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Symposium: An Experiment in Integrating Critical Theory and Clinical Education

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AN EXPERIMENT IN INTEGRATING CRITICAL THEORY AND CLINICAL EDUCATION

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"[F]eminist practice has generated feminist legal theory, theory has then reshaped practice, and practice has in turn reshaped theory."[1]

INTRODUCTION

Critical theory is important in live-client clinical teaching as a means to achieve the pedagogical goals of clinical education. Feminist legal theory, critical race theory, and poverty law theory serve as useful frameworks to enable students to deconstruct assumptions they, persons within institutions, and broader society make about the students' clients and their lives.[2] Critical theory highlights the importance of looking for both the "obvious and non-obvious relationships of domination."[3] Thus, critical theory informs students of the presence and importance of alternative voices that challenge the dominant discourse.[4] When student attorneys ignore or are unaware of such voices, other voices, including the students' own voices, invisibly influence the lawyer-client relationship and lawyering activities, such as interviewing, case theory generation, fact investigation, strategic planning, counseling, and problem-solving.[5] Critical theory also has a value in transmitting a structured and systemic critique "of law, legal institutions, and lawyering."[6]

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1. Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 249 (1998).

2. *See* Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1617 (1991) (discussing the interconnectedness and similarities between clinical education and feminist theory, including the interplay between theory and practice).

3. *See* Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) ("When I see something that looks racist, I ask, 'Where is the patriarchy in this?' When I see something that looks sexist, I ask, 'Where is the heterosexism in this?' When I see something that looks homophobic, I ask, 'Where are the class interests in this?'").

4. *See* Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 871-72 (1992) (explaining that "universalized narratives exclude alternative voices and perspectives," thereby limiting the potential narratives that an attorney can create for a disadvantaged client "whose experiences, perspectives, and images are absent from the dominant legal narratives").

5. *See id.* at 864 ("The project of critical practice and theory . . . is to develop theory rooted in practice in order to learn from and about, and then improve upon, the lawyer's participation as representative of those who are disempowered by the operation and interpretation of law."); *see also* Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1021-22 (1997) (discussing how "clinical scholars and others who train lawyers to represent women who have been abused have begun to examine how the relationship between lawyer and client affects the experiences of these women in the legal system").

6. *See* Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 110 (1994) ("Nowhere is the intersection of legal theory and legal practice more intense than in supervising students representing real clients on real cases.").

This Article discusses the way in which the Women and the Law Clinic and the Domestic Violence Clinic at the Washington College of Law at American University have attempted to incorporate feminist legal theory, critical race theory, and poverty law theory into our jointly-run seminar in order to further the clinics' pedagogical goals.[7] Our effort began with identifying feminist and other critical legal theories that resonate with the lives of our clinics' clients, their legal and non-legal issues, and the lawyering skills and values we teach. Next, we created a simulated fact pattern that is intended to highlight the theoretical issues we want to teach. Finally, we selected scholarly readings that discuss the theoretical concepts, and assign them to be read in preparation for the lecture and simulation exercise classes that we believe provide the best context in which to discuss the theory. This Article sets forth details of this ongoing project and explores the impact that infusion of critical theory in every aspect of the clinic has had on achievement of our pedagogical goals.

Section I provides a brief overview of clinical legal education theory and acknowledges that there is no agreement as to one theory of clinical legal education. Our clinics focus on teaching lawyering skills through case theory, client-centeredness, student ownership and responsibility, reflection and self-evaluation, and recognition of the context within which clients, lawyers, and other persons and institutions interact and relate.

Section II discusses relevant feminist legal theory and other critical legal theories and how they have been compared to and applied in clinical education to date.[8] For instance, some argue that knowledge of feminist legal theory and its critique of the operation of gender and power among attorney, client, and legal institutions provide students with tools necessary to more effectively represent their clients.[9]

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7. This ongoing project is a joint effort of the Women and the Law Clinic faculty, Professors Ann Shalleck, Diane Weinroth, Vivian Hamilton, Carolyn Grose, and me. The students and the faculty of the Women and the Law Clinic and the Domestic Violence Clinic join together for a weekly clinical seminar.

8. *See* Goldfarb, *supra* note 2, at 1667-75 (discussing feminist legal theory and clinical education's shared emphasis on experiential learning, interpersonal relationships, interconnection of ideas, context, critical thinking, cooperation and collaboration, ethics, and the operation of power); *see also* Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 13-14 (1993) (explaining the convergence of feminist legal theory and clinical education because they both recognize the importance of experience, context and reflection). *See generally* Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L. J. 717 (1992) (examining the relationship and similarities between clinical legal education and critical legal theory).

9. *See* Deborah Manville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081, 1083 (1992) (arguing that feminist legal theory helps attorneys to create new legal theories); Goldfarb, *supra* note 2, at 1675-87 (observing that feminist legal theory

Finally, section III discusses our approach to integrating feminist legal theory and other critical theories into clinical education in the Women and the Law Clinic and the Domestic Violence Clinic during the 2003-05 school years and its impact on the students. Building upon previous clinicians' work in documenting the compatibility of feminist legal theory, other critical theory, and clinical legal theory, our project uses critical theory to reconstruct the clinical seminar, its simulations, in-class exercises, and readings to further clinical legal education's pedagogical roles.

I. CLINICAL LEGAL EDUCATION

There is a diversity of opinion and practice regarding the goals and theoretical underpinnings of clinical legal education.[10] Nonetheless, for the purposes of this discussion, I attempt to outline a few general principles of clinical legal theory.

Some of the most prominent theories taught through clinical education include case-theory-driven lawyering,[11] client-centered lawyering[12] and reflective practice.[13] Case theory is an "explanatory

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helps clinic students learn to appreciate other "perceptions, judgments, strategies and communications" by acknowledging differences and the operation of power); *see also* Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1750-51 (1993) (noting that there is a growing trend of scholarship incorporating theory and practice that is focused on the power dynamic "between lawyers, clients, judges, clerks, bureaucrats" and the legal system as a whole); Frank S. Bloch et al., *Filling in the 'Larger Puzzle': Clinical Scholarship in the Wake of the Lawyering Process*, 10 CLINICAL L. REV. 221, 226-27 (2003) (noting that antisubordination theory, which is rooted in feminist legal theory, has been a common theme in clinical legal education's mission to serve marginalized persons).

10. *See* Susan Bryant & Elliott S. Milstein, *Reflections upon the 25th Anniversary of the Lawyering Process: An Introduction to the Symposium*, 10 CLINICAL L. REV. 1, 19-27 (2003) (discussing some of the tensions in clinical education pedagogy, including whether the goal of clinic is to turn out effective lawyers or promote social justice).

11. *See* DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 39-50 (2004) (positing the need for case-theory-driven lawyering that serves as the "organizing principle" for the lawyer's representation of the client); PAUL BERGMAN, TRIAL ADVOCACY 1-23 (3d ed. 1997) (explaining an argument-centered approach to trial advocacy, which entails developing stories about the case and the necessary legal elements, identifying factual propositions, and discovering important evidence).

