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Client, Self, Systems: A Framework for Integrated Skills-Justice Education

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Client, Self, Systems: A Framework for Integrated Skills-Justice Education

CLAIRE P. DONOHUE*

ABSTRACT

As scholars and administrators look to experiential learning and clinical education specifically to cultivate practice-ready law school graduates there is worry amongst some clinicians that they must sanitize the experiential learning experience of its social justice bent, or at the very least dilute it, so as to make it marketable to the legal academy and the “typical” enrolled, or enrolling, law student. On the other hand, the time is particularly ripe for clinicians to recommit to clinical legal education’s social justice roots and remind the academy that social justice skills are relevant, transferable, and effective in preparing students for rigorous (but also humane and sustained) legal practice.

Too often conversations such as these are framed as a debate: skills training versus social justice. This Article takes an alternative approach by insisting instead that the timeworn skills versus social justice debate misses an obvious point: clinical education’s social justice mission can be advanced by developing the skills dimension of social justice education. This Article, therefore, intentionally blurs the line between social justice education and skills education. Social justice is defined herein as having a skills dimension; meanwhile, the skills featured are described in a manner that demonstrates how they are enriched by contextualizing them in social justice.

A starting premise is that social justice education is imperative for any institution wishing to act in accordance with our professional standards. A concluding sentiment is that training students in social justice skills meets many pedagogical goals for a varied student body. The framework that moves the Article from the starting premise to the pedagogical conclusions rejects a common approach to social justice in clinics: teaching skills alone while supposing that the client or project experience will provide the conversion

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moment. Rather, the proposed framework separates the curriculum into themes of client awareness, self-awareness, and systems awareness and developing an integrated presentation of the social justice imperatives and the essential skills within each category.

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INTRODUCTION

Although clinical education was founded with a social justice mission, some have called for broadening the scope of clinical offerings to include any one of “a slew of [topics] not rooted in traditional poverty law or social justice issues.”¹ These trends are perhaps inspired by, or fueled by, the increasingly loud clamor for curriculum reform in the legal academy that supports the expanded use of experiential learning methods.² As scholars and administrators alike have noted, “[t]he traditional law school model now appears economically and educationally unsustainable.”³

The effort to expand experiential learning, and the focus on clinical pedagogy for an understanding of the power and promise of experiential learning, brings legal clinics to an interesting crossroads. There is a very real risk that “the effort to obtain broad acceptance of clinical legal education by the legal academy and the bar . . . [will] undercut [a legal clinic’s] social justice mission.”⁴ There is

1. See, e.g., David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 192 (2003); Peter Toll Hoffman, *Clinical Scholarship and Skills Training*, 1 CLINICAL L. REV. 93, 111 (1994). See also Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B. C. J. L. & SOC. JUST. 331, 340 (2012).

2. See, e.g., COMM. ON PROF’L EDUC. CONTINUUM, SEC. ON LEGAL EDUC. & ADMISSIONS TO BAR, AM. BAR ASS’N, *TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY* 16–17 (2013).

3. Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B. C. J. L. & SOC. JUST. 279, 280–81 (2012); see Deborah Maranville et al., *Re-vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N. Y. L. SCH. L. REV. 517, 519 (2012); see, e.g., *On-Campus ‘Law Firm’ to Open: Hands-on Learning Center Will Bring Clinics Under One Roof*, B. C. L. SCH. MAG., Fall/Winter 2013, 38, at 38 (“[T]he Center for Experiential Learning . . . [W]ill provide a home for all in-house clinics; trial advocacy, semester in practice, and short-term externship programs; and is part of a comprehensive long-term vision for the support and expansion of BC Law’s experiential learning efforts.”).

4. Frank S. Bloch & M. R. K. Prasad, *Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross-National Currents from India and the United States*, 13 CLINICAL L. REV. 165, 166 (2006) (alteration to original).

worry amongst some that clinics must sanitize the experiential learning experience of its social justice bent, or at the very least dilute it, so as to make it marketable to the legal academy and the “typical” enrolled, or enrolling, law student.⁵ Too often the ensuing conversation is framed by those having it as a debate: skills training versus social justice. This Article takes an alternative approach by insisting instead that the timeworn skills training versus social justice debate misses an obvious point: clinical education’s social justice mission can be advanced by developing the skills dimension of social justice education.⁶

This call for reform and the increased attention on clinical education means the time is particularly ripe to recommit to clinical legal education’s social justice roots. Rather than just remind ourselves and the academy of the fundamental importance of that commitment and its potential to cultivate good, ethical people, clinical education should also effectively teach and prepare excellent lawyers.⁷ This Article intentionally blurs the line between social justice education and skills education. Social justice is defined herein as having a skills dimension; meanwhile, the skills featured are described in a manner that demonstrates how they are enriched by contextualizing them in social justice.⁸

5. Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 330–31 (2001) [hereinafter Wizner, *Beyond Skills*] (“Even clinicians who may not actually believe that skills training is or ought to be the primary objective of their teaching may have been unwitting accomplices in perpetrating and perpetuating the ‘selling’ of clinical education as ‘skills-training.’”).

6. Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J. L. & POL’Y 63, 67 (2003) (“[S]ocial work ethical principles are ones that we can not only accept, but should embrace wholeheartedly. They are entirely consistent with what we see as effective lawyering . . .”).

7. Telephone Interview with Lynn Barenberg, Lecturer in Law & Clinical Soc. Worker, Bos. Coll. Legal Assistance Bureau (Jan. 15, 2014). As panelists at the 2014 Association of American Law Schools’ Annual Conference on Clinical Education suggest, “[n]ow, more than ever, clinicians must be able to articulate the pedagogy and value of justice education . . .” ASS’N OF AM. LAW SCH., 37TH ANNUAL CONFERENCE ON CLINICAL LEGAL EDUCATION: BECOMING A BETTER CLINICIAN 34 (2014).

8. The author, a Master of Social Work (“MSW”), and by extension a former student in a Graduate School of Social Work notes that schools of social work employ an integrated skills-social justice curriculum by design. Indeed, the accreditation of a school of social work is contingent upon its curricular commitment to social justice imperatives while of course social workers must also be trained in the skills necessary to engage in certain therapeutic modalities or in macro-level development and organizing. In defining required program missions and goals, the Council on Social Work Education (“CSWE”) indicates that schools must incorporate the following:

Educational Policy 1.1—Values: Service, social justice, the dignity and worth of the person, the importance of human relationships, integrity, competence, human rights, and scientific inquiry are among the core values of social work. These values underpin the explicit and implicit curriculum and frame the profession’s commitment to respect for all people and the quest for social and economic justice.

And yet in defining a pillar of the explicit curriculum, the CSWE requires:

Educational Policy 2.1—Core Competencies: Competency-based education is an outcome performance approach to curriculum design. Competencies are measurable practice behaviors that are comprised of knowledge, values, and skills. The goal of the outcome approach is to demonstrate the

A starting premise is that social justice education is imperative for any institution wishing to act in accordance with our professional standards: “as a public citizen, a lawyer should seek improvement of law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”⁹ A concluding sentiment is that training students in social justice skills meets many pedagogical goals for a varied student body. The framework that moves the Article from the starting premise to the pedagogical conclusion rejects a common approach to social justice in clinics: teaching skills alone while supposing that the client or project experience will provide the conversion moment. Rather, the proposed framework separates the curriculum into themes of client awareness, self-awareness, and systems awareness¹⁰ and develops an integrated presentation of the social justice imperatives and the essential skills within each category.

This Article will consist of five substantive sections. Part I provides the context for the concept of social justice skills as an alternative to the social justice versus skills debate. This part concludes by outlining a three-tiered integrated framework for social justice skills training in which themes of client awareness, self-awareness, and systems awareness can be explored.¹¹

integration and application of the competencies in practice with individuals, families, groups, organizations, and communities.

EDUC. POL’Y & ACCREDITATION STANDARDS §§ 1.1, 2.1 (COUNCIL ON SOC. WORK EDUC. 2012) [hereinafter CSWE] (footnote omitted), <http://www.cswe.org/File.aspx?id=41861> [<http://perma.cc/NU7E-GL6A>] (last visited Oct. 30, 2015). Not surprisingly then, the mission statement of Boston College School of Social Work, for example reads:

Our mission is to prepare students with the knowledge, values, and skills to practice competently and compassionately and to provide an intellectual atmosphere that facilitates faculty and student scholarship and research.

Bos. Coll. Sch. of Soc. Work, *About Boston College School of Social Work*, B. C. SCH. SOC. WORK, <http://www.bc.edu/schools/gssw/about.html> [<http://perma.cc/F262-QL52>] (last visited Nov. 23, 2015).

9. MODEL RULES OF PROF’L CONDUCT pmbl. (2013) [hereinafter MODEL RULES].

10. Here, the author refers to the legal, regulatory, or financial systems in which our clients operate. Other conceptualizations of “systems” refer to more personal contexts of environment; for example, a person’s family system or neighborhood. Susan L. Brooks, *Using Social Work Constructs in the Practice of Law*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* 53, 64 (Marjorie A. Silver ed., 2007). While the author does discuss personal systems (*infra* Part II.E.), the category of systems awareness here refers to awareness of institutional or formal systems.

11. Clinicians borrow from interdisciplinary viewpoints and methodologies for defining and teaching social justice. One discipline often used for offering context and understanding social justice is social work. *See, e.g.*, Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 *CLINICAL L. REV.* 659 (2007); Beth Caldwell, *Addressing Intersectionality in the Lives of Women in Poverty: Incorporating Core Components of a Social Work Program into Legal Education*, 20 *AM. U. J. GENDER SOC. POL’Y & L.* 823 (2012); Rose Voyvodic & Mary Medcalf, *Advancing Social Justice Through an Interdisciplinary Approach to Clinical Legal Education: The Case of Legal Assistance of Windsor*, 14 *WASH. U. J. L. & POL’Y* 101 (2004). Social work is a particularly apt methodology to borrow from because social work is explicitly defined by, and bound to, its social justice mission:

Part II explores the skill of client awareness and suggests a curriculum that highlights integrated skills and theories: client-centered counseling, reflective listening, empathy, cultural competence, and the empowerment approach. Part III discusses self-awareness skills, including making the unconscious conscious and exploring students' countertransferences while also exploring themes of emotional intelligence and self-care. Part IV addresses systems awareness, focusing on how institutional systems and advocacy within them can be critiqued through exploration of various professional codes, and the use of critical theories and Self-Determination Theory. This section also discusses the skills and awareness required to respond to the effects institutional rules, norms, and processes have on legal clients.

Part V illustrates the use of the client, self, systems framework in the context of a particular clinic case. This example demonstrates how the proposed framework creates an overall social justice skills pedagogy that can inspire professional responsibility. This section also discusses the contribution that this pedagogy makes to the law school's offerings, and argues that social justice skills are relevant, transferable, and effective in preparing students for rigorous, but also humane and sustained, legal practice.

I. SOCIAL JUSTICE SKILLS IN CLINICAL EDUCATION

Law schools came into being to supplement and formalize the apprenticeship model that was in place before.¹² These early law schools then began the process of differentiating themselves from apprenticeship models, while also grappling with the realities of underfunding and the need to create standards and

The primary mission of the social work profession is to enhance human well-being and help meet the basic human needs of all people, with particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty . . . Fundamental to social work is attention to the environmental forces that create, contribute to, and address problems in living. Social workers promote social justice and social change with and on behalf of clients. "Clients" is used inclusively to refer to individuals, families, groups, organizations, and communities. Social workers are sensitive to cultural and ethnic diversity and strive to end discrimination, oppression, poverty, and other forms of social injustice Social workers seek to enhance the capacity of people to address their own needs. Social workers also seek to promote the responsiveness of organizations, communities, and other social institutions to individuals' needs and social problems.

CODE OF ETHICS OF THE NAT'L ASS'N OF SOC. WORKERS pmbl. (NAT'L ASS'N OF SOC. WORKERS 2008) [hereinafter NASW CODE]. Not surprisingly then, social justice training is explicit and intentional in social work pedagogy; moreover, skills training naturally occurs in concert with social justice themes and theories. See CSWE, *supra* note 8, at § 2.1.5 (citing "[a]dvanc[ing] human rights and social and economic justice" as a core competency for social work curriculums). This Article similarly defines and explores social justice themes in an interdisciplinary way, and highlights clinical methodologies that endorse and adopt an interdisciplinary understanding of social justice.

12. *Id.*

accreditation.¹³ Law schools soon embraced the casebook method, whereby students were taught about the law's complexity through reading and analysis of legal opinions.¹⁴ The casebook method could be easily replicated and students' success understanding it could be assessed with relative ease.¹⁵ The focus on replicable models of teaching and common assessment and accreditation standards institutionalized legal education.¹⁶ This in turn had a general chilling effect on the very diverse, highly contextualized offerings on early experiential models.¹⁷

There were, however, rumblings of discontent with the casebook method and a departure from experiential learning.¹⁸ Moreover, the social justice movements of the 1960s and 1970s inspired many law students to join in "demanding more 'relevance' in university studies and a more active role by universities in public affairs."¹⁹ Increased federal funding for "war on poverty" initiatives and funding from the Ford Foundation resulted in clinics becoming common in most law schools.²⁰ By the 1990s, sentiments for experiential learning culminated in, or were at least affirmed by, the often cited MacCrate Report, a study by the American Bar Association that concluded that law schools needed to teach

13. Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 8–9 (2000).

14. See Sharon L. Beckman & Paul R. Tremblay, *Foreword: The Way to Carnegie*, 32 B. C. J. L. & SOC. JUST. 215, 215–16 (2012).

15. Barry et al., *supra* note 13, at 6.

16. *Id.* at 2 n.5, 6.

17. Beckman & Tremblay, *supra* note 14, at 216; see William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 466–67 (1995) [hereinafter Quigley, *Introduction to Clinical Teaching*].

18. Having said that, a few early versions of our modern clinical education dawned in the time following the decline of apprenticeships as those who defended the apprenticeship model fought for its inclusion in modern legal education. By the 1930s scholarship in support of experiential learning models echoed the earlier cries of those who resisted the demise of apprenticeships: "[t]he trouble with much law school teaching is that, confining its attention to a study of upper court opinions, it is hopelessly oversimplified." Quigley, *Introduction to Clinical Teaching*, *supra* note 17, at 468 (quoting Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 913 (1933)).

19. Bloch & Prasad, *supra* note 4, at 168. See also Barry et al., *supra* note 13, at 12. Meanwhile the critique of law graduates continued:

The shortcomings of today's law graduate lies not in a decent knowledge of the law but that he has little, if any, training dealing with the facts or people- the stuff of which cases are really made. It is a rare law graduate, for example, who knows how to ask questions- simple, single questions, one at a time, in order to develop facts into evidence either in interviewing a witness or examining him in a courtroom. And a lawyer who cannot do that cannot perform properly- in or out of court.

Quigley, *Introduction to Clinical Teaching*, *supra* note 17, at 469–70 (citing Chief Justice Warren E. Burger, Address Before the American Bar Association Convention Prayer Breakfast (Aug. 10, 1969)).

20. See Barry et al., *supra* note 13, at 12–13 ("[T]he earliest law student volunteer 'legal aid dispensaries,' blossomed . . . [Into] clinical programs [that] provided representation to indigent clients with a myriad of legal problems."). See also Beckman & Tremblay, *supra* note 14, at 217; Bloch & Prasad, *supra* note 4, at 169; Maranville et al., *supra* note 3, at 521–22.

professional skills and values.²¹ These sentiments were recently echoed forcefully by two reports, the Best Practices for Legal Education and the Carnegie Report, reports that showcased “an unrelenting theme: legal education must devote greater attention to what lawyers do in the world.”²²

Even this brief history shows the push-pull tensions between a legal education that is “on the ground” so to speak, and one that is formalized, standardized, and replicable. Push: experiential models are relevant and stimulating, but how can one verify education will be consistent and sound if the law school is exercising less control over the implementation of learning? Pull: classroom learning can be routinized, and a students’ comprehension can be measured and tested; but how does that comprehension translate into an ability to function in a professional role later in a career? The perceived tension between experiential learning and assessment-based replicable legal education plays out forcefully in clinical legal education, where clinicians are often left wondering how best to define or defend themselves within the legal academy: do they showcase the relevancy and appeal of their “in the trenches” education; or do they play up their ability to conform with the ubiquitous focus on consistency and bar readiness in legal education. The resulting conversations are too often framed as debates, and the decisions made are too often seen as taking a side.

