiate discussions, better understand, and capably confront pervasive bias we enable the next steps in our efforts towards a bias-free legal system and

⁴⁹ Give example of extensions of asylum law: domestic violence

legal culture.

As we begin to develop a pedagogy well-suited to America in 2010 and beyond, understanding two concepts from critical theory--1) essentialism and inter-sectionality; 2) micro-aggression; -- will be useful tools, but not ending places in these discussion. In addition, we must seek to improve our understanding of 3) broader trends in which material inequality persists and stymies justice for our clients and 4) conducting constructive vibrant conversation about race and material inequality. While we have not fully designed the pedagogy that is needed, we are pursuing these four topics and present here our preliminary thoughts about the role of each in the pedagogy to come.

When we introduced the Habits, we did so tentatively calling them "works in progress." We developed the ways to begin difficult conversations with students and to inculcate difficult personal inquiry. We knew the Habits alone are not enough. In writing about the Habits we described racial differences and similarities as important cultural factors to consider. For example, in using Habit 1, we identified race as one of many cultural attributes to consider when a lawyer sets out to identify the ways in which the lawyer and client are the same or different.⁵⁰ We also noted that not all similar or different attributes have the same significance, observing that, for example, racial similarity or difference can have a substantial effect on the relationship built between the lawyer and client and in the justice system. In Habit 2, we asked lawyers to focus on similarities and differences between themselves, other legal players, the law and clients and noted racial disparities in the justice system. However, as we reflect on our teaching of the Habits and our learning goals for students, we fear that including race as one aspect in a cross-cultural approach failed to teach students the significant role that racial bias plays in the ways lawyers and the broader legal system respond to clients and the systemic racial disparities that exist in those systems. In our focus on the role that culture plays in building relationships between lawyers and clients, we depoliticized the role that race plays in systemic injustice and creating the material inequalities in our society.⁵¹

We know from working for a number of years with students that the

⁵⁰ Cross-cultural lawyering occurs when lawyers and clients have different ethnic or cultural heritages and when they are socialized by different subsets within ethnic groups. By this definition, everyone is multi-cultural to some degree. Cultural groups and cultural norms can be based on ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, religion, accent, skin color or a variety of other characteristics. Quote from Jean's chapter

⁵¹ We might also ask whether we depoliticized many of the other attributes and I guess if depoliticizing them is a good thing?

Habits and Doubting and Believing are useful de-biasing tools that help lawyers mitigate their natural tendency to interpret the world through their own preconceptions, experiences, stereotypes, and biases. They also help identify some of the ways the law and lawyers fail to respect a multicultural vision. As tools that are employed by individual lawyers working on individual client cases to help the lawyer get beyond his or her individual biases, they are helpful tools for improving justice for clients. As we help students use these tools, we see concretely the ways that students are able to understand clients and their lives better and as a result, they are able to advocate for them differently with better results. However, these as we tried to identify our teaching goals about race and sources of material inequality de-biasing tools are useful but not sufficient to meet our goals.

In addition to enhancing connection and understanding of clients, our teaching about race has several other learning goals including: (1) to improve our students' understanding of how race and other vectors of oppression operate in the legal system and in the distribution of legal and other material goods; (2) to learn how to use this understanding to analyze justice issues and to identify legal solutions for individuals and communities; (3) to encourage and equip students to be leaders on these issues in the profession and broader society; and (4) to enable students to explore their own racial identity and to identify how it shapes their thinking and their work as lawyers

These learning goals are challenging to achieve because the persistence of inequality is challenging and talking about race itself is challenging. For example, while we know that systemic racial bias and stereotyping contribute to the material inequalities our client's face, we do not have the "answers" for how best to fight against these inequities. In our casework, we struggle along with the students for the best ways to address these issues individually and to think about how to link our work with others to address them more systemically.