12. *See* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 2-13 (2d ed. 2004) (championing the adoption of client-centered lawyering, which focuses on collaboration between a lawyer and client and empowers the client to make decisions about their own case); CHAVKIN, *supra* note 11, at 51-57 (observing that client-centered lawyering places the client at the center of the representation and increases the client's decisionmaking role); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 15-16 (2d ed. 2003) (focusing on the attorney-client collaboration in the representation, which considers the client's actual needs).

13. *See* Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 389-90 (1995) (calling

statement linking the case to the client's experience of the world," thus creating a "perspective for the facts, relationships, and circumstances of the client and other parties that is grounded in the client's goals."[14] One clinician has defined client-centered lawyering as "recognizing the uniqueness of the individual being represented and understanding that the legal problems for which the individual is seeking assistance occur within a constellation of unique goals and needs."[15] In addition, clinical legal education often emphasizes reflection on performance as a necessary process for effective learning through experience.[16]

There are also numerous goals of clinical education. These goals include teaching creative lawyering, the importance of the context in which clients' problems arise, and teaching ethical lawyering, social justice, and fairness. Clinical education teaches creative lawyering by teaching that theory informs practice and practice in turn informs theory; and through the interaction of these two frameworks, students can create stories and case theories to assist the client in problem-solving.[17] Clinical education also teaches students the importance of context.[18] Students learn to recognize and evaluate the effect of the

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for less emphasis on clinical education that teaches lawyers how to practice under a mentor through trial and error and more emphasis on teaching student attorneys to be theoreticians who rely on their own experience and education); DONALD A. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION 79-104, 130-40 (1983) (analyzing how different professionals solve problems, and theorizing that the use of reflective conversation through asking questions and incorporating prior experiences is a common way that professionals solve problems); GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY xxii-xxiv (1978) (advocating the combination of theory, practice, and reflection as an educational model to teach lawyers how to be effective professionals).

14. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 553 (1994) [hereinafter Miller, *Back Their Lives*]; *see also* Binny Miller, *Teaching Case Theory*, 9 CLINICAL L. REV. 293, 298 (2002) (comparing case theory to a "storyline . . . the short version of the lawyer's story of the case that takes into account the context in which it will be told").

15. David F. Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 268 n.79 (2003).

16. *See* Bryant & Milstein, *supra* note 10, at 13 (discussing the basic clinical learning method as a three step process: "(1) place students in role with a simulated or actual case; (2) provide students with multiple opportunities to describe, evaluate and solve problems; and (3) encourage students to generalize, utilizing what they are reading to focus the learning from experience"); Kimberly E. O'Leary, *Evaluating Clinical Law Teaching – Suggestions for Law Professors Who Have Never Used the Clinical Teaching Method*, 29 N. KY. L. REV. 491, 504-07 (2002) (discussing the different processes for incorporating reflection of the students' clinical experiences into the classroom).

17. *See* Bowman & Schneider, *supra* note 1, at 269-70 (observing that the exchange between feminist legal theory and clinical education has resulted in alternative methods of resolving disputes).

18. *See* Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635, 1643 (1991) (explaining that context is important to lawyering because "[t]he conceptualizations that determine

social, political, economic, and systemic context within which the client's issues have arisen. Students learn that context affects the nature of the client-lawyer relationship, the client's decision-making, and outcomes.[19]

Clinical education teaches ethical and value-driven lawyering.[20] Due in large part to its roots in the legal services movement, clinic students represent primarily marginalized people, such as poor women of color.[21] Accordingly, clinics may seek to assist students in developing a value system that prioritizes the provision of legal services to such clients.[22] Finally, clinical education strives to teach about justice and fairness and the roles lawyers play in pursuit of these values.[23] This includes discussing how power and authority operate within and between public and private institutions, communities, and persons.[24]

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legal outcomes begin to be formed in a process by which a matter is reduced from a situation in the world of social reality to an issue for resolution in the world of law"); Smith, *supra* note 8, at 11 (noting that "[a]ll clinical learning occurs in an interpersonal, institutional, doctrinal and procedural context"); Linda Morton, *Creating a Classroom Component for Field Placement Programs: Enhancing Clinical Goals with Feminist Pedagogy*, 45 ME. L. REV. 19, 42-43, 49-50 (1993) (arguing that contextualizing legal theory by incorporating human experiences into a law school class is critical to understanding a case).

19. *See* Robert Dinerstein et al., *Legal Interviewing and Counseling: An Introduction*, 10 CLINICAL L. REV. 281, 294-96 (2003) (exploring how context, which includes situational factors such as race, gender, and class, affects the development of the lawyer-client relationship); *see also* Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLINICAL L. REV. 41, 61 (1994) (proposing that by telling stories about clients, including the daily minutiae of their lives, students and lawyers may "begin to understand something about human motivation and behavior, something about their own assumptions and where those come from, and something about the limits of legal analysis").

20. *See* Dinerstein et al., *supra* note 19, at 285 (promoting the integration of ethics, along with skills, values, and differences, in the interviewing and counseling curriculum); Smith, *supra* note 8, at 38-45 (discussing the role of criminal defense attorneys as zealous advocates as opposed to truth seekers).

21. *See* Michael Meltsner, *Celebrating the Lawyering Process*, 10 CLINICAL L. REV. 327, 346 (2003) (observing that clinical movement founders came from legal services and civil rights organizations and saw their mission to teach lawyering with an attention to the poor and the pursuit of social justice); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 523 (2003) (identifying the second wave of clinical legal education as having its origins in the anti-poverty movement).

22. *See* David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 194 (2003) (stating that a goal among clinicians is "to imbue in students the desire to devote their professional lives to legal and social reform").

23. *See generally* Jane Harris Aiken, *Strive To Teach "Justice, Fairness, and Morality,"* 4 CLINICAL L. REV. 1 (1997) (suggesting ways in which law professors can teach students to promote justice in their legal careers, including deconstructing society's power structure, confronting privilege, relying on learning theories designed to cater to adult learners, self-reflection, and using clinic to provide students experience with injustice).

24. *See* Peter Margulies, *The Mother with Poor Judgment and Other Tales of the*

Our project developed because we wanted to enhance our teaching of clinical education through formal teaching of feminist and other critical legal theories. We believe that understanding critical legal theory helps our students formulate case theories, be client-centered lawyers, improve interviewing and counseling skills, and grapple with their role as lawyer in relation to their client, the legal system, and the broader community.

II. CLINICAL EDUCATION THROUGH FEMINIST LEGAL THEORY AND OTHER CRITICAL LEGAL THEORIES

Clinicians have used feminist legal theory and other critical theories in various ways to provide powerful constructs that help educate students about clinical concepts such as client-centered lawyering, case theory, the importance of context, and social justice.[25] For example, critical theory shows that subordination of classes of people is perpetuated when differences remain unexamined.[26] Unexamined differences can operate to create hierarchies because preconceptions and stereotypes then control interactions with other persons and institutions.[27]

Many clinicians teach students the importance of acknowledging differences in client representation when teaching client-centered lawyering skills, case theory, and context.[28] Clinicians often use

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Unexpected: A Civic Republican View of Difference and Clinical Legal Education, 88 NW. U. L. REV. 695, 726-28 (1994) (emphasizing the need for students to acknowledge their assumptions and stereotypes about race, class, and gender in order to understand a client's narrative).