A. SKILLS TRAINING “VERSUS” SOCIAL JUSTICE

Is the value of clinical education that it is “a lot of fun thinking about and litigating exciting issues on the cutting edge[];”²³ or is it that “lawyer work can be analyzed and discussed in much the same way as . . . an appellate case?”²⁴ More likely, these simply stated positions belie the heart of the matter: clinical education is pedagogically sound precisely because it is exciting and contemporaneous *and* because it requires teaching exacting lawyering skills. The 2007 Carnegie report concluded that the ideal is to integrate theory and practice.²⁵ But while it may be easy to dispense with the initial dichotomy, there is a related, trickier controversy at play. Even assuming one agrees that clinics can and should integrate theory and practice, the question still remains—to what end?²⁶ Do we “stake our place in the academy with social justice markers . . . [or] . . . shed that territoriality to enhance our position in the institution by promoting more clinical

21. Beckman & Tremblay, *supra* note 14, at 216.

22. Goldfarb, *supra* note 3, at 291.

23. Frank Askin, *A Law School Where Students Don't Just Learn the Law; They Help Make the Law*, 51 RUTGERS L. REV. 855, 856 (1999).

24. Binder & Bergman, *supra* note 1, at 192 (quoting Gary Bellow & Bea Moulton, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* xxiii (1978)).

25. Kosuri, *supra* note 1, at 337.

26. *See, e.g.*, Frank S. Bloch, *The Case for Clinical Scholarship*, 4 INT'L J. CLINICAL LEGAL EDUC. 7, 11 (2004) (“Even with a specifically clinical-oriented clinical scholarship, there are substantial differences of opinion over what direction it should take.”).

opportunities?”²⁷

Staging a commitment to social justice as being at odds with the momentum and direction of legal reform is rash.²⁸ It ignores an important aspect of the history of clinical education, namely, its roots in the social justice movement and the perceived public service obligation of law schools.²⁹ Moreover, a social justice curriculum offers perhaps a singular opportunity to expose law students to economic and social injustices in which law is involved, while simultaneously teaching transferable lawyering skills in a challenging environment.³⁰ Teaching social justice, then, is not at odds with teaching skills, because teaching social justice to aspiring lawyers requires teaching skills.

B. A FRAMEWORK FOR SOCIAL JUSTICE SKILLS

Before we can decide how to teach social justice, we must find a working definition of it. The *Model Rules* do little to help us understand what social justice is and how to practice toward it, so it becomes difficult, perhaps impossible, to reverse engineer a curriculum based on our professional mandates alone.³¹ So what is social justice? At its most basic level, social justice promotes the interests of people otherwise marginalized by society.³² Social justice principles recognize that problems are often due to power imbalances.³³ Social justice initiatives aim to challenge systems, level the power imbalance, and promote full and equal participation in economic, social, and legal realms of society.³⁴ Social justice education, by extension, aims to teach students to recognize “oppression and their own socialization within oppressive systems.”³⁵ It aims also, to “develop[] the agency and capacity within people to change oppressive patterns and

27. *Id.*

28. See Bloch & Prasad, *supra* note 4, at 169 (“Although the legal aid dimension has receded somewhat as clinical legal education has become more integrated in the law school curriculum, social justice and professional responsibility remain at the heart of the clinical movement in the United States.”).

29. See *id.* at 521.

30. See William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7, 26 (2007) [hereinafter Quigley, *Letter to a Law Student*]; Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1648–1649 (1991) [Goldfarb, *Theory-Practice*] (describing the clinical environment as “colorful and chaotic” and explaining that “[s]tudents often represent people who present them with a mélange of legal, personal, and institutional problems in unsifted form”); J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 72–73 (1996) (citing the “messy, ill-structured problems” found in the actual practice of law).

31. See Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work’s Empowerment Approach*, 13 CLINICAL L. REV. 459, 469–70 (2006).

32. See Artika R. Tyner, *Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering*, 10 HASTINGS RACE & POVERTY L. J. 219, 231 (2013).

33. See Rand, *supra* note 31, at 491.

34. See, e.g., Simon P. Funge, *Promoting the Social Justice Orientation of Students: The Role of the Educator*, 47 J. SOC. JUST. EDUC. 73, 74–75 (2011) (discussing historical notions of social justice, in particular the evolution of theories of utilitarianism).

35. Tyner, *supra* note 32, at 231.

behaviors in themselves and in the institutions and communities of which they are a part.”³⁶

Law clinics promote social justice and engage in social justice education in different ways.³⁷ The common denominator for most clinics is a commitment to the difficult work of empowering subordinated people and/or promoting projects that challenge and change system norms.³⁸ Across the population of legal clinics, students are doubtlessly taught many and varied techniques as they assume a professional role. A valuable framework for social justice skills training is one where students are called upon (with intentionality) to know themselves, their client, and their institutional surrounding before deciding how they might then operate zealously and ethically to meet their client’s goals. Indeed the preamble of the *Model Rules* invites consideration of these areas when it suggests: “[v]irtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.”³⁹

A curriculum designed around this type of skill development in these categories is possible in all manner of clinics: litigation clinics, transactional clinics, reform clinics, and community-based clinics.⁴⁰ The proposed framework provides a gateway for integrating social justice imperatives into skills-based clinical education. Arguably, interacting with people and systems can always be explained as a skills-based endeavor, but a sense of self, others, and systems, is highly contextual. Social justice teaching can define that context with careful attention to power, privilege, race, gender, and class.⁴¹

36. *Id.*

37. Consider the offerings of the Jacob Burns Community Legal Clinics at The George Washington University School of Law: Domestic Violence Project, Family Justice Litigation Clinic, Criminal Appeals and Post-Conviction Services Clinic, Immigration Clinic, International Human Rights Clinic, Neighborhood Law & Policy Clinic, Public Justice Advocacy Clinic, Small Business & Community Economic Development Clinic, Vaccine Injury Clinic, and (affiliation with) D.C. Law Students in Court. See *The Jacob Burns Community Legal Clinics*, THE GEORGE WASHINGTON UNIVERSITY, <http://www.law.gwu.edu/academics/EL/clinics/Pages/Overview.aspx> [<http://perma.cc/P688-KNFA>] (last visited Sept. 9, 2015).

38. See, e.g., Margaret Martin Barry, et al., *Teaching Social Justice Lawyering: Systemically Including Community Legal Education in Law School Clinics*, 18 CLINICAL L. REV. 401, 404 (2012) (discussing community empowerment through: “‘encourag[ing] planning on the basis of legal rights and obligations’; ‘mobiliz[ing] individuals and groups to pursue their rights’; ‘facilitat[ing] and strengthening community organizations’; ‘foster[ing] self-help activities for which lawyers will not be necessary; and ‘demystifying the law.’”) (citations omitted).

39. MODEL RULES pmb1. cmt. 9 (2013).

40. See, e.g., Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles To Maximize Student Learning and Social Justice Impact*, 20 CLINICAL L. REV. 39, 41–42 (2013) (offering an example of a clinic engaging students in “non-litigation advocacy and transactional work” but “driven by social justice goals”); Voyvodic & Medcalf, *supra* note 11, at 102 (discussing a more traditional model of clinical education inside a community legal clinic “charged with advancing social justice through a collaborative, interdisciplinary approach”).

41. See Ascanio Piomelli, *Sensibilities for Social Justice Lawyers*, 10 HASTINGS RACE & POVERTY L. J. 177, 177 (2013) (stating “[w]e are wise to pay close attention to class, race, and gender”). Not surprisingly, social

II. CLIENT AWARENESS

Client awareness endorses clients' autonomous role in the attorney-client relationship. Traditional legal education does little to acknowledge the reality that clients are the foundation of every line of every case that students read. Instead, the case method conceptualized law as "a social science using appellate cases as its data."⁴² Students are then expected to read this data "rigorously" with an eye to the law's complexity— though notably, not the law's context and relativity.⁴³ Students do not necessarily learn that behind every case there was a client, or stated differently: that it is only because there was a client that now there is a case. If the existence of a client is far from law students' minds, then the notion that the client might *direct* the attorney-client relationship would likely be even more remote. Client-centered counseling, in contrast seeks to minimize the lawyer's presence or position in order to promote increased client participation and decision making; it serves, in other words, to empower the client.⁴⁴ Reflective listening is an important tool in empowering client counseling; so too is it important to employ empathy and cultural competence skills.

A. CLIENT COUNSELING

Client counseling can be seen simplistically (and inaccurately) as a matter of interviewing one's client and perhaps also informing her of the legal landscape.⁴⁵ In this view, the relevant and important material is what is said or what information is being exchanged between the client and the attorney.⁴⁶ While this straightforward aspect of client counseling is important and necessary, it is not the beginning and end of client counseling.⁴⁷

work schools, founded on principles of integrated skills-social justice education, must submit to the Council on Social Work Education's articulation of social work schools' "responsibilities to integrate content related to social justice" into its curriculum. Funge, *supra* note 34, at 74 (quoting the CSWE standards, which state that programs must "provide content related to implementing strategies to combat discrimination, oppression, and economic deprivation, and to promote social and economic justice . . .") (citations omitted). *See also* Rand, *supra* note 31, at 485 (discussing the perspective that "people empower themselves and our job is to assist them." This approach, therefore, "demands looking at problems on both micro and systemic levels and evaluating how power is affecting the relationships of parties generally.").

42. Beckman & Tremblay, *supra* note 14, at 215.

43. *See id.* at 215–16.

44. *See* Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 371 (2007).

45. *See, e.g.*, Roger S. Haydock & Peter B. Knapp, *LAWYERING: PRACTICE AND PLANNING* 46–94 (3rd ed. 1996) (discussing "Interviewing: What We Need from Our Clients" and "Counseling: What Clients Need From Us").

46. *Id.*

47. *See* Brooks, *supra*, note 10, at 64 (discussing the concept of client engagement, which transcends developing rapport and "involves a broader skill set including reflective listening, empathy, and assessment").

Attorney-client relationships will have terms and a life of their own even if the parties to the relationship are unaware of them.⁴⁸ An attorney-client relationship will be more effective if the subconscious terms and understandings are brought to the surface.⁴⁹ Students must be taught, therefore to unearth unspoken data. With this different view of client counseling, the relevant data comes to include the clients' cues as to their positions, beliefs, and abilities; and the attorneys' conscious and unconscious reaction to their clients.⁵⁰ This data, important in any attorney-client relationship, has critical social justice implications because it is the source of client empowerment and responsive advocacy.⁵¹

The trend toward client-centered counseling, was embraced by, and in large part defined by, clinical educators.⁵² Once exposed to such a notion, students might nod their heads and acknowledge that in fact clients are important and their needs and desires should dictate the direction of the attorney-client relationship. But this is often before meeting a client. The client population of law clinics may experience any number of challenges from a list including, but not limited to: interpersonal challenges, a lack of resources, disenfranchisement or overt discrimination, and/or the collateral consequences of substance abuse, trauma histories, and mental health issues. It is not natural or easy for everyone to allow that, despite their challenges, a person in such straits is to be treated as a partner and an equal in the attorney-client relationship and in the decision-making process.⁵³ Indeed early proponents of client-centered counseling found that many "poverty lawyering" practices "process[ed] clients cases routinely; . . . define[d] client problems narrowly; and . . . impose[d] solutions upon clients without meaningful discussion."⁵⁴ A legal services attorney could, address a housing problem, for example, by providing representation at the cattle call style hearings

48. See generally Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 *BUFF. L. REV.* 71 (1996) (opening with a case example where the client was "furious" despite a technical, legal victory; after which the lawyering team began a "discussion of their relationship . . . a discussion that should have begun when they first met").

49. See Kruse, *supra* note 44, at 385-89, 405-10 (discussing the myth of lawyer neutrality and the constraints on exercising autonomy).

50. See, e.g., *id.*; Paul R. Tremblay & Carwina Weng, *Multicultural Lawyering: Heuristics and Biases*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL* 64 (Marjorie A. Silver ed., 2007); Joseph Walsh, *Supervising the Countertransference Reactions of Case Managers*, 21(2) *THE CLINICAL SUPERVISOR* 129 (2002); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *CLINICAL L. REV.* 33 (2001). This section primarily deals with client centered counseling's focus on the client; yet of course, the lawyer is part of the relationship too. I will attempt to deal with each side of this relationship in turn, though invariably, the two are intertwined.

51. As has been noted, "we must do more than place our students and our [typically poor or disenfranchised] clients in the same room if we hope to work toward social justice." Rand, *supra* note 31, at 461.

52. See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 *ARIZ. L. REV.* 501, 501 (1990).

53. When one challenges herself to build co-equal relationships with people they might not have ever seen, let alone to whom they might have attributed much knowledge and power, they learn the "critically important" skill of humility. See Quigley, *Introduction to Clinical Teaching*, *supra* note 17, at 22.

54. Dinerstein, *supra* note 52, at 520.

in a landlord tenant court; but an attorney employing an empowering client-centered approach might additionally consider, for example, whether that same housing issue has a political dimension involving affordable housing, or a psychological dimension involving tendencies to hoarding.⁵⁵ As subsequent sections herein will demonstrate, this latter advocate assumes less and asks more about how the client identifies the problem and about how the client would frame the remedy or intervention. So, while it is a new notion and a challenging practice, client centered-counseling is an important tool of social justice; it is politically conscious and empowering.⁵⁶ As such, clinics take a broader view of what skills are required for a client meeting. Social justice clinics will discuss the importance of approaching a client interview with an agenda and some preliminary research or investigation at hand; but they will also teach skills such as reflective listening, empathy, and principles of client empowerment in order to give students the additional skills necessary to lean into the client relationship.⁵⁷

B. REFLECTIVE LISTENING

Reflective listening is the skill by which the listener listens to learn, and listens non-judgmentally.⁵⁸ This seems like a straightforward proposition when one considers the case scenarios that law students are often confronted with in their professional development courses in law school: client walks in to your office with a complaint about a breach of contract; client owns a strip mall and tenant has apparently reneged in some fashion on the lease. Here, students might naturally take the position that they need to learn more about the facts and circumstances of the lease. They will listen to learn about what the parties agreed to in writing, and what the parties might have said to one another (for example in the event that the terms of the contract are ambiguous and the matter turns on the intent of the parties).

A basic aspect of reflective listening is to repeat back to the client what one has heard at various points during the conversation.⁵⁹ The goal here is two-fold: the listener wants to insure that the conversation builds on accurate understandings

55. *See id.*

56. *See id.* at 521.

57. Brooks, *supra* note 10, at 64.

58. In an article for practitioners published by the American Bar Association, Elizabeth J. Van Arsdale, offers the following example of reflective listening: when a client says "I won't pay alimony. That's going to be a deal breaker," Arsdale suggests investigating the statement by saying "It sounds like that is an important issue for you . . . Tell me about it. What does it mean to you?" Elizabeth J. Van Arsdale, *Reduce Stress by Redefining Your Role*, 16 FAM. ADVOC. 28, 32 (1994). Consider also that reflective listening is an important mode of operation for community lawyers. Social justice advocates seek to build relationships with communities of people or organizations that are working for reform. "These relationships are built the old-fashioned way, one person at a time, one organization at a time, with humility." Quigley, *Letter to a Law Student*, *supra* note 30, at 22.

59. Robert E. Lee Wright, *Alternative Dispute Resolution: Mediator Listening Skills for All Attorneys*, 89 MICH. B. J. 32, 32-33 (2010).

of the speaker's intent; and the listener wants to demonstrate that she is listening and the speaker is being heard.⁶⁰ Reflective listening demonstrates the important concept that the listener has something to learn, not something to teach.⁶¹ Reflective listening requires asking open-ended questions.⁶² Reflective listening also acknowledges emotional content; if the speaker is angry, the listener communicates that she hears the anger and she enquires into it.⁶³

Listening to learn gets harder when problems or people are "fuzzy."⁶⁴ Listening to learn gets harder when students consciously or unconsciously question the client's aptitude or motives as they easily may do when confronted with a client who is less likely to share the same education, background, and experiences as the student attorney.⁶⁵ To combat this, students in social justice clinics should be taught the mechanics of reflective listening, but they must also be taught the reason for it, namely that reflective listening encourages empathic connections and client empowerment.