We summarize briefly below our initial thoughts about four promising avenues of inquiring in developing a robust pedagogy to explore these critical issues in the clinic. In doing so, it is worth noting that the first two—(1) intersectionality and (2) microaggression, can be focused on the experience of individuals—provide a useful segue from the Habits to the broader inquiry sought in the third and fourth avenues: (3) an understanding of how systems and other broad trends have perpetuated bias and material inequality and (4) how to discuss the micro- and macro- issues of racism and material inequality constructively and productively. For the same reason, intersectionality and microaggression, while profoundly useful, cannot be the ending points of this inquiry.

1. Using and Breaking Categories: Inter-sectionality and anti-essentialism

Comment [sb2]: For next draft using categories

Essentialism occurs when we interpret people through a unitary perspective based on a shared characteristic or experience of a particular group. Anti-essentialism is a process that surfaces assumptions of sameness that mask differences among individuals. Approaching clients with an anti-essentialism perspective helps students be better, more sophisticated problem solvers. Thus, for example, in a battered woman's clinic, students need to understand that while battered women share being a woman and being battered, a lawyer who fails to recognize significant differences among clients will make assumptions about how a client defines her problem and what resources are available to her for solving them.

Comment [JKP3]: Quote Harris here

Inter-sectionality, a related but different concept, explains that a given person can be a member of multiple different socially constructed groups.⁵² This membership can form both a positive personal identity and be the basis for discrimination and subordination. A Latina may proudly embrace herself as a Latin and as a feminist.⁵³ Those same categories and same group memberships, Latin, feminist, Latina feminist can also be used through stereotype and bias to discriminate. A student who understands inter-sectionality will recognize that an undocumented Bengali battered woman will face multiple sites of subordination based on membership in these groups, including race, ethnicity, gender, immigration status, class, caste and collectively, all of the separate categories intersect cause a particularized experience of subordination.

Clinics who teach students these two concepts help students see clients both as individuals and as members of groups that face multiple and unique obstacles in their lives. In the clinical classroom, students can while studying interviewing, counseling and/or case planning read critical race scholarship that explains these concepts. For example, in a Battered Woman's Clinic context at CUNY Law School, we assign multiple readings including Kim Crenshaw's [article] that explicitly address inter-sectionality and essentialism in the context of domestic violence. These readings, together with chapters from an assigned book, *DV at the Margins*, describe the special problems faced by women in different ethnic and racial communities. The students read these articles and chapters over the course of three interviewing classes. The readings encourage students to avoid stereotyping or essentializing their clients and at the same time to understand that as a result of their membership in particular groups as

⁵² Quote Krenshaw here

⁵³ Noting critical

women of color and immigrants that they face discrimination and material inequality.

Later in the semester, the students read articles about the special problems of limited English speakers in getting language appropriate services and of lesbians in the criminal justice system. We assign these when students are engaged in case theory development and problem solving.⁵⁴ The readings document the discrimination faced by women who are refused entrance to shelters because they fail to speak English. The readings alert the students when they are engaged in problem solving to not presume that clients will have equal access to services. They also alert students to some of the special discrimination faced by lesbians who have difficulty getting the court to see them needing the same protection as other battered women.

When we assign critical race and other readings, we follow several common practices. First we assign excerpts of longer articles, shorten to give students the salient ideas espoused by the reading. We integrate the discussion with our teaching of lawyering theory to illustrate the relevance of the material to practice and to their approaches as lawyers. We sometimes focus the discussion narrowly on the reading by asking students to adopt a believer's stance and identify the author's insights about law and lawyering. We then try to name the important lessons or approaches the article suggests for lawyers. For example, after reading the Crenshaw article, we identify how a lawyer who employed an inter-sectionality analysis might interview differently. Students identify the importance of understanding the client's perspective more expansively and understanding how the client might be experiencing multiple problems not just battering. Students who thought of clients "wandering all over the place" sometimes are able to see the connections their clients are making to multiple sites of oppression. Crenshaw's insights about how women of color view the criminal justice system help students understand their client's reluctance to use the criminal justice system. This understanding, in turn, enables students to engage clients differently about safety planning and goal setting.