25. *See* Shalleck, *supra* note 5, at 1041 (commenting that "teaching theory is important in developing lawyers and developing theory"); Miller, *Back Their Lives*, *supra* note 14, at 486 (describing the "theoretics of practice literature," which examine the intersections of theory and practice).

26. *See* Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 341-42 (1987) (examining unconscious racism that pervades everyday life, which is reflected in comments that come from seemingly racially neutral thoughts). "Difference" is used throughout this article as meaning differences related to such personal identification issues as race, gender, class, national origin, sexual orientation, and ability.

27. Smith, *supra* note 8, at 17-27 (discussing student attorneys' reflections regarding differences between themselves and their clients, and other lawyers and the legal system and how the perception of differences and commonalities impacts their lawyering).

28. *See* Kimberly O'Leary, *Using "Difference Analysis" To Teach Problem-Solving*, 4 CLINICAL L. REV. 65, 76-80 (1997) (discussing the importance in grounding the teaching of differences in lawyering skills theory); Dinerstein et al., *supra* note 19, at 285 (noting that issues of difference are "inextricably interrelated" to the teaching and practice of lawyering skills, values, and ethics); *see also* Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 1001 (1997) (observing that because the society in which lawyering occurs is not colorblind, "only by considering the race implications of a particular case will a lawyer be able to assess the relevance of race"); Leslie Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95

exercises to teach about differences in live-client clinics.[29] These exercises in part rely upon the premise that understanding differences promotes a three-dimensional view of the client as a person, who is in relationships, and who is living in a broader world that interacts with that person. Such understandings of individual clients can promote empathy and trust-building for more effective client-centered lawyering, including interviewing, fact gathering, problem-identification, creative problem-solving, and other counseling.[30] The student's understanding of the perceived and

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MICH. L. REV. 901, 930 (1997) (arguing that "[w]hen lawyers are silent about race, we deny that it matters").

29. *See* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 62-95 (2001) (providing examples of clinic exercises used to teach cultural differences between clients and lawyers). Some examples of clinic exercises include asking students to identify differences and similarities between lawyer and client; having students then analyze the possible effects of what they have identified; inviting students to think of alternative explanations for their clients' behavior; encouraging students to develop cross-cultural communication skills by gathering knowledge about a client to interpret a client's behavior; and challenging students to engage in self-analysis to recognize their biases. *See id.*; *see, e.g.*, David Dominguez, *Beyond Zero-Sum Games: Multiculturalism as Enriched Law Training for All Students*, 44 J. LEGAL EDUC. 175, 176-79 (1994) (advocating teaching multiculturalism through "negotiable learning," which consists of dividing the class into small, diverse teams and assigning a provocative group problem that requires students to reconcile differing cultural views, values, and priorities); Espinoza, *supra* note 28, at 931-35 (calling for the recognition of race as an influence on lawyering rather than ignoring the existence of race as a factor); Melissa Harrison & Margaret E. Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, 6 COLUM. J. GENDER & LAW 387, 392-93 (1996) (introducing two techniques, slow motion reading and resonance, to "ameliorate [their] own and the student's 'cultural dyslexia'"); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Classes*, 45 STAN. L. REV. 1807, 1810 (1993) (teaching students to be conscious and sensitive to personal identification differences between themselves and their clients so that they can work towards developing a good rapport with the clients); Michelle Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U.L. REV. 345, 372 (1997) (explaining the need to recognize racial and cultural differences between lawyer and client for the lawyer to properly translate the client's story or problem); O'Leary, *supra* note 28, at 72 (using "difference analysis" to create plans to assist clients that include problem-solving options other than litigation and alternative dispute resolution); Suellyn Scarnecchia, *End Gender and Race Bias Against Lawyers: A Classroom Response*, 23 U. MICH. J.L. REFORM 319, 324-31 (1990) (presenting students with hypothetical legal situations, which they must discuss, identify the biases in the problem, and develop possible responses); Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 590-97 (1999) (arguing that understanding a client's community is vital to effectively representing the client). Exercises that are used to "teach" the clients' culture include having students plot out their cultural influences from birth to law schools; discussing the intersection of language and culture and techniques in using interpreters within the context of interviewing clients; and addressing the impact of culture and race on advocacy, cross-cultural communication, and socio-political considerations when representing clients. Cruz, *supra*. In countering the concern that race-consciousness may lead to stereotyping and racism, one scholar responds that because "the stereotypes are already present, race may be useful as a means for presenting countermyths and narratives." Cahn, *supra* note 28, at 1002.

30. *See also* Shalleck, *supra* note 5, at 1032 (suggesting that lawyers' reflection

actual differences between herself and her client can help make obvious for examination assumptions being made within the relationship.[31] Challenging assumptions promotes better case theory generation, understanding of context, and progress towards social justice.[32]

The related critical theory concepts of antisubordination[33] and essentialism[34] can also serve the goals of clinical education. These concepts illustrate that difference is used as the organizing principle of political, economic, and social structures.[35] Students can gain a vocabulary, a context, and a greater understanding of how differences might operate in relationships among themselves, their clients, and society by understanding theories such as antisubordination and essentialism. Students can use the critical theory of antisubordination to examine their role as a lawyer within society and in relation to their clients, as well as in how power and privilege operate in these relationships. For example, critical theorists and clinicians debate the use of "racialized stories of deviance" in the representation of clients.[36] Some suggest that the risk of further subordination of minorities makes the lawyer's use of such stories, even if they could help acquit a client, problematic.[37] Others argue that lawyers must

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and empathy with their clients can assist lawyers in avoiding judgment of clients).

31. *See id.* (explaining that as a lawyer becomes more empathetic to her client's vulnerabilities, the lawyer becomes less certain that she could have handled the situation more effectively than her client and is less likely to impose her own values on the client).

32. *See id.* at 1032-33 (using the example of intimate violence to illustrate the complexities and contradictions involved in a lawyer's understanding of a client's frame of reference).

33. *See* Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 6-11 (1994) (discussing the feminist theory of nonsubordination, which focuses on the power imbalance between the genders and whether a legal practice or rule furthers the subordination of women to men).

34. *See id.* at 15-17 (explaining that essentialism directs its critique inward against feminist theory itself and examines false generalizations about "women" that deny differences among women).

35. *See generally* Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 122-24 (2003) (discussing the similar critical theories of unconscious racism, interest convergence, and agency). The value of teaching critical theory through acknowledging differences and examining power, essentialism, and subordination has been labeled as part of the "idealist" school within critical race theory. *Id.* In his piece, Delgado is critical of the idealist school's belief that discrimination can be eliminated by purging thoughts, speech, and other narratives of stereotypes of negative racial messaging. *Id.* Instead, he proposes as more effective the "realist" school, which works on eliminating the racial hierarchy through markets and economics. *Id.*

36. *See* Cahn, *supra* note 28, at 968, 995 (explaining that a racialized story is one that invokes racial stereotypes).

