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## Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law

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# Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law<sup>†</sup>

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In a recent survey, nearly three-quarters of respondents rated “trustworthiness” as the most important reason for hiring an attorney.<sup>1</sup> Professional experience was the second most important reason, followed by price, and, finally, law school.<sup>2</sup> In a Gallup poll, when asked to rate the honesty and ethical standards of lawyers, 18% of respondents said “very high” or “high” compared to 31% of respondents who said “low” or “very low.”<sup>3</sup> Perhaps of greater note is that the percentage of respondents giving ratings of “very high” and

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1. Brenda Gallop-Goodman, *In Lawyers We Trust*, 25 AM. DEMOGRAPHICS 29 (May 2001).

2. *Id.* (noting that for 53% of respondents, years of professional experience was the most important criteria for hiring a lawyer, for 42% of respondents, price was the most important criteria, and for 20% of respondents, the law school from which the attorney graduated was the most important criteria).

3. U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001 113 tbl. 2.22 (2001) (citing The Gallop Organization, Inc., *The Gallop Poll*, available at <http://www.gallup.com/poll/releases/pr991116.asp>).

“high” has steadily *decreased* since 1976 from a combined total of 25% to the current 18%.<sup>4</sup> When comparing ratings of honesty and ethical standards to other professions, lawyers scored eleventh out of thirteen possible rankings.<sup>5</sup> Four percent of respondents ranked lawyers’ honesty and ethical standards as “very high,” compared to 40% who ranked firefighters as having “very high” honesty and ethical standards.<sup>6</sup> Professionals who scored lower than lawyers included business executives, insurance salespeople, people in advertising, and car salespeople.<sup>7</sup> Ratings of police officers’ integrity and honesty were consistently higher than lawyers’, with 68% of respondents saying “very high” or “high,” and only 6% responding “low” and “very low.”<sup>8</sup>

What does this say about public confidence in the court system, if attorneys are held in such low regard? In a national survey, 27% of respondents said they had “a great deal” or “quite a lot” of confidence in the criminal justice system and 26% said they had “very little” or no confidence.<sup>9</sup> This would be of little concern were it not for the public service aspect of the practice of law. The issue is further exacerbated by the apparent professional dissatisfaction among attorneys.<sup>10</sup> Daicoff encapsulates these issues in what she calls a “tripartite crisis,” highlighting the interdependence between three concerns: a growing lack of professionalism among attorneys, increasing lawyer dissatisfaction, and decreased public opinion of lawyers and the legal profession.<sup>11</sup> Daicoff reasons that this growing

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4. *Id.* (noting in 1976, 6% of respondents said “very high,” compared to 4% in 2001, and 19% of respondents said “high” in 1976 compared to 14% in 2001).

5. *Id.* at 112 tbl. 2.21 (citing The Gallup Organization, Inc., *The Gallup Poll*, available at [http://www.gallup.com/poll/topics.hnsty\\_ethics.asp](http://www.gallup.com/poll/topics.hnsty_ethics.asp)).

6. *Id.*

7. *Id.* Professionals that scored the same as lawyers in the “very high” category were: bankers, congress members, labor union leaders, auto mechanics, and Senators. *Id.* The picture is even bleaker when looking at the 14% of respondents who rated lawyers in the “high” response category. Professionals that scored lower than lawyers in this category were labor union leaders, insurance salespeople, advertisers, and car salespeople. *Id.* Nurses received the highest response rate in this category with 57%, followed by pharmacists, who received 53%, and firefighters, who received 50%. *Id.*

8. *Id.*

9. *Id.* at 107 tbl. 2.14.

10. Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U.L. REV. 1337, 1346-47 (1997).

11. *Id.* at 1340-41.

dissatisfaction has contributed to a “new era in the legal profession” that may result in a more humane and therapeutic practice of law under the auspices of several theoretical and practice-based approaches that she labels “the comprehensive law movement.”<sup>12</sup> Each of the ten “vectors” or theories in the comprehensive law movement in some way “optimizes human well-being” and focuses on “extra-legal concerns,” including the emotions of those involved and relationships.<sup>13</sup> Therapeutic jurisprudence (“TJ”) is noted as one of the most developed of the ten vectors<sup>14</sup> and is the primary theoretical approach that will be applied in this Article.

One of the key attributes of this comprehensive law movement is its interdisciplinary approach.<sup>15</sup> It is out of the growing concern about the perceptions of the criminal justice system and how these perceptions translate into practice that we have pursued this inquiry. As social work researchers in the criminal justice system, our interest has emerged from our interactions with defendants, victims, and professionals involved in the criminal justice system. We advocate the application of a social work generalist approach,<sup>16</sup> which will contribute to a more effective lawyer-client relationship, which will in turn enhance the overall effectiveness of criminal justice operations. As a major component of this approach, we argue for increased attention to race, ethnicity, and culturally competent practice in the lawyer-client relationship from a TJ perspective. Scholarship in TJ has just begun to explicitly address cross-cultural competency.<sup>17</sup> This Article is intended to further this area of literature and apply a TJ framework to a cultural competency education model for lawyers to use in approaching their clients. This framework is

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12. Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 465-67 (Dennis P. Stolle et al. eds., 2000) (stating the movement’s ten “vectors” are: “preventive law, therapeutic jurisprudence, procedural justice, restorative justice, facilitative mediation, transformative mediation, holistic law, collaborative law, creative problem solving, and specialized courts”).

13. *Id.* at 470.

14. *Id.* at 491.

15. Daicoff, *supra* note 12, at 470, 490.

16. See BARKER, *infra* note 43 and accompanying text.

17. See *infra* note 42.

presented as a critical component to the lawyer-client relationship and the effectiveness of the legal process.

The Article will be presented in two parts. Part I lays the theoretical and empirical foundation for the need for an emphasis on lawyers' cultural competence. Part II then details the substantive content of a culturally competent approach to lawyering. In Part I.A, we define TJ and discuss some of its current applications. In Part I.B, we identify the commonalities between TJ and the generalist social work model. In Part I.C, we discuss the current thinking and debates on racial and ethnic disparities and discrimination in the criminal justice system from a macro social work perspective. Part I.D describes a TJ approach to lawyering that addresses how TJ might be used to uncover key aspects of racial and ethnic disparities in the legal process. Part I.E presents a discussion of the empirical research that supports the important emphasis on "relationship" in the lawyer-client relationship while arguing that specific attention to racial and ethnic competency is notably missing. In Part II.A, we provide a discussion of the role of race in the lawyer-client relationship using racial identity development theory. Finally, in Part II.B, we present a cultural competency education model that integrates existing approaches in social work and law, and advocates a process that includes recommendations for: institutional change; infusion of diversity content throughout law school curriculum; an exploration of issues of power and oppression; an exploration and challenging of one's own racial beliefs and biases; and a skill-building component.

Although culture and multiculturalism can encompass a broad range of unique characteristics among groups of people, including race, gender, age, sexual orientation, social class, ethnicity, religion, and able-ness, we focus our attention on race, and, to a large extent, the challenges white law students face in becoming more culturally competent. We do this for several reasons. First, members of the dominant culture, in this case whites, are likely to have the most difficulty with cultural competency because they enjoy the most privileges in our society.<sup>18</sup> These privileges are unconscious for many

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18. Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 231 (2002); Thomas R. Bidell et al., *Developing Conceptions of Racism Among Young White Adults in the Context of Cultural Diversity Coursework*, 1 J. ADULT DEV.

whites, even “liberal” whites.<sup>19</sup> The literature discussed in the second part of this paper describes how whites are more resistant to examining issues of racism and privilege because this challenges the common and accepted images and messages members of the majority culture have received since childhood.

Second, as we will demonstrate, racial disparities are rampant in the legal system.<sup>20</sup> The majority of legal professionals are members of the white dominant culture, while racial minorities are disproportionately represented in the criminal justice system. Given the inherent power of the criminal justice system and the intersection of this power with oppression and discrimination,<sup>21</sup> we believe issues of race are a relevant starting place to help law students become more culturally competent. Finally, we believe that a focus on race is necessary because academic dialogues often obscure the the importance of race and dominant groups tend to “steal back the center” in dialogues on multicultural issues.<sup>22</sup> Thus, in our opinion, race is one of the largest hurdles to clear when assisting lawyers in becoming more culturally competent.

## I. THE THEORETICAL AND EMPIRICAL FOUNDATION

### A. *Therapeutic Jurisprudence Briefly Defined*

Therapeutic jurisprudence is an interdisciplinary approach to law that asks how the law itself might serve as a therapeutic agent without displacing due process.<sup>23</sup> It emphasizes how legal actors, legal rules, and legal procedures can produce therapeutic or anti-therapeutic consequences in legal practice.<sup>24</sup> The co-founders of TJ explain its

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185, 188 (1994).

19. See Silver, *supra* note 18, at 231; Bidell et al., *supra* note 18, at 188.

20. See *infra* notes 80-84 and accompanying text.

21. See *infra* notes 285-90 and accompanying text.

22. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons between Racism and Sexism (or Other Isms)*, in *CRITICAL RACE FEMINISM: A READER* 46 (Adrien Katherine Wing ed., 1997).

23. *ESSAYS IN THERAPEUTIC JURISPRUDENCE* xi (David B. Wexler & Bruce J. Winick eds., 1991) [hereinafter *ESSAYS*]. For a complete bibliography of published materials on therapeutic jurisprudence, visit <http://www.therapeuticjurisprudence.org>.

24. *ESSAYS*, *supra* note 23, at ix.

purpose and interdisciplinary focus as follows: “Therapeutic jurisprudence proposes the exploration of ways in which, consistent with principles of justice, the knowledge, theories, and insights of the mental health and related disciplines can help *shape* the development of the law.”<sup>25</sup> A TJ inquiry can consider the psychological and behavioral outcomes for legal actors, such as judicial satisfaction and burn-out,<sup>26</sup> defendant compliance,<sup>27</sup> or victim satisfaction.<sup>28</sup> TJ does *not* advocate an exclusive focus on therapeutic considerations, but seeks to include them with legal considerations.<sup>29</sup> Moreover, TJ encourages the empirical testing of therapeutic concerns in the legal process to determine their relevance and impact.<sup>30</sup> A TJ approach focuses on the process of law as well as its outcomes from the perspective of legal actors—judges, attorneys, or other legal professionals, and those subject to the law—victims, offenders, families, plaintiffs, and respondents.<sup>31</sup>

In analyzing these questions, TJ encourages the integration of interdisciplinary techniques into the practice and analysis of law.<sup>32</sup> It borrows from and integrates existing social and behavioral sciences research. For example, TJ has been merged with preventive law

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25. LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (David B. Wexler & Bruce J. Winick eds., 1996).

26. See Deborah J. Chase & Peggy F. Hora, *The Implications Of Therapeutic Jurisprudence For Judicial Satisfaction*, 37 CT. REV. 12, 12-20 (2000).

27. See, e.g., Bruce J. Winick, *Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change*, in ESSAYS, *supra* note 23, at 219.

28. See, e.g., Richard P. Wiebe, *The Mental Health Implications of Crime Victims' Rights*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 213 (David B. Wexler & Bruce J. Winick eds., 1996); Bruce Feldthusen, *The Civil Action for Sexual Battery: Therapeutic Jurisprudence?*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 845 (David B. Wexler & Bruce J. Winick eds., 1996).

29. ESSAYS, *supra* note 23, at xi.

30. *Id.*

31. David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225, 229 (2002). An example of a TJ inquiry in the court processing of sex offender would consider how the legal rules, legal procedures, or interactions with the judge and lawyers might impact a sex offender's cognitive distortions, contributing to the offender's denial and minimization of the criminal act. A TJ inquiry might also ask how legal rules, procedures, or legal actors promote cognitive restructuring, encouraging the offender to accept responsibility.

32. *Id.* at 226.

techniques,<sup>33</sup> cognitive-behavioral therapy,<sup>34</sup> and legal psychology.<sup>35</sup> The interaction between legal actors and defendants is an area of particular interest in TJ,<sup>36</sup> and a growing amount of TJ scholarship exists regarding the judge-defendant interaction.<sup>37</sup> Also of interest is how lawyers interact with their clients,<sup>38</sup> including TJ scholarship focusing on the lawyer's role in contributing to a defendant's ability to take responsibility for his behavior.<sup>39</sup> Other TJ work has looked at how lawyers can frame questions<sup>40</sup> and handle depositions.<sup>41</sup> An increasing concern in law practice is with the cultural competency aspects of the lawyer-client relationship.<sup>42</sup> However, TJ scholarship has not substantively delved into this area.