C. EMPATHY VERSUS SYMPATHY

Empathy generally is the ability to understand and share the feelings of another. In psychosocial settings empathy is understood as "[perceiving] the internal frame of reference of another with accuracy and with the emotional components and meanings which pertain thereto as if one were the person, but without ever losing the as if condition."⁶⁶ Research has confirmed that empathy is a skill, and a skill that can "be modified by educational strategies" or "perhaps

60. *Id.* at 33.

61. *Id.*

62. Wright, *supra* note 59, at 34. Asking open ended questions does not preclude following one's curiosity or seeking clarification. *See, e.g.,* Van Arsdale, *supra* note 58, at 32.

63. Van Arsdale, *supra* note 58, at 32.

64. David Chavkin, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 80–81 (2002) (discussing the importance of "fuzzy thinking," thinking that is mindful of the "variability of language and perception").

65. Goldfarb, *Theory-Practice Spiral*, *supra* note 30 (stating that "[a]bsent a conscientious effort to acquire [an understanding of the client's situation, broadly defined] and awareness of the difficulties in doing so, attorneys are likely to fall prey to unexamined assumptions that their understanding of the world coincides with their clients' understanding, an assumption that negates the clients' humanity"). *See generally* Susan Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 219–20 (1997) [hereinafter Jones, CLINICAL.] (noting students' initial inclination to assume they know what a client wants versus students' evolution toward interacting with their clients in more complex, detailed ways).

66. Carl R. Rogers, A WAY OF BEING 140 (1980). Research has identified four components or areas of empathy: first, emotional empathy, which involves sharing the feelings of another; then cognitive empathy, which speaks to the ability to comprehend the feelings of the other; third is moral empathy which refers to the motivation to understand and relate to the other; lastly, there is behavioral empathy which involves being able to communicate your understanding of the other. JANE STEIN-PARBURY, PATIENT AND PERSON: INTERPERSONAL SKILLS IN NURSING 146 (5th ed. 2014). *See also* Karen E. Gerdes et al., *Teaching Empathy: A Framework Rooted in Social Cognitive Neuroscience and Social Justice*, 47 J. SOC. WORK EDUC. 109, 109 (2011).

even ‘mastered.’”⁶⁷ Empathy takes compassion or sympathy a step further to demonstrate a willingness or ability to enter the experience of another in order to truly understand it.⁶⁸ Students are taught that sympathy is not a bad emotional reaction, but it is one that, by its very terms, communicates a separation between client and observer.⁶⁹ A relationship based on sympathy is susceptible to hierarchies because a sympathetic reaction can leave a client feeling vulnerable or disempowered.⁷⁰ Empathy, in comparison, allows for more effective communication, because the communication occurs as if the client and the observer were on equal footing.⁷¹ Reserving judgment, openness to others, a willingness to enter and learn from the client’s experience are all an important elements of social justice education: before one can truly understand the oppression of another, one must be willing to enter the experience of another; and before one can or work to develop the agency and capacity of another, one must first meet and understand the other.⁷² Students’ abilities to relate, communicate, and problem solve are expanded once they locate themselves in the moment,

67. Samantha A. Batt-Rawden et al., *Teaching Empathy to Medical Students: An Updated, Systemic Review*, 88 ACAD. MED. 1171, 1173 (2013); Denise Panosky & Desiree Diaz, *Teaching Caring and Empathy Through Simulation*, 13 INT’L J. FOR HUMAN CARING 44, 45 (2009). Indeed schools of social work have included training in empathy as part of their skills training for more than forty five years. Gerdes et al., *supra* note 66, at 110. There is clearly no one way to proceed, but one starting point is to, one can employ the deep, dark hole example to explain empathy and differentiate it from sympathy. *See generally* Bratt-Rawden et al., *supra* note 61, at 1173. One can ask students to imagine a deep dark hole; they can see their client at the bottom looking up anxiously. What might they say to their client in help them feel better, to assure them that help is on the way? Then one can ask the students to put themselves in the hole with their client. What might they be able to say now to help the client feel better or assure them that help is on the way? The first scenario, where the student is on higher ground, describes communicating sympathy. *Sympathy*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/sympathy> [<http://perma.cc/G7E6-YM9X>] (last visited Jan. 9, 2016). The latter scenario, where the student joins the client and communicates from a position beside the client, describes empathy.

68. STEIN-PARBURY, *supra* note 66. *See* Gerdes et al., *supra* note 66 (stating “pity rarely helps, sympathy commonly helps, empathy always helps” (citations omitted)). Not surprisingly then, empathic relating and communicating improves services. Bratt-Rawden et al., *supra* note 67, at 1171.

69. As Dr. Brene Brown, Ph.D., author, and lecturer, explains simply and eloquently in this short video, “Empathy fuels connection. Sympathy drives disconnection.” Dr. Brene Brown, *Brene Brown On Empathy*, YOUTUBE (Dec. 10, 2013), <https://www.youtube.com/watch?t=160&v=1Evwgu369Jw> [<https://perma.cc/5H83-8PHJ>].

70. STEIN-PARBURY, *supra* note 66; Gerdes et al., *supra* note 66; *see* Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 73-75 (1996). As Delgado describes false empathy, it sounds remarkably similar to sympathy, and shallow sympathy at that, a means of connecting to another that unsurprisingly “reproduces power relations.” As Delgado describes false empathy, it sounds remarkably similar to sympathy, and shallow sympathy at that, a means of connecting to another that unsurprisingly “reproduces power relations.”

71. *See, e.g.*, Panosky & Diaz, *supra* note 67, at 45–46, (describing simulation in which student nurses were obliged to “walk a mile in another’s shoes” during a simulated exercise. The students were required to wear adult diapers and colostomy bags (with mock content) for forty-eight hours).

72. *See supra* Part I.B for discussion of social justice education.

alongside their clients.⁷³

D. FALSE EMPATHY AND CULTURAL COMPETENCE

Empathy can meet social justice ends only if it is genuine and well-informed. Cultural constraints and assumption-making can thwart empathy. At many points in client counseling, students should be encouraged to identify and analyze the cultural similarities and differences they perceive between themselves and their clients; and empathy skills training provides a particularly apt juncture to introduce these habits.⁷⁴ Students can be taught to notice where they attribute meaning to the differences or similarities between themselves and their clients, and to be critical about where the meaning they ascribe is based on assumptions rather than true, empathic understandings of their clients.⁷⁵ Training in cultural competence also will enhance a student's ability to rigorously identify and analyze similarities and differences between themselves and their clients.⁷⁶ A basic tenet of cultural competence training is the notion that by making the invisible visible "[we] help students understand the reactions that they and the legal system may have towards clients and that clients may have towards them."⁷⁷ Educating students on empathy in this way trains clinical students to avoid "false empathy," a mistaken, misplaced empathy wherein you "visualize what you would want if you were she, when your experiences are radically different, and your needs, too."⁷⁸ To assume that, having entered your client's experience, you now share identical reactions with your client, "reproduces power relations" because it replaces the authentic voice of the client with your assumptions, assumptions that all too easily may be based on your privilege or your agenda.⁷⁹

73. As stated by photographer Diane Arbus, who took "portraits of transvestites, dwarfs, twins, triplets, carvinal performers, and sometimes ordinary people with troubling expressions or postures who said: 'I work from awkwardness if I stand in front of something instead of arranging it, I arrange myself.'" The Writer's Almanac, NPR (Mar. 14, 2014), <http://writersalmanac.publicradio.org/index.php?date=2014/03/14> [http://perma.cc/44LQ-L7FY].

74. Gerdes et al., *supra* note 66, at 119 (suggesting that their teaching techniques can be used "throughout the curriculum, particularly in diversity and practice classes"). See Bryant, *supra* note 50, at 33 (generally aspiring for cultural competence through learned habits).

75. Bryant, *supra* note 50, at 43–44.

76. Cultural competence is an article topic in and of itself and has been handled elegantly by many other scholars. See Tremblay & Weng, *supra* note 110, at 64.

77. Bryant, *supra* note 50, at 40.

78. Delgado, *supra* note 70, at 94.

79. *Id.* at 74–75; see Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470, 471 (1976) [hereinafter Bell, *Serving Two*] (discussing civil rights lawyers' determination to implement *Brown* with school desegregation via busing and other dislocating methods despite "[t]his stance involv[ing] great risk for clients whose educational interest may no longer accord with the integration ideals of their attorneys.").

False empathy is a particularly easy trap for well-intentioned clinic students. It is tempting for students to overindulge in a sense of self as a defender of a cause, someone helping a marginalized lot reach some higher plain. Students can fail to double back and ask themselves if they really do understand the view of those very people inspiring the cause in the first place.⁸⁰ In framing the discussion of empathy with an eye to cultural competence and the false empathy dilemma, students are reminded of a fundamental tenant of empathy, namely that one aims to relate to the other “*as if one were the person, but without ever losing the as if condition.*”⁸¹

The focus on listening to learn and empathically aligning oneself with the client are two important means of achieving the over-arching social justice objective of empowering the client. Exploring empowerment theories with students contextualizes the skill beyond one conversation with one client and further integrates social justice themes.⁸²

E. THE EMPOWERMENT APPROACH

Empowering a client is different than saving a client. Empowering a client acknowledges that the person in the position to do the saving is the client herself albeit with initial support or intervention.⁸³ The empowerment approach also reinforces the need to define people, problems, and solutions holistically.⁸⁴ Within this holistic approach it is understood that problems do not exist in a vacuum; rather the client’s problems are caused or exacerbated by forces at play

80. Delgado, *supra* note 70, at 71, 78 (stating at 78 that “false empathy is worse than indifference. Professor. It encourages the possessor to believe he is beyond reproach”); see Bell, *Serving Two*, *supra* note 79, at 471.

81. Samantha A. Batt-Rawden et al., *supra* note 67, at 1171 (2013) (emphasis added) (describing an aspect of empathy training, namely a “detached concern” or the ability to understand the experience of another without letting that understanding provoke a personal emotional response). Moreover, if the student attorney becomes so caught up in a riptide of false empathy that they fail to acknowledge and exploit their relative position of power and privilege for their client’s benefit, then everyone loses. As community organizer and activist, Malik Rahim put it:

First you have to understand the unearned privilege you have in this country just by being born in your race or gender or economic situation. You have to learn how you got it. You have to learn how to challenge the systems that maintain that privilege. *But while you are with us, we want to train you to use your privilege to help our community.*

Quigley, *Letter to a Law Student*, *supra* note 30, at 22 (emphasis added). Indeed, “a leader intentionally exercises his/her power to influence.” Tyner, *supra* note 32, at 242. Therefore, one way to answer the question of “what am I doing when I do law?” is to teach toward the answer, “I can use my legal skills, position, and power to inspire, create, or defend just systems.” See *id.* at 233, 242.

82. Rand, *supra* note 31, at 480.

83. *Id.* at 484–85.

84. *Id.*; see, e.g., Robin Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N. Y. U. REV. L. & SOC. CHANGE 625, 630 (2006) (discussing holistic advocacy).

around the client.⁸⁵ But, simultaneously, the empowerment approach, does not pathologize the family, community, or network around the client; rather, it emphasizes the strengths of the people and systems around the client and looks for solutions that are interior to those people and systems.⁸⁶

The goal then becomes to: 1) analyze the family, the community, and the society in which the client operates; 2) identify functioning, healthy systems that can help the client; and 3) help the client challenge the unhealthy systems that thwart the client's wellbeing.⁸⁷

As an advocate looks for solutions and functionality within and around the client, an advocate employing the empowerment approach works from the premise that clients are the authorities on their own worlds and therefore natural collaborators for identifying and implementing solutions to their problems.⁸⁸ It should also be noted, however, and shall be discussed in more detail below, that students must be taught that empowering a client does not necessarily require agreeing with them or declining to challenge them.⁸⁹ An effective, ethical advocate must confront maladaptive thinking and there is value in acknowledging that certain decisions clients make are not necessarily in their own client's interests.⁹⁰ If, for example, "the client is primarily interested in inflicting as much pain as possible on the other party, that interest will determine how the case proceeds" whereas perhaps the client would be better served in the longer run if she could "redefine [her] goals and focus on broader, more forward-looking

85. Rand, *supra* note 31, at 484–85 (stating "[a] social worker must work with the client to see the problem in context of the community"); Steinberg, *supra* note 84, at 630 (stating that "presence in the client community" as one of two "critical components" of holistic advocacy). The empowerment approach is evident in many modalities used by social workers and other social scientists; one common modality is family systems theory. See Brooks, *supra* note 10, at 68 (discussing family systems theory); see also NASW Code, *supra* note 11, at preamble (stating that "attention to the environmental forces that create, contribute to, and address problems in living" are "[f]undamental to social work"). Family systems theory suggests that in order to understand the individual, you must understand the family in which they operate. See Brooks, *supra* note 10, at 68. In understanding systems theory, the term 'family' can be used to be representative of broader systems surrounding the client. *Id.*

86. Brooks, *supra* note 10, at 70; Rand, *supra* note 31, at 499.

87. Rand, *supra* note 31, at 487.

88. "Mrs. G. was a better strategist than the lawyer—more daring, more subtle, more fluent—in her own home terrain. She knew the psychology, the culture, and the politics of the white people who controlled her community. She knew how to read, and sometimes control, her master's motivations; she had to command this knowledge—this intuition—to survive . . . [The lawyer] was an outsider to the county, and to Mrs. G's social world." Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 47 (1990); MARTHA ALBERTSON FINEMAN & NANCY SWEET THOMADSEN, *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 40 (1991); see Lorraine M. Gutierrez, *Working With Women of Color: An Empowerment Perspective*, 35 SOC. WORK 149, 151 (1990).

89. Anderson et al., *supra* note 11, at 18.; Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney To Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1118 (1994).

90. *Id.*; see Joan Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1364 (1993); Van Arsdale, *supra* note 58, at 29.

solutions.”⁹¹ Similarly, there is a time and a place to show the client how their thinking might have negative consequences for those around them.⁹² Ultimately, however, the client-advocate team must define the path they will take and move forward together. That path will be an empowering one if the advocate proceeds assuming that the client possesses valuable insight and information as well as “unused or underused competencies and resources that can be brought forth when constraints are removed.”⁹³

III. SELF-AWARENESS

As students are being taught how to know and understand their client, they must also turn their attention to the other half of the attorney-client relationship: students must be taught self-awareness. Clients will “evoke a range of conscious and unconscious reactions” in the advocate.⁹⁴ The field of psychology calls these reactions countertransferences.⁹⁵ To understand countertransferences, one must first understand the concept of transferences. Transferences were originally defined as “a client’s projection of feelings, thoughts, and wishes onto the [advocate], who comes to represent a person from the client’s past.”⁹⁶ Today, transferences have come to refer more generally to all of a client’s reactions to a therapeutic “other.”⁹⁷ Countertransferences,⁹⁸ in turn, were traditionally understood as the advocate’s reaction to the client’s transferences (a reaction to the reaction, if you will); but countertransferences are now understood more broadly⁹⁹ to be:

1. The conscious and unconscious reactions of the advocate to a transference (classic definition);
2. The effects of the advocate’s conscious and unconscious needs and wishes as these needs and wishes are informed by the advocates own personal history, or by her understanding of the client; and
3. Specific or general tendencies that an advocate has about a range of clients (i.e., being “drawn to” a certain client base or reluctant to work with a certain sort of client).¹⁰⁰

91. Van Arsdale, *supra* note 58, at 29.

92. Rein, *supra* note 89, at 1118; Anderson et al., *supra* note 11, at 675–76.

93. Susan Brooks, *Practicing (and Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques into Clinical Legal Education*, 17 ST. THOMAS L. REV. 513, 523 (2005) [hereinafter Brooks, *Practicing*].

94. Walsh, *supra* note 50, at 129–130.

95. *Id.* at 130.

96. *Id.*

97. *Id.*

98. *Id.* at 130–131.

99. *Id.* at 131; see Michael J. Tansey & Walter F. Burke, UNDERSTANDING COUNTERTRANSFERENCE: FROM PROJECTIVE IDENTIFICATION TO EMPATHY 10 (1989).