37. *See* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1308 (1995) (arguing that racializing a story leads to a spillover between law and society, which results in further oppression of racial minorities).

use subordinating stories to prevent criminal convictions despite the potential of these stories to replicate existing power hierarchies.[38] Sensitivity to this debate strengthens collaborative decision-making by students and clients about case theories.

In addition, feminist legal theory and other critical theories assist students in learning about context and its importance – another of clinical education's goals.[39] For example, in the representation of women who are abused, many have discussed concepts such as the operation of physical, emotional, and economic abuse in intimate relationships; women's multiplicity of responses to the violence; the context of the violence within women's lives and relationships; and the effectiveness of institutional responses to the violence.[40] These ideas help students understand their client in relation to her situation. Moreover, exposure to the debate between the theories of antisubordination and agency within the context of domestic violence, for example, can help students gain context for the competing case theories that may be raised by opposing parties, judges, social workers, and other institutional players.

Finally, teaching critical theory also is important in helping students determine the role they can play in creating a fairer and more just legal system and society.[41] Theory can be useful in helping students better understand individual clients and the systemic structural features of society in which their clients live.[42]

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38. *See*, *e.g.*, Smith, *supra* note 8, at 42-45 (describing the necessity of exploiting sexism in order to defend the accused in a criminal trial).

39. *See* Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1748-49 (1993) (noting that the synthesis of theory and practice serves to concentrate lawyers' focus on situating clients within the context of their lives and their relationships with their lawyers).

40. *See* Shalleck, *supra* note 5, at 1022-27 (stating that through interactions with battered women, feminist theorists have begun to construct new methods of examining abuse of women in intimate relationships); Susan Bryant & Maria Arias, *Case Study: A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering That Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207, 217 (1992) (describing the clinical teaching of a variety of theories regarding violence against women in intimate relationships to counter stereotyping of clients). *See generally* ELIZABETH A. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 104-06 (Yale Univ. Press 2000) (explaining that education regarding domestic violence theory can effectively limit the impact on lawyering caused by unexamined biases, experiences and normative views on lawyering).

41. *See* Bryant, *supra* note 29, at 36 (emphasizing the importance of cross-cultural lawyering in improving the legal system); *see also* Goldfarb, *supra* note 2, at 1692 (arguing that practicing feminist theory through the clinical experience reinforces the underpinnings of feminism while simultaneously reworking the legal structure).

42. *See* Ann Shalleck, *Pedagogical Subversion in Clinical Teaching: The Women and the Law Clinic and the Intellectual Property Clinic as Legal Archaeology*, 13 TEX. J. WOMEN & L. 113, 122-24 (2003) (describing how, through the course of representing a woman who had been abused in an intimate relationship, the students

Therefore, ensuring that students understand critical theory is important to enhancing their clinical legal education. With the assistance of critical theory, clinical students strengthen the lawyer-client relationship by developing greater empathy and a stronger sense of client-centeredness; improve their creative lawyering due to a better understanding of context and case theory; and further their lawyering for social justice.

III. INTEGRATING CRITICAL LEGAL THEORY AND CLINICAL LEGAL EDUCATION

As discussed above, critical theory can enhance clinical legal education. This is due in part to the shared mission of promoting social justice. In addition, critical theory's critique of the interactions between dominant persons, subordinate persons, and powerful institutions echoes themes common to lawyer-client relationship and lawyer-client-other relationships. However, despite the body of scholarship discussing the compatibility of critical theory and clinical theory, my colleagues and I struggled to find a model to fully integrate these theories into our clinical seminar. Below I discuss our "work-in-progress," in which we have woven critical theory throughout traditional clinic activities and exercises to more effectively teach students in the Women and the Law Clinic and Domestic Violence Clinic.

A. The Women and the Law Clinic and the Domestic Violence Clinic

In the Women and the Law Clinic, students represent individual clients who are primarily poor women of color. The representation includes legal and nonlegal problems that may be presented in matters such as abuse and neglect proceedings, custody proceedings, domestic violence cases, landlord-tenant cases, and special education cases. In the Domestic Violence Clinic, students represent individual clients, who are also primarily poor women of color, in legal and nonlegal matters arising from the clients' subjection to domestic violence. Most of the representation is in the context of seeking civil protection orders and ancillary relief, such as child custody and support.

The two separate clinics join for a weekly seminar that lasts for the

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learned their client's meaning and framework for the experience; they worked on accepting that framework; they discovered how their client's understanding of her situation was fluid, as it was impacted by her interactions with other persons and institutions; and they learned how legal frameworks offered only limited redress, if any, to their client's situation); *see also* Goldfarb, *supra* note 2, at 1692 (emphasizing the importance of feminist and clinical methods to providing historical and social context to the teaching of doctrine).

entire academic year. During both semesters, the seminar is simulation-based. In the fall, the seminar classes address pretrial lawyering skills such as interviewing, case theory, fact investigation, strategic planning, counseling, and negotiation. As such, the fall semester focuses on the lawyer-client relationship. In the spring semester, the seminar classes cover trial skills, such as opening statement, direct and cross examination, and closing argument. Accordingly, the spring semester focuses on lawyer-client and lawyer-other relationships, such as relationships with judges, opposing parties, opposing counsel, experts, and lay witnesses. Throughout both semesters, the seminar emphasizes clinical theory, focusing on client-centered lawyering, contextualization, case and client theory, and reflection. In addition to the seminar, the clinics each have a weekly "case rounds" meeting for students to discuss with fellow clinic students issues arising with clients and in cases, and talk about broader systemic and theoretical themes resonating throughout the clinic's work. Finally, students meet with a faculty supervisor, at least weekly, to discuss matters specific to the clients and cases on which they are working.

In both clinics, teachers and students routinely and informally raise issues important to feminist legal theory, critical race theory and poverty law during case rounds, supervision meetings, and seminars. We frequently discuss institutions and their role in poor people's lives, as well as the ways in which race, gender, and class intersect in influencing the potential options available to clients to address their needs. Prior to the 2003-2004 clinic year, however, we had not systematically incorporated critical theory into the clinic seminar.

B. Reconfiguring the Clinics' Seminar Curriculum

Prior to the 2003-2004 clinic year, although we were committed through our case rounds and supervision meetings to teaching about the integral nature of feminist and other critical legal theories to the representation of clients by our students, the students indicated that they would appreciate more formal inclusion of the theory. Similarly, we found that even students familiar with critical theory were not always able to generalize their knowledge to their client work. Rarely did students perceptibly integrate their knowledge of critical legal theory into their work on case theory, problem-solving, and other matters related to client representation. In addition, not making these ideas an explicit part of the curriculum tended to marginalize the theoretical concepts.