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33. See generally PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000) [hereinafter PRACTICING].

34. See David B. Wexler, *Relapse Prevention Planning Principles for Criminal Law Practice*, 5 PSYCHOL. PUB. POL'Y & L. 1028 (1999).

35. See Mark A. Small, *Legal Psychology and Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 611 (David B. Wexler & Bruce J. Winick eds., 1996).

36. See David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft-spots and Strategies*, in PRACTICING, *supra* note 33, at 45 [hereinafter *Psycholegal*]; Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, in PRACTICING, *supra* note 33, at 245 [hereinafter *Redefining*].

37. See, e.g., Peggy F. Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999); Carrie J. Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 263 (2002); David B. Wexler, *Robes & Rehabilitation: How Judges Can Help Offenders "Make Good,"* 38 CT. REV. 14 (2001). See generally DAVID B. WEXLER & BRUCE J. WINICK, *JUDGING IN A THERAPEUTIC KEY* (2003).

38. See generally PRACTICING, *supra* note 33.

39. See Astrid Birgden, *Dealing with the Resistant Criminal Client: A Psychologically-minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225 (2002); *Redefining*, *supra* note 36.

40. David Carson, *Therapeutic Jurisprudence and Adversarial Injustice: Questioning Limits*, 4 W. CRIMINOLOGY REV. 124 (2003).

41. Dennis P. Stolle & Mark D. Stuaun, *Defending Depositions in High-Stakes Civil and Quasi-criminal Litigation: An Application of Therapeutic Jurisprudence*, 4 W. CRIMINOLOGY REV. 134 (2003).

42. Linda G. Mills, *Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation*, in PRACTICING, *supra* note 33, at 419, 434-35; Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Marjorie Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, in PRACTICING, *supra* note 33, at 357, 402.



### *B. Therapeutic Jurisprudence and the Generalist Social Work Model*

Therapeutic jurisprudence shares much common ground with the generalist approach to social work.<sup>43</sup> Specifically, the generalist social work model encompasses social workers operating effectively within an organizational structure, utilizing their knowledge, professional values, and skills to target change at the individual, group, organizational, or societal levels.<sup>44</sup> Social workers accomplish this by assuming a wide range of roles, using critical thinking skills, and carrying out a planned change process.<sup>45</sup> A generalist approach emphasizes training all social workers to interact with “client systems” at three different levels: the individual level (micro); the small group level (mezzo); and the agency or community level (macro).<sup>46</sup> This multilevel approach is a unique characteristic of social work.

Note should be made that in the work environment, many social workers continue their training in clinical practice and go on to become state certified licensed clinical social workers (L.C.S.W.’s). L.C.S.W.’s may still incorporate into their practice several aspects of a generalist approach, but focus primarily on working with clients at the individual level. The key point is that in the lawyer-client context there are greater parallels between a generalist social work approach and legal practice than there are between a clinical social work approach and legal practice. While it is *not* being suggested that lawyers become “therapists,” it is recommended that lawyers become familiar with the psychological dimensions of behavior<sup>47</sup> in a manner

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43. “Generalist” social work is defined as: “A social work practitioner whose knowledge and skills encompass a broad spectrum and who assess problems and their solutions comprehensively.” ROBERT L. BARKER, *THE SOCIAL WORK DICTIONARY* 190 (4th ed. 1999). The key point is to differentiate a generalist social worker from a licensed clinical social worker.

44. KAREN K. KIRST-ASHMAN & GRAFTON H. HULL, JR., *GENERALIST PRACTICE WITH ORGANIZATIONS & COMMUNITIES* 7 (2d ed. 2001).

45. *Id.* at 8.

46. COUNCIL ON SOCIAL WORK EDUCATION, *EDUCATIONAL POLICY AND ACCREDITATION STANDARDS* 9 (2001) (listing the generalist approach as a program objective for social work education at both the baccalaureate and master’s level). *See also* KIRST-ASHMAN & HULL, JR., *supra* note 44, at 4-9 (giving an in-depth discussion of the generalist approach to social work, including several definitions of “generalist”).

47. Integration of the psychological dimension is a basic tenet of therapeutic

similar to that of a generalist social worker. A closer look at the pertinent dimensions of a generalist approach will be useful to illustrate this point further.

First and foremost, a generalist approach to social work makes integral the organizational context of client interaction.<sup>48</sup> This refers to consideration of formal and informal organizational structures, including lines of authority, communication, and power.<sup>49</sup> Certainly, the court in which the lawyer-client interaction takes place is of paramount importance to many aspects of legal practice, because a specific judge, the type of court, and presence of a jury are all important factors. Therapeutic jurisprudence, with its emphasis on legal rules and legal procedures, also focuses on an organizational context and how this context impacts legal actors.

Second, a generalist approach assumes utilization of a theoretical approach,<sup>50</sup> and systems theories<sup>51</sup> are the most commonly used theoretical approach in social work. Like the generalist approach,

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jurisprudence. Wexler and Winick discuss this integration throughout their writing in therapeutic jurisprudence. See David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, 40 CLEV. ST. L. REV. 517, 518-19 (providing an early example of this integration). See generally DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); ESSAYS, *supra* note 23.

48. KIRST-ASHMAN & HULL, JR., *supra* note 44, at 19-20.

49. *Id.* at 19.

50. *Id.* at 10.

51. Note should be made that when referring to systems theories, we do not reference one specific theory, but rather a constellation of systems theory approaches that may be pertinent in various contexts. The derivation of a systems approach in social work is thought to have originated in the 1950s, borrowing from von Bertalanffy's work in open systems which include individuals, families, communities, schools, and societies. Ludwig von Bertalanffy, *The Theory of Open Systems in Physics and Biology*, 111 SCIENCE 23-28, cited in BARBARA M. NEWMAN & PHILIP R. NEWMAN, DEVELOPMENT THROUGH LIFE: A PSYCHOSOCIAL APPROACH 119 (1991). The parts within the systems are seen to be constantly changing, but the organization of the whole remains intact. *Id.* "Systems theories" are defined as:

Those concepts that emphasize reciprocal relationships between the elements that constitute a whole. These concepts also emphasize the relationships among individuals, groups, organizations, or communities and mutually influencing factors in the environment.

THE SOCIAL WORK DICTIONARY, *supra* note 43, at 477. See also PHILLIP FELLIN, THE COMMUNITY AND THE SOCIAL WORKER 19, 22-27 (3d ed. 2001) (discussing two examples of systems theories from a community perspective: a social system, made up of subsystems or social institutions and an ecological system or person-in-environment approach, which considers the interdependence of people within their environments).

systems theories consider a system's multiple levels and how a level impacts the client.<sup>52</sup>

This approach can easily be translated to the lawyer-client relationship. For example, in a criminal domestic violence case, a male defendant will likely be concerned about micro-level factors, such as how the judge perceives him. The defendant may also be concerned with other micro-level factors, such as his relationship with his wife and children, and the potential impact of a restraining order. At the mezzo-level, a criminal conviction could impact the defendant's employment. His neighbors, or those in his local community may react differently toward the defendant if they learn about the case, thus creating macro-level concerns. The defendant may also be concerned about how the domestic violence case might impact his pending divorce or his custody rights, which can be micro-, mezzo-, or macro-level concerns. If the lawyer is willing to consider how the current case impacts the client at all of these levels, such consideration may provide useful information in formulating an approach to the case. Therapeutic jurisprudence also encourages this multilevel approach in its application of how legal actors, the micro-level, legal rules, the mezzo- or macro-level, and legal procedures, the mezzo- or macro-level, can impact the legal process, legal outcomes, and individuals operating within the legal setting.<sup>53</sup>

Third, a generalist approach assumes cultural competence education as an inherent part of its process.<sup>54</sup> This can be seen in graduate social work education's emphasis on the eclectic knowledge base<sup>55</sup> and attention to professional values and ethics. Examination and awareness of professional values and ethics is also central to cultural competency in the generalist social work approach.<sup>56</sup> A hallmark of social work education and practice is, first, to identify

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52. KIRST-ASHMAN & HULL, JR., *supra* note 44, at 10-12.

53. *See infra* note 108. *See also* LAW IN A THERAPEUTIC KEY, *supra* note 25, at xvii.

54. *See* KIRST-ASHMAN & HULL, JR., *supra* note 44, at 8. A multicultural focus is also embedded throughout social work training. EDUCATIONAL POLICY AND ACCREDITATION STANDARDS, *supra* note 46.

55. This eclectic knowledge base specifically includes: knowledge and understanding of oppression and a commitment to advocacy; knowledge of populations-at-risk; examination of human diversity issues; examination of social policy and how it impacts oppressed groups; and promotion of social and economic justice. KIRST-ASHMAN & HULL, JR., *supra* note 44, at 10.

56. *Id.* at 17.

one's personal and professional values and second, to assure that one's personal values do *not* impact one's professional decisions.<sup>57</sup> This emphasis on values, knowledge, and skills is intended to contribute to social workers' cultural competency when they interact with diverse populations.

Fourth, and perhaps most notably, a generalist social work approach emphasizes the importance of the clinical, or "micro," skills which are the foundation of professional-client interactions. These skills include establishing rapport, communicating through both verbal and non-verbal behavior, and conflict resolution.<sup>58</sup> Professionals need these skills not only in professional-client interactions, but also in interactions with other professionals. Inherent in this approach is the "client-centered" philosophy based on Rogers' work,<sup>59</sup> and the oft-cited social work motto "be where the client is." According to this approach, utilization of warmth, empathy, and genuineness are the foundation of professional interactions.<sup>60</sup> Genuineness contributes to a sense of trust,<sup>61</sup> which, as the client-relations skills research in a later section suggests, is believed to be necessary to establish a good lawyer-client working relationship.<sup>62</sup> Thus, using a generalist social work model, a relationship between the lawyer and client is assumed as integral to achieving the best outcomes for clients.<sup>63</sup> However, before engaging in this discussion, it is necessary to step back and consider the larger political and social, or macro, contexts in which lawyers and clients interact.

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57. *Id.* at 18.

58. *Id.* at 46-76.

59. See generally CARL R. ROGERS, CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS, AND THEORY (1951).

60. See ROGERS, *supra* note 59, at 346-58; CARL R. ROGERS ET AL., THE THERAPEUTIC RELATIONSHIP AND ITS IMPACT: A STUDY OF PSYCHOTHERAPY WITH SCHIZOPHRENICS 10-11 (1967). Social work practice textbooks consistently include an emphasis on warmth, empathy, and genuineness as the most common utilization of Rogerian techniques in social worker-client interactions. See, e.g., KIRST-ASHMAN & HULL, JR., *supra* note 44, at 52-56.

61. See KIRST-ASHMAN & HULL, JR., *supra* note 44, at 56.

62. See *infra* Part I.E.

63. This emphasis on relationship will emerge in a more detailed discussion of therapeutic jurisprudence and lawyering in Part I.D.

*C. Racial and Ethnic Disparities and Discrimination in the Criminal Justice System*

Social work education has a long history of promoting social justice on behalf of disenfranchised and oppressed groups<sup>64</sup> as a core component of its educational curriculum, along with direct practice skills.<sup>65</sup> Clients served by social workers often experience oppression and discrimination in their day-to-day lives. Therefore, it is of critical importance that social workers are aware of how this history has impacted individuals and groups, as well as how to work toward mitigating and eradicating oppression.<sup>66</sup> Thus, social work also emphasizes a systems approach that includes the broader social issues that can impact client beliefs and behavior.<sup>67</sup> The client-centered approach<sup>68</sup> also remains integral at this macro level.

With this in mind, we ask whether the criminal justice system is characterized by racial and ethnic discrimination, an issue that continues to be hotly debated among criminal justice policy experts.<sup>69</sup> We will respond to this question from two perspectives: (1) what can be proven through available research, and (2) what the actual experience of racial and ethnic minorities is in this country historically and today. We take this approach for a practical reason: direct practitioners in social work have day-to-day interactions with people from oppressed groups who do not need to be assured through research that discrimination exists because they have lived it. Thus, if legal practitioners are to interact effectively with clients, particularly in a multicultural context, the client perspective must also be acknowledged, whether it is supported by research or not.

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64. See Mimi Abramovitz, *Social Work and Social Reform: An Arena for Struggle*, 43 *SOCIAL WORK* 512, 513-17 (1998); FELLIN, *supra* note 51, at 19.