Another approach we use is to integrate the insights from the readings as we address different aspects of lawyering theory. For example, while teaching students the concept of "filling," the process whereby the listener fills in unspoken details to a story, the teacher can reference essentialism and ask how our assumptions about the essential "battered women" cause us to fill in details that may not be there. We also use Habit 1 as a tool for incorporating inter-sectionality and anti-essentialism concepts into practice. By asking students to identify the salient identity characteristics for

⁵⁴ Rivera and Robson

themselves and their clients, they identify the multiple and overlapping groups that clients and they belong to. This helps them avoid assuming that because they share a characteristic with a client for example that they are women that they are “essentially” the same. Additionally, they have identified multiple, intersectional sites for their own bias and the legal system’s bias.

Finally once students learn these concepts, they become useful for conversation in supervision. For example, in expanding the students’ understanding of why abused clients may be reluctant to leave their housing, we can ask students what about multiple inequalities creates this stance for the client? We can look at all of the possible places where the client faces discriminatory treatment or disparity based on race and other intersecting factors. For example, gender and race discrimination in housing are but two sites of discrimination that clients might face. These concepts and the conversations they spark not only increase the student’s understanding of the client but also alert the student to the challenges that must be engaged to create real change for this client and similarly situated others. The next section identifies how we can illuminate these inequalities for students.

2. Micro-aggression, privilege and power (empowerment and anti-subordination).

These are important concepts for students to understand in relation to themselves, their colleagues, and their clients and the legal system. How does identity shape privilege and how is power exercised in their co-counseling relationships, with clients and in courts? How does white privilege blind students’ capacity to understand clients’ experiences? How do we help students recognize and deal with micro-aggressions committed against them and their clients?

We assign Peggy Davis’s classic article on Law as Micro-aggressions to teach the concept and locate it in a legal framework.⁵⁵ Micro-aggressions, defined as a series of minor but constant indignities,⁵⁶

⁵⁵ In our work on the Habits we understood the importance of these concepts, as the Five Habits article noted. Thus, a competent cross-cultural lawyer acknowledges racism, power, privilege and stereotyped thinking as influencing her interactions with clients and case planning, and works to lessen the effect of these pernicious influences. A cross-cultural framework that asks students to look at a variety of similarities and differences allows those students to examine the “isms” and power issues from a different perspective. The cross-cultural perspective helps explain why we use stereotypes and think in ethnocentric ways as well as identifying new ways of thinking and behaving. However, we did not address how to teach these topics.

⁵⁶ Cite Sue, Davis and quote Davis

“incessant, often gratuitous and subtle offenses” based on identity characteristics, serve to undermine confidence, sense of belonging and subordinate people. Identifying and using this concept often helps students of color name their life experiences⁵⁷ and help other students see subtle examples of racism. During court observations, we ask students to hunt for micro-aggressions, students of color, especially women of color in family courts, are likely to report various comments that mistake them for litigants and students from countries heavily represented in immigration court will be asked if they are interpreters or litigants in those courts. Attorneys and those assumed to be attorneys are often given spots up front in courtrooms, while litigants and those assumed to be litigants are kept behind lines. Thus, the subtle “are you a litigant,” spoken as the law student tries to assume her spot on the lawyers’ bench demotes the lawyer of color from a position of power. We also ask students to think about the micro-aggressions that their clients experience in the various legal systems they must encounter and how that contributes to their client’s reaction to lawyers, law and courts.

Davis’s article gives students a framework for analyzing these sometimes “seemingly inconsequential acts” as ones that are interpreted differently by those who are subjected to them.⁵⁸ The concept hopefully helps students understand why some clients are angry at court systems; why they distrust their capacity to get a fair trial; and why they do not naturally see their lawyer as an ally. The micro-aggressions are largely invisible to students who have the privilege of not being the subject of them. Our goal for these students is to recognize micro-aggressions, to understand their impact and avoid engaging in these micro-aggressions themselves. For students who are the subject of micro-aggression, the concept names behavior they have experienced throughout their lives and allows them to interpret potentially destabilizing experiences and respond differently.