100. Walsh, *supra* note 50 at 131.

Countertransferences can provoke a whole range of reactions in an advocate: affection, infatuation, hostility, ambivalence, dissociation, anxiety. Both negative *and* positive reactions to a client can be problematic if they go unchecked.¹⁰¹ It is easy to see that being repelled by or from your client is not workable; but affection for a client can threaten objectivity and must be monitored as well.¹⁰²

A. NEGATIVE COUNTERTRANSFERENCE

It is relatively easy to see how negative countertransferences are problematic, but it's important that students know that countertransferences are also common and normal. Clients who are in crisis or otherwise experiencing heightened interpersonal or emotional circumstances, often provoke more acute conscious and subconscious reactions in those who work with them.¹⁰³

Student attorneys must additionally appreciate that, of course, they do not enter the relationship free of their own burdens and impediments.¹⁰⁴ It follows then that students must be cautioned to realize that not every reaction they are having to their client is due to the client or the situation the student is entering into with the client.¹⁰⁵ Even leaving aside the possibility that some students might have their own challenging history or problematic present day functioning, it is almost universally true that all students will experience anxiety about their impending in-court performance or their legal acumen.¹⁰⁶ Understandably, students will have their own stressors. Stress in turn threatens burn out and provokes biased responses.¹⁰⁷ Moreover, a stressed or emotional brain is a distracted brain.¹⁰⁸

Whether a negative reaction is prompted by a student reacting to something about herself or about the client, clinical instructors must encourage the student not to disregard her reactions. Failing to acknowledge that aspects of the attorney-client relationship are causing a negative reaction and failing to address

101. Meier, *supra* note 90, at 1351; Melissa L. Nelken, *Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. L. LEGAL EDUC. 420, 423 (1996) (highlighting the issue as it arises in negotiation and offering the following: "Everyone has heard stories of lawyers so competitive that they poison deals that could have been made to the benefit of their clients; there are also lawyers whose need to accommodate those they negotiate with leads them to give away the store, to the detriment of their clients. Without some degree of self-understanding, then, some attention to feelings, lawyers run the risk of missing much that is central to competent representation").

102. Meier, *supra* note 90, at 1352.

103. Walsh, *supra* note 50, at 130; Tansey & Burke, *supra* note 99, at 77.

104. Tansey & Burke, *supra* note 99, at 77.

105. *Id.* at 111 (describing this aspect of countertransference as being an "important caveat").

106. *Id.* at 77.

107. Bryant, *supra* note 50, at 78 (stating that "we are more likely to fall prey to stereotype when we are feeling stress and unable to monitor ourselves for bias").

108. Van Arsdale, *supra* note 58, at 30.

those feelings can stymie the relationship and the resolution of the case.¹⁰⁹ Students acknowledging their reactions implicitly suggests, of course, that they are aware of their reaction.

There is a trickier scenario when a reaction is latent or unconscious. Here again is an opportunity to incorporate the skills and lessons of cultural competence. Many biases, particularly those based on race, class, and gender, are likely to be “the implicit, unconscious ways in which our own cultural heritages . . . influence our world view and our deep-seated assumptions about how the world works.”¹¹⁰ There are skills and techniques detailed eloquently in various sources that offer many ways to summon latent schemas and assumptions, but the techniques suggested below may help to surface some as well.¹¹¹

B. POSITIVE COUNTERTRANSFERENCE

The second aspect of countertransference, the notion that someone might like a client too much is often overlooked or discounted. While having affection for a client can be a delightful and important byproduct of a good attorney-client relationship, it can impair impartiality and so it must be raised into consciousness, acknowledged, and monitored carefully.¹¹² Particularly liking a client can arise from identifying “sameness” with the client. As has been discussed earlier, where students perceive themselves as *different* from their client, they are likely to miss something or interpret something in a manner consistent with a patent or latent bias against the perceived difference.¹¹³ What is also possible, however, and equally as problematic, is a student perceiving sameness between themselves and their client and over-identifying with a client. Here, the risk is that students assume their own assessment of a given situation is naturally the same as their client’s.¹¹⁴ A focus on sameness denies the reality that “culture is enough of an abstraction that people can be part of the same culture, yet make different decisions in the particular.”¹¹⁵

Another scenario of indulging in a positive-affect response to a client arises for almost opposite reasons: here the student does not perceive sameness and closeness, but rather has an initial reaction to a client that makes them uncomfortable and so they correct themselves to bring their reaction into line

109. Nelken, *supra* note 101, at 423 (stating “[c]lient dissatisfaction with legal representation often results from the lawyer’s inability to see the client’s emotional self as anything but an impediment to sensible, rational management of the legal problem the client brings”).

110. Tremblay & Weng, *supra* note 50, at 51.

111. See e.g., Bryant, *supra* note 50; Tremblay & Weng, *supra* note 50; Brooks, *Practicing*, *supra* note 93.

112. Marjorie Silver, *Love, Hate, and Other Emotional Interferences in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 276 (1999); Meier, *supra* note 90, at 1352.

113. See Bryant, *supra* note 50, at 43; Goldfarb, *Theory-Practice*, *supra* note 30, at 1681.

114. Bryant, *supra* note 50, at 42; see also *infra* Part II.D (discussion on false empathy).

115. Bryant, *supra* note 50, at 41.

with what they perceive is the optimal or expected reaction.¹¹⁶ In fairness, some of this “fake it until you make it” strategy can be a powerful tool for students who are first learning to be with people who may make them uncomfortable in some way.¹¹⁷ One might make all outward appearances, for example, of being perfectly at ease with an individual with a severe mental illness despite one’s genuine, negative gut reaction to the person’s lack of personal hygiene, invasion of personal space, disordered speech, peculiar social cues, etc. The correction becomes maladaptive, however, if it is an overcorrection, an unconscious correction, or both.¹¹⁸ “The first step, of course, is recognition that a problem or potential problem exists. The goal is to make the Unconscious conscious.”¹¹⁹

Another source of a positive countertransference is the tempting risk to infantilize a struggling client, particularly where, as will be the case with many law school clinic clients, the client’s struggle is based on objectively intolerable circumstances of disenfranchisement and all its many ugly causes: poverty, racism, classism, sexism, violence, and intolerance among others. Students, particularly those coming into a neophyte’s awareness of social justice impera-

116. Wendy Berry Mendes and Katrina Koslov reviewed several studies concerning “correction efforts of white study participants toward African American ‘targets’” in their piece *Brittle Smiles: Positive Biases Toward Stigmatized and Outgroup Targets*, 142 J. OF EXPERIMENTAL PSYCHOL., 923 (2013). Study participants automatic responses (e.g. facial muscle movements) to a “target,” an African American, indicated a negative affect while associating with the target; but they moderated their controlled reaction and reported “more liking for those targets.” *Id.* at 923. Researchers “argue that in many cases, those who correct may be the ones who are the most biased toward outgroup or stigmatized group members.” *Id.* at 924. These corrective efforts “may take [a] toll on cognitive resources” and risk being “disrupted with stress or cognitive load.” *Id.* at 923. *See also* Silver, *supra* note 112, at 302. Silver offers an interesting retelling of an account by psychoanalyst Theodore Jacobs:

During the course of the analysis of a highly attractive young woman, I became aware of the unusual correctness of my posture as I greeted her. I made few spontaneous movements, and both my gait and posture conveyed a certain stiffness. I noticed, too, that the muscles of my arms and trunk were not relaxed as I sat in my chair, and that my tone conveyed a more formal quality than was true with other patients. Some self-analysis of these observations made clear to me what I had sensed in myself but had not sufficiently focused on; that I was responding to the patient’s considerable charms by a defense of physical and emotional distance. My anxiety over my own positive feeling for her had led, not only to an exaggerated and rather sterile analytic stance, but to inadequate analysis of the patient’s seductiveness both as a character trait and a resistance. *Id.*

117. Amy Cuddy, *Your Body Shapes Who You Are*, TED, 7:04 (June 2012), http://www.ted.com/talks/amy_cuddy_your_body_language_shapes_who_you_are?language=en#t-421829 [<http://perma.cc/CK94-P9CP>].

118. Mendes & Koslov, *supra* note 116, at 923–24. *See also* Samuel R. Sommers & Saul M. Kassin, *On the Many Impacts of Inadmissible Testimony: Selective Compliance, Need for Cognition, and the Overcorrection Bias*, 27 PERSONALITY & SOC. PSYCHOL. BULL., 1368, 1370 (2001) (discussing how “motivation and [the need for cognition] can influence bias correction,” but also considering that “personal and situational factors can influence whether perceivers overestimate the potential influence of biasing information and adjust their perceptions too far in the opposite direction”).

119. Silver, *supra* note 112, at 296 (discussing that one’s goal should not be framed as changing one’s reaction, so much as having a goal of recognizing and analyzing one’s reactions); Goldfarb, *Theory-Practice*, *supra* note 30, at 1650 (discussing generally the goal of clinical education to use reflection to make one’s thinking conscious).

tives, can (and often will) fall into the “poor client!” trap. This trap soon turns “poor client!” into “victimized/helpless/blameless/perfect client” who the student decides they love or care for, or feel emotionally bonded to in some way.¹²⁰ A recent experience exemplifies the problematic nature of this view of one’s client. A student was representing a seventy-year-old woman in an extension of a Civil Protection Order in Domestic Violence Court and a Motion to Compel Alimony in Domestic Relations Court. The client was a petite, soft-spoken, African American woman. The student was a twenty-five year old white woman. When asked to describe her *case* in rounds she plunged in first with a description of her *client* in which she repeatedly pronounced that her client was a “total sweetheart” or “such a sweetie.” While the author would never suggest that it is error to start a description of your casework with a description of the client, the saccharin description of the client served initially to distract the student and the class from working their way toward the very real factual and legal difficulties that existed in the case. Moreover, the tone and descriptors notably infantilized the client who was, after all, a respectable, capable senior, not a child, friend, or pet.

C. MAKING THE UNCONSCIOUS CONSCIOUS

Reflecting on the emotional reaction to a client helps the student unpack her reasoning and think critically about any action she takes.¹²¹ It also has important implications for learning and self-care, but emotional intelligence is a learned skill, not an innate skill.¹²² Indeed, world renowned psychoanalyst Sigmund Freud initially referred to countertransferences as “blind spots.”¹²³ For some law students, crediting emotional content is a challenging or novel notion.¹²⁴ Teaching them theories of countertransference during a seminar and intentionally inquiring about it in supervision or rounds may reach most students.¹²⁵ It will likely be helpful to approach the issue at an even more granular level and teach students how to notice the ways in which they are experiencing their client.¹²⁶

120. See Meier, *supra* note 90, at 1353; Batt-Rawden et al., *supra* note 67, at 1171 (discussing an important aspect of empathy, one that has been described as “‘detached concern,’ or the ability of one individual to understand the experiences of another without invoking a personal emotional response”).

121. Silver, *supra* note 112, at 260 (stating that “[i]n order to do our work well, we must be in touch with what we are feeling—and why”).

122. See, e.g., Batt-Rawden et al., *supra* note 67, at 1173; Panosky & Diaz, *supra* note 67, at 44. *But see* Geredes et al., *supra* note 60 (noting that there is a link between neuroplasticity and the development of empathy, which means that “infants and children who grow up with stable attachment to a nurturing caregiver are strengthening the existing synaptic pathways necessary to experience empathy”).

123. Joseph Sandler, *Countertransference and Role-Responsiveness*, 3 INT’L REV. OF PSYCHO-ANALYSIS 43, 43 (1976).

124. See Silver, *supra* note 112, at 278–279; Meier, *supra* note 90, at 1355.

125. Silver, *supra* note 112, at 272.

126. Consider again at *supra* note 112, Silver’s retelling of the account by psychoanalyst Theodore Jacobs, who noted his positive feelings for his client, first by noting the physical reactions he was having to her. He

One can start by suggesting students note their body positions and movements while counseling a client:¹²⁷ Were they leaning in or leaning away? Were they crossing their arms across their body? Were they struggling to motivate or maintain eye contact? Were they holding their breath? Was their heart racing? Were they sweating? Were they smiling? Were they struggling to control tears? Noticing “bodily reactions as they manifest themselves in posture, gesture, and movement” is the first step of self-awareness and often the key to internal “attitudes and conflicts” about which a student might potentially be unaware.¹²⁸ Once they have noticed their bodies, students can more easily move to a conversation about their mood during the conversation: Were they nervous? Excited? Mad (at who?)? Upset? Happy? Similarly, we can ask students to reflect on where their mind wanders to when they are working on their case. Do they tense up? Do they get resentful or emotional? Are they able to engage with other aspects of their life outside of the case and the client? One can also ask students what facts they keep returning to when they think about the client or the case.¹²⁹

Once a student notices her emotional responses to a client, she can then begin to recognize that some of her conclusions are likely based on reactions and assumptions, not fact; and she can ask herself why she is reacting as she is; she can inquire within herself about whether the reaction is effecting her perception of the client. “[R]ealizing that there are powerful internal forces motivating one’s perception of the [client] . . . opens up the whole question of what *other* assumptions . . . are being treated as if they are facts.”¹³⁰ We teach students to reach better, reality-based outcomes if we teach them to focus on actually *gathering* information (asking questions; exploring many angles) rather than *perceiving* information (“working from internally generated assumptions”).¹³¹

Secondly, reflecting on one’s emotional reaction in order to remove those aspects of it that are specific to the advocate’s bias, will leave the aspects of the reaction that are perhaps important reactions to the client’s thinking or approach.¹³² In traditional psychoanalysis, analysts are taught to suppress their own countertransferences and instead reflect back the patient’s emotions and reactions (i.e. transferences); the logic being that seeing their behavior manifest in another will raise the patient’s consciousness and allow them to fully see,

noticed, for example making “few spontaneous movements,” a “stiffness” in his gait and posture and that his arms and trunk were “not relaxed.” Silver, *supra* note 112, at 302 (emphasis added).

127. Silver, *supra* note 112, at 302.

128. *Id.*

129. Silver, *supra* note 112, at 296.

130. Nelkin, *supra* note 101, at 425.

131. *Id.*

132. Meier, *supra* note 90, at 1352 (identifying countertransferences as a “valuable clue” to understanding a client or patient).

appreciate, and ultimately deal with their inner struggles.¹³³ Of course, this use of transference and countertransference is a technique designed with a therapeutic end and not one that attorneys should engage in. The contemporary view of countertransferences, however, is exportable into the attorney-client relationship and can be a valuable tool for lawyers.¹³⁴

The contemporary view of countertransferences requires less suppression of the therapist's emotions and reactions, and even suggests that the reactions have relevant therapeutic value and should be relayed to the patient.¹³⁵ In a therapeutic context it might look like this: When you talk that way, I feel nervous/sad/angry. What do you make of my reactions? Do you think those around you might share my reaction? Do you have to care about the reactions of others in this instance? If you do care, what do you think you can do? Alternatively, it may look like: When you talk that way, I feel nervous/sad/angry. Do you feel that way too? How are you dealing with the way you feel? Do you want to change the way you are dealing with those feelings? Is there something we can do to help you stop acting in a way that makes you feel this way?¹³⁶

When students first learn about the importance of empathy and connection to their client, they can easily perceive messaging suggesting that unless their reactions to their clients are glowing and supportive, then they are antithetical to being a good advocate. Yet there is benefit to bringing negative impressions into the client-advocate relationship and into the legal strategy.¹³⁷ Unlike my brief hypothetical above, the law student would not ask the client to explore their feelings with the student attorney. But one can, and arguably should, highlight for the client one's discomfort with a given position as that discomfort relates to a challenge in legal strategy. So perhaps the conversation looks like this: When you state that you want X/or when you talk that way, it makes me nervous/sad/angry. My worry is that the opposing-party likely feels that way too. I wonder if we can frame your position in a way that will make the opposing party more willing to negotiate. Alternatively, the conversation may look like: When you state that you want X/or when you talk that way, it makes me nervous/sad/angry. Is this what you really want, or are you just feeling nervous/sad/angry too? I ask, because we are all entitled to our feelings, but the judge will want and expect (fair or not) that

133. Sandler, *supra* note 123, at 43 (citing the works of scholar Paula Heimann and stating that two of her papers published in 1950 and 1960 "have to be singled out as landmarks in the change of view of countertransference. She started by considering countertransference as referring to all the feelings which the analyst may experience towards his patient. Heimann remarks that the analyst has to be able to 'sustain the feelings which are stirred up in him, as opposed to discharging them (as does the patient), in order to subordinate them to the analytic task in which he functions as the patient's mirror reflection.'").