65. See generally EDUCATIONAL POLICY AND ACCREDITATION STANDARDS, *supra* note 46; WILLIAM G. BRUEGGEMANN, *THE PRACTICE OF MACRO SOCIAL WORK* 377 (2d ed. 2002); KAREN S. HAYNES & JAMES S. MICKELSON, *AFFECTING CHANGE: SOCIAL WORKERS IN THE POLITICAL ARENA* (4th ed. 2000); Abramovitz, *supra* note 64, at 524.

66. HAYNES & MICKELSON, *supra* note 65, at 31.

67. FELLIN, *supra* note 51, at 2; KIRST-ASHMAN & HULL, JR., *supra* note 44, at 10.

68. See ROGERS, *supra* note 59.

69. SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* 15 (2d ed. 2000)

Criminal justice researchers are reticent to state that racial or ethnic discrimination currently exists in the criminal justice system.<sup>70</sup> We would hope that this can be attributed to the difficulty in isolating a cause-effect relationship in empirical research, more than to an ignorance of United States history. However, researchers are willing to discuss the disparities between and disproportionality of racial and ethnic minorities in the criminal justice system, as they can more easily determine these results through documentation and data analysis. People and communities who recall a long experiential history of racial and ethnic inequality in the criminal justice system, however, likely see it as a foregone conclusion that discrimination exists today; why wouldn't it when it has been part of their experience for generations? Understanding these different perspectives is useful in attaining a greater appreciation of the complexity of the issues involved and in furthering the discussion of the cultural aspects of racial and ethnic disparities in the criminal justice system today.

From a historical perspective, documentation of societal practices, such as those under Jim Crow laws, makes it difficult to deny what can only be characterized as blatant racism in multiple institutions in the United States, most notably in the criminal justice system.<sup>71</sup>

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70. In a recent Juvenile Justice Bulletin prepared by the National Center for Juvenile Justice based on national data, discrimination occurs when "decision-makers treat one group of juveniles differently from another group...based wholly, or in part, on their gender, racial, and/or ethnic status." U.S. DEP'T OF JUSTICE, *Minorities in the Juvenile Justice System*, in JUVENILE JUSTICE BULLETIN 2 (1999). The study states:

One possible explanation for disparity and overrepresentation is, of course, discrimination. This line of reasoning suggests that because of discrimination on the part of justice system decision-makers, minority youth face higher probabilities of being arrested by the police, referred to court intake, held in short-term detention, petitioned for formal processing, adjudicated delinquent, and confined in a secure juvenile facility. Thus, differential actions throughout the justice system may account for minority overrepresentation. Disparity and overrepresentation, however, can result from factors other than discrimination...Thus, at the national level, questions regarding the causes of observed disparity and overrepresentation remain unanswered.

*Id.* at 2-3.

71. ALFREDA IGLEHART & ROSINA BECERRA, SOCIAL SERVICES AND THE ETHNIC COMMUNITY 33-34 (1995) (noting that Jim Crow laws derived their name from a song-and-dance act of the 19th century that presented stereotyped and offensive portrayals of African-Americans, and came into existence after the Supreme Court's decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which allowed "separate but equal" institutions for whites and African-

Historically, racial and ethnic minorities have been either totally excluded or ignored by the criminal justice process,<sup>72</sup> or disproportionately victimized by it.<sup>73</sup> Indisputable support of discrimination in the late 1800s and early 1900s is not difficult to find. For example, between 1885 and 1915, whites lynched<sup>74</sup> over 3,000 African-American men and women, none of whom were prosecuted.<sup>75</sup> Similarly, an equal or greater number of Mexican-Americans are believed to have been killed by whites in the Southwestern United States between 1850 and 1930.<sup>76</sup> People of racial and ethnic minorities were often excluded from participation in the criminal justice system as jurors<sup>77</sup> and witnesses,<sup>78</sup> and there was

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Americans, impacting voting, housing, education, jobs, and transportation). See generally ADALBERTO AGUIRRE, JR. & JONATHAN H. TURNER, *AMERICAN ETHNICITY: THE DYNAMICS AND CONSEQUENCES OF DISCRIMINATION* (1995); *THE RISE AND FALL OF JIM CROW* (Quest Productions, VideoLine Productions, and Thirteen/WNET New York 2002) (offering an excellent overview of the history and consequences of Jim Crow laws). See JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2000) (providing an overview of case law that promulgated racial and ethnic discrimination throughout the 1900s).

72. IGLEHART & BECERRA, *supra* note 71, at 31-35, 42-44, 55-57, 60-62, 66-68. Iglehart and Becerra trace the historical injustices various racial and ethnic groups experienced. According to the authors, in the first half of the 1900s, law enforcement's lack of response to racial violence perpetrated by whites upon racial and ethnic groups typified the experience of most communities of color, including African-Americans, Native Americans, Mexican-Americans, Chinese immigrants, and Chinese-Americans, until the civil rights movement of the 1960s. *Id.* at 34, 43, 55, 61, 67. A possible exception to this was the minimal law enforcement protection that Japanese-American business people received at the request of President Theodore Roosevelt. *Id.* at 67. The authors explain that Roosevelt acknowledged Japan as a world power, and wanted to assure good diplomatic relations. *Id.* To avoid possible problems, Roosevelt ordered the use of troops in the event that Japanese businesses experienced mob attacks during his tenure. *Id.* Perhaps as a consequence, the Japanese-American experience during this period was not typified by racial violence to the extent that other racial and ethnic groups experienced it. *Id.*

73. RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 29-135 (1998) (noting the paradox of under-enforcement and over-enforcement for African-Americans). See also AGUIRRE, JR. & TURNER, *supra* note 71 (providing a comprehensive historical overview of the violence and inequities experienced by people of color across multiple social institutions); IGLEHART & BECERRA, *supra* note 71 (devoting individual chapters to African-Americans, Native Americans, Hispanic Americans, Asian Americans, and white ethnic Americans).

74. It is noteworthy that the word "lynching" for this phenomena is used rather than the word "murder." See KENNEDY, *supra* note 73, at 41-49, 403-04 nn.56-57 (discussing the history and controversy surrounding the definition of "lynching"). Kennedy states "at least 4,743 people were lynched in the United States" between 1882 and 1968, and 73% of those lynched were African-American, the remaining being white. *Id.* at 42.

75. IGLEHART & BECERRA, *supra* note 71, at 31.

76. *Id.* at 56.

77. KENNEDY, *supra* note 73, at 174-75 (noting that historical analysis reveals that until

an inherent lack of access to education and jobs as a consequence of the unquestioned practices of the times.

When considering racial and ethnic discrimination in the criminal justice system, one must remember that people today recall violence or inequitable treatment against their family members or themselves, which can, logically, only be attributed to discrimination.<sup>79</sup> Placing the discussion solely in the abstract could be, at best, frustrating and, at worst, offensive for those who have first-hand experience with discriminatory practices. If researchers wish to incorporate the valuable input of people who have experienced discrimination, a middle ground must be reached so that both sides are willing to communicate with one another.

The key to this issue is understanding the terminology experts studying race and ethnicity utilize: specifically, the terms *disparity*, *overrepresentation* and *discrimination*.<sup>80</sup> *Disparity* refers to different groups having different probabilities for a particular outcome due to their group status.<sup>81</sup> It is important to note, however, that the presence of disparity does not necessarily mean that racial and ethnic discrimination exists.<sup>82</sup> Disparity can be due to legal factors, such as a previous criminal record or the seriousness of the offense, or extra-legal factors, such as race or ethnicity.<sup>83</sup> Racial and ethnic disparities

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the 1960s, African-Americans in the South were seldom present on juries); IGLEHART & BECERRA, *supra* note 71, at 43 (stating that few Native Americans served on juries because of legislation regarding citizenship); PEREA ET AL., *supra* note 71, at 583-84 (noting that during the pre-civil rights era, voting rights were categorically denied based on race).

78. IGLEHART & BECERRA, *supra* note 71, at 61 (stating people who were of Chinese descent were prohibited from testifying against white people).

79. Several films and videos illustrate this point by interviewing people who tell their personal stories of discrimination. See THE RISE AND FALL OF JIM CROW, *supra* note 71; THE AMERICAN EXPERIENCE (WGBH Boston 2002); EYES ON THE PRIZE (Blackside Inc. & the Corporation for Public Broadcasting 1986) (tracking multiple aspects of the civil rights movement and the subsequent War on Poverty programs). See also 4 LITTLE GIRLS (A Spike Lee Joint 1997) (chronicling the story of four African-American girls killed in a church bombing in 1963, told from the perspective of their family members and friends).

80. See HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 192 (1999).

81. *Id.* For example, minority youth are more likely to end up in a secure facility compared to white youth. *Id.* at 193.

82. *Id.* at 192.

83. WALKER ET AL., *supra* note 69, at 15-16.



have been well documented in the juvenile and adult criminal justice systems.<sup>84</sup>

Disparity can lead to *overrepresentation* of specific racial and ethnic groups at various stages of criminal justice processing.<sup>85</sup> Overrepresentation refers to a larger number of people of a particular racial or ethnic group being represented in the criminal justice system than would be expected based on their proportion in the general population.<sup>86</sup> Overrepresentation of African-American, Latino, and Native American youth and adults has also been well documented in the juvenile and criminal justice systems.<sup>87</sup>

*Discrimination* refers to being treated differently based on a group status, such as race or ethnicity, rather than on one's behavior or qualifications.<sup>88</sup> In other words, a person's behavior is not the determining factor of how they are treated by another. A paradoxical aspect of this definition of discrimination is that it does not have to be intentional.<sup>89</sup> This means that if an act results in differential treatment, it is discrimination, regardless of whether the actor intended or foresaw discrimination as the outcome. This result speaks to the multi-faceted nature of the discrimination process, which makes it difficult to prove that discrimination exists in the criminal justice system, since there can be many competing causes present in the multiple steps of criminal justice decision-making.<sup>90</sup>

Criminal justice experts Samuel Walker, Cassia Spohn, and Miriam DeLone have conceptualized a useful model for understanding discrimination in society as it occurs from the

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84. *Id.* See generally CARL E. POPE & WILLIAM FEYERHERM, MINORITIES AND THE JUVENILE JUSTICE SYSTEM: RESEARCH SUMMARY (1995); SNYDER & SICKMUND, *supra* note 80.

85. SNYDER & SICKMUND, *supra* note 80, at 192.

86. *Id.*

87. *Id.* See generally MINORITIES IN JUVENILE JUSTICE (Kempf-Leonard et al. eds., 1995); POPE & FEYERHERM, *supra* note 84; IGLEHART & BECERRA, *supra* note 71; AGUIRRE, JR. & TURNER, *supra* note 71; WALKER ET AL., *supra* note 69, at 72.

88. SNYDER & SICKMUND, *supra* note 80, at 192.

89. AGUIRRE, JR. & TURNER, *supra* note 71, at 9.

90. SNYDER & SICKMUND, *supra* note 80, at 192-93; POPE & FEYERHERM, *supra* note 84, at 2-7; DARNELL F. HAWKINS ET AL., U.S. DEP'T OF JUSTICE, *Race, Ethnicity, and Serious and Violent Juvenile Offending*, JUVENILE JUSTICE BULLETIN 4 (2000) (discussing community-level factors, such as socio-economic status as a contributor to racial and ethnic differences in offending).

individual level to the systemic level.<sup>91</sup> In their view, discrimination can be envisioned on a continuum, with *systematic discrimination*, in which all decisions at all stages are characterized by intentional discrimination, on one end and *pure justice*, in which discrimination is totally absent, on the other.<sup>92</sup> Three categories of discrimination exist within the two extremes.<sup>93</sup> *Institutionalized discrimination* suggests that rules or policies result in discriminatory outcomes for racial or ethnic groups, but may not be intentional discrimination.<sup>94</sup> *Contextual discrimination* refers to discrimination that occurs in certain situations.<sup>95</sup> Finally, there is *individual discrimination*, which refers to individuals making decisions that can be linked specifically to race or ethnicity.<sup>96</sup>

One must ask where leading criminal justice researchers stand on the presence, absence, or degree of discrimination in the criminal justice system. Walker, Spohn, and DeLone argue that prior to the civil rights era, the criminal justice system, as a whole, was characterized by systematic discrimination.<sup>97</sup> However, they argue that the criminal justice system currently is characterized by contextual discrimination, which is one step closer to the middle ground than is systematic discrimination.<sup>98</sup> Other experts believe that racial bias “clearly exists” in some juvenile justice systems,<sup>99</sup> and that “minority status does make a difference” in decision-making.<sup>100</sup>

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91. WALKER ET AL., *supra* note 69, at 15-18.