The Habits, along with Doubting and Believing Practices, teach us that we all have bias and perspectives and that our life experiences limit what we see and how we interpret what we see. If we teach these ideas with a race conscious approach, we address how in particular white privilege shields white students and teachers from seeing and experiencing micro-aggressions and other acts of discrimination. Michelle Jacobs’ *People from the Footnotes* article can be used along with a reading about the Habits to teach students how their own micro-aggressions may create a problematic interaction. Similarly, our failure to name how white middle class experiences are privileged in the law and its norms, fails to educate all students about how to challenge these raced based norms. For example, in

⁵⁷ also helps white women

⁵⁸ Sue

criminal cases, employed defendants are treated differently on bail and sentencing determinations. Using employment as a test of trustworthiness has a disproportionate impact on black and latino men when one compares their unemployment rates with whites men.⁵⁹ The 40% to 10% unemployment rates shows how this factor is racialized.⁶⁰ This seemingly neutral category relies on privileging white people's experiences versus people of color's experiences and results in greater sentences for people of color.⁶¹ Clinical teacher can help students see this disparity and also explore with them how to use this insight in the individual case as well as lobby for more systemic change to the standards articulated for bail and sentencing.

Power and Privilege are useful frames to use in talking about attorney-client relations as well as relations among co-counsel. A frame that explicitly discusses these concepts with a racial and intersectional lens contextualizes some of the problems and opportunities that students have to use understanding of these concepts to better connect to clients and co-counsel. For example, in teaching interviewing and collaboration, we often discuss lawyer/client and lawyer/lawyer interactions to explore issues of power and privilege. Consider the learning potential of this critical incident presented in class:

A video is played showing two lawyers, a white male and a woman of color meeting with a community group composed primarily of women of color.⁶² The white male lawyer takes the lead in starting the meeting and talks for the first few minutes about the meeting's agenda. His Latina co-counsel takes a secondary role. His clients say very little.

Students are asked, "How do we think about power and privilege in this context between the lawyer and his clients? Between co-counsel? What do race and gender dynamics contribute to this analysis? What might be the real and perceptual issues in this scenario? How did the lawyers get to this plan? Did the lawyers discuss who would start the meeting? Was the client consulted? Or did the white male lawyer assume that he had the power to start the meeting. If you were the woman lawyer of color how might you address power imbalances to create a space for herself at this meeting? How can the two lawyers create space for their clients and

⁵⁹ See if Pautette Caldwell has any cites on this

⁶⁰ get statistics for young men

⁶¹ One of many reasons for disproportionality of incarcerated. Every defense attorney knows that those who are bailed are less likely to serve time for similar acts

⁶² **Carmen cite for example

acknowledge their power.

Cross-racial work between students and with clients that ignores the impact of race, power and privilege on the work deprives students of valuable learning. In the critical incident above, a teacher could fail to address race and gender by simply discussing this scenario as potential lawyer-client imbalance in decision-making or lack of planning by co-counsel. If the woman of color never engages in a conversation about asserting herself in the space or the white male never understands how his actions maybe interpreted through a race and gender lens, both will have missed opportunities for learning.

Through debriefing client interviews, simulated and real, students can learn about these micro-power dynamics. Talking about cross race and gender conversations in the context of client relationships provide a “one-step removed” possibility for the discussion. Students who co-counsel across race and/or gender lines have additional opportunities to talk about these dynamics in their relationship. By introducing these concepts in class, a teacher normalizes them, makes them easier supervision topics that students sometimes raise themselves and enables student learning from their interactions with each other and their clients. These conversations are difficult requiring trust between the parties.