Thus, for the 2003-2004 clinic year, we decided to modify our seminar curriculum in order to provide our students with a more

sophisticated understanding of critical theories that related to our students' client work. We believed that the theories would not be given primacy in the students' learning until we institutionalized the theories in the seminar through simulations, exercises and assigned readings. After making this decision, we faced the complicated questions of how best to implement our goal.[43] What should be taught? When should it be taught?[44] How should it be taught?

Many thoughtful articles informed our decision-making process regarding teaching critical theory, differences, social justice, and clinical education.[45] For instance, one approach is to assign critical theory readings regarding the legal subject matters most often at issue in the students' client work.[46] One could also assign readings about the role of differences or critical theory in specific lawyering skills.[47] Yet, another approach is to focus on teaching differences and social

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43. *See* Shalleck, *supra* note 5, at 1048 (discussing various ways in which to address domestic violence theory: assigning readings, devoting classes to aspects of the theory, simulations confronting conceptualizations of domestic violence, case round discussions grounded in live-client representation, and supervision). Some have recognized, however, the difficulty in teaching these important issues given the demands of working through the lawyering skills and theories alone. *See* Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1329-30 (1993) (noting that time constraints cause trade-offs between the teaching of substantive and theoretical material and skills).

44. *See* Shalleck, *supra* note 5, at 1044-48 (cautioning that introducing theory before the commencement of client representation may curb students' creation of theory out of practice). Another view might hold that theory is a necessary precursor to practice in order to expose students to an unknown that might permit them to challenge the unchallenged, make visible that which society promotes as invisible, and thus increase the possibilities of creation. *Id.*

45. *See, e.g.*, Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 289 (2001).

> We would be far better off if our students learned how to reflect on their experience, place it in a social justice context, glimpse the strong relationship between knowledge, culture and power, and recognize the role they play in either unearthing hierarchical and oppressive systems of power or challenging such structures.

Id.; *see also infra* notes 46-51 and accompanying text.

46. *See, e.g.*, Bryant & Arias, *supra* note 40, at 217 (discussing assignment of readings regarding theories about domestic violence); Leigh Goodmark & Catherine Klein, *Deconstructing Teresa O'Brien: A Role Play for Domestic Violence Clinics*, 23 ST. LOUIS U. PUB. L. REV. 253, 257-58 (2004) (advocating the assignment of theories regarding domestic violence for the first seminar class to provide context for the clinic students).

47. For instance, for a class on counseling, one could assign Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U.L. REV. 345 (1997). When discussing the creation of case theory and its use within a trial, one could discuss the "ethics of narrative," the tension between client-centered zealous representation, and the broader goal of a lawyer's commitment to anti-subordination. *See* Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U.J. GENDER SOC. POL'Y & L. 117, 117 (2002).

justice through exercises and activities.[48] Further, one could integrate issues involving differences into various teaching techniques.[49] Another approach is to offer sequential coursework that focuses on issues of subordination and differences.[50] Of course, many of these methods have overlapping ideas and a combination of any or all of these approaches would be possible as well.

Drawing from these various methods, we decided to teach critical theory pervasively across the curriculum, as opposed to in isolated classes.[51] We first considered which basic critical theoretical constructs are most important to discuss in the context of our seminar's lawyering skills, our client population, and our client's problems.[52]

We started by examining which feminist legal theory and other critical theories inform and resonate most with the different aspects of lawyering theory. For instance, in interviewing, we decided that respect for the client's voice is important. Thus, teaching about narratives and storytelling, an important element of critical race and feminist legal theory, works well. In addition, for interviewing we decided it is important for the students to understand theories about

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48. *See* Bryant, *supra* note 29, at 64-67, 88 (providing the example of Habit One, which is a mapping exercise where similarities and differences of clients are listed and mapped in Venn diagrams as a tool to identify assumptions and judgments about clients); Aiken, *supra* note 45, at 298-306 (discussing the importance of "critical reflection" on assumptions, "critical incident" exercises, "faculty interventions," "criteria analysis" and role-playing in order to assist the student in identifying various levels of assumptions regarding her client, herself, society, lawyering, and values); *see also* discussion *infra* Sections III.D.1 and III.D.2.

49. *See* Hing, *supra* note 29, at 1826-33 (discussing the inclusion of differences in journal writing and simulation fact patterns). Film clips used in seminar could also include issues of differences. *Id.* at 1831.

50. *See id.* at 1830-31 (suggesting that in order to ensure that students think critically about their clients' issues, they must analyze their personal identities in a critical manner).

51. Teaching theory across the curriculum is the preferred method to show that it is a not a segregable issue. *See* Bryant, *supra* note 29, at 35 (proposing that teaching cross-cultural theory emphasizes the importance of being culturally aware of one's surroundings in an attorney-client situation). However, teaching across the curriculum presents its own problems as well if the discussion of differences is left to the last few minutes of each class. *See* Shalleck, *supra* note 5, at 1046 (elaborating on the timing of teaching theory). Instead, teaching theory would be most effective if it were pervasively taught across the curriculum for each class. Shalleck, *supra* note 5, at 1045-46.

52. Shalleck, *supra* note 5, at 1046.

> [W]ithin the different components of a clinic, the teacher may identify themes, such as agency and victimization, early in the course, which can be developed and explored as the students have increasing experience representing women who have been abused. Also, tasks that call upon students to theorize based on their experiences can be intermixed with opportunities to evaluate the theories of others based on what has happened in the students own work.

Id.

essentializing and stereotyping in order to fully listen to, probe, and empathize with their clients' stories, and guard against unconscious assumptions.

Similarly when looking at counseling, where the students facilitate the client's generation and evaluation of options, as well as her decision-making, we decided that the issue of choice within the context of self-direction is important. Accordingly, we determined that the theories of agency and antisubordination are important for the students to explore in working through counseling issues.[53]

In the end, we decided to teach essentialism in one of our interviewing classes, a systemic critique of the intersection of poverty and race in our case theory class, and agency within the context of subordination in one of our counseling classes. We decided to wait to introduce the concept of storytelling and the power of narrative until the second semester trial component of the seminar. We based our decision to teach a limited number of theories in part upon a hope that fewer new concepts would permit teaching each one in depth.

C. Simulation

After deciding upon the feminist legal theories and other critical theories we intended to teach, we created a new simulation. The new simulation serves to draw out the identified critical theories and to facilitate the teaching of interviewing, counseling, case theory development, client-centered lawyering and contextualization.[54]

In discussing this project, it is helpful to begin with a synopsized version of the facts from the new simulation we use for interviewing, case theory generation and counseling.

1. Abuse Petition

The only information we give the students about their new client, Jenna Jeffries, is a copy of the petition alleging abuse of Jeffries' daughter. The petition claiming abuse of Amberly Jeffries, an eleven-year-old girl, contains many allegations, including that the child protection services agency has removed Amberly from her mother's care due to abuse. Specifically, the agency alleges that Amberly's mother, Jenna Jeffries, failed to protect Amberly by leaving her alone with Jeffries' boyfriend, Kyle Bryce, Sr. During this time, Bryce beat

53. *See* Margulies, *supra* note 24, at 709 (discussing how the use of "stock stories" and stereotypes may have denied their clients' agency, that is, "the capacity to control their own lives," or ignored society's role in constructing the stereotypes).