134. Meier, *supra* note 90, at 1350, 1352.

135. Even an "old school" analyst such as Sandler could, as early as 1976, identify "crucial" elements of "useful countertransferences." Sandler, *supra* note 123, at 43.

136. Goldfarb, *Theory-Practice*, *supra* note 30, at 1681.

137. Anderson et al., *supra* note 11, at 675.

we are able to put our feelings aside to work to resolve things. I need to think about how to state a theory of the case that is grounded in law and facts, not emotions, a theory that does not make the judge feel nervous/sad/angry.¹³⁸

D. EMOTIONAL INTELLIGENCE AND SELF-CARE

Another reason to keep emotional content at a conscious level is that doing so is an important part of self-care and transformational learning. As student attorneys approach their work in challenging scenarios or with challenging clients they can easily become overwhelmed or upset by the difficult realities they face. Left unchecked, stress can affect quality of life in terms of personal health and wellness and the health of the students' relationships.¹³⁹ This type of experience is sometimes referred to as secondary or vicarious trauma.¹⁴⁰ Secondary trauma refers to the difficulty of bearing witness to another's trauma; hearing, telling, and framing a client's story can tax the advocate.¹⁴¹ Further, as students approach their work with an increasingly empathic and even therapeutic lens, they make themselves vulnerable to deeper sensitivity and deeper feeling. This, in turn can exacerbate feelings or manifestations of emotional distress and the secondary trauma can feel even more acute.¹⁴² Additionally, there is a risk that students will so enmesh themselves with their client that they will over identify with the client's experience and take it on as their own, or they will begin to identify problems in their own life that suddenly feel "the same" as their client's.¹⁴³ This process has been (somewhat facetiously) labeled "Beginning Psychiatry Training Syndrome."¹⁴⁴

But while working with difficult content or difficult clients in an empathic way creates certain dilemmas, there is a certain grace to be found: the more skills students acquire to approach their clients mindfully and thoughtfully, the more skills they have to be mindful and thoughtful about their own experience.¹⁴⁵ Students must be encouraged to apply mindfulness to self-care.¹⁴⁶ Self-care can

138. Virgil Wiebe, *Washing Your Feet in the Blood of the Wicked: Seeking Justice and Contending With Vengeance in an Interprofessional Setting*, 1 U. ST. THOMAS L. J. 182, 184 (2004) (arguing, for example, that "cries for vengeance are instructive as expressions of outrage, but not as prescriptions for action").

139. Martin Blinder, *Psychic Trauma, Emotional Burnout and the Practice of Law*, 50 ARIZ. ATT'Y 28, Nov. 2013, at 28.

140. Lynda Murdoch, *Psychological Consequences of Adopting a Therapeutic Lawyering Approach: Pitfalls and Protective Strategies*, 24 SEATTLE U. L. REV. 483, 492 (2003).

141. *Id.*

142. *Id.* at 485.

143. *Id.* at 487.

144. *Id.*

145. Gerdes et al., *supra* note 66, at 122 (discussing link between mindfulness and improved concentration and attention, as well as emotional regulation).

146. Mindfulness has been defined as "the awareness that arises out of intentionally attending in an open and discerning way to whatever is arising in the present moment." Robert W. Barner & Charlotte P. Barner, *The Role of Mindfulness in Fostering Transformational Learning in Work Settings*, in ADVANCES IN POSITIVE

come in many forms of attending to physical, emotional, or spiritual health. Students can be encouraged to engage in body-mind activities: exercise, meditation, religious affiliation, therapy, therapeutic self-education, sleep, nutrition.¹⁴⁷ Clinical education should include education and support on setting boundaries.¹⁴⁸ Students can be encouraged to establish and prioritize having a support network. Clinics are often careful to set caseload limits or limit the amount of emotionally charged cases.¹⁴⁹ Lastly, by maintaining healthy communication and appropriate boundaries with their students, a supervisor can model these important strategies.¹⁵⁰ With proper assistance and training, students will be less stressed by their roles; the reduction of stress, in turn, enhances concentration, increases attention, and decreases the likelihood of empathy “burnout.”¹⁵¹

IV. SYSTEMS AWARENESS

At the macro level clinic students are taught about the institutions in which they operate. Students in a litigation clinic might receive procedural rules, take a tour of the courthouse, attend a roundtable with court personnel, and sit in a courtroom for observation. A transactional clinic might provide an overview of the regulatory entities with whom their client will interact. Students are taught about how attorneys’ advocacy for their clients within these institutions is regulated by ethical codes.

By integrating social justice themes into the discussions of institutional systems, one accomplishes several important goals. One can enrich the discus-

ORGANIZATIONAL PSYCHOLOGY 189 (Arnold B. Baker ed., 2013) (citation omitted). Mindfulness is seen as an important pathway for “transformational learning,” learning “reflected in the development of a new and broader perspective of oneself and one’s world.” *Id.* at 191 (citations omitted). Studies suggest that transformational learning is often triggered by a “critical life event” that is “personally disorienting or traumatic.” *Id.* Mindfulness allows for transformational learning that is an intentional, gradual “unfolding;” rather than a reactive outcome following a jarring life event. *Id.*

147. Blinder, *supra* note 139, at 32.

148. Ingrid Loreen, *Therapeutic Jurisprudence and the Law School Asylum Clinic*, 12 ST. THOMAS L. REV. 835, 851 (2005).

149. *Id.*

150. Supervisors should also explicitly educate students on the various hazards that their work may cause, and inquire after their students in intentional and explicit way. *See generally* Walsh, *supra* note 50 (an article directed at those supervising case managers). “How are you?” takes on new meaning if one has created the permission and the space to field a complete and honest account. A response of “fine” should not necessarily be taken as given. Nor should an unmitigated emotional outpouring be considered expected and appropriate if the supervisor has reason to suspect the student is over-identifying. And if the supervisor does not know what is provoking either response on either end of the spectrum, then surely, a supervisor should inquire. A supervisor can model healthy communication, empathy, and boundaries Brooks, *supra* note 10, at 61. Moreover, those same principles of self-determination that direct our approach to our clients, should direct our approach to our students (footnote, conference topic). A good supervision relationship will foster autonomy, competence, and relatedness in students, just as a strong attorney client relationship can foster that for a client.

151. Loreen, *supra* note 148, at 853–54.

sion of reform;¹⁵² one can train attorneys to focus on context;¹⁵³ and one can address an essential vulnerability in the traditional approach to teaching students about the systems, namely neglecting to acknowledge clients' distinct interactions with the systems.¹⁵⁴ Considering reform, context, and client interactions help students think critically and imaginatively about their role as an advocate; they are also an integral part of embracing their professional responsibility.¹⁵⁵

A. INSTITUTIONAL SYSTEMS

Student attorneys must obviously be aware of the legal, regulatory, or financial systems (hereinafter, collectively: "institutional systems" or "formal systems") in which they, and their clients, must operate. Law students will have learned about the legal system's theoretical underpinnings in their doctrinal classes, but participating in a clinic will be their chance to see the legal system in action. But unlike students generically observing court operations, students focused on social justice will be asked to conceptualize what they see in keeping with what they have learned about power and privilege and also with an eye to their client's experience. Students should be asked to consider whether what they see is a justice system that "resolve[s] conflicts in such a way as to bind up the social fabric and encourage continuation of a productive exchange between individuals."¹⁵⁶ Students in transactional settings can be asked to consider whether regulatory and financial systems allow for, let alone promote, equal access to, and opportunity for, wealth.

An important aspect of integrating social justice principles into a discussion of systems is stating the simple truth that our systems do not always adequately serve our clients. Clinics teaching client awareness skills will have helped

152. See, e.g., Askin, *supra* note 23, at 856 (reflecting that clinics can "(1) offer[] a practical vision of law as an important instrument of social justice; (2) provid[e] an opportunity for students (and a road map for lawyers) to have a real social impact and create new and better law . . ."); Rand, *supra* note 31, at 490 (conceptualizing solution or reform as a matter of correcting power imbalance).

153. Delgado, *supra* note 70, at 61 n.1 (citing the series of articles in which Professor Delgado, discusses the rule and role of law with his fictional alter ego, Rodrigo, a figure concerned with race, economics, gender, and culture); see also Rand, *supra* note 31, at 491 (suggesting that students must "learn to identify the specific individual problem prompting the initial interview *and also evaluate the problem as a potential systemic societal wrong.*"); Quigley, *Letter to a Law Student*, *supra* note 30, at 16 (stating "[c]ritique of current law is an essential step in advancing justice").

154. Quigley, *Letter to a Law Student*, *supra* note 30, at 17 (stating "you must seek out the voices of the people whose voices are not heard in the halls of Congress or in the marbled courtrooms"). A focus on learning about "other's culture is not sufficient as it absolves individuals from learning and understanding the impact of their own sociopolitical and ethnocentric biases on their work with clients who are racially/ethnically or culturally different from themselves." Nalini J. Negi et al., *Enhancing Self-Awareness: A Practical Strategy to Train Culturally Responsive Social Work Students*, 11 *ADVANCES IN SOC. WORK* 223, 224 (2010).

155. MODEL RULES pmbl. cmt. 6 (2013); Caldwell, *supra* note 11, at 831; Wizner, *Beyond Skills*, *supra* note 5, at 340.

156. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 27 (1988).

students learn the importance of considering the client's own position, system,¹⁵⁷ and strengths. Clinics teaching self-awareness skills will have helped students learn the ways in which the reality of subordination and marginalization of certain people has influenced the student's own reaction to their clients.¹⁵⁸ When discussing systems, one can further explore the realities of the divide between clients' needs and experiences, and the norms of institutional systems.¹⁵⁹ In this third frontier of social justice skills training, one can give students the tools to advocate for their client effectively and/or the courage and permission to work toward reform.

B. CLIENT INTERACTION WITH INSTITUTIONAL SYSTEMS

In terms of the client experience, students will become attuned to the way institutional systems and their designated processes can be a burden to clients.¹⁶⁰ It is too easy or tempting to assume that a client who has found an attorney is now poised to right some wrong—the “wrong” is the clients experience or troubles thus far; the “right,” is the march to legal victory or the realization of wealth.¹⁶¹ And yet as with most temptations, there is hidden peril in such a view. To begin with, as this Article's section on client-centeredness hopefully makes evident, such a view of powerless client, empowered attorney is misplaced.¹⁶² Indeed, “one of the most basic insights of the client-centered approach is that clients come to lawyers, not to get answers to routine legal questions, but to get help solving problems that are deeply embedded within particular contexts.”¹⁶³ Moreover, the legal processes confronting our clients, far from being some magic elixir, can be harmful to our clients; in fact, scholars and practitioners have concluded that harms are an “intrinsic and often inescapable” part of the legal process.¹⁶⁴ There is an irony here: the legal process, seemingly a system of redress, is itself problematic, maybe even traumatic for parties.

157. Systems theory in social justice often refers to a client's personal system—e.g. family, community, etc. This paper discusses those issues in the section about client- awareness. The notion of systems in this section then refers to awareness of institutional systems.

158. Negi et al., *supra* note 154, at 224. *See also supra* note 72, quoting Malik Rahim, “[f]irst you have to understand the unearned privilege you have in this country just by being born in your race or gender or economic situation.” Quigley, *Letter to a Law Student*, *supra* note 30, at 22.

159. Bryant, *supra* note 50, at 68 (discussing “Habit Two: The Three Rings” which asks the students to analyze the similarities and difference between the client and the legal system and the student attorney and the legal system and identify the cultural differences that might provoke the legal decision maker to have biased responses and make negative judgments about the client).

160. Thomas Gutheil et al., *Preventing “Critogenic” Harms: Minimizing Emotional Injury From Civil Litigation*, 28 J. PSYCHIATRY & L. 5, 11 (2000).

161. Jones, CLINICAL, *supra* note 65, at 220 (noting that where attorney client relationships arise in typically “disempowering situations” (e.g. need for assistance in the criminal justice system or and entitlement program) students and practicing attorneys alike are tempted to see themselves as “saviors”).

162. *See supra* Part II.

163. Kruse, *supra* note 44, at 369.

164. Gutheil et al., *supra* note 160, at 6.

Considering first the legal system, participation in the court process can cause sleeplessness, anger, frustration, inability to concentrate, and isolation.¹⁶⁵ Parties may feel humiliated or anxious.¹⁶⁶ Client self-esteem suffers and distress intensifies.¹⁶⁷ Collateral social and psychological issues that were present before the onset of the legal proceeding, or are raised by participation in a legal proceeding, can complicate a client's ability to attend to their legal matter.¹⁶⁸ As one divorce attorney describes it:

[S]pecializing in divorce means working with clients who often are so stressed that they behave erratically or interpret normal events in a paranoid manner. They have such difficulty listening that they ask the same questions repeatedly or call their attorney at the office and at home with problems that could easily wait.¹⁶⁹

Students are particularly well poised to understand or relate to the very real anxiety that litigation and court can produce because they, like many of their clients may be in court for one of the first times or may, in those early days of practice, still feel like an outsider. As will be discussed below,¹⁷⁰ students who have been trained to notice and care about the client experience are poised to do something about the client experience. There are many sources for the harms that litigants face in court, but several are worth asking students to attend to.¹⁷¹

165. Vincent Cardi, *Litigation Violence*, 49 WAKE FOREST L. REV. 677, 685 (2014).

166. *Id.* at 677–78.

167. Gutheil et al., *supra* note 160, at 11.

168. Sally Engle Meity, GETTING JUSTICE AND GETTING EVEN 142, 142–43 (1990).

169. Van Arsdale, *supra* note 58, at 28.

170. See *infra* Part IV.C.

171. See Gutheil et al., *supra* note 160, at 11 (listing nine sources or types of critogenic harms). An important additional source of harm in law is the problem of equal access to courts and quality legal service. Indigent people do not have the same access to court as wealthier parties, because legal services are primarily a private good. See MARTHA MINOW, PARTNERS NOT RIVALRY: PRIVATIZATION AND THE PUBLIC GOOD 132 (2003) [hereinafter MINOW, PARTNERS NOT RIVALRY]. It costs money to file a civil complaint and the state does not have to waive the filing fee unless a fundamental right is involved in the lawsuit. U.S. CONST. amend. V; Hershkoff & Loffredo, *supra* note 135, at 318–19. The question of what constitutes a fundamental right is highly subjective and not altogether resolved. One must be granted access to court for a divorce for example, but not for settling bankruptcy matters. *United States v. Kras*, 409 U.S. 434 (1973); *Boddie v. Connecticut*, 401 U.S. 371 (1971). Even upon getting access to court, a poorer person will not have the same experience at court as a wealthier individual, as it costs money to retain counsel and certain court services. Under the Sixth Amendment of the Constitution the state must provide indigent defendants with legal counsel whenever there is a risk of imprisonment. U.S. CONST. amend VI. Indigent litigants may also be granted access to counsel in civil matters depending on what liberties are at stake in complaint against them. Determinations as to what liberties count and what do not vary: one is guaranteed counsel in the event that they are facing civil commitment or a jail sentence for civil contempt; in contrast, it is undecided if one should be granted counsel if they are facing eviction from state housing or termination of parental rights. *Lassiter v. Dep't of Soc. Services*, 452 U.S. 18 (1981); *Vitek v. Jones*, 445 U.S. 480 (1980); *V.F. v. State*, 666 P.2d 42 (Alaska 1983); *Walker v. MacLain*, 768 F.2d 1181 (7th Cir. 1985). Legal services are sometimes available at low or no cost to those needing help with civil matters, but the supply hardly meets the demand. In recent years, in fact, federal funding for the Legal Services Corporation was cut by \$100 million. See MINOW, PARTNERS NOT RIVALRY at 134. Meanwhile, pro bono work is not mandatory and not readily supported by “private ethos” in many firms. See *id.* at 133, 135. Even where they have adequate

1. LOSS OF PRIVACY, DELAY, AND LOSS OF CONTROL

Civil and criminal litigation requires the examination of people's intimate relationships with one another—their family structure, their sexual history and substance abuse history, their wealth and income, their strengths and weakness as parents and life partners, possible mental health issues, etc. This material is often revealed in a very public, very busy courtroom forum. Exposure of personal issues in a public manner, let alone in such a casual, chaotic atmosphere, easily violates a party's sense of privacy and personal boundaries.¹⁷² Indeed, relating one's experiences or needs to one's own attorney can amount to a perceived invasion of privacy.