3. Material Inequality and the Role Racial Bias Plays

A second key concept that we want students to understand is material inequality and the role that race plays in establishing material inequality. Clinic students meet poor clients who are often clients of color. If they have the empathetic skills and perspectives we teach them or if they are believers rather than doubters, they learn from their client’s narratives about struggle, about disadvantage, about lack of health care, foreclosures, family destruction, etc. Assuming most clinical students enter clinic with the dominant view that race is an irrelevant explanatory theory for the distribution of social goods, how do they interpret the facts given that their clients are people of color? For example, if a student sees injustice happening to her client, does she see her client as an exceptional person who works hard, does the right thing but yet remains materially disadvantaged⁶³? Our teaching goal for these students is for them to see their clients not as exceptional people but as typical examples of broader social inequities? For the students who already understand and for those who come to understand that race plays a salient role in determining social

⁶³ Site aiken, Quigley for transformative learning literature; race crit

inequities, our teaching goals also include increasing student's capacity to recognize how racial inequality might be engaged in the context of their cases.

To help our students situate their clients in broader descriptions of deprivations based on race, we engage in a variety of activities over the semester. We often start with their own observations in court, in the welfare office, in their client's narrative by asking what role race plays? Students capacity to observe racial dynamics differs dramatically, some do not observe race unless directed to do so⁶⁴ while others bring sophisticated analysis to the observation. Classroom conversations that debrief observations move from descriptive to inquiry and analytical mode as illustrated:⁶⁵

In a visit to immigration court where people are challenging deportation notices, students noted that the bench and court officers are disproportionately white while the litigants are disproportionately people of color. A few students were outraged by the treatment of litigants by lawyers and judges. They observed lawyers yelling at clients and judges dismissing client's concerns. Students note that litigants often do not know what is going on as only their exchanges with the judge are interpreted and many are unrepresented and often the interpretation is difficult because the litigant and the interpreter are having trouble understanding each other.

These observations start an inquiry, How did the litigants get to the court? The teacher asks how our clients got to court. Forty percent of our clients were picked up on Greyhound buses and taken into detention. Who rides and who does not ride these buses? What do we want to know about who is not in court? For example, a large number of people who are deported never get to have the due process hearings provided by immigration court. One significant group are people who are convicted of a broad range of crimes. What do we know about race and criminal justice

⁶⁴ For that reason, we often do a least one structured observation in which we ask them to address the racial dynamics of the courtroom as they observe them.

⁶⁵ This example and the insight that students need more information to fully understand the disparities that may be invisible to them during this observation occurred in conversations with Sameer Ashar in preparation for the Clinical Teachers Conference 2010.

and how that impacts who is not in court.

This inquiry requires us to examine more systemic information about material inequality. Who is deported and for what reasons? What is the success rates in immigration court for people from different countries and which judges are more likely to believe the litigants? And how does bringing a racial lens to the inquiry help us understand the court and the context better? In each clinic practice field, studies showing disproportionate allocation of social goods and disproportionate share of negative results based on race. For example, studies show that in black and Latino communities, the largest expenditure of public dollars is allocated for prison and foster care, while in white communities schools received the largest expenditure.⁶⁶

In the fields we practice in, we give students articles and book chapters that detail racial disparities created by law and practices in their fields.⁶⁷ For example, we assign Dorothy Robert's work, *SHATTERED BONDS*,⁶⁸ to show that mothers are more likely than fathers to be charged by the state with neglect and how once charged, mothers of color are more likely than white mothers to be separated from their children and for longer periods of time for the same offenses. We assign articles that detail the paucity of services for immigrant women and non-English speakers⁶⁹ and articles that connect high unemployment rights in communities of color and poor child care facilities for working moms with reasons for why women stay in abusive relationships or have difficulty regaining custody of their children. We ask students whether these same statistics and problems identified in the articles also apply in our communities and to our clients and how we might discover that? We also find that when students do some of the research about local conditions they are more likely to credit the results.