92. *Id.* at 16-17.

93. *Id.*

94. *Id.* at 17. An example would be having an employment requirement for bail. If employment is less available to those of a racial or ethnic minority compared to the white population, then the employment requirement becomes a form of institutionalized discrimination. The discrimination is a by-product of the requirement, and may or may not have been intentional.

95. *Id.* An example would be aggressive police patrolling in a low socio-economic area inhabited primarily by racial and ethnic minorities. Again, this would result in racial and ethnic disparities though this may not have been the original intent.

96. *Id.* at 18.

97. *Id.* at 288.

98. *Id.* To reach this conclusion, the authors trace evidence of varied levels of discrimination based on existing research at each stage of criminal justice decision-making, including law enforcement, court processing, sentencing, and corrections. *Id.* at 287.

99. PATRICIA DEVINE ET AL., U.S. DEP'T OF JUSTICE, *Disproportionate Minority Confinement: Lessons Learned from Five States*, JUVENILE JUSTICE BULLETIN 7 (1998).

100. POPE & FEYERHERM, *supra* note 84, at 13.

Snyder and Sickmund conclude that, at the national level, the data is simply not comprehensive enough to ascertain with certainty that discrimination exists in the juvenile justice system.<sup>101</sup>

Capturing discrimination's existence in the criminal justice system is a challenging task for several reasons. A significant obstacle is that the criminal justice "system" is exactly that—a network of agencies, including the police or sheriff's department, the jail, the district attorney's office, the public defender's office, the court, the prison, and community corrections agencies, and a series of decisions made by many different people that, when combined, produce a systems approach.<sup>102</sup> In their review of literature and research on the disproportionate confinement of minorities in the juvenile justice system, Pope and Feyerherm found disproportionate treatment at some or all decision points in two-thirds of the studies, with no evidence for disparity found in one-third of the studies.<sup>103</sup> In those studies in which disproportionate treatment was found, the effects were often cumulative. This indicated that racial differences, even small ones, that occurred earlier in the process, at intake, for example, impacted decisions at a later point in case-processing putting minority youth at an increased disadvantage as they traveled further into the system.<sup>104</sup>

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101. SNYDER & SICKMUND, *supra* note 80, at 193. However, the authors will conclude that overrepresentation and disparity are clearly evident in the system. *Id.*

102. POPE & FEYERHERM, *supra* note 84, at 5.

103. *Id.* at 2. The decision points they examined included: *decision to arrest* (arrest or order to appear in court without arrest; made by law enforcement); *intake decision* (handle the case at intake or submit the case for further processing; can be made by probation and/or prosecution); *placement decision* (detain the youth or allow the youth to remain home prior to adjudication; can be made by probation or court decision); *petition decision* (file a formal petition or use an informal resolution to the case; prosecutor); *resolution decision* (resolve the case through probation or custody; judge or jury). *Id.* at 5.

104. *Id.* at 3. It is notable that some jurisdictions have applied the process of documenting multiple decision-points to pinpoint disparities as a means to make system-level improvements. In Multnomah County, Oregon, for example, in which overrepresentation was found in police referrals and detention, three strategies were implemented simultaneously to make improvements: use of alternatives to detention, such as day reporting centers and home detention, training decision-makers and service providers about over-representation, and utilizing an objective scoring system. William H. Feyerherm, *Detention Reform and Overrepresentation: A Successful Synergy*, 4 CORRECTIONS MGMT. Q. 44 (2000). These improvements precipitated a decrease in percentage differences in the use of detention for Anglo- and African-American youth, as well as an overall decrease in the use of detention for all racial and ethnic categories. *Id.*

This discussion of racial and ethnic disparities is not intended to be comprehensive. Rather, the point is to provide a foundation in the terminology and debates within the disparities and discrimination literature in order to ask how we might look at racial and ethnic disparities from a therapeutic jurisprudence perspective.

#### *D. Therapeutic Jurisprudence and Lawyering*

Four aspects of therapeutic jurisprudence lend themselves well to analysis and further research of discrimination in the criminal justice system. First, because therapeutic jurisprudence encourages an interdisciplinary approach,<sup>105</sup> it does not force a choice of theory or research of one discipline over another. Because scholars in multiple disciplines, including criminology, criminal justice, sociology, socio-legal studies, law, social work, psychology, and public health, have all addressed various aspects of discrimination in the criminal justice system, a TJ analysis can borrow from any of the pertinent existing theories and research. By definition, TJ explores issues from an individual, micro perspective as well as from a macro perspective, which is useful in exploring racial and ethnic disparities and discrimination.<sup>106</sup>

Second, TJ can be applied as both a theoretical application and a practice-based theory.<sup>107</sup> This is particularly useful in the context of discrimination, as the question is not only how discrimination occurs, but what can be done about it in legal practice. Third, TJ also encourages a consideration of therapeutic or anti-therapeutic outcomes as they relate to the legal process.<sup>108</sup> This process-outcome link is imperative in identifying racial and ethnic disparities in the legal process and determining how they might impact legal outcomes. This can encompass the emotional and psychological well-being<sup>109</sup> of

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105. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY, *supra* note 28, at 645, 646.

106. David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY, *supra* note 28, at 821-28.

107. Carrie J. Petrucci et al., *Therapeutic Jurisprudence: An Invitation to Social Scientists*, in HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS 579, 593 (David Carson & Raymond Bull eds., 2003).

108. *Id.* at 590.

109. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, in LAW

individuals as they experience the law, whether they are defendants, victims, legal professionals, families, or communities, as well as behavioral outcomes. This also is typical of how discrimination occurs—as an intended or unintended process with an outcome believed to be directly linked to that process.<sup>110</sup> A fourth advantage of a TJ analysis is that it considers the often underemphasized perspectives of defendants, victims, and legal professionals. These considerations add an important dimension to a construct as multifaceted as discrimination.

What does a TJ perspective on lawyering look like? While we know that a specific focus on lawyers' cultural competency has not yet been addressed, scholars have given attention to the actual practice of law and the lawyer-client relationship from a TJ perspective.<sup>111</sup> It is perhaps of greatest importance to note that with its emphasis on how legal actors can impact therapeutic or anti-therapeutic outcomes for individuals involved in the legal process, the relationship between a lawyer and a client is implicit in the definition of TJ.<sup>112</sup> TJ urges lawyers to consider how their role as lawyers can impact the emotional and psychological well-being of their clients.<sup>113</sup>

Both Wexler and Winick advocate applying a combined TJ/preventive law model.<sup>114</sup> A lawyer following this model would practice law proactively,<sup>115</sup> trying to avoid legal problems before they occur through legal planning, legal check-ups,<sup>116</sup> and anticipation of psycholegal soft spots.<sup>117</sup> Thus, a lawyer is expected to consider more

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IN A THERAPEUTIC KEY, *supra* note 28, at 763, 767.

110. AGUIRRE, JR. & TURNER, *supra* note 71, at 9.

111. *See generally* PRACTICING, *supra* note 33; Symposium, *Symposium on Therapeutic Jurisprudence and Criminal Law*, 38 CRIM. L. BULL. 199 (2002). The co-founders of therapeutic jurisprudence, David Wexler and Bruce Winick, have both contributed to the scholarship describing lawyering in a therapeutic jurisprudence context; their work is the focus of this Article's discussion. Additionally, because this Article's primary focus is criminal law, this discussion is limited to the lawyer-client interaction in criminal law rather than civil law.

112. *Redefining*, *supra* note 36, at 252.

113. *Psycholegal*, *supra* note 36, at 46.

114. *See generally* PRACTICING, *supra* note 33.

115. *Id.* at 6.

116. *Redefining*, *supra* note 36, at 252.

117. *Psycholegal*, *supra* note 36, at 48. "Psycholegal soft spots" are situations resulting from the legal process that one can anticipate will elicit an emotional response from a client. *Id.*

than just the legal aspects of the client-interactions, the “law-related psychological well-being”<sup>118</sup> should also be a key focus of the lawyer-client relationship.

Also central to the TJ/preventive law model is a client-centered counseling approach.<sup>119</sup> In this approach, the lawyer is the agent of the client, providing information about all possible choices and alternatives available to the client, but allowing the client to make the critical decisions about the case.<sup>120</sup> This method avoids paternalism and coercion,<sup>121</sup> as lawyers only assist clients in making informed decisions by engaging the client and exploring all possible alternatives.<sup>122</sup> The lawyer-client relationship is seen as an integral part of the client’s ability to reach self-actualization when the lawyer acts as a helping professional and is genuine, empathic, and nonjudgmental.<sup>123</sup> By working with clients in this manner, the lawyer-client relationship can be empowering for clients, which will contribute to the client’s autonomy.<sup>124</sup> Applying this client-centered counseling approach to lawyer-client interaction, is believed to lead to positive, therapeutic consequences for clients.<sup>125</sup> Clients will emerge empowered and with a greater level of satisfaction.<sup>126</sup> Attorneys will emerge with fewer emotional conflicts and with a personally and professionally satisfying experience.<sup>127</sup> While a client-centered focus is central to TJ, and client-centered models are currently integrated into the training in many clinical legal programs, it has been noted that a major weakness of these models is their failure to address the effects of race on the lawyer-client relationship.<sup>128</sup>

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Lawyers are encouraged to anticipate psycholegal soft spots so they can avoid, eliminate, or minimize them. *Id.* at 47.

118. *Id.*

119. *Redefining*, *supra* note 36, at 286.

120. *Id.* at 287.

121. *Id.* at 286.

122. *Id.*

123. *Id.* at 287.

124. *Id.*

125. *Id.* at 291.

126. *Id.* at 288.

127. *Id.* at 298.

128. Michelle Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 347 (1997).

The last key feature of a TJ/preventive law model is the use of an interdisciplinary approach that focuses on existing behavioral science research and methods.<sup>129</sup> Wexler discusses the integration of relapse prevention plans based on McGuire's work in cognitive-behavioral programs.<sup>130</sup> Clients are encouraged to develop their own rehabilitation plan in which they problem-solve about future risk of crime.<sup>131</sup> Clients identify what the "chain of events" was that led to their involvement in crime, what a high-risk situation looks like, and how they will avoid or cope with high-risk situations in the future.<sup>132</sup> By being the "architects" of their own relapse prevention plans, it is presumed that clients will be more committed to changing their own behavior.<sup>133</sup>

Winick advocates capitalizing on the lawyer-client relationship to work with clients towards rehabilitation through available avenues in the criminal justice system, most notably the plea and sentencing processes.<sup>134</sup> Post-conviction rehabilitation can be a mitigating circumstance and a valuable tool in pursuing a downward sentencing departure for defendants.<sup>135</sup> In some circumstances, sentencing can be postponed to allow defendants to complete rehabilitative programs.<sup>136</sup> To offer these rehabilitative options as possibilities, however, lawyers must first know about them, and second, acknowledge their own role in the client's rehabilitative process. When forwarding rehabilitative programs to their clients, lawyers must understand that they can positively impact both their client's situation and their own personal and professional satisfaction.<sup>137</sup>

Preventive lawyering techniques encourage lawyers to practice with an ethic of care and an emphasis on interpersonal skills.<sup>138</sup> Preventive lawyering emphasizes the psychological aspects of the

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129. David B. Wexler, *Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law*, 38 CRIM. L. BULL. 206, 209 (2002).

130. *Id.* at 209-10.

131. *Id.* at 210.

132. *Id.* at 207.

133. *Id.*

134. *Redefining*, *supra* note 36, at 247.

135. *Id.* at 248.

136. *Id.* at 248-49.

137. *Id.* at 250.

138. *Id.* at 252.

lawyer-client relationship and encourages good interviewing and client counseling skills.<sup>139</sup> In other words, the lawyer must address the psychological dimensions of what the client is experiencing as a result of the legal process. By ignoring these emotional dimensions of the lawyer-client relationship, lawyers risk alienating clients, inhibiting the development of a trusting relationship,<sup>140</sup> which can be key to the lawyer's ability to work with the client toward a rehabilitative plan.<sup>141</sup> By helping clients deal with their rehabilitative needs in the current case, lawyers can assist clients in avoiding future criminal actions and achieving long-term rehabilitation.<sup>142</sup>

A TJ approach to lawyering implicitly assumes the presence of a lawyer-client relationship, advocates a client-centered approach, and integrates existing interdisciplinary theories and techniques to achieve therapeutic outcomes for clients and their lawyers. It is also clear that, from practice and research perspectives, it very easily could integrate a cultural competency emphasis.