54. *See generally* Shalleck, *supra* note 5, at 1047 (recognizing that "simulations can be effective in presenting theoretical material"); Goodmark & Klein, *supra* note 46, at 253-88 (discussing a simulation created to teach lawyering skills as well as domestic violence theory).

Amberly repeatedly with a belt, leaving welts on her legs. In the petition, the social worker for the agency states that Bryce is a drunk and a violent man with a criminal record, who also physically abused Jenna on multiple occasions in the past.

2. Client Role

We also created instructions and information about Jenna Jeffries for the volunteer who acts in the role of Jeffries. We do not provide this information to the student-lawyers. Below is a summary version of the client instructions:

> Jenna Jeffries is a thirty-year-old woman who has been married under common law to Kyle Bryce, Sr. for the past five years. They have two young children. She also has an eleven-year-old daughter, Amberly, from a previous relationship. Together, Jenna and Kyle have raised the three children they love. Jenna and Kyle also work at the same diner – though on different shifts to ensure that one of them is always home with the kids. They are just barely making it month-to-month on their wages.
>
> Jenna and Kyle have what she would say is a pretty good relationship, with ups and downs, especially when Kyle drinks. In the past during a verbal argument, Kyle grabbed Jenna by the hair and arm and pulled her through the house. After that incident, she went to court and was able to get a court order where he agreed to not abuse her again, but did not require him to admit to any wrongdoing. They still continued to live together.
>
> Jenna and Kyle are in complete agreement about child raising issues and believe that if you "spare the rod, you spoil the child." Jenna and Kyle agree on using hands, bedroom slippers, or belts to spank the children.
>
> Last night, Amberly called Jenna at work hysterically crying. She said that Kyle was drinking and hit her with a belt on her legs. Seeing that her boss was irritated that she was on the telephone, Jenna agreed to let Amberly go to her Aunt Geneva's house in order to let Amberly and Kyle have some time away from each other and let Jenna try to finish her shift at the diner before having to work it out.
>
> Upon learning about Kyle's hitting of Amberly, Geneva notified the child and family services agency, which then took custody of Amberly. The agency then notified Jenna (once she got home from work) that her daughter was removed because Jenna failed to protect Amberly from Kyle's physical abuse.
>
> When she learned that Amberly had been taken into the government's custody, Jenna and Kyle got into an argument. Frustrated by the situation, she said, "I should just smack your sorry ass back to Sunday." He then grabbed Jenna by her arm and roughly pushed her backwards on the bed and she hit her head on

> the night table.
>
> The next day, when Jenna meets with her student attorneys, she can disclose that she believes she and Kyle have done nothing wrong, that her daughter should not have been removed and that she wants Amberly back as soon as possible because she misses her and is worried about Amberly being scared about being in the care of strangers. Jenna will also disclose that she wants to continue living with Kyle although she would like to get another order for him not to abuse her.

The simulation targets theoretical issues that inform our students' most likely assumptions about their client and their relationship to their client. Many of the assumptions result from differing degrees of essentializing and stereotyping[55] and deference to the power of institutions.[56] The simulation also invites discussion about issues raised in dominant discourse. For example, in the area of domestic violence, the simulation generates discussion about whether women with children should leave when subjected to intimate abuse. The simulation provides context to Jeffries' relationship with Bryce and provides information about her decision to continue her relationship with Bryce. The simulation also gives more information about the abuse in their relationship to counter stereotyping of intimate violence and challenge assumptions about agency and victimization.[57]

D. Assigned Readings and Exercises

Once we identified the theories we would teach and created a simulation that would help bring these out, we selected theoretical articles that explained and gave depth to the theories. Although many other choices could have been made, I discuss briefly below the articles we assign and how they fit into our project.

We use theory in three separate, yet overlapping ways. We use critical theory as an entryway to a larger discussion of differences and their impact on lawyering.[58] We also use critical theory to facilitate a

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55. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory,* 42 STAN. L. REV. 581, 585 (1990) (critiquing feminist legal theory as essentializing in its assumption that a woman's experience can be defined independently of other social factors such as race, class, and sexual orientation).

56. *See* DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 267-68 (2002) (critiquing the child welfare system, which removes children alleged to have been abused in poor, black families in far greater numbers than similarly-situated children in other families).

57. *See* Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 21-22, 30-33 (2004) (discussing assumptions of victimization and impediments to agency).

58. *See* Harris, *supra* note 55, at 615-16 (discussing the need to move away from essentialism in feminist legal theories by looking at the different experiences of women as a result of class, race, and sexual orientation).

systemic critique of the various legal and governmental institutions with which the clients and students will interact throughout the year.[59] Finally, we use critical theory to discuss the role of power, privilege, and agency within the context of differences and the systemic critiques.[60] As discussed below, these applications for theory fit well with our goals for clinical education, such as client-centered lawyering and case theory.

1. Critical Theory and the Role of Differences in Client Representation

First, we use theory to assist our students to become more conscious of differences and their role in lawyering. We assign a now-classic piece by Angela Harris about gender essentialism.[61] In her article, Harris critiques some of the feminist legal theory writings as assuming "a unitary, 'essential' women's experience [that] can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[62] Such essentialism, Harris argues, results in a hierarchy of voices of those that are privileged because they are spoken (primarily white women) versus those that the privileged silence (primarily black women).[63] In addition, essentialism denies the multiplicity of individuals,[64] as well as the fact that differences are fluid and relational, not static.[65]

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59. *See* ROBERTS, *supra* note 56, at 16-19 (arguing that the child welfare system's decisions to either remove a child to foster care or provide in-home services fall along racial lines).

60. *See* Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1300-11 (1992) (discussing the complexity of women's responses to abuse and the importance of recognizing women's agency); *see also* Harris, *supra* note 55, at 615-16 (discussing the need to subvert feminism that relies on essentialism through the use of narratives and stories that focus on differences); ROBERTS, *supra* note 56, at 16-24 (demonstrating that the child welfare system is institutionally racist by showing that black children are more likely to be taken away from their parents, black children spend a disproportionately longer time than others in foster care, and children of black families receive inferior services).

61. *See generally* Harris, *supra* note 55 (critiquing the view of gender essentialism, which assumes that all women share a common experience, and advocating for a move to multiple consciousness in feminist theory).

62. *Id.* at 585.

63. *See id.* at 585, 588 (discussing how feminist legal theory usually ignores the black woman's voice because of the presumption of a unitary female experience that is mostly white and socio-economically privileged).

64. *See id.* at 587-88 (demonstrating how black women's voices have influenced the second wave of the feminist movement to focus on oppression based on race, color, and sexual orientation, as well as gender).