We explore with students how to use this information in their casework and use insights generated in these discussions in class, rounds and supervision to think about implicit bias as one explanatory theory that is

⁶⁶ list articles for prison economics and school economics

⁶⁷ Document disparity articles Jenny's article – disparate health rates; school dropout rates; wealth rates; life expectancy – same as 20 years ago – progress for some/many – but many/most – left behind how do we have such divergent views? About racial progress – majority benefits from this or we do not have shared experiences -- where 8 – 1 difference in black/latino to white incarceration rates and then connection between arrest and immigration But also in foreclosure rates; health care disparities; educational opportunities; potentially in bankruptcy rates; immigration quotas

⁶⁸
⁶⁹ Jenny's work, Krenshaw, high unemployment rates in communities of color.

operating to create disparities in the legal system and other systems.⁷⁰ In our conversations about how bias operates in legal decision-making, we identify how the discretionary decision-making embedded in law creates opportunities for bias to influence the result. We also identify fact-finding and credibility determinations as rich sites for implicit bias. Consider the following class in an asylum clinic:

Jean starts her asylum clinic curriculum with an examination of the refugee claims of Victor Laszlo, the anti-Nazi Czech refugee played by Paul Henreid in the 1942 classic film, *Casablanca*. Sometimes jokingly referring to the class as “Six Degrees of Separation from Victor Laszlo, the central theme of the class is this: You have each been given a new asylum claim, which we hope you will take to fruition this semester. To assess how strong or weak your claim is, on every important vector--the substance of the persecution, protected ground and nexus between the two; the demographic characteristics; the shape of the refugee story—analyze how similar or different your case is from Laszlo’s, a white, educated, English fluent famed political dissident travelling on legal papers with his wife and pursued overtly by Nazi military. I suggest that every place in which your case diverges sharply from Laszlo’s, special attention must be paid in the briefing, evidence collection, and affidavit writing.

Over the years, I’ve come to understand, and begun to articulate in the class, the ways in which Victor Laszlo represents the inverse of an intersectionality that increases and complexifies disparity, to a place in which many privileges and norms converge to enhance privilege. As a white, straight, financial secure male claiming persecution by a malevolent Government based on his political opinion, he is an attractive refugee, and typifies the convergence of privilege in his race, gender, class, sexual orientation and protected refugee ground. My students find that African or South American women, claiming protection based on domestic violence based social groups, facing private persecutors in countries with unenforced legislation banning domestic violence, have initially faced substantial hurdles which could be instantly identified in comparison with VL as the paradigmatic refugee.

⁷⁰ Cite implicit project and critical stance on implicit bias

[One more paragraph: Circles, Habit Two, talking about the broader mission of the clinic to expand notion of the who a refugee is.]

We explore what we can do as advocates to assist our clients by identifying different approaches to limit discretion systemically and by fighting stereotypes in the individual case.⁷¹ We developed Habit 2 to focus on the decision maker and to alert students to how differences and sameness between decision makers and clients might affect cases.

We are cognizant of research that shows that statistics alone do not influence people's thinking about race,⁷² and our own experience confirms that students push back in class, in supervision and sometimes just to themselves from these statistics. They explain these disparities with theories based in thinking that reinforces the dominant ideology that racial inequality if it exists results from individual failure to work hard and accept personal responsibility. If a student shares his interpretations, we have an opportunity to explore how this thinking by focusing on our own cases to uncover assumptions we bring to the conversation and we can inquire how to examine our contrary views. Doubting and believing can be used to explore assumptions and students can be asked to consider disparity based on race as at least one explanatory theory for the inequalities that exist. Below we offer some additional observations about how to talk about racial disparities more generally.

4. Conducting conversations about Race and Material Inequality

In many settings, including our clinics, explicit conversations about race are difficult. Many of us, Jean prominently among us, remain concerned that discussions about race are so difficult to convene that we continue to avoid raising the topic, in class and in practice settings, for fear that the topic will supplant all other agenda, explode into emotion and then dissolve into lack of resolution, alienation and anger. Research shows three salient views on race that dominate national thinking and make any conversations about race more difficult: (1) the U.S. has made considerable progress on race, and, if any disparity exists, it favors African Americans (and people of color more generally); (2) achievement is viewed as the result of will and desire not of privilege; and, (3) racial inequality, if it exists, is explained by individual failure to work hard and accept personal responsibility.⁷³