#### *E. Research Support for the Emphasis on the "Relationship" in the Lawyer-Client Relationship*

The quality of the relationship between legal actors in the criminal justice system may be influenced by racial attitudes and beliefs.<sup>143</sup> TJ is one of several theories that assumes these relationships are important to improving the legal process and to achieving therapeutic outcomes.<sup>144</sup> No research could be found that looked specifically at lawyers' and clients' perceptions of race and also considered legal variables, such as outcomes. However, two emerging bodies of literature address the "relationship" in the lawyer-client relationship, and may provide a foundation for including racial and ethnic cultural competence in the existing knowledge base. These two areas are

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139. *Id.* at 253.

140. *Id.*

141. *Id.*

142. *Id.* at 254.

143. Jacobs, *supra* note 128, at 384 (noting there are no empirical studies on how white law students' perceptions impact their ability to work with clients of color, but arguing that this relationship exists).

144. *See generally* Petrucci, *supra* note 37 (offering a qualitative analysis of the judge-defendant interaction).



procedural justice, addressed in Tyler's work,<sup>145</sup> and client-relations skills, primarily borrowing from Boccaccini's work.<sup>146</sup> Ultimately this Article seeks to determine if a culturally competent legal practice will contribute to a more therapeutic process and more therapeutic outcomes for lawyers and clients.<sup>147</sup> The procedural justice and client-relations skills literature discusses the importance of relationships within the legal process and how these relationships might enhance legal outcomes.<sup>148</sup>

Procedural justice theory suggests that people comply with the law if they believe that legal institutions are legitimate and fair, even when legal outcomes are unfavorable.<sup>149</sup> Two contrasting approaches to procedural justice are often discussed: the normative approach put forth by Tyler,<sup>150</sup> and the instrumental approach discussed by Thibaut and Walker.<sup>151</sup> The normative approach to justice focuses on a fair process rather than solely on the outcome, and emphasizes neutrality, honesty, and respect.<sup>152</sup> Additionally, the normative approach to justice suggests that people obey the law voluntarily because they believe it is the right thing to do, rather than because of external

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145. TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) [hereinafter OBEY]; Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830 (1989) [hereinafter GROUP-VALUE]; Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984) [hereinafter DEFENDANTS].

146. Marcus T. Boccaccini & Stanley L. Brodsky, *Attorney-Client Trust Among Convicted Criminal Defendants: Preliminary Examination of the Attorney-Client Trust Scale*, 20 BEHAV. SCI. & L. 69 (2002) [hereinafter TRUST]; Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCHOL. REV. 81 (2001) [hereinafter CHARACTERISTICS]; Marcus T. Boccaccini et al., *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 LAW & PSYCHOL. REV. 97 (2002) [hereinafter *Client Relations Skills*].

147. A TJ analysis could also encompass all legal actors including defendants, victims, judges, attorneys, and the community. However, this discussion will focus specifically on the lawyer-client interaction.

148. See *supra* notes 145, 146.

149. OBEY, *supra* note 145, at 143.

150. *Id.*

151. Thibaut and Walker's instrumental view of procedural justice focuses on two aspects of control: process control and decision control. John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 546 (1978). Note should be made that their analysis occurs in the context of dispute resolution rather than the court system. *Id.*

152. OBEY, *supra* note 145, at 4.

factors, such as the favorability of the outcome.<sup>153</sup> This instrumental view of procedural justice suggests that when people feel they have control over the decision made, they will view the outcome more favorably.<sup>154</sup>

These two views diverge in considering the role of the third party decision-maker. In an instrumental view, defendants are assumed to be concerned only with their level of control and the outcome of their case.<sup>155</sup> The normative view, however, emphasizes the relationship the defendant has with the third-party decision-maker as a key factor in determining fairness.<sup>156</sup> In a study that included the instrumental view's process and control variables as well as the normative variables of neutrality, trust, and standing, findings revealed that the normative variables had a much greater influence on perceptions of fairness than did the process and decision control variables.<sup>157</sup> In fact, neutrality<sup>158</sup> was found to be the most important influence on the overall perception of fairness.<sup>159</sup> Based on this study, Tyler concluded that survey respondents valued the relationship with the third party decision-maker in their evaluations of fairness more so than favorable outcomes or control.<sup>160</sup>

Tyler's work, along with other studies, developed the "group-value" interpretation of a psychology of justice.<sup>161</sup> This interpretation states that "people are concerned about their long-term social relationships with the authorities or institutions acting as third parties and do not view their relationship with third parties as a one-shot

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153. *Id.* at 24.

154. *Id.* at 7.

155. *Id.* at 175.

156. *Id.*

157. GROUP-VALUE, *supra* note 145, at 834 (finding these results held true when demographic variables and specific characteristics of the case were included in the statistical modeling).

158. The study defined neutrality as a lack of bias, proper behavior, factual decision-making, whether defendants thought the decision was influenced by their demographic characteristics, and whether defendants believed that the decision-maker exhibited favoritism. *Id.* at 252.

159. *Id.* at 834 (noting that favorability of outcome also influenced overall fairness, but to a much lesser degree).

160. *Id.* at 836.

161. *Id.* at 830-31, 832, 836. *See also* E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

deal.”<sup>162</sup> The importance of a defendant’s relationship with the decision-maker is empirically supported by the influence of: a defendant’s standing, which is based on the defendant’s interaction with the third-party decision-maker; the defendant’s trust in the consistency of the decision-making; and the defendant’s perceived neutrality of the decision-maker on how fairness is evaluated.<sup>163</sup>

The group-value model also assumes that people value their memberships in groups and want to establish and maintain the social bond that results from group membership.<sup>164</sup> Individuals seek and value a rewarding experience, even in the legal system.<sup>165</sup> As further evidence in support of the group-value model, a study indicated that respondents who were more committed to the social group, which was defined as having higher support for the legal system and a greater perceived obligation to obey, scored higher on standing, trust, and neutrality than did respondents who scored lower in support for the legal system and obligation to obey.<sup>166</sup> Other work in procedural justice has used misdemeanor<sup>167</sup> and felony populations<sup>168</sup> with similar results, finding that the fairness of the procedure was valued more than the case outcome.

Casper, Tyler, and Fisher specifically addressed the lawyer-client relationship.<sup>169</sup> Seven questions related to the lawyer-client relationship were part of a “procedural justice” scale comprised of 16 items specific to the defense lawyer, prosecutor, and judge. The questions asked specific to lawyers were: “Your lawyer . . . believed/did not what you told (him/her), did/did not fight hard for you, did/did not tell you the truth, did/did not listen to what you

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162. GROUP-VALUE, *supra* note 145, at 831.

163. *Id.* at 834.

164. *Id.* at 831.

165. *Id.*

166. *Id.* at 836. Note should be made that the respondents in this study had minor interactions with police or courts; therefore, these findings should not be too quickly generalized to people who have committed more serious crimes. OBEY, *supra* note 145, at 87.

167. DEFENDANTS, *supra* note 145, at 69-70 (based on a sample of 121 traffic and misdemeanor defendants, those who believed they were treated better than others with similar cases (relative outcome) and based on their actual case disposition (absolute outcome) were more likely to perceive their treatment as fair. Moreover, those who fared poorly still rated the judge and the system highly if they perceived their procedure as fair).

168. Casper et al., *supra* note 145, at 503.

169. *Id.*

wanted to do, did/did not give you good advice, did/did not care about getting your case over with quickly than about getting justice for you” and “generally speaking, would you say your lawyer was . . . on your side, or, on the state’s side, or somewhere in the middle.”<sup>170</sup> This population of felony defendants had all types of criminal charges including person (30%), property (42%), and drug crimes (22%), with a median prison time of thirty-six months.<sup>171</sup> Among all defendants, including those who received a sentence involving incarceration, outcome satisfaction was influenced more by defendants’ perception of overall fairness than by their sentence and their regret.<sup>172</sup> Additionally, procedural justice, distributive justice,<sup>173</sup> and sentence severity were found to directly affect outcome satisfaction, while case-processing variables and client characteristics did not.<sup>174</sup> Finally, the time defendants spent with their attorneys had a significant influence on procedural justice, which impacted outcome satisfaction, while the type of attorney the defendant had (public defender vs. private) did not impact outcome satisfaction.<sup>175</sup>

Whether the race of the attorney, judge, or prosecutor is a factor in a defendant’s perception of fairness remains untested. The procedural justice literature discussed suggests the importance of a relationship between the defendant and the legal actors involved. Thus, it does not seem too far-fetched to imagine that racial differences between the lawyer and defendant, as well as cultural competence on the part of all actors involved, may be factors that are important in the development of a relationship that comprises trust, standing, and neutrality in the legal environment.

Literature discussing client-relations skills as a component of effective lawyering is also of interest to this Article. This work contains some of the more specific analyses of the lawyer-defendant

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170. *Id.* at 505. Casper et al. conducted a study using 411 male, felony defendants from three cities. *Id.*

171. *Id.* at 488.

172. *Id.* at 492. Overall fairness was measured by the response to the question “all in all, do you feel that you were treated fairly or unfairly in your case?” *Id.* Fifty-five percent of the defendants responded with “fairly” and 45% responded “unfairly.” *Id.*

173. *Id.* at 491 (noting that distributive justice refers to the defendant’s perception of fairness compared to sentences other defendants with similar convictions received).

174. *Id.* at 502 fig.2.

175. *Id.* at 501 fig.2.

interaction, although it too excludes consideration of race. Boccaccini and his colleagues looked at specific components of client-relations skills to see if defendants and lawyers rank the same skills as valuable in the lawyer-client relationship.<sup>176</sup> They argue that a more cooperative and effective lawyer-client relationship will result in greater satisfaction for both lawyers and clients.<sup>177</sup>

Based on a random sample of 252 lawyers and 103 prison inmates, subject ranked thirteen lawyering skills in order of importance.<sup>178</sup> Lawyering skills were comprised of six legal skills<sup>179</sup> and seven client-relations skills.<sup>180</sup> The results revealed that inmates rated twelve out of thirteen skills higher than attorneys, with the difference reaching statistical significance.<sup>181</sup> Three client-relations skills were rated much higher by inmates than attorneys: obtaining clients' opinions, spending time with clients before court, and keeping clients informed of their cases.<sup>182</sup> The authors also analyzed how often each skill was ranked in the top five, revealing that lawyers and inmates agreed on the importance of some skills, but not for others.<sup>183</sup> Mean rankings of the client-relations skills for lawyers who had had a continuing legal education or law school class in client-relations skills were compared with those lawyers who did not have training in client-relations skills.<sup>184</sup> This analysis revealed that those attorneys who had received training ranked five out of the seven client-relations skills higher than attorneys who had not

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176. *Client Relations Skills*, *supra* note 146.

177. *Id.*

178. *Id.* at 109.

179. Legal skills included: standing up for the client's rights; knowledge of criminal law; being a good deal-maker; relationship with the judge; and relationship with prosecutor. *Id.* at 118.

180. *Id.* Client-relations skills included: listening skills; caring about what happens to the client; keeping the client informed; involving the client in decision-making; getting to know the client; getting the client's opinion; and spending time with the client before court. *Id.*

181. *Id.* at 110. Note should be made that overall, attorneys also gave high ratings to these skills. *Id.*

182. *Id.* at 111.

183. *Id.* Lawyers and inmates both ranked standing up for clients' rights highly, while lawyers more often ranked knowledge of criminal law and listening skills highly and inmates more often ranked getting clients' opinions and spending time with clients before court highly. *Id.*

184. *Id.* at 112.

received the training.<sup>185</sup> The authors concluded that inmates want legal knowledge as well as a substantive lawyer-client relationship.<sup>186</sup> The authors advocate lawyers using client-relations skills as a means to elicit more cooperation, trust, and respect from clients, thus making lawyers' jobs more enjoyable.<sup>187</sup>

The same researchers later developed the Attorney-Client Trust Scale and used it to measure a client's trust and satisfaction with sentencing outcomes.<sup>188</sup> A volunteer sample of 307 prison inmates completed the scale based on their last experience with an attorney.<sup>189</sup> While in order to protect confidentiality, the race of the inmates was not recorded,<sup>190</sup> 95% of inmates indicated a white attorney represented them.<sup>191</sup>

Results revealed an overall low rating of inmates' trust in their attorneys, with nineteen of the twenty-four items falling below the midpoint.<sup>192</sup> This outcome may not be surprising given that the men in this sample were all convicted. The study also indicated that inmates with private attorney gave higher trust scores than inmates with court-appointed attorneys. Inmates who had served more time on their sentences at the time they completed the trust scale scored lower on the trust scale than those who had served less time, as did inmates who had more time remaining to serve on their sentences at the time they completed the trust scale.<sup>193</sup> Contrary to what might have been expected with procedural justice, inmates who attempted to contact their attorneys did *not* indicate higher levels of trust compared with those inmates who did not attempt to contact their attorneys.<sup>194</sup> Moreover, inmates who made suggestions to attorneys

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185. *Id.* There was no difference between the two groups on their ratings of legal skills. *Id.*

186. *Id.* at 117.