65. *See* Lisa A. Crooms, *"To Establish My Legitimate Name Inside the Consciousness of Strangers": Critical Race Praxis, Progressive Women-of-Color Theorizing, and Human Rights*, 46 HOW. L.J. 229, 243-45 (2003) (discussing the fluidity of identity by viewing experiences through gender, race, class, and sexuality

Harris' article holds promise for students grappling with client-centered lawyering. To represent Jeffries as an individual with a specific context, a specific web of relationships, and specific problems, the students need to confront any of their essentialized views of clients and other institutional actors, such as domestic violence victims, abusive parents, poor women and government workers. They also need to challenge their assumptions, if present, that the client has only one primary source of oppression as opposed to multiple and perhaps conflicting sources of oppression.[66]

We assign Harris' article for one of our seminar classes on interviewing. For the interviewing simulation, the students receive only the government's petition that alleges abuse of Amberly. In the petition, the government makes allegations regarding the type of injuries Amberly sustained because Bryce hit her with a belt. In addition, the government includes allegations by Amberly's Aunt Geneva regarding Bryce's violence toward Jeffries and Amberly. As a result, heading into the simulations, many students uncritically accept the government's petition as the truth and circumscribe goals for the interview as a result of their belief in the government's position. Harris' discussion of essentialism challenges the reader to approach all generalized discussions with skepticism that privileged voices are silencing marginalized voices.[67] In class, we discuss essentialism as a theory that applies beyond gender and race alone. We broaden the application of essentialism when we discuss how poor women in abusive relationships are essentialized into ineffective mothers that are literal embodiments of the "failure to protect" statutory provisions, which serve as the basis for the state's removal of their children for abuse and neglect.[68]

We purposely do not assign any personal identity characteristics, other than gender, for Jeffries or the others in the simulation fact pattern because we believe we can teach about the power of assumptions regarding differences by making the simulated client's race, for instance, ambiguous.[69] After the interview, we discuss openly

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and the subsequent multiplicity of the experience of oppression).

66. *See id.* (discussing the fragmented experience of black women, who have experienced multidimensional and conflicting sources of oppression).

67. *See* Harris, *supra* note 55, at 585 (encouraging legal theorists to recognize that the law often silences those without power).

68. We also discuss essentialism when discussing case theory in the context of trial stories and the ethics of using stereotypes. *See* Cahn, *supra* note 28, at 996 (discussing the conflict between individual interests and the common good when deciding whose vision of goodness - client's, lawyer's, or community's - will be privileged in the story and how to decide whose vision is best for the client or society).

69. *But see* Hing, *supra* note 29, at 1809-11 (suggesting the importance of assigning personal identity characteristics to persons in simulations in order to ensure

with the students the assumptions about Jeffries' race and national origin and have the students grapple with the meaning of their assumptions. We believe this design helps to inform the students about the power of differences, because of the way in which race is constructed and essentialized and its impact on not only the client and her interaction with a broader society, but in her relationship with her own attorney.

Later, we build upon the concept of anti-essentialism by conducting a short exercise based upon Sue Bryant's and Jean Koh Peters' *The Five Habits*.[70] We ask the students to identify similarities and differences between themselves and Jeffries. After doing so, we discuss the research showing that lawyers' assumptions about differences affect interviewing and counseling.[71] For example, "lawyers usually ask questions based on differences that they perceive between themselves and their clients."[72] When clients make choices lawyers would not have made, lawyers tend to question their clients' decisions.[73] However, lawyers tend not to ask similar questions when clients make choices the lawyers would have also made.[74] The research also shows that assumptions of similarities that mask differences can lead the lawyer to solutions and legal theories that may not ultimately work for the client.[75] Tying this research and the

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that differences are discussed).

70. This exercise is a variation of the one contained in Habit One. Bryant, *supra* note 29, at 64. Prior to the students' simulated counseling session with Jeffries, we ask each student to list unselfconsciously as many similarities and differences between herself and Jenna Jeffries as she can identify. *Id.* We ask each student to think about such issues as ethnicity, economic status, marital status, race, gender, social status, role in the family, gender, language, immigration, nationality, sexual orientation, religion, age, physical characteristics, education, time orientation, and individualistic/collective values. *Id.* at 65. We inform the students that whatever they generate during this exercise is confidential and they will not need to turn in anything. After they have created their lists, we ask them to reevaluate them. *Id.* If their list of similarities is long, we ask them to probe if there are any differences overlooked because misunderstandings can occur when we assume our client's story is just like ours. *Id.* at 65-66. We also tell them that if their list of differences is long, to probe whether there are any similarities they are missing, because more negative judgments are made when we see our client as an outsider or "other." *Id.* at 66. Bryant notes that rather than encouraging stereotyping and the promotion of inequality, research has shown that because we already stereotype persons based on misconceptions, conscious attention to differences is an effective means of eliminating stereotypes. *Id.* at 41-46.

71. *See id* at 64-66 (showing the effects of the assumptions about differences found during a mock interviewing simulation for a class).

72. *Id.* at 66.

73. *See id.*

74. *See id.*

75. Through this exercise, we ask our students to think about these differences and similarities in a conscious and constructive way. *See* Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLINICAL L. REV. 41, 60 (1994) (identifying similarities between untold stories by client and lawyer provides

students' identification of similarities and differences between themselves and Jeffries to interviewing and client-centered counseling, we discuss with the students the importance of being aware of the client and themselves as individuals, whose personal, cultural, and social experiences may shape behavior and communication throughout the information gathering, option generating, and problem-solving stages of lawyering.[76]

When teaching our seminar class on negotiation, we query whether Harris' piece and the concept of essentialism are relevant to lawyer bargaining. We talk about the possibility of not only essentializing clients and opposing parties, but the attorneys as well. For instance, we question whether all women attorneys use cooperative style and integrative approaches to negotiation. We talk about the fact that although generalizing from characteristics can be a useful exercise, Harris' piece effectively cautions us to ensure that we are conscious when we generalize, that we critique and monitor our generalizations, and that we recognize that categorizations fail to acknowledge the fluidity and indeterminacy of characteristics.[77]

2. Critical Theory and the Role of Systemic Critique in Client Representation

Second, we use critical theory to introduce students to a systemic critique of the various legal and governmental institutions relevant to their client representation. We assign an excerpted reading by Dorothy Roberts to educate students about the history of child welfare systems in the United States and to explore Roberts' critique that the racialized nature of the system causes it to target poor, black families for removal of children for alleged abuse and neglect in far greater numbers than other families, poor or otherwise.[78] This is helpful in giving the students a systemic view of the child welfare system and to

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valuable insights). We ask them how they can connect with their client across their differences. *See* Bryant, *supra* note 29, at 66-67 (examining a class simulation which allows students to become aware of differences between themselves and the client, so that they can bridge the gap between their experiences and the client's experiences); *see also* Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 766-73 (2004) (discussing the role of similarities and differences - real or assumed - in the lawyer-client connection).

76. *See* Cook, *supra* note 75, at 60 (emphasizing that "[a]n awareness of the otherness of experience is a necessary ingredient to client-centered service and a role of enabling people to exercise their power"); *see also* Dinerstein et al., *supra* note 75, at 766-73 (providing examples of how lawyers can connect with their clients across their differences by focusing on similarities during their initial meetings with clients).