⁷¹ Note the problematic stance of creating "exceptional" clients reinforces the stereotype - Tirien

⁷² frameworks Institute, race matters tool kit

⁷³ talking about race, Annie E. Casey; frameworks Institute

This national reluctance to talk about race combined with the dominant view that we are “post-racial,” (i.e. that race no longer matters) makes our tasks as teachers more complex and more compelling. We are swimming upstream; the context that exists to a greater or lesser extent in our classrooms, courtrooms and graduates’ work environments, view race as largely irrelevant. In this context, those who raise issues of race often have to fight to make race part of the dialogue. More recently, those who identify racial dynamics have been labeled “racists.” For example, Justice Sonia Sotomayer was called a “racist” for opining that her experiences as a Latina shape her thinking by stating “a wise Latina might make a better decision.”⁷⁴ President Obama was also labeled a “racist” when he referenced the difficult relationship between black men and the police in his comments about the problematic arrest for disorderly conduct of a prominent African-American Harvard Professor.⁷⁵

In our classrooms, we have complex dynamics at play. Our students have a spectrum of knowledge and understanding about race and a spectrum of comfort in talking about race. If we make race a normal part of classroom dialogue, teachers depending on their own identity characteristics and those of their students may get similar reactions to Justice Sotomayer and President Obama. Teachers of color, in particular, may be viewed as “playing a race card,” i.e. unnecessarily injecting race into the conversation or engaging in dialogues that separate teacher from white students. Any teacher who insists that race be a normal part of the case dialogue in supervision may for example find herself being judged harshly by her students. Our goal in developing the habits was to create mechanisms to make conversations about diversity more normal and part of every day conversation in the classroom.

In teaching the Habits, we recognized that cross-cultural learning takes place in three different spheres: the cognitive, behavioral and emotional. And we urged teachers to determine what students needed to know about cultural style differences, the dynamics of prejudice, and the nature of oppression. But our list of knowledge topics and examples focused on knowledge needed to understand cultural differences.

Thus, in teaching these the Habits and Doubting and Believing, we also find ourselves supplementing them with other materials to give students more specific knowledge about how race functions and why the racialized world we live in creates a need for these de-biasing tools for us to function as lawyers. Our recent work for the 2010 AALS clinical

⁷⁴ In contrast Justice Alioto who commented that his Italian Immigrant heritage made him sympathetic to others.

⁷⁵ Insert more facts here.

conference and our work on this chapter, has sparked us to more clearly name these concepts and relate them to critical theories about race⁷⁶: We want our students to leave the clinic with a better understanding of the complexity of race and the ways it functions at the individual and systemic level. At the individual level, we want to empower all of our students to engage in race analysis and race talk. At the systemic level, we want them to understand racial inequality, the role law plays in perpetuating inequality and their obligations to use law to create a more just less discriminatory world.

“Will we be able to have these conversations about race in our workplace?”

Students ask us questions that stay with us. This question was asked of Sue at the end of a rich supervision meeting debriefing the racial dynamics in an interview in which an afro-Caribbean woman client bonded visibly with her Afro-Caribbean woman clinic student while her co-counsel, a white woman student, had difficulty bonding with the client. In the conversations, the Afro- Caribbean student recalled a client interview the previous summer in which a VAWA client who was also Afro-Caribbean had bonded with a white student interviewer and not her. In her debriefing this prior interview, the Afro-Caribbean student had not raised the impact of sharing a racial identity had on the client and on her failure to bond with the client. However, now because race was a permissible topic in the supervision, the student was able to debrief not only her clinic interview but her prior one as well.

This students’ question and our recent explicit conversations with students at Yale⁷⁷ and CUNY about talking about race⁷⁸, convince us that unless we talk about race in the clinic and explicitly talk with our students about how to talk about race, we will not have prepared them for important work in their future workplaces. Students take messages from our failure to talk about issues of implicit bias, structural inequalities based on race, or relationship difficulties created by race. Students who experience micro-aggressions towards themselves and their clients have no framework to talk about these acts and how to respond. Lawyers who fail to consider how they might help both their own client and others by taking race into account miss important analysis of the context within which their client’s case

⁷⁶ Acknowledge Ann, Margaret, Mary, Tirien and Sameer. Name critical theory movements: LatCrit, CRT, queer-crit,

⁷⁷ Insert Jean’s conversations about whether to include some critical race material and peggy davis article?