It is not just the location of the revelations that makes them traumatic, but also the fact that the revelations are required over and over again during multiple stages in the litigation (complaints, answers, interrogatories, pre-trials, hearings on motions, and the trial itself). Constant mention of a harrowing, dangerous, or embarrassing past can reawaken trauma.¹⁷³ Ultimately, revelation of trauma and repeated exposure to discussions of the trauma may be therapeutically beneficial for an individual; however, there are important therapeutic defenses such as avoidance of the trauma or slow revelation of the full extent of the trauma that protect victims' psychological well-being, and there may be cultural differences around talking about trauma as well.¹⁷⁴ These defenses are often compromised by the obligations and pace of participation in litigation.¹⁷⁵

Delays both in court and between court appointments are endemic given crowded dockets, large caseloads, the difficulty in coordinating attorneys' and judges' schedules, and the limited supply of interpreters and jury members; also, a delay might be strategic.¹⁷⁶ Court dates arouse a myriad of emotions: hopes for the day in court, terror of a false accusation, apprehension about facing a batterer or an assailant, guilt or shame about facing a victim, fear of an unfavorable

counsel, parties might not be able to afford the rest of the staff and resources they require; for example, court reporters or interpreters and copies of transcripts or access to necessary experts and tests. See HELEN HERSHKOFF & STEPHEN LOFFREDO, *THE RIGHTS OF THE POOR* 322-23 (1997). In response to issues of inequitable access to courts, courts such as the Massachusetts trial court boast progress on the subject. See *The State of the Massachusetts Court System* (Annual Report), 12 (2012). While many of the solutions, include self-help or promoting forms of alternate dispute resolution for poorer, unrepresented clients; there appears to be a dawning sense that access to trained and motivated pro bono counsel is an important part of the solution. See *id.* at 12-14. An understanding that a lawyer is not necessary in these contexts, may finally be speaking to a sense that advocacy is important in light of apparent power imbalances in order not to segregate and subordinate indigent parties. Cf. MINOW, *PARTNERS NOT RIVALS* at 136.

172. See Gutheil et al., *supra* note 160, at 14.

173. *Id.* at 13.

174. *Id.*; see Derek Summerfield, *A Critique of Seven Assumptions Behind Psychological Trauma Programmes in War-Affected Areas*, 48 *SOC. SCI. & MED.* 1449, 1453 (1999).

175. See Gutheil et al., *supra* note 160, at 14.

176. See *id.* at 11.

finding, hope of a favorable one.¹⁷⁷ These hopes and fears are intermittently raised and frustrated with each delay.¹⁷⁸ Many parties develop an emotional numbness to protect themselves from this emotional roller coaster.¹⁷⁹ This numbness might foreclose the possibility of meaningful work toward healing or make an ultimate victory seem hollow, because the passion for justice and closure has been replaced by detachment.¹⁸⁰ The fatigue, strain, and financial burden of maintaining counsel and a presence in court provides a breeding ground for self-doubt, and self-loathing.¹⁸¹

Another harm associated with delay becomes apparent when one considers how decisions about delay and strategy are made. Within the legal process, most decisions about timing and strategy are issued from the courts and attorneys outward onto the client. The vacation or work schedules of the court or the attorneys dictate postponements or rescheduled hearings; it is often the lawyer's sense of strategy that commands the pace of the legal process.¹⁸²

Clients may feel a similar loss of control as their attorney constructs the case narrative, the theory of the case. Procedural or evidentiary rules might dictate the terms of an attorney's presentation of fact,¹⁸³ and often an attorney's own assessment of what is persuasive and relevant may inform their theory of the case.¹⁸⁴ As was put so eloquently some time ago:

In worshipping the law, this notion of case theory ignores context and misconceives the power of important facts—especially the client's life facts. Traditionalists express too much objectivity about the “facts” and see a limited universe of case theory. Perhaps most importantly, this approach

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. Interviews with Interdisciplinary Clients, Community Legal Services and Counseling Center, Cambridge, Mass. (2002-2005). Project cited in Anderson et al., *supra* note 11.

182. See Bruce J. Winick, *Therapeutic Role of Counsel in Litigation*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 309, 322 (Dennis P. Stolle et al. eds., 2000).

183. Alex Hurder, *The Pursuit of Justice: New Direction in Scholarship about the Practice of Law*, 52 J. LEGAL EDUC. 167, 180 (2002).

184. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 501 (1994). On a related theme, the nature of proceedings as adversarial, a given for most law students whose prior experience is in the context of mock trials with static facts and role play, may in fact be unsettling or difficult for a live client. Many legal disputes happen within the context of an ongoing social or professional relationship; here, the original relationship will (even must) remain intact to some extent during and after dispute resolution. See LIND & TYLER, *supra* note 156, at 27. Yet in spite of this, parties in lawsuits are encouraged to think in terms of “good” and “bad,” “right” and “wrong.” See Gutheil et al., *supra* note 160, at 12. All subtleties of human experience give way to these dichotomies. *But see* Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. L. J. & POL'Y 83 (2003) (advocating for a “different ethical standard” for criminal defense that defends the adversarial process generally and the duty of zeal and confidentiality specifically).

overlooks the insights that clients can bring to case theory and ignores the possibility that clients have other goals for case theory besides winning.¹⁸⁵

The liberties that the court and attorneys take in ordering clients' lives (their calendars and their narratives) and the loss of control parties experience creates potentially damaging power differentials between attorney and client, and court and client.¹⁸⁶ These power differentials may mirror the power imbalance experienced by the client in the very matter for which they are before the court.¹⁸⁷ Or the imbalance may be suggestive of the dilemmas already faced by a client who suffers the daily effects of poverty, racism, and/or family or community violence. If an attorney is complicit, however unintentionally, in these power differentials it can harm the trust and cooperation required in an empowering client-centered relationship.¹⁸⁸

While this section focuses mainly on litigation, themes of delay and loss of control are familiar for transactional and project-model settings as well. Here, clients are people trying to harness their entrepreneurial and/or creative spirit to form a business; they are not-for-profit entities engaged in community development; they are interest groups; they are community organizers or advocates.¹⁸⁹ Many small businesses, particularly those started by low and moderate income entrepreneurs, are capitalizing their business with personal savings, loans from family, credit cards, or home equity lines.¹⁹⁰ Before the visions of small businesses, not-for-profits, and community organizers can be realized, there are reams of "regulator hurdles" and "hours [of] forms" to deal with.¹⁹¹ These clients may face lack of respect for an idea or for their ability to see a project through.¹⁹² The need to ask for money, and specifically to make this request from a formal

185. Miller, *supra* note 184, at 485.

186. See William L.F. Felstiner, *Justice, Power, and Lawyers*, in JUSTICE AND POWER IN SOCIOLEGAL STUDIES 60 (Bryant G. Garth & Austin Sarat eds., 1998).

187. See, e.g., Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL., PUB POL'Y, & L. 433, 437 (1998) (discussing Canadian study on civil compensation for sexual violence found that respondents associated delays in court proceedings with a loss of control).

188. Smith, *supra* note 184, at 120 (stating "[o]nce a lawyer has undertaken to represent an accused, it is often difficult to establish a relationship of trust and confidence. This can also be a problem for non-criminal lawyers, especially court-appointed or otherwise "free" lawyers. Clients who are unable to choose because they cannot pay for their own lawyer are more likely to be unsophisticated about the law, to feel more alienated in a legal setting, and to believe that their lawyer is not really working for them"); see *infra* note 234.

189. See, e.g., Jones, CLINICAL, *supra* note 65, at 211–18 (offering a description of the variety of client profiles in transactional and community economic development work); Carpenter, *supra* note 40, at 52 (discussing examples of 'project-based' clinics).

190. Susan Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. L. J. & POL'Y 249, 255 (2004).

191. Jones, CLINICAL, *supra* note 65, at 213.

192. *Id.* at 214–15 (describing a client as a young African-American woman, and a recovering addict, a woman who could easily have been disregarded in her efforts to start a business, but whose "enthusiasm, pride and dignity taught [the clinic] about the boundless human capacity unleashed by a highly motivated entrepreneurial spirit").

bureaucratic institution, can generate anxiety, inadequacy, or resentment. While loss of privacy per se may not be an issue for these clients, legitimate proprietary issues arise, as does a general sense of discomfort when high-stress exclusive disclosures are made on an officious clock and met with bureaucratic silence.

C. ADVOCACY AND REFORM

Systems-conscious students mindful of these themes might take a different approach to “witness prep” and client consultation than someone who is not anticipating anti-therapeutic effects. Instead of just discussing what a client should wear and what time to arrive,¹⁹³ the student might think to help the client anticipate some frustrations and discomfort. They might take some time to explain why certain disclosures are being made or why certain defenses must wait; alternatively, a student might forgo a certain strategy or theory if the damage to a client seems too great.¹⁹⁴ Or a student might think creatively about how to minimize the issues that might trouble their client; for example: Can they request that their client’s presence be waived for a given proceeding? Is their client interested in a referral for resources?¹⁹⁵ A student may, after consultation with a client, rethink a certain legally sound strategy because it does not comport with ongoing and vital dynamics of the client’s family or community system.¹⁹⁶ And certainly students might think about where they can challenge certain practices of the tribunal to foster a better experience or environment for their client.¹⁹⁷ Lastly, students mindful of the social and emotional costs of litigation and transactions can be mindful about empathically bearing witness to their client enduring the process.

At this juncture of student learning it can be powerful to reveal that: 1) our own ethical rules anticipate that the needs of our clients will not always synch up

193. Conversations already loaded with issues of class or privilege.

194. Goldfarb, *Theory-Practice*, *supra* note 30, at 1683 (discussing that a given legal strategy is only viable if attorney and client chose it together after comparison of alternatives).

195. See, e.g., Van Arsdale, *supra* note 58 (sharing the habit of carrying a list of referral material). Therapeutic jurisprudence is an “interdisciplinary enterprise” that proposes exploring ways to enhance the therapeutic effects and diminish the anti-therapeutic effects of legal rules, procedures, and actors; see Dennis P. Stolle, *Introduction*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* xv, xv (Dennis P. Stolle et al. eds., 2000).

196. Tyner, *supra* note 32, at 237–38 (discussing the cooperative and collaborative nature of legal advocacy).

197. Goldfarb, *Theory-Practice*, *supra* note 30, at 1685 (suggesting that judges can make better decisions if the lawyer refuses to oversimplify client narrative); Tyner, *supra* note 32, at 233 (discussing lawyer as social architect/engineer). To reinforce these concepts, one might consider intentionally teaching students about therapeutic jurisprudence (“TJ”). Therapeutic jurisprudence theorizes a legal system that affirms participants’ sense of, and need for, dignity and fairness. Mark A. Small, *Advancing Psychological Jurisprudence*, 11 *BEHAV. SCI. & L.* 3, 6 (1993); see also, Winick, *supra* note 182, at 320–21; Gary B. Melton, *The Significance of Law in the Everyday Lives of Children and Families*, 22 *GA. L. REV.* 851, 895 (1988). TJ considers how the law itself, its substance and its procedures, effect psychological functioning. The jurisprudence then aims is to find and exploit laws healing potential. See Winick, *supra* note 182, at 311.

perfectly with the institutional systems before them; and 2) our professional rules invite us to use our professional discretion to resolve conflicts and to engage in reform.¹⁹⁸ As students anticipate identifying and resolving professional conflicts and/or engaging in reform, it helps to expose students to various codes of professional conduct that directly discuss the importance of social justice and human dignity. One should also expose students to the critiques of the legal system found in critical legal theory. Doing so helps students answer the call afforded them by our profession in a way that promotes social justice.

1. PROFESSIONAL CODES

Our code of professional conduct does not speak to a straightforward interaction with legal systems; rather as mentioned earlier, the *Model Rules* anticipate dissonance between the needs and wishes of a client, an attorney, and the systems in which they operate.¹⁹⁹ Yet, many schools approach professional responsibility training in a static and one-dimensional way: learn ethics rules, apply them to a scripted scenario in a controlled milieu, spit out the answer.²⁰⁰ In reality, ethical determinations are fluid and open to interpretation.²⁰¹ Rules “often prescribe terms for resolving such conflicts”²⁰² but even given the availability of certain rules “many difficult issues of professional discretion can arise.”²⁰³ In these cases, attorneys are called upon to use “sensitive and professional moral judgment guided by . . . the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests [amongst other principles] . . .”²⁰⁴ Moreover an attorney is invited “[a]s a public citizen to improve the law . . . and employ [knowledge of the law] in reform of the law.”²⁰⁵

As a student ponders potential next steps or reform, exposing them to various ethical codes invites a conversation about professionalism and duty, and demonstrates how minds can differ as to how to conduct oneself in service to a client, a profession, and justice. Professional codes that have been referenced by clinicians include the Code of Ethics of the National Association of Social Workers, the Ethical Principles and Code of Conduct of the American Psychologi-

198. MODEL RULES pmbll. cmt. 6 (2009).

199. MODEL RULES pmbll. cmt. 9 (2009).

200. Many law curriculums have a professional lawyering class, but most students never visit the subject again with intentionality until it is time to study for the Multistate Professional Responsibility Exam (MPRE).

201. Even the MPRE advertises itself as a “best answer” style test. See Overview of the MPRE, NCBE (2015), <http://www.ncbex.org/about-ncbe-exams/mpre/overview-of-the-exam> [<http://perma.cc/3XY6-QR9D>] (last visited Jan. 9, 2016).

202. MODEL RULES pmbll. cmt. 9 (2009).

203. *Id.*

204. *Id.*

205. *Id.* at cmt. 6 (2013).

cal Association, and the American Nurses Association Code of Ethics.²⁰⁶ When students compare and contrast priorities and approaches, they can note alternate language and focus, and they are invited to think critically, expansively, and imaginatively. In so doing, students explore and expand their definition of social justice²⁰⁷ or find guidance in realms where our own professional code of ethics seems silent or lacking.²⁰⁸

206. See generally Aiken & Wizner, *supra* note 6 (discussing the Social Worker’s Code of Ethics and how it’s treatment of social justice specifically may map onto our work as attorneys); Rand, *supra* note 31 (discussing the Nurses Code of Ethics as well as the Social Worker’s Code); Anderson et al., *supra* note 11, at 663 n. 11 (comparing and contrasting aspects of the Social Worker’s Code of Ethics alongside that of attorneys); Wiebe, *supra* note 138, at 185-187 (considering sources from the Old testament to the Social Worker’s Code of Ethics in discussing themes of social justice and morality in the practice of law).

207. The American Nurses Association Code of Ethics for Nurses also contains provisions that include respect for human dignity, self-determination, and responsibility to the public and to social reform:

Provision 1: The nurse . . . practices with compassion and respect for the inherent dignity, worth, and uniqueness of every individual

Provision 8: The nurse collaborates . . . in promoting community, national, and international efforts to meet health needs.

Provision 9: The profession of nursing . . . articulat[es] nursing values, for maintaining the integrity of the profession and its practice, and for shaping social policy.

AM. NURSES ASS’N., CODE OF ETHICS FOR NURSES §§ 1, 8–9 (2015). Lastly, in a long statement of General Principles that precedes specific ethical standards for professional conduct, the American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct discusses aspirations meant to “guide and inspire psychologists toward the very highest ethical ideals of the profession.” These principles include:

Principle A: Beneficence and Non-Maleficence

. . . In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons

Principle D: Justice

Psychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists.

Principle E: Respect for People’s Rights and Dignity

Psychologists respect the dignity and worth of all people, and the rights of individuals to privacy, confidentiality, and self-determination. Psychologists are aware that special safeguards may be necessary to protect the rights and welfare of and respect cultural, individual and role differences, including those based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, and socioeconomic status, and consider these factors when working with members of such groups. Psychologists try to eliminate the effect on their work of biases based on those factors, and they do not knowingly participate in or condone activities of others based upon such prejudices.

AM. PSYCHOLOGICAL ASS’N., ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (2010).