77. *See* Harris, *supra* note 55, at 615 (explaining the consequences of generalizing the characteristics of all women to a unitary female experience, which leads to the suppression of the diversity of female experiences).

78. *See* ROBERTS, *supra* note 56, at 7-10, 14-27, 47-54.

introduce the discussion of the operation of hierarchy, race, and class within government actors and institutions.[79]

We assign Roberts' piece for our seminar class on case and client theory in order to ensure that students consider a systemic view of the intersections of race, class, gender, and child welfare during the creation of the case theory for Jenna Jeffries. To teach this class, we divide the students into different groups and ask each group to create a case theory for Jeffries regarding her upcoming shelter care hearing in the abuse and neglect case. In one group, all of its members are in the role of Jeffries' attorney; in another group, the members are either in the role of Jeffries' attorney or Jeffries; and in the third group, each member is assigned the role of Jeffries, Jeffries' attorney, or Roberts. After this exercise, we ask for each group's case theory. The students can see the differences in case theories as a result of the groups' composition. We also ask the students to discuss the input Jeffries and Dorothy Roberts gave to the discussion and how Jeffries felt about Roberts' viewpoint. Through this exercise, we want the students to discover the tension between the critical view of the system, as seen through Roberts' piece, and the fact that their client does not necessarily want to be considered as part of this systemic view that might de-emphasize the individual injustice she has experienced. The result is that the students' understandings of Roberts' theory affects their practice of case theory creation, as well as the students' work with their client, Jeffries, in creating a case theory informed by their understanding of Roberts' theory.

3. Critical Theory and the Role of Power, Subordination, and Agency in Client Representation

Finally, we use critical theory to discuss the role of power, privilege, and agency within the context of differences and a systemic critique. We assign a piece by Martha Mahoney for one of our seminar classes on counseling.[80] Because client-centered counseling involves facilitating the client's decision-making, we believe the theory of women's agency is an important concept to introduce during this segment. Mahoney's piece critiques the dominant discourse regarding domestic violence that focuses on the concept of exit: the expectation that women who are truly abused should and would leave their abuser.[81] Contextualizing the exit decision, Mahoney suggests

79. *See id.* at 55-67 (examining the reasons for an institutionally racist child welfare system, which include the broad discretion given to caseworkers, a culturally biased definition of neglect, which uses the white, middle-class family as a model, and the stereotype that single black mothers are unfit).

80. *See generally* Mahoney, *supra* note 60.

81. *See id.* at 1285 (mentioning how "[e]quating exit and agency denies the

that leaving is a complex concept that is not necessarily the best or safest recourse to violence.[82] She discusses the complexity of the relationship of the woman to the abuser and the fact that there are other factors, which may have higher or equal priority than the violence itself.[83] For instance, racism and other societal violence may contextualize the violence within the relationship and make leaving it less of a priority.[84] In addition, leaving for some women may be less safe than staying because of documented separation assault, which is heightened violence that may occur upon leaving a relationship with an abuser.[85] Mahoney shows that the focus on leaving makes invisible love, relationships with children, economic factors, and educational issues that are significant considerations in the lives of women who are abused.[86]

To teach the theory of women's agency, during our seminar class we review videotaped segments of the students' simulated counseling sessions with Jeffries, and ask students how certain lawyering approaches to counseling relate to Martha Mahoney's article. We discuss students' decisions to ask Jeffries how her wishes for her relationship with Bryce impact her evaluation of the choices for approaching the shelter care hearing. Similarly, we discuss how students' implicit incorporation of Mahoney's argument about the importance of giving the client control in decision-making, especially where systemic and other forces have restricted Jeffries' control, affect the students' client-centered counseling. Throughout the class, students have discussed how the concepts of agency and

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possibility and legitimacy of resistance against oppression. Since both staying and leaving can be normal acts of resistance, the focus on exit warps inquiry and treats as illegitimate the struggle to make the fundamental areas of life more one's own").

82. *See id.* at 1300-04 (discussing how the focus on exit hides the complexities of the decision to stay in an abusive relationship, which is tempered by such things as love, home, family, and fear of economic and physical consequences).

83. *See id.* at 1303-04 (demonstrating that love, family relationships, and economic support might be more important than the need to leave the violent relationship).

84. *Id.*

> Men who batter justify their expectations and treatment of women with explanations that closely track society's expectations of women. But discussion of exit hides the correlation of the batterer's individual quest for power with society's expectation: The question 'why didn't she leave' implies abuse is unusual, when statistics tell us it is not, and directs attention away from the abuser as well as the context of power that makes abuse possible.

Id. at 1304.

85. *See id.* (explaining that documented separation assault shows that the abuser does not stop seeking control and power over a woman even after she leaves the relationship).

86. *See id.* at 1304 (discussing that in law the focus is redirected from the batterer and issues of power and control to the woman who is abused and whether her responses are legitimate).

contextualizing the client have provided them with greater insight for future counseling sessions and demonstrate how to ensure their facilitation of effective client decision-making.

Similarly, by assigning Martha Mahoney's piece within the context of the students' representation of Jeffries, the critical theory debate about victimization and agency takes on new meaning. As Jeffries' attorneys, the students initially find it difficult to empathize with Jeffries' choices, both to remain in a relationship with Bryce and to have Amberly returned to her. By engaging with Mahoney's argument for a more contextualized view of women who are abused and their options and choices, the students are able to gain better insight into clinical education's concepts of emphasizing the client's voice and client-centered lawyering.

CONCLUSION

Our project of integrating critical theory and clinical education is only two-years old and remains a work-in-progress. Our goal is to create a new curriculum around the critical and clinical legal education theories we think are important to teach in order for our students to effectively represent clients. This model of reconstructing a clinical seminar curriculum around critical and clinical theory can be applied to a variety of clinics and not simply domestic violence or women and the law clinics. The specifics of a clinical seminar's reconstruction, such as the specific legal and clinical education theoretical concepts, readings and simulation, would depend upon the legal theories that resonate with the clinic's clients as well as the skills, values, and lawyering theory to be taught.

Regarding our project, in terms of context, storytelling, and case theories, the critical theory is integral to the students' successful creation of case theories that reflect a more complex understanding of their clients within the context of their situations. Students have commented on their belief that the critical theory helps them contextualize their clients' stories. The students also integrate the theory in their formulations of case theories both for their simulated clients, like Jeffries, and their real clients.

The experiment also appears to be successful in fostering client-centered lawyering. Students frequently draw upon Dorothy Roberts' research about the operation of race in the child welfare system when addressing their clients' intersections with child protective services, as well as other government agencies. Students often independently conduct the similarities and differences exercise when engaging with their client around new problems or issues.

Finally, in future years we intend to include even more integration

of critical theory into our clinical teaching. Additional critical legal theory concepts can be introduced to highlight the teaching of fact investigation, strategic planning and negotiation, for example. Nonetheless, based on our first two years of this project and the client representation performed by our students, it appears that even with the limited integration we have been able to achieve, the students are able to use the critical theory to inform their client representation and have their client representation facilitate their understanding of theory.