⁷⁸ Insert info about students workshop on race

occurs. For example, in crafting arguments of exceptionalism, they may be reinforcing stereotypes.

In addition to knowing that they can talk about race, students need practice analyzing how race impacts the issue they are working on and in addressing these conversations to skeptical audiences. As Margaret Montoya noted,

“[e]ngaging in public dialogue about [d]ifference ... requires practice because we so often can, and do get things wrong.” We constantly revise vocabularies and theories and employ “provisional pedagogical and interactive strategies.”⁷⁹

By preparing our students for these conversations, we hope that will find the “courage” to talk about race.

We have in our classrooms, students who understand racial dynamics but may not understand how to explore its effect in a particular case or community issue or their interaction with clients and courts. We have skeptical students who may be willing to frankly discuss their skepticism to facilitate learning for the group and the clients. For many students, class and race are *competing* categories used to explain social inequities.⁸⁰ They believe social inequality is rooted in class not in race. Two organizations, the Annie E. Casey Foundation and the Frameworks Institute, have devoted substantial research and resources to analyzing how to talk about race inequalities that counters the dominant ways that racial bias is dismissed as a credible explanation for these inequities. In introducing our students to “race talk” that is designed to address material inequalities, we can introduce them to this research and ask them to think about how it applies in the legal setting. Thus in addition to debriefing their own work and experiences to gather insights into how to talk about race, students can be introduced to the insights drawn from the research.⁸¹

⁷⁹ Margaret Montoya, [Voicing Difference](#), 4 *Clin. L. Rev.* 147, 152 (1997)

⁸⁰ This competition was identified as a predominant thinking pattern in page 9, *My Race is My Community:” Peer Discourse Sessions on Racial Disparities, A FrameWorks Research Report Prepared for the FrameWorks Institute by Moira O’Neil*

October 2009

⁸¹

CONCLUSION

While we remain committed to the Habits and the Doubting and Believing scale as two examples of a myriad ways the thoughtful lawyer can confront her assumptions and steadily improve her practice, we also are freshly convinced that this approach to cross-cultural lawyering, alone, is not enough. The sophisticated practitioner, and clinical law student, must commit to a daily practice of challenging their assumptions and biases in whatever ways they find useful, but the task of ridding our legal practice and our legal system of pervasive racism and prejudice requires more.

Focusing only on our own self-improvement and culture-sensitive practice risks replicating a mistake currently made in our legal jurisprudence: focusing only on individual targeted intentional or identifiable acts of racism by identified actors, rather than acknowledging the racism which continues to manifest in our national policies and our juries and bureaucracies, replicating historical racial discrepancies which have long lost any articulated legitimacy. If as practitioners, we find it wrong that the US Supreme Court ignored systematic statistics demonstrating racism in the administration of the death penalty in McCleskey v. Kemp because it found that there was no intentional racism, we must ourselves acknowledge that, even while we seek to rid our own actions of intentional or unintentional racism, we still may be participating in systems which perpetuate racist action and racist results.

Thus, a continued focus on practices like the Habits and the Doubting and Believing scale go hand in hand with a renewed interest in studying and discussing race, continually, openly, and despite the resistances, in the clinic. It will always make sense to address critical issues of bias and difference individually and interpersonally, so that each of us, and each generation, can develop practices of reflections and self-understanding that will improve our cross-cultural work, minute-by-minute, and day by day. And this consistent micro-progress will embolden us in the larger unfinished struggle to see clearly, name plainly, study conscientiously and confront consistently residual racism and prejudice in our systems of justice. Both sets of daily commitments, in tandem, are required for the racism-free world towards which we must be constantly striving.

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