208. Wiebe, *supra* note 138, at 190. This may be particularly necessary and important where an attorney is trying to account for a holistic sense of who their client is and what their client needs and can do, as discussed above in regards to various client-systems-theories—e.g. if one is to zealously advocate for their individual clients can they regard the needs of the community and family around that client? If so to what extent? Perhaps students will have a strategy for whether or how to regard a client’s own personal (family, community) systems if they have been exposed professional codes that mandate consideration of those systems. NASW CODE, *supra* note 11. Discussion of various codes can also demonstrate how even those directed by different professional

Conversations about ethical conduct must be “intentional inquir[ies]” that aim to settle the immediate legal issue, but also discussions that address “the assumptions and values that underlay [choices];”²⁰⁹ because the ethical way forward is likely to be as imprecise as the facts that brought the advocate to an ethical crossroads.²¹⁰ An integrated social justice framework asks that students invite consideration of social justice issues such as race, gender and power into their choices.

2. CRITICAL THEORIES AND SELF-DETERMINATION THEORY

Critical theories provide important concepts to study at many junctures in the clinical curriculum. Critical legal theory and critical race theory lend themselves nicely to a discussion of how students might analyze the rules, requirements, and biases of institutional systems as they endeavor to make ethical and empowering decisions for their clients. These theories teach students to think critically about what it means to advocate for someone and for a given cause when deciding how rules should be interpreted, for whose benefit, and to what gain.²¹¹ Critical legal studies views legal precedent not as a

formal mechanism for determining outcomes in a neutral fashion” but . . . rather [as] a ramshackle ad hoc affair whose ill-fitting joints are soldered together by suspect rhetorical gestures, leaps of illogic, and special pleading tricked up as general rules, all in the service of a decidedly partisan agenda that wants to wrap itself in the mantle and majesty of law.²¹²

Emerging from this jurisprudence, critical race theory suggests that the law’s reliance on “rational” or “objective” truth, as if there is a “neutral perspective,” is misplaced: “The problem is that not all positioned perspectives are equally valued, equally heard, or equally included. From the perspective of critical race theory, some positions have historically been oppressed, distorted, ignored, silenced, destroyed, appropriated, commodified, and marginalized—and all of

mandates can concur where a collaborative sense of social justice and service to a particular client guides them. Anderson et al., *supra* note 11, at 668.

209. Wallace J. Mlyniec, *Where To Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLINICAL L. REV. 505, 550 (2012).

210. *See id.*

211. Antoinette Sedillo Lopez, *Teaching A Professional Responsibility Course: Lessons Learned From the Clinic*, 26 J. LEGAL PROF. 149, 151–52 (2001–2002); Quigley, *Letter to a Law Student*, *supra* note 30, at 17–18 (discussing a continuum for teaching legal ethics, where on one end teaching ethics is seen as teaching moral perception and moral judgment).

212. Derrick Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 899–900 [hereinafter Bell, *Who’s Afraid* (citing Stanley Fish and stating, “critical legal studies view of legal precedent as not a formal mechanism for determining outcomes in a neutral fashion—as traditional legal scholars maintain—but is rather a ramshackle ad hoc affair whose ill-fitting joints are soldered together by suspect rhetorical gestures, leaps of illogic, and special pleading tricked up as general rules, all in the service of a decidedly partisan agenda that wants to wrap itself in the mantle and majesty of law”).

this, not accidentally.”²¹³

These theories seek to include or empower “traditionally excluded views.”²¹⁴ One intimate and essential way attorneys can empower those views is in moderating how they listen to their clients and interpret their needs.²¹⁵ When students use these theories and expansive notions of social justice to inform the mandate of zealous advocacy, they can empower their client to some degree within the institutional systems.

Consider briefly the empowerment themes in Self-Determination Theory. Self-Determination Theory looks to human experience to understand what motivates people and posits that the ultimate goal for any intervention is inspiring a person’s “optimal functioning.”²¹⁶ The theory suggests that three basic psychological needs are associated with increases in wellbeing: autonomy, competence, and relatedness.²¹⁷ Autonomy refers to the need to have an independence of being; competence is defined as the desire to “master one’s environment;” and relatedness refers to the desire for meaningful social interactions.²¹⁸ Client awareness and self-awareness skills all seek to optimize the client’s sense of autonomy, competence, and relatedness because they seek to unearth a client’s talents, reveal what motivates the client, and insure that advocacy is in partnership with the client.²¹⁹ Students can further provide for client self-determination when they insist that the institutional system recognize and credit their client’s previously marginalized or subordinated position.

V. ILLUSTRATION

Approaching casework with an eye to client awareness, self-awareness, and systems awareness encourages students to “locate the client authentically” and choose action that is “both client centered, and holistic [and I would add, realistic and ethical] as well.”²²⁰ The following is a description and analysis of a hypothetical based on an experience with a student team that demonstrates such advocacy.²²¹

213. *Id.* at 901.

214. *Id.*

215. See Tremblay & Weng, *supra* note 50, at 147; Mlyniec, *supra* note 209, at 541; see also Smith, *supra* note 184, at 114–23 (discussing the difficulty and nuance of establishing an attorney-client relationship in the criminal defense context).

216. Maryle’ne Gagne’ & Maarten Vansteenkiste, *Self-Determination Theory’s Contribution to Positive Organization Psychology*, *ADVANCES IN POSITIVE ORGANIZATIONAL PSYCHOLOGY* 63 (Arnold B. Bakker ed., 2013).

217. *Id.* at 64.

218. *Id.*

219. See Bell, *Serving Two*, *supra* note 79, at 512; Tyner, *supra* note 32, at 227.

220. Steinberg, *supra* note 84, at 4, 6; Tremblay & Weng, *supra* note 50, at 180 (noting that a “greater appreciation for narratives and stories” is important in insuring that the values of the dominant culture do not subvert a subordinated culture).

221. Names and identifying content has been changed.

A. THE FACTS

A student team represents a grandmother in her case for third party custody. The grandmother is sixty-four years old, a veteran of the air force, and a former government employee who currently resides in Washington, DC. She is the primary caregiver to three grandchildren from two different fathers. Both fathers and the mother of the children are largely missing in action due to a combination of mental health deficits, substance abuse, and incarcerations. By emergency order, following an episode of family violence at the hands of their mother, the client was granted temporary custody of her grandchildren.

The eldest child is seventeen, the next is eleven, and the youngest is two. The client worked a security detail in a government office buildings until the youngest grandchild came into her exclusive care two years ago, at which time she left her job to provide for the child at home. The children and their grandmother live together with the client's mother, the children's great grandmother. The family of five exists on extremely limited means of approximately \$20,000 a year comprised of the client's modest military benefits and her mother's modest pension. The family is African-American.

The two-year-old boy is home all day with the client; the eleven year old excels at her middle school; but the seventeen year old, we will call him Michael, has struggled. In response to Michael's struggles in school, the client placed Michael with her other daughter who lives outside of Washington, DC, two metro stops away. Living with his aunt during the week, Michael had, for the last year, attended a school he enjoyed. The school's focus on visual and performing arts suits him and he explains that he appreciates being able to attend school away from the "foolishness" in his neighborhood. Asked to explain, he describes scenes of troubling bullying and aggression at his neighborhood school. This year the school pushed back against some of the inconsistencies on Michael's registration forms, noticing that no parent or legally declared substitute had signed his forms. Further investigation revealed that the closest person he had to a legal guardian, his grandmother (the client), lived in Washington, DC. The school indicated that with a final order of final custody, the client could sign the requisite papers for an inter-county transfer; until then, Michael would have to attend his neighborhood school or move into the correct county to attend their school. Frustrated and discouraged, Michael responded that he was not going to school at all.

B. THE DILEMMA

The students were troubled by the scenario for two main reasons: 1) in order to demonstrate their client's standing under the third party custody statute, the students had to demonstrate that Michael lived with her; and 2) they had to establish that their client was "primarily assum[ing] the duties and obligations for which a parent is legally responsible" (including providing food, clothing,

shelter, and education amongst other needs).²²² The students' initial reaction was that Michael simply must be in school. In their estimation, it was a losing proposition for the case if he was not in school because education is so important. If their client was not providing for Michael's education, then the court might find that she was not primarily assuming the parental duties. They were willing to try to advocate for their client with the administrators in the out-of-county school, but this would require making the case to administrators that Michael could live with his in-county Aunt. While this would allow Michael to go to the school of his choice, it would encourage an arrangement in which he would not be living with their client and she would lose standing as a viable third-party custodian. Michael would simply have to move home and enroll in his local school.

When they voiced these sentiments, their client would sigh, shake her head, and indicate she was "working on him, but that Michael has always had a mind of his own. He's gonna do what he is gonna do and that is that." And indeed it seemed to the students as though the client was allowing Michael to skip school. The students were horrified. Education is objectively so important, they reasoned; Michael was too close to the end of high school not to finish; the judge would not look favorably upon their client if she could not get Michael into school. Their client was making a horrible decision. Surely, the students persisted, she could or should insist that Michael come back to her home and attend the neighborhood school. They wondered whether her inability to assert her authority in this way suggested that she should not be seeking third-party custody at all. They wondered if Michael's stubbornness did not suggest that their intervention was too late and perhaps everyone should just "wait it out" since Michael was almost eighteen anyway. Surely, the students reasoned, if their client insisted on going forward, she had to understand that her options and Michael's options were limited. If the family could not realize this and adjust their behavior accordingly, then they were going lose the case. If attending his school of choice was paramount, perhaps the aunt should be the one to seek custody since it would be easier to demonstrate that Michael lived with her?

But what if their client disagreed? What if she insisted on pursuing custody even while Michael remained steadfast in his decision to attend school out of county? The students were concerned about the mechanics and ethics of representing their client. The hearing would likely be an *ex parte* hearing comprised only of a direct examination of their client. How could they elicit questions on direct about where Michael lives? How could they coach her to answer?

On the one hand, the emphasis on client centeredness and client empowerment does not preclude consciousness and conversation about where the client's

222. D.C. CODE § 16-831.02 (2014).

choices or preferences might be contrary to others interests and positions.²²³ If a goal of lawyering is to solve problems, and do so creatively, it would follow that one should be open to critically examining the impact of the client's desires or decisions.²²⁴ It may be fair then to engage with the client about whether her attitude toward Michael's education amounts to a decision to defer to the whims of a seventeen year old about whether and how his education proceeds.

Moreover, lawyers are ethically obligated to speak truthfully to their clients about the relative strengths and weaknesses of the client's position.²²⁵ The *Model Rules* require an attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation."²²⁶ Where a client's position is counter to obvious evidence or a sound predilection of the court, the client is likely not served by maintaining the party line.²²⁷ Indeed the court would not like to hear that a seventeen year old was running the show, and would that reaction by the court be particularly biased given then this young man was a young black male? Nor would the court abide someone making an end run around the requirements for standing. If the lawyers "played cute" on the issues with Michael, would they risk their and their client's credibility and threaten the strong case for custody of the other two children?

On the other hand, the student's client and Michael have an important and central story to tell about how this family orders itself to meet many goals, including those involving Michael's education and safety.²²⁸ To lawyer empathically and collaboratively, and to reflect critically about the systems in which their client and Michael operate, the students must remain open to the reality that the family has analyzed the problem correctly.

Were the students correct to conclude that Michael *must* return home? Should they counsel their client to consider not seeking custody of Michael at all?²²⁹ The analysis necessary to answer the students' questions is obviously not contingent on applying the skills and understanding of each category of the social justice

223. Anderson et al., *supra* note 11, at 18; see Rein, *supra* note 89, at 1117–18 (stating "[I]nterdependent human beings cannot exercise autonomy without nurturance from the community, autonomy cannot mean mere 'freedom from restraint'").

224. Silver, *supra* note 112, at 295; see Wiebe, *supra* note 138, at 215 (discussing balancing a client's "very real desire for vengeance" as evidenced by "going for blood" with broader themes of social justice). Consider also that models of collaborative lawyering, for example, espouse the notion that "[t]he lawyer's role is not merely to work for an individual client, but to work with community partners to reach a shared outcome and vision of justice . . ." Tyner, *supra* note 32, at 226.

225. Anderson et al., *supra* note 11, at 677.

226. *Id.* (citing MODEL RULES R. 1.4 (2009) (obligating lawyers to keep clients appropriately informed about their case's status and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation")).

227. *Id.*

228. See White, *supra* note 88.

229. Sometimes, "[a]n approach that frankly recognizes the issue as one of competing interests and the need for mediation between them will allow far fewer and less permanent incursions on an individual's dignity and far fewer instances of attorney disloyalty . . ." Rein, *supra* note 89, at 1118 (discussing competency constructs

framework linearly. Indeed the skills and understanding bound up in any one of the umbrella headings—client awareness, self-awareness, and systems awareness—are relational to the skills and understandings of the other categories. Yet one can see how competency in each area leads the student toward ethical decision-making.

C. THE ANALYSIS

The analysis below follows the client, self, systems framework to demonstrate how the three-tiered analysis allows the students and instructor to work with social justice themes in the context of trial skills preparation.

1. CLIENT AWARENESS

As an obvious starting point, lawyers are ethically obligated to represent their client's interests zealously.²³⁰ A student versed in social systems theory, cultural competence, and other social justice theories is able to appreciate the nuanced position a client might have and work with the client to present that position in the legal system. Filtered through a certain lens, the client's actions are sound and entirely square with the statute.²³¹

In their case, the students' client was wrestling with a willful teenager and confronted with some difficult choices impacting her grandson's education and safety. She was, in point of fact, parenting a child through a difficult life crossroads; and she was doing so, unlike a wealthy counterpart, with limited means of redress.²³² She would at least be better positioned to locate and execute options for the child if she had a definitive declaration of custody from the court. A different case theory emerges if the students adopt this thinking. They could position their client in a deliberate, considered mode; not a reactive, apologetic one.²³³ Instead of asking the client to hide the family's agenda in regards to

and declaring that “[t]elling someone he cannot do exactly what he wants because it will unfairly harm someone else is far more humanizing and dignity-preserving than telling him that he cannot do it because he is incompetent . . .”).

230. Anderson et al., *supra* note 11, at 677 n.24 & 28.

231. Wiebe, *supra* note 138, at 184–85 (quoting Judge John T. Noonan, Jr.: “[t]he analytic bent of most of those now so engaged [in legal history, philosophy, and education] leads them to reduce ‘person’ to a congerie of ‘rights,’ with the highest ideal, if any is expressed, to do ‘justice’ by enforcing the rights. Evading analytical reduction, the whole person escapes them. But it is necessary to insist that the person precedes analysis, and to seek to do justice in the narrow sense is no more a full human aspiration than such justice is the sum of human virtues”).

232. Bryant, *supra* note 50, at 70–71 (discussing “Habit Three: Parallel Universe” in which students are “invite[d] . . . to look for multiple interpretations [for client behavior], especially at times when the student is judging the client negatively”).

233. Critical theory suggests a neutral perspective is a myth. We can chose to advocate that our client's perspective is accurate and important:

We emphasize our marginality and try to turn it toward advantageous perspective building and concrete advocacy on behalf of those oppressed by race and other interlocking factors of gender,

Michael, instead of agreeing to cast Michael as reckless and impulsive, the students could frame this families' insistence that Michael receive the best education available to him as evidence of insight and persistence. Instead of hoping the court did not notice some perceived inconsistency in terms of residency, they could declare the instability and uncertainty as a problem the court is positioned to solve. Why not ask the court to help the only parent this child had ever know solve an otherwise intractable problem?

2. SELF (STUDENT)-AWARENESS

It can be easy for students, particularly those conditioned by much of their law school experience to believe in "hard evidence" and final opinions, to miss the obvious point that the truth is a moving target and no position is neutral.²³⁴ Instead students should be asked to think critically about what facts they are choosing to editorialize and how they are editorializing them.²³⁵ How much of their discomfort is informed by their panic over not having a tidy case that fits precisely into statutory definitions? How much of their discomfort is influenced by insidious bias or assumptions that Michael, as a willful young black man, has motives that are somehow insincere or damaging; or that his grandmother, the parent of a woman who is now absent, has not proven herself to have appropriate parental instincts? One could start by asking the students to consider how their own analysis, or the analysis of the court, would differ if the news they were hearing from their client was that her grandson attended a private boarding school because his local high school was underperforming. Would they be asking themselves about whether they could or should discuss Michael's whereabouts with the court? Would they feel the need to confront their client about her

economic class, and sexual orientation. When I say we are marginalized, it is not because we are victim-mongers seeking sympathy in return for a sacrifice of pride. Rather, we see such identification as one of the only hopes of transformative resistance strategy. However, we remain members of the whole set, as opposed to the large (and growing) number of blacks whose poverty and lack of opportunity have rendered them totally silent. We want to use our perspective as a means of outreach to those similarly situated but who are so caught up in the property perspectives of whiteness that they cannot recognize their subordination.