187. *Id.*

188. TRUST, *supra* note 146, at 69-87.

189. *Id.* at 72.

190. *Id.* at 76.

191. *Id.* at 72.

192. *Id.* at 77. For sixteen items, the lowest response was the most common one given by inmates. *Id.*

193. *Id.* at 78.

194. *Id.* at 79. However, note should be made that it is not known whether inmates were successful in reaching their attorneys, so this is likely a somewhat crude measure of procedural justice participation variables.

about the case were less satisfied with their attorneys than inmates who did not.<sup>195</sup>

Boccaccini and Brodsky concluded that a client's trust of his or her attorney is probably complicated by the attorney's willingness to accept the client's participation.<sup>196</sup> They argue for bolstering a "meaningful" attorney-client relationship, because "the quality of the attorney-client relationship directly impacts the effectiveness of a client's defense."<sup>197</sup> They further posit that "trust and confidence" should be key aspects of the effective attorney-client relationship.<sup>198</sup>

## II. A CULTURALLY COMPETENT APPROACH TO LAWYERING

### A. *The Role of Race in the Lawyer-Client Relationship*

Our previous discussion has shown that at the aggregated level, a series of individual decision-makers in the criminal justice system can produce a system that is characterized by racial and ethnic disparities. The extent to which unspoken or unrealized individual beliefs and attitudes about race impact decision-making likely is important, but is difficult to isolate in empirical research. As already noted, some criminal justice researchers are reluctant to state that the existing empirical research "proves" the existence of racial or ethnic discrimination in the criminal justice system.<sup>199</sup> However, both common knowledge and social science research support the notion that certain beliefs about differences among racial groups affect interpersonal interactions between racial groups.<sup>200</sup>

Research has found that whites generally have more positive constructions of their own racial group and fewer positive

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195. *Id.*

196. *Id.* at 82.

197. *Id.* at 83.

198. *Id.*

199. *See supra* note 70 and accompanying text.

200. J. Blaine Hudson & Bonetta Hines-Hudson, *A Study of Contemporary Racial Attitudes of Whites and African Americans*, 23 W. J. BLACK STUD. 22, 27 (1999). In a survey of 260 participants in race relations workshops, the authors found a fair segment of white respondents (22%) held "decidedly racist views." *Id.* at 24. *See also* Donald B. Pope-Davis & Thomas M. Ottavi, *The Relationship Between Racism and Racial Identity Among White Americans: A Replication and Extension*, 72 J. COUNSELING & DEV. 293 (1993).

constructions of other racial groups.<sup>201</sup> Gender, age, and education level differences among white adults also indicated differences in racial attitudes. Men reported less comfort in racial interactions and in dealing with race-related issues than women reported,<sup>202</sup> and men are also more apt to be confused about racial identity issues than women.<sup>203</sup> With regard to age, older white individuals held less positive views of racial minorities compared to whites than younger individuals,<sup>204</sup> and older people also reported greater discomfort with racial interactions.<sup>205</sup> When examining education level, studies find that whites with lower levels of education view racial groups other than their own less favorably compared to their own race than do whites with higher levels of education.<sup>206</sup> Specifically, whites “with lower levels of education tend to characterize whites as more ‘hardworking,’ ‘intelligent,’ and ‘peaceful’ than blacks, Asians, and Hispanics.”<sup>207</sup>

Research on general attitudes about differing racial groups do not, however, illuminate the entire picture with regard to how perceptions of racial differences affect support for various social policies designed to address issues of racial disparity. To understand these greater complexities, one needs to examine how social constructions of race affect attitudes towards racial groups.

### 1. Social Constructions of Racial Differences

Social constructions are cultural characterizations or popular images individuals hold that serve to define certain groups in

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201. See Michael W. Link & Robert W. Oldendick, *Social Construction and White Attitudes toward Equal Opportunity and Multiculturalism*, 58 J. POL. 149, 163 (1996).

202. Pope-Davis & Ottavi, *supra* note 200, at 295. See also Robert T. Carter, *The Relationship Between Racism and Racial Identity Among White Americans: An Exploratory Investigation*, 69 J. COUNSELING & DEV. 46, 71 (1994).

203. See Pope-Davis & Ottavi, *supra* note 200, at 295.

204. Link & Oldenick, *supra* note 201, at 159.

205. *Id.* However, it should be noted that these age differences were found in a survey of subjects with a very broad age range. Cf. Pope-Davis & Ottavi, *supra* note 200, at 296 (finding older undergraduate students, 21 or above, were more comfortable with and accepting of racial differences than were younger undergraduate students).

206. Link & Oldenick, *supra* note 201.

207. *Id.* at 159.



society.<sup>208</sup> Social constructions are different than stereotypes in that social constructions involve clusters of images or attitudes about a particular group. These images, particularly in the case of racial groups, are often strongly held and tend to reinforce each other. The more strongly held the social construction, the more resistant are the attitudes associated with the construction to new and contradictory information.<sup>209</sup>

Link and Oldendick examined how social constructions of racial differences affected white Americans' endorsements of race-related social policies, such as affirmative action.<sup>210</sup> They argue that the development of public policy is significantly affected by social constructions of racial groups "in that they produce pressures for public officials to provide benefits for groups that are positively constructed and to penalize those that are negatively perceived."<sup>211</sup> The authors specifically looked at the *social construction differential*, or the difference between how whites perceive their own race as a group compared to how they view minority groups.<sup>212</sup> They hypothesized that the higher the differential, the less likely the individual would be to hold favorable views toward policies or ideas beneficial to minorities.<sup>213</sup>

The authors found that in general, younger whites and white women were more likely to support equal opportunity policies than were older whites and white males.<sup>214</sup> When examining the social construction differential, the results showed that whites who perceived greater differences between whites and blacks tended to be less supportive of the need for equal opportunity policies than whites who perceived fewer differences between races, thus supporting their hypothesis.<sup>215</sup> Link and Oldendick concluded that decreasing social construction differentials between whites and other racial groups is needed because these differentials, particularly how whites perceive

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208. *Id.* at 151.

209. *Id.* at 151-52

210. *Id.*

211. *Id.*

212. *Id.* at 153.

213. *Id.* at 150.

214. *Id.* at 161.

215. *Id.*

racial groups in relation to their own race, have a strong impact on determining whites' attitudes towards particular issues associated with minority groups.<sup>216</sup>

## 2. The Need for Cultural Competency Education for Lawyers

Why do we need to explore and challenge issues of racial disparity in legal curricula? Silver argues that many lawyers are oblivious to the impact of race on the practice of law.<sup>217</sup> While race may be considered when it has a strategic advantage, as is the case in jury selection,<sup>218</sup> the intersection of the lawyer's racial and cultural background with that of his or her client is rarely considered.<sup>219</sup> Issues of race and culture are not a significant part of legal education. Even in clinical training programs, where more attention is paid to the lawyer-client relationship, the effects of racial difference, privilege, and oppression on the lawyer-client relationship are minimally addressed.<sup>220</sup>

The reality is that whites, be they law or social work students, are resistant to learning about racism because of the persistent nature of racial stereotypes and misinformation and a keen desire to preserve in-group status.<sup>221</sup> Recognizing the systematic nature of racism and oppression requires whites to examine how they are systematically advantaged compared to people of color. Whites are also challenged to acknowledge their role, whether it is passive or not, in maintaining this social injustice.<sup>222</sup> Many white students "resist" learning about racism because they are uncomfortable seeing themselves as "contributing" to the mistreatment of others, and often perceive such

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216. *Id.* at 163.

217. Silver, *supra* note 18, at 220.

218. Frank P. Cervone & Linda M. Mauro, *Ethics, Cultures, and Professions in the Representation of Children*, 64 *FORDHAM L. REV.* 1975, 1982 (1996).

219. *Id.* See Silver, *supra* note 18, at 224 (discussing an earlier article by Clark Cunningham, and concluding that Cunningham and his students had failed to consider how their racial attitudes affected their perceptions of what had occurred in the case).

220. Cervone & Mauro, *supra* note 218, at 1982. A notable exception to this lack of attention to cultural issues is Susan Bryant's treatise on the five habits of building cross-cultural competence in lawyers. Bryant, *supra* note 42.

221. Bidell et al., *supra* note 18, at 187.

222. *Id.* at 188.

discussions as indictments of whites.<sup>223</sup> An additional reason for this resistance is that learning about racism requires whites to challenge their current racial identities and doesn't offer them positive alternatives.<sup>224</sup> Thus, several authors suggest *racial identity development theory* is a useful framework for examining this resistance and supporting individuals in developing a more mature sense of racial identity.<sup>225</sup>

### 3. Racial Identity Development Theory and Models

Racial identity development theory posits that members of all socio-racial groups go through a racial identity developmental process characterized by several stages or statuses.<sup>226</sup> These statuses are assumed to differ between racial groups due to power differences among socio-racial groups in U.S. society.<sup>227</sup> Racial identity theory assumes members of different racial groups are socialized differently based on how their own race is classified in society and how they react to that classification.<sup>228</sup> According to Helms, how one identifies with their racial group happens in response to environments in which societal resources are allocated differently based on group membership, and usually involves an assumption that one group is entitled to more than its share of resources and other groups less.<sup>229</sup> In the U.S., whites have historically been the entitled group and people of color have been the deprived groups.

Based on white racial identity theory, Helms proposes a racial identity development model to describe how individuals' attributes, affects, behaviors, and interactions with members of different racial groups are reflective of their racial identity.<sup>230</sup> Presenting separate models for whites and persons of color, she proposes a set of ego

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223. *Id.*

224. *Id.*

225. *Id.* at 187.

226. Janet E. Helms, *An Update of Helms's White and People of Color Racial Identity Models*, in *HANDBOOK OF MULTICULTURAL COUNSELING*, 181, 183 (Joseph G. Ponterotto et al. eds., 1995).

227. *Id.* at 183.

228. *Id.* at 183-84

229. *Id.* at 184.

230. *Id.* at 191.

statuses<sup>231</sup> to describe how racial identity development can range from less mature or sophisticated conceptions of one's racial self in relation to members of a different race, to more mature or sophisticated ego statuses.<sup>232</sup> Helms's racial identity statuses for whites include: (1) *contact status*, defined as satisfaction with the racial status quo and obliviousness to racism and one's participation in it; (2) *disintegration status*, characterized by disorientation and anxiety provoked by un-resolvable racial moral dilemmas that force one to choose between own-group loyalty and humanism; (3) *reintegration status*, which involves an idealization of one's own racial group and denigration of and intolerance for other groups; (4) *pseudo-independence status*, distinguished by an intellectualized commitment to one's own racial group and a deceptive tolerance of other groups; (5) *immersion/emersion status*, which encompasses a search for an understanding of the personal meaning of racism and how one has benefited from racism as well as a redefinition of whiteness; and (6) *autonomy status*, exemplified by an informed, positive racial-group commitment, use of internal standards for self-definition, and a capacity to relinquish the privileges of racism.<sup>233</sup>

Models of racial identity development also explain how individuals of a particular racial group react when encountering members of other racial groups. According to Helms, when a person is exposed to an event involving racial issues,

the ego selects the dominant racial identity status to assist the person in interpreting the event. Once an interpretation is made, the schemata (or behaviors) then respond in ways that are consistent with the dictates of the status and ideally protect the person's sense of well-being and self-esteem.<sup>234</sup>

Thus, a person's racial identity status influences how she or he interacts with individuals in different racial groups.

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231. *Id.* at 182-83. Helms prefers the term "statuses" rather than "stages" because it better reflects the "dynamic interplay between cognitive and emotional processes that racial identity models purport to address." *Id.*

232. *Id.* at 186.

233. *Id.* at 185-86.

234. *Id.* at 187.