Bell, *Who's Afraid*, *supra* note 212, at 902.

234. Bell, *Who's Afraid*, *supra* note 212, at 901; Bryant, *supra* note 50, at 37.

You know, there is a world of difference between facts and the truth. You can have so many facts that you don't deal with the truth. You never get to the truth. You have the places where, the people who, the times when, the reasons why, the methods how - blah blah. And never get to the human truth. The human truth is as elusive as the air. And as important as the air.

Nikki Giovanni Honors Her Late Friend Maya Angelou, NPR (May 28, 2014) (airing clip from 2010 interview with Maya Angelou), <http://www.npr.org/2014/05/28/316677613/nikki-giovanni-honors-her-late-friend-maya-angelou> [<http://perma.cc/C7Q7-NWTQ>].

235. See *supra* note 234.

decision? Would they be worried about the court's conclusions?²³⁶

3. SYSTEMS AWARENESS

The option of profiling the issue with Michael's schooling confronts the legal system with reasoning and argument that provides for the client's self-determination. It credits her instincts and avers that her motivations are sound. To take up such a gauntlet, students would be coached to proceed armed with thorough legal analysis. How does the court define residency for the purposes of jurisdictional analyses? What constitutes a temporary absence from a jurisdiction? Have the courts spoken on the issue of "residing with" in the context of a child away at school?

And of course while this option is a sound one, it is not the only one available to students. Students are trained to attempt to reconcile the preference of a client and the attorney's professional instincts with the temperament of the assigned judge. Therefore, students could be challenged to describe a case theory that accounts for institutional biases and predilections while still honoring the client's narrative. Here, students could structure their questions based on the truth they know: Michael's grandmother's house is his home. He eats family meals there; he spends time with his siblings there; the door is always open to him there; he has a place to sleep there and clothes to wear there. There are many and varied questions to ask that honor the family arrangement and tick boxes for the court. Meanwhile, the team could strategically refrain from inquiring or inviting inquiry into more problematic issues of schooling, other residences, and number of nights spent in one bed versus another. With this strategy, however, students could be encouraged to invite their client into the decision-making both as a matter of empowerment (lest she feel judged for her current reality) and also for the basic trial prep issue of wanting to insure that they and their witness have developed a shared language with which to communicate to the court.²³⁷

With either option the students add the third tier of reasoning, systems awareness. Both options honor a subordinated narrative while accounting for the constraints of the legal system. Both options also acknowledge (one more

236. Bryant, *supra* note 50, at 68 (discussing "Habit Two: The Three Rings" which asks the students to analyze the similarities and differences between the client and the legal system and the student attorney and the legal system and identify the cultural differences that might influence the case).

237. Lucie White offers a brilliant analysis of how easy it is to be complicit in the system's inclination to silence our clients by submitting ourselves and our clients to a closed view of dominant language. See White, *supra* note 88, at 45-47. Professor White discusses the welfare system and "race and gender ideology in social arrangements" and posits that "[g]iven the power amassed behind these forces, we might predict that they should win the contest with Mrs. G. for her voice." *Id.* at 44. She then reveals, however that "[b]y talking . . . Mrs. G. claimed, for one fragile moment, what was perhaps her most basic 'life necessity.'" *Id.* at 50. Mrs. G.'s voice affirms a "feminist insight that dominant languages do *not* construct [] closed system[s] . . . Although dominant groups may control the *social institutions* that regulate these languages, those groups cannot control the *capacity* of subordinated peoples to speak." *Id.*

explicitly than the other) that there are underlying reasons for the client's reality. There are other unjust institutions and social forces that create the "savage inequalities"²³⁸ in the client's (and Michael's) education and housing options. Michael's school is located mere minutes and no more than two miles from the more attractive option. Why is it an underperforming school with an undercurrent of violence? Why can his family not afford to move approximately 200 yards to cross out of the District and into an affluent neighboring county? There is a historical basis here; racial basis. Requiring students to wrestle with these larger themes of structural and institutional inequity helps them honor a professional responsibility to resolve conflicts in a way that improves the equality and responsiveness of law.²³⁹

Clinics that integrate social justice imperatives with skills training cultivate in students a meaningful appreciation for the complexities of human experience. These are students who are more likely to be open to the relativity of truth and poised to be thoughtful about the ethical practice of law.²⁴⁰ Integrated skills-justice curriculums serve other pedagogical goals as well, each of which invite in-depth exploration of their own, but will be mentioned briefly in closing here.

CONCLUSION: ESSENTIAL LEARNING AND SUSTAINED PRACTICE

Textbooks abound with descriptions of skills. Law schools offer skills development courses and simulations. There is, nonetheless, the concern that without a live client context, the skills training falls flat. Addressing that pedagogical concern, law schools may offer clinics and externships to contextualize the skills. These modes of teaching have value, value most recently recognized by the American Bar Association in its decision to allow that simulations and externships can satisfy the required experiential learning credit hours.²⁴¹ Similarly, many fine clinics chose to be oriented in a positivist skills framework.²⁴²

Learning skills in externships and skills-based clinics goes part of the way towards correcting the concern that learners, particularly adult learners, better internalize skills when they are mastered in context.²⁴³ So one might ask, why integrate social justice education with skills training? In answer, this Article ends

238. JONATHAN KOZOL, *SAVAGE INEQUALITIES* (1991).

239. *Id.*

240. Mlyniec, *supra* note 209, at 547.

241. STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 303(a)(3) (AM. BAR ASS'N 2014) (stating that the "one or more [required] experiential course(s) totaling at least six credit hours . . . must be a simulation course, a law clinic, or a field placement").

242. *See, e.g.*, Roy Stuckey et al., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP* (2007).

243. Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 328–29 (1982); J.P. Ogilvy et al., *LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS* 146 (2d ed. 2007) ("[P]rofessional knowledge is derived from experience, and such knowledge is the result of a disciplined thought process.").

where it began: on the premise that the history of our vocation and our professional standards invites exploration of social justice, our students benefit from it, and it enriches instruction and learning.

There is an obvious focus on wanting to ensure that clinical education imparts “transferable competencies” to its students.²⁴⁴ And to be sure, if the legal academy is to embrace social justice modalities it will be because the academy can locate and market transferrable competencies to its student body and prospective students. The lessons learned with an integrated social justice-skills curriculum are relevant and transferrable, and not just for those who chose to practice “poverty law.” To begin with, many themes that show up in integrated curriculums are evident in business and for-profit settings. Themes of empowerment and mindfulness, for example, are not themes for poverty lawyers alone. Self-Determination Theory is being applied to business management in the areas of work engagement, organizational commitment, and how proactive and flexible employees can be.²⁴⁵ Organizational psychologists are asking how mindfulness might lead to transformational learning in work settings.²⁴⁶ Furthermore, themes of cultural competence are not just a matter for those dedicated to working with subordinated others; rather the “very concept of domestic business may have become anachronistic.”²⁴⁷

Similarly, law students are not asked to sit with emotional content, ask open ended questions, and resist jumping in with insight, analysis, and judgment in other contexts in law school; yet these are vital tools for effective professional communication no matter where they ultimately work.²⁴⁸ Lastly, it is no secret that lawyers and law students have disproportionately high incidents of depression and anxiety, as well as substance abuse.²⁴⁹ The high intensity environments of corporate and not-for-profit workspaces alike can prove to be challenging for many, and leads to burn out for some.²⁵⁰ Students exposed to themes of mindfulness, boundaries, and other self-care mechanisms, are better

244. Kosuri, *supra*, note 1, at 341.

245. Gagne' & Vansteenkiste, *supra* note 216, at 71.

246. *Id.* at 189.

247. One must consider the perspectives of foreign cultures and “the influence of national and ethnic cultures on organizational functioning” in defining “global strategies and management approaches from the perspective of people and culture.” NANCY J. ADLER & ALLISON GUNDERSEN, INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 5, 9 (5th ed. 2008); see P. CHRISTOPHER EARLEY & SOON ANG, CULTURAL INTELLIGENCE: INDIVIDUAL INTERACTIONS ACROSS CULTURES 59 (2003).

248. John T. Legier Jr., *Assessing Leadership Effectiveness: The Relationship Between Emotional Intelligence and Leadership Behaviors on Group and Organizational Performance*, 111 (December 2007) (unpublished Ph.D dissertation, Southern Illinois University Carbondale), https://books.google.com/books?hl=en&lr=&id=oM3NB1g0Af0C&oi=fnd&pg=PR1&dq=John+T.+Legier+Jr.,+Assessing+Leadership+Effectiveness:+The+Relationship+Between+Emotional+Intelligence+and+Leadership+Behaviors+on+Group+and+Organizational+Performance&ots=clkHHn_53S&sig=t8n38fSe9C2f7yMDFJH2laPKGQs#v=onepage&q&f=false [perma.cc/4XTA-YQ3P] (last visited January 9, 2016).

249. Murdoch, *supra* note 140, at 483.

250. *Id.*

able to cope. Students with a sense of perspective and persistence, engendered by their time working on important social justice issues will have critical skills in resiliency that they can bring to bear on whatever work they undertake.²⁵¹

More generally, integrated curriculums organized around general themes of client awareness, self-awareness, and systems awareness inspire learning objectives that are more reflective and fundamental than rote skills curriculums or amorphous social justice courses can be.²⁵² Reflective objectives, in turn, give rise to learning that is more transferable to future learning and future professional roles.²⁵³ Further, the notion that learning about lawyering in a social justice setting is wasted on those who decide to work for a private law firm disregards the findings of cognitive scientists and others concerning cognitive flexibility.²⁵⁴ Cognitive flexibility can be understood as the ability to adjust one's thinking from a known context to a new context.²⁵⁵ Cognitive flexibility is especially important for learners who will later operate in "ill-structured domains," such as legal domains where "there is not likely to be a set, technical approach to follow to reach a solution nor necessarily a single determinant answer to resolve the matter."²⁵⁶

An oversimplification or routinization of concepts does not encourage "flexible use of pre-existing knowledge, the ability to use multiple schemas, and

251. Social justice work teaches resilience. Quigley, *Letter to a Law Student*, *supra* note 30, at 24 (quoting a veteran social justice advocate saying "[i]f you cannot handle chaos, criticism and failure, you are in the wrong business," and stating that "[t]he path to justice goes over, around and through chaos, criticism and failure. Only by experiencing and overcoming these obstacles can you realistically be described as a social justice advocate").

252. Goldfarb, *Theory-Practice*, *supra* note 30, at 1652 n.221 (citing D. BELL, *THE REFORMING OF GENERAL EDUCATION* 108 (1966) as stating "the broader [the theory] is, the greater the chance it will prove useful in practice"). Note that while Bell declares that theoretical knowledge alone has "permanent value," *id.*, others would argue the interplay of theory and practice is what deepens learning. See, e.g., Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *FORDHAM L. REV.* 1929, 1932 (2002) [hereinafter Wizner, *Law School Clinic*] (discussing the view of Jerome Frank and others that "good theory is practical, and that good practice is informed by theory"). Goldfarb, *Theory-Practice*, *supra* note 30, at 1653 (stating that at its best the clinical "model of lawyering precludes the treatment of cases in a mechanistic, formulaic manner" and further stating that by extension clinics, must resist mechanistic, formulaic presentation of skills and content to support the goal of future learners).

253. Goldfarb, *Theory-Practice*, *supra* note 30, at 1653 (stating that "[s]tudents do inevitably learn some lawyering skills in the course of a clinical program, but more importantly, they learn the foundational skills for learning further skills in the future") (quoting Bellow as stating "After graduation our students will be plunged into a welter of impressions, processes, roles and obligations. The most important questions they will face will not be concerned with the coherence of doctrine or the skills of case analysis, but with making sense of this experience, of coping with it, understanding it and growing within it, in the context of the particular professional role they have chosen to perform."); see Ogilvy et al., *supra* note 243, at 147 (describing acquisition of expertise as a "process of adjustments").

254. The ability to adjust acquired understanding to a new context is, in and of itself, a skill associated with expertise or mastery. Ogilvy et al., *supra* note 243, at 147.

255. Stefan H. Krieger & Serge A. Martinez, *Performance Isn't Everything: The Importance of Conceptual Competence in Outcome Assessment of Experiential Learning*, 19 *CLINICAL L. REV.* 251, 272-73 (2012).

256. *Id.* at 271; see also J.P. Ogilvy, *supra* note 30, at 72-73 ("[W]hat passes for 'problem-solving' practice in much of law school is recitation of heuristic responses to well-structured problems rather than a true grappling with messy, ill-structured problems, such as those found in the actual practice of law.")

the skill to view a problem from different conceptual perspectives.”²⁵⁷ Law students who do pursue public interest careers have ample opportunity to cultivate and demonstrate cognitive flexibility. No one asks these students if they need or desire training in subject-specific areas like property and torts; no one is concerned that students’ time is wasted when they are asked to familiarize themselves in various applications of the Uniform Commercial Code of contracts. Few people worry that these fields are largely taught by the casebook method and employ corporate or private agency examples. It is assumed that students desiring to work in different areas of law will glean transferable skills from the lessons; and I suspect, for the most part they do. Yet students who desire to apply their law degrees to corporate or profit-driven objectives are not subjected to the same cross-contextual learning. Instead, there seems to be a sentiment that to force them to change their focus while in school is problematic or alienating.²⁵⁸

Lastly, assuming that students would not be politically, psychologically, or philosophically engaged by social justice themes does them a disservice beyond thwarting their opportunities for cross-contextual learning. To begin with, it assumes students are professionally driven suit jackets waiting to be filled, a sentiment with which countless law professors and students would take issue.²⁵⁹ Also, the notion that students want nothing more than a white-collar vocational school does little to instill in them the proud history of our profession or prepare them for the realities of ethical obligations.²⁶⁰ Nor does it acknowledge that the same transactional or corporate lawyer may one day be a judge or teacher or politician or community leader or someone in a position to engage with themes they might not have originally assumed they would upon graduation from law school.²⁶¹

Clinics, and law schools generally, should embrace the task of teaching students with diverse interests and long professional roads ahead of them. As

257. Krieger & Martinez, *supra* note 255, at 271.

258. Perhaps law schools could look to schools of social work as a source of comfort on this point. Schools of social work maintain a strong commitment to social justice, a focus much more explicit and codified than law schools, and yet have been able to adjust to the evolution of their field and the interest of students and professionals by offering courses of study that allow students to pursue their aspiration to go into private practice or for-profit endeavors.

259. Aiken & Wizner, *supra* note 6, at 71. Indeed, professional behavior is not “a primordial given.” Wizner, *Law School Clinic*, *supra* note 252, at 1936.

260. Wizner, *Beyond Skills*, *supra* note 5, at 331 (“We need to profess a social, political and moral agenda in our teaching, an agenda that exposes students to the maldistribution of wealth, power and rights in society, and that seeks to inculcate in them a sense of their own ability and responsibility for using law to challenge injustice by assisting the poor and the powerless. In professing such an agenda in teaching the representation of low-income clients, we as clinical teachers would not be doing anything new. We would be returning to our roots . . .”; and of course social justice is a professional responsibility; “[a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”). MODEL RULES pmb1. cmt. 6.

261. See *supra* note 260.

every clinician knows, one of the primary pedagogical tools for imparting professional skills is to allow for, in fact insist on, students assuming a professional role in casework. Yet, assuming the professional role of “lawyer” transcends being lead counsel on a case. It speaks also to the need for students to inquire of themselves, “‘Who am I as a lawyer?’ and ‘What am I doing when I do law?’”²⁶² And here is where social justice themes and the framework suggested herein play an important role: Students will necessarily explore larger who-am-I/what-is-law themes when they are asked to understand and lean into the best and the worst of their clients, themselves, and the systems in which they operate.²⁶³ And it is only after adopting such an informed sense of professional role that students can truly understand what it means to help.²⁶⁴

262. Wizner, *Beyond Skills*, *supra* note 5, at 340; *see* Caldwell, *supra* note 11, at 831 (discussing expanding the definition of the lawyer’s role to include an “ethic of care”).

263. Tyner, *supra* note 32, at 231.

264. Justice Sonia Sotomayor, U.S. Supreme Court, Remarks at the George Washington Law School Annual Moot Court (Jan. 23, 2014).