According to Helms, the general racial identity development issue facing whites is the abandonment of entitlement, whereas the general developmental issue facing people of color is overcoming the various manifestations of internalized racism.<sup>235</sup> The process by which a person moves from less mature to more mature statuses typically involves the person encountering meaningful, and often new, racial information or material in one's environment.<sup>236</sup> If the person is unable to cope with the new information, he or she will develop new statuses and, consequently, new schemata and behaviors to deal with that status. For example, a law student working for the first time in a clinic that serves predominantly black clients will encounter new racial information. This new information may challenge the student's current understanding of different racial groups, and require her or him to develop new schema and behaviors when interacting with clients of color. If these new schema and behavior work for the student and client, the student develops a new mature racial identity status.

#### 4. Racial Identity Development and Interpersonal Interactions

Helms notes that reactions occur in interpersonal interactions between members of different racial groups, regardless of the nature of the relationship.<sup>237</sup> Thus, racial identity statuses structure people's reactions to one another as well as to external events and, as a result, "people form harmonious or disharmonious alliances with one another based on the tenor of their expressed racial identity."<sup>238</sup>

Several research studies have looked at the role of racial identity development in counseling relationships. Looking at perceptions of working alliance in therapy relationships, one study found that more mature racial identity attitudes were positively related to working alliance formation between white counselors and clients of color,

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235. *Id.* at 188-89. Helms states people of color must move away from internalizing white society's definition of one's group, by conforming to stereotypes or attempting to become white, to expressing a positive racial self and resisting the multiple practices in one's environment that discourage positive racial self-conceptions and group expression. *Id.*

236. *Id.* at 186.

237. *Id.* at 191.

238. *Id.*

whereas less mature racial identity statuses were negatively related to working alliance formation between the same groups.<sup>239</sup>

Other studies indicate that racial identity development is associated with counselors' abilities to increase their cultural competencies in client interactions. Brown, Parham, and Yonker found that participating in a cross-cultural counseling course positively changed the racial identity attitudes of white counselors-in-training.<sup>240</sup> Conversely, Ottavi, Pope-Davis, and Dings found that more mature racial identity statuses were associated with higher levels of cultural competencies, and that racial identity status explained variation in reported competencies reported beyond that which was accounted for by demographic, educational, and clinical variables.<sup>241</sup> The authors believe their findings suggest that "the development of white racial identity attitudes should be considered in the conceptualization and planning of interventions to improve students' multicultural counseling competencies."<sup>242</sup>

Some research has also looked at the relationship between racial attitudes and clients' perceptions of service delivery. In a study of mental health case managers and their clients, Singleton-Bowie found that "clients whose case managers scored higher on the Racial Oppression Sensitivity Scale felt better about the services they received and had less difficulty in receiving services" than clients whose case managers were less sensitive to racial oppression issues.<sup>243</sup>

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239. Alan W. Burkard et al., *White Counselor Trainees' Racial Identity and Working Alliance Perceptions*, 77 J. COUNSELING & DEV. 324, 326 (1999).

240. Sherlon P. Brown et al., *Influence of a Cross-Cultural Training Course on Racial Identity Attitudes of White Women and Men: Preliminary Perspectives*, 74 J. COUNSELING & DEV. 510, 514 (1996).

241. Thomas M. Ottavi et al., *Relationship Between White Racial Identity Attitudes and Self-Reported Multicultural Counseling Competencies*, 41 J. COUNSELING PSYCH. 149 (1994).

242. *Id.* at 151. See also Paul R. Tremblay, *Problem Solving in Clinical Education: Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 415-16 (2002) (stating while lawyers and law students are not likely to study identity development theories to the same depth that mental health practitioners might, lawyers wishing to become more culturally competent ought to have some familiarity with racial identity development literature).

243. Sharron M. Singleton-Bowie, *The Effect of Mental Health Practitioners' Racial Sensitivity on African Americans' Perceptions of Services*, 19 SOC. WORK RES. 238, 241 (1995).

Thus, numerous social science research studies support the importance of developing cultural competencies for effective helper-client relationships, as well as the role of more mature racial identity statuses in developing these cultural competencies. Although research on the lawyer-client relationship is sparse, we believe one can safely assume that this relationship would also benefit from lawyers improving their cultural competency skills.

### *B. Cultural Competency Education for Lawyers*

Different models of cultural competency education have similar threads, but can vary in their emphasis or focus. Most models include components that challenge students to examine or become more aware of their own attitudes and beliefs toward “other” groups,<sup>244</sup> increase students’ knowledge about diverse populations, and assist students in acquiring or increasing their cross-cultural communication skills and cultural competencies.<sup>245</sup> Pedersen goes further to identify three ways in which cultural competency education programs can fail.<sup>246</sup> First, he cautions against programs that focus exclusively on awareness objectives.<sup>247</sup> In “awareness only” programs, students become aware of their own inadequacies or inadequacies of the social environment, but they fail to learn what to do with this awareness.<sup>248</sup> Second, programs fail when they over-emphasize “knowledge” objectives about a culture.<sup>249</sup> Such programs might include numerous readings and lectures on culturally diverse populations, but again, this information provision fails if the students are unaware of how this knowledge is important in developing skills and have not learned how to apply this knowledge in their interactions with clients.<sup>250</sup> Finally, cultural competency educational

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244. This is sometimes called “anti-racism training.”

245. PAUL PEDERSEN, *A HANDBOOK FOR DEVELOPING MULTICULTURAL AWARENESS* (2d ed. 1995). See generally Michael D’Andrea et al., *Evaluating the Impact of Multicultural Counseling Training*, 70 J. COUNSELING & DEV. 143 (1991); Brown et al., *supra* note 240.

246. PEDERSEN, *supra* note 245, at 26.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

programs can fail if they over-emphasize “skill” objectives.<sup>251</sup> According to Pedersen, teaching skills without providing appropriate awareness and documented knowledge about a culture may lead students to implement change in culturally inappropriate ways.<sup>252</sup>

Thus, the recommendations we propose for cultural competency education in the legal profession include: an infusion of cultural competency content throughout the curriculum, rather than as an “add-on” in clinically-oriented courses; an exploration of issues of power and oppression in perpetuating institutional racism; an exploration of one’s racial identity development status and a challenge to one’s personal racial beliefs and biases; and a skill building practical component to increase culturally competent interactions. Before we address the specifics on cultural competency education, we examine the organizational and individual challenges that must be addressed in order to successfully implement a cultural competency curriculum.

### 1. Organizational Challenges: Institutional Change

Cultural competence is a “set of congruent behaviors, attitudes, and policies that come together in a system, agency, or among professionals and enable that system, agency, or those professionals to work effectively in cross-cultural situations.”<sup>253</sup> Thus, culturally competent practice involves integrating and transforming knowledge about individuals and groups of people into specific standards, policies, practices, and attitudes to increase the quality of responses.<sup>254</sup> Cross, Bazron, Dennis, and Isaacs stress that increasing cultural competency requires a commitment to the process at all system levels, including the institutional and individual levels.<sup>255</sup>

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251. *Id.*

252. *Id.*

253. TERRY L. CROSS ET AL., I TOWARDS A CULTURALLY COMPETENT SYSTEM OF CARE 13 (1989).

254. KING DAVIS, EXPLORING THE INTERSECTION BETWEEN CULTURAL COMPETENCY AND MANAGED BEHAVIORAL HEALTH CARE POLICY: IMPLICATIONS FOR STATE AND COUNTY MENTAL HEALTH AGENCIES (1997).

255. *See* CROSS ET AL., *supra* note 253, at 19.



Institutional or organizational change differs from individual change. While there needs to be commitment on the part of the administrators, faculty, and students who are part of the institution, organizational change goes beyond simply requiring individuals within the organization to become more culturally competent. There are five essential elements that contribute to an institution's ability to become more culturally competent.<sup>256</sup> First, the institution must value diversity, which means seeing and respecting its worth.<sup>257</sup> In the case of a law school, the school must accept that its faculty, students, and the clients the students will ultimately serve come from very different backgrounds and will make different choices based on their culture.<sup>258</sup>

Second, the institution must engage in cultural self-assessment.<sup>259</sup> The law school must have a sense of its own culture, how the school is shaped by that culture, and how that culture influences the school's interactions with other cultures.<sup>260</sup> This cultural self-assessment is connected to the third essential element of organizational cultural competence, which is the ability to manage the dynamics of difference.<sup>261</sup> "Each [institution brings] to the relationship its own unique histories . . . [and] culturally prescribed patterns of communication, etiquette, and problem solving."<sup>262</sup> For example, a law school and a school of social work would, no doubt, have different perspectives on what it means to "advocate" for one's client. Thus, both schools would need to be aware of how their cultures influences their position on client advocacy and how they might perceive the other profession's perspective.

The fourth element of institutional cultural competence addresses the institutionalization of cultural knowledge.<sup>263</sup> The institution must develop ways of integrating knowledge about cultures in to the

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256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 17.

260. *Id.*

261. *Id.* at 20. The dynamic of difference exists "when an institution of one culture interacts with a population from another, [and] both [] misjudge the other's actions based on learned expectations." *Id.* at 20.

262. *Id.*

263. *Id.*

institution that live beyond the individuals that make up the institution at any given time.

Finally, the institution must be able to adapt to diversity.<sup>264</sup> The institution must modify its organizational policies and structures to reflect a commitment to cultural competency.<sup>265</sup> For example, a law school could modify its mission statement to include a statement on the significance of cultural competency to its overall mission. The school could also create a cultural competency committee charged with reviewing cultural plans, soliciting cultural competency consultation, and assuring that cultural competency initiatives are consistently implemented throughout the institution.

In social work education, this commitment to institutional change is reinforced through educational accreditation standards.<sup>266</sup> These standards require that schools of social work make specific and continuous efforts to provide a learning context in which everyone practices respect for all people and an understanding of diversity.

## 2. Individual Challenges: Faculty and Student Change

Law faculty and students are likely to initially view cultural competency education skeptically, as such content is foreign to law schools.<sup>267</sup> In particular, cultural competency education that is designed to reveal and challenge hidden racial biases is likely to be met with resistance from both faculty and students.<sup>268</sup> Reluctance to address diversity issues in courses is often split across gender and racial lines.<sup>269</sup> In the legal profession, teaching cultural competency content, particularly challenging students' racial biases, requires

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264. *Id.*

265. *Id.* at 21.

266. EDUCATIONAL POLICY AND ACCREDITATION STANDARDS, *supra* note 46, at 17 (“Social work education builds upon professional purposes and values; therefore, the program provides a learning context that is nondiscriminatory and reflects the profession’s fundamental tenets.”).

267. Silver, *supra* note 18, at 239-40.

268. *Id.* at 239.

269. In counseling and psychology departments, male and Euro-American faculty are less likely to include content on diversity in their courses than are females and faculty of color. Hanya H. Bluestone et al., *Toward an Integrated Program Design: Evaluating the Status of Diversity Training in a Graduate School Curriculum*, 27 PROF. PSYCHOL.: RES. AND PRAC. 394, 397 (1996).

those who train lawyers to have challenged their own racial biases and to commit to increasing their own cultural competency skills.<sup>270</sup> Pack-Brown cautions that those who educate and train students must reflect a non-racist attitude in their work in order to assist students in maturing in their racial identity development and increasing their cultural competency.<sup>271</sup> In addition, instructors must be highly skilled and well prepared to help students work through difficult, and often emotional, interpersonal encounters.<sup>272</sup>

Educators also face the challenge of creating an environment that fosters optimal conditions for cultural competency learning.<sup>273</sup> While some students might consider a safe environment to be one in which people “do not get angry,” or “raise their voices,” others, particularly students of color, “may view this as an effort to squelch their expression of the angering experiences with racism that they have lived through and want to talk about.”<sup>274</sup> Educators need preparation to navigate the anger and conflict that arises, particularly in classrooms that include victims of racism.<sup>275</sup>

Another challenge is to develop a cultural competency curriculum that is not designed exclusively for white students, and does not place unfair burdens on students of color to educate white students about racial issues.<sup>276</sup> Instead, what is needed, is a support/challenge model of teaching in which the “support” lowers students’ resistance to examining difficult topics, and “challenge” is used to confront racist, sexist, or ethnocentric comments.<sup>277</sup>

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270. Silver, *supra* note 18, at 244.

271. Sherlon P. Pack-Brown, *Racism and White Counselor Training: Influence of White Racial Identity Theory and Research*, 77 J. COUNSELING & DEV. 87, 91 (1999) (referring to educators in the counseling field).

272. Jeffrey M. Ring, *The Long and Winding Road: Personal Reflections of an Anti-Racism Trainer*, 70 AM. J. ORTHOPSYCHIATRY 73, 76 (2000).

273. *Id.* at 79.

274. *Id.*

275. *Id.*

276. Bryant, *supra* note 42, at 57-58.

277. *Id.* at 58-59.

### 3. Infusing Cultural Competency Content Throughout the Curriculum

Social scientists have found that exposing students to diversity courses that contain racism content can help them move along a continuum to a more complex understanding of racism.<sup>278</sup> However, Bidell found that at least one-third of students made no progression in their understanding of racism's complexities after participating in one cultural diversity class addressing this topic, indicating that one course on racism may not be sufficient to challenge students racial beliefs and move students toward more mature racial identity development, cultural awareness, or cultural competence.<sup>279</sup> Infusing and reinforcing cultural competency content throughout the curriculum is needed, because an "infusion approach" offers a greater opportunity to develop cultural competencies.<sup>280</sup> An infusion approach is also more effective in helping students overcome their resistance to examining cultural competency content on racism, discrimination, and oppression.<sup>281</sup> Furthermore, infusion provides many opportunities that will challenge students. Because students are continually challenged, their ensuing discomfort may serve as a catalyst for developing and strengthening more mature racial identity development statuses.<sup>282</sup>

Changes in social constructions of race require, at a minimum, exposure to experiences with different racial groups. However, infusing content into the curriculum that supports and encourages students to explore and challenge their racial perceptions and reach more mature levels of understanding about perceptions of their own race and of other races would be best. There are, no doubt, some barriers to how much of this content can be taught in law school. A significant barrier is that many law schools have an already overburdened curriculum thus faculty may resist infusing such

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278. See D'Andrea et al., *supra* note 245; Brown et al., *supra* note 240; Bidell et al., *supra* note 18.

279. Bidell et al., *supra* note 18. The authors also argue that taking one course will increase a person's general orientation to multiculturalism, but it represents only a starting point. *Id.*

280. D'Andrea et al., *supra* note 245, at 144.

281. *Id.*

282. Helms, *supra* note 226, at 187.

content into the curriculum, because they are preoccupied with concerns about coverage.<sup>283</sup>

Silver argues that clinical faculty cannot and should not carry the entire burden for teaching cultural competency. She states:

It would be far better to introduce such training at the beginning of the educational process, no later than the first year of law school. Multicultural awareness could then serve as both a lens and a filter through which the student might experience the law and the participants in the legal system.<sup>284</sup>

#### 4. Exploring Issues of Power and Oppression in Perpetuating Institutional Racism

Many academic departments opt for diversity courses that simply examine cultural differences and fail to examine the dynamics of power and oppression.<sup>285</sup> Ring questions the value of cultural competency education that fails to address power relationships and oppression, and argues that programs that do not focus on the dynamics of power and oppression cannot facilitate genuine cultural competence.<sup>286</sup> According to Pinderhughes, power is a central, but often unacknowledged dynamic in cross-cultural encounters.<sup>287</sup> She argues that power is inherent in the practitioner's role and can be compounded by the status assignment associated with the client's and the practitioner's cultural or social group identity.<sup>288</sup> The practitioner must understand how these power dynamics influence clients' behavior, their own behavior, and the helping process.<sup>289</sup> She further cautions that practitioners who are members of the dominant racial group or culture may "exploit aggrandized [racial] group status" as a

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283. Silver, *supra* note 18, at 240.

284. *Id.* at 243.

285. Ring, *supra* note 272, at 77.

286. *Id.*

287. ELAINE PINDERHUGHES, UNDERSTANDING RACE, ETHNICITY, AND POWER: THE KEY TO EFFICACY IN CLINICAL PRACTICE 109 (1989).

288. Elaine Pinderhughes, *Developing Diversity Competence in Child Welfare and Permanency Planning*, 5 J. MULTICULTURAL SOC. WORK 19, 22 (1997).

289. *Id.* at 22.

means of “relieving anxiety and reducing tension for themselves when working with persons from [non-majority] groups.”<sup>290</sup>

In the lawyer-client relationship, “any differences that exist between the lawyer and her client can exacerbate the power imbalance inherent in the relationship. These differences threaten to create barriers to effective communication and may impair the attorney/client relationship.”<sup>291</sup> The temptation to exploit this power when working with clients from low-status social or cultural groups is greater than one might think.<sup>292</sup> To develop “empowering and non-exploitative behaviors, law students must explore their reactions to having or lacking power, and be able to responsibly manage these reactions to assure that they do not negatively interfere with the their abilities to work effectively with clients.”<sup>293</sup> Because racism is a power system, any examination of power takes on additional significance when working with clients of color.<sup>294</sup>

##### 5. Exploring and Challenging One’s Personal Beliefs and Biases

According to Silver, “understanding unconscious racism and the dynamics of privilege and learning how to recognize it in ourselves and others, is an important step” in developing the ability to communicate cross-culturally.<sup>295</sup> A culturally skilled counselor is actively engaged in the process of becoming aware of how her or his assumptions about human behavior, values, biases, preconceived notions, and personal limitations impact work with diverse clients.<sup>296</sup> “To become good cross cultural lawyers, [law] students first must become aware of the significance of culture on themselves.”<sup>297</sup> Our own cultural perspectives tend to be invisible to us and, therefore, we

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290. *Id.* at 23.

291. Silver, *supra* note 18, at 231.

292. Pinderhughes, *supra* note 288, at 23.

293. *Id.* at 27.

294. PINDERHUGHES, *supra* note 287, at 109.

295. Silver, *supra* note 18, at 228-29.

296. DERALD WING SUE & DAVID SUE, COUNSELING THE CULTURALLY DIFFERENT: THEORY AND PRACTICE 166 (2d ed. 1990). *See also* D’Andrea et al., *supra* note 245; Pack-Brown, *supra* note 271, at 88; Silver, *supra* note 18, at 239 (discussing how the culturally sensitive lawyer must be aware of her or his own values and biases and how they affect minority clients); PEDERSEN, *supra* note 245.

297. Bryant, *supra* note 42, at 40.

do not pay attention to how our culture influences the way we perceive or judge others.<sup>298</sup>

Thus, a critical aspect of cultural competency education and training must include a self-exploration of one's own racism,<sup>299</sup> which will challenge the fear on which racism thrives and facilitate interpersonal learning that builds connections between diverse groups.<sup>300</sup> If cultural competency education does not include a strong antiracism component, students, especially white students, "will continue to deny responsibility for the rac[ism]."<sup>301</sup> The ability to cognitively conceptualize the systemic aspects of racism is necessary, but not sufficient, for young white adults to challenge patterns of racism in their own lives.<sup>302</sup> Developing "multicultural competence requires facing discomfiting truths about ourselves and our society, especially for those of us who enjoy the privileges of the dominant culture."<sup>303</sup>

Conceptions of racism and other complex social justice issues can change and develop over time.<sup>304</sup> These conceptions usually begin as simplistic notions: young adults view racism as a problem of individual prejudice or the racist beliefs and actions of a few individuals.<sup>305</sup> Individuals who hold these early conceptions also show a limited "conceptual grasp of the connections between prejudice and larger societal, institutional, or cultural forces" as well as little sense of responsibility for their own involvement in racism.<sup>306</sup> Cultural competency education should be designed to move students away from these simplistic notions toward a more complex

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298. *Id.*

299. SUE & SUE, *supra* note 296, at 73-74 (arguing that efforts to teach cross-cultural counseling are doomed to fail unless trainees examine their own white racism). *See also* Tremblay, *supra* note 242, at 409 (noting that lawyers need to explore their own conscious and unconscious biases and understand where their learned preferences might interfere with understanding their client's stories, thus having a negative effect on the client's case).

300. Ring, *supra* note 272, at 76.

301. Silver, *supra* note 18, at 237-38 (quoting SUE & SUE, *supra* note 296, at 15).

302. Bidell et al., *supra* note 18, at 186.

303. Silver, *supra* note 18, at 230.

304. *See* Bidell et al., *supra* note 18 (finding students were able to move from less complex to more complex understandings of racial issues while participating in a cultural diversity course).

305. *Id.* at 196.

306. *Id.*

understanding of the multiple dimensions of racism, discrimination, and oppression in this country.<sup>307</sup> White students, in particular, must be able to intellectually understand how systematic racial inequalities function to assign roles of racial advantage within the social system and how they benefit from these advantages.<sup>308</sup>

## 6. Skill Building for Increasing Culturally Competent Interactions

Lawyers need to learn how to communicate openly and effectively across cultural and racial divides, because failure to do so obscures the client's interests and impairs the lawyer's ability to effectively represent the client.<sup>309</sup> However, much of the legal curriculum continues to favor academics, separate from practice.<sup>310</sup> Thus, to effectively increase cultural competencies, education must include a skill development component, which allows students to move beyond awareness to action.<sup>311</sup> This action largely takes place in the process of communicating with clients. Thus, culturally competent practice requires law students to attend to differences in the communication styles of different racial and ethnic groups.

Students need to be aware of cultural differences in nonverbal communications, such as use of personal space, bodily movements and gestures, and other vocal cues, such as loudness of voice, pauses, and silences.<sup>312</sup> Students also need practice in using a *skilled dialogue* approach to cultural competency.<sup>313</sup> Skilled dialogue reflects an ability to engage in respectful, reciprocal, and responsive interactions with culturally diverse clients.<sup>314</sup> Communicating *respect* involves acknowledging the range and validity of diverse perspectives by asking clients open-ended questions that invite them to share

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307. *Id.*

308. *Id.* at 228.

309. See Silver, *supra* note 18, at 229.

310. See Cervone & Mauro, *supra* note 218, at 1983.

311. SUE & SUE, *supra* note 296, at 166; D'Andrea et al., *supra* note 245, at 143; PEDERSEN, *supra* note 245, at 19-20.

312. DERALD WING SUE & DAVID SUE, *COUNSELING THE CULTURALLY DIVERSE: THEORY AND PRACTICE* 127-35 (4th ed. 2003).

313. *Id.*

314. ISAURA BARRERA & ROBERT M. CORSO, *SKILLED DIALOGUE: STRATEGIES FOR RESPONDING TO CULTURAL DIVERSITY IN EARLY CHILDHOOD* (2003).



information about their perspectives.<sup>315</sup> It also involves examining one's own perspective about the assumptions and meanings one attaches to behaviors or information shared by the client.<sup>316</sup> *Reciprocity* requires one to establish interactions with clients that allow equal time for all perspectives and does not value one perspective over another.<sup>317</sup> Skills used to establish reciprocity include asking clients questions about how they see the lawyer's actions and what they understand the lawyer to say.<sup>318</sup> Finally, *responsiveness* means communicating an understanding of the client's perspective by using reflecting questions and summaries.<sup>319</sup> Such skill development involves presenting and discussing the skill, demonstrating the skill, practicing the skill in a role-play situation with feedback, and transferring the skill into real-world interactions with clients.<sup>320</sup>

### III. CONCLUSION

In this Article, we argue for increased attention to racial issues and culturally competent practice in the legal profession from a therapeutic jurisprudence perspective. We present a series of recommendations from the social work and counseling professions for teaching cultural competency in law schools. We chose to look at the issue of cultural competency through a TJ lens because of TJ's focus on improving or assuring therapeutic outcomes in the legal process, and its emphasis on the lawyer-client relationship that is needed to bring about these positive, therapeutic outcomes.

We assert throughout the Article that if law students and lawyers increase their cultural competency skills they will increase the quality and effectiveness of their interactions with culturally diverse clients. This will, in turn, lead to more satisfactory and therapeutic outcomes for both the clients and their lawyers. The research on counseling relationships supports the relationship between cultural competency

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315. *Id.* at 67-69.

316. *Id.* at 68.

317. *Id.* at 84-85.

318. *Id.* at 68.

319. *Id.* at 72.

320. PEDERSEN, *supra* note 245, at 41.

and client satisfaction; however, we need to empirically examine these issues within the legal profession. TJ, with its interdisciplinary focus, would clearly support the use of social science research to further examine the lawyer-client relationship.<sup>321</sup> What is needed to further this dialogue and reinforce the significance of cultural competency education in the legal profession is in-depth social science research on the successes and failures of cultural competency education with law students and the effects of increased cultural competency on clients' perceptions of outcomes. Therapeutic jurisprudence can serve as the lens through which this culturally competent legal practice can be evaluated.<sup>322</sup>

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321. Jacobs, *supra* note 128, at 361-62 (arguing for “theoretics of practice,” which means the use of social science methodology to examine lawyer-client interactions).

322. Petrucci et al., *supra* note 107.