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Epistemology and Ethics in Relationship-Centered Legal Education and Practice

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The need for a system of laws arises from the social nature of human beings. Laws are about relationships, just as practicing law and achieving justice are always concerned with relationships.[1]

I. INTRODUCTION

Epistemology involves views about knowledge and how it is developed. It is the study of how individuals come to know the truth about given phenomena as it relates to the knowledge generation process: How is knowledge acquired, internalized, and applied to situations?[2] The epistemology and ontology of a discipline affect the type of inquiry and the method of investigation used by professionals in that discipline, which in turn influence the particular phenomena that are the focus of and create meaning for the professional.[3] Traditional legal epistemology is based on the Enlightenment principles giving reason and objective rationality priority status as pure sources of knowledge. Recent research on how the brain obtains and processes information raises important questions about whether pure legal reasoning is possible without attending to underlying emotional and relational variables.[4]

In the discussion that follows, we present a model for enhancing legal education that is premised on changing the culture of the legal profession by adjusting the epistemology. Our framework raises some obvious questions: Can the study of social science theories enable a law student to be more professional and to act in more ethical ways by moderating each student's personal epistemology? Can exposure to real clients with real problems help a law student to develop perspectives and techniques that will lead to a deeper understanding of clients' needs and a more fulfilling role in society? What will it take to make a palpable difference in how law is practiced, how lawyers are perceived, and how the dominant societal narrative about the legal profession is expressed?

This analysis draws upon recent research into personal values and how they influence behavior. Researchers have found that individuals are more likely to adhere to socially desirable behaviors supported by normative expectations.[5] The social force of conforming behavior to that which is expected by others within a group is a powerful determinant of behavior. Somewhat counter-intuitively, the more popular or normative a behavior is, the weaker its connection is to personal values. This is

1. Daisy Hurst Floyd, *Lost Opportunity: Legal Education and the Development of Professional Identity*, 30 Hamline L. Rev. 555, 559 (2007).

2. Barbara K. Hofer & Paul R. Pintrich, *The Development of Epistemological Theories: Beliefs About Knowledge and Knowing and Their Relation to Learning*, 67 Rev. of Educ. Res. 88 (1997).

3. Barbara K. Hofer, *Personal Epistemology as a Psychological and Educational Construct: An Introduction, in* Personal Epistemology: The Psychology of Beliefs About Knowledge and Knowing 3, 3–4 (Barbara K. Hofer & Paul R. Pintrich eds., 2002).

4. *See generally* Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*, 56 Am. Psychologist 717 (2001).

5. *See* Anat Bardi & Shalom H. Schwartz, *Values and Behavior: Strength and Structure of Relations*, 29 Personality & Soc. Psychol. Bull. 1207 (2003).

particularly true for people high in conformism values.[6] The conclusions from this research are consistent with the realities in current legal practice where the dominant narrative is adversarialism and many lawyers, regardless of their personal values, tend to conform their behavior to meet this social expectation rather than feel disconnected from the profession. The necessary extension of this argument, and what we are proposing, is that if the legal epistemology is changed to be consistent with a relationship-centered, experientially rich approach, law students and practitioners will adjust their behavior in conformance with an emerging narrative that values the significance of extra-legal, contextualized elements of a client's life.

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

II. NEUROBIOLOGY AND COGNITION: THE ROLE OF EXPERIENCE AND CULTURE

Through neurobiological and psychological research over the past ten years, there is now general agreement that information processing and decisionmaking occurs not just in the cognitive realm but also in the body's physical responses to a situation, as well as in the perceptions and emotions that are influenced by the life experiences

6. *See* Jan-Erik Lönnqvist et al., *The Moderating Effect of Conformism Values on the Relations Between Other Personal Values, Social Norms, Moral Obligation, and Single Altruistic Behaviours*, 48 Brit. J. Soc. Psychol. 525, 525 (2009).

of an individual.[7] What does the research tell us about how humans process information and come to conclusions about what they are experiencing? First, the brain receives information that we are aware of, the conscious, as well as inputs from our bodily systems that, generally, we are oblivious to, the unconscious. Conscious thought refers to the cognitive and/or affective task-relevant processes one is knowingly aware of while attending to a task. "*Unconscious thought*, on the other hand, refers to cognitive and/or affective task-relevant processes that take place outside conscious awareness."[8] Some authors have referred to the mind/body combination, particularly those inputs that emerge from automatic responses to stimuli, as embodied cognition.[9] The concept of embodied cognition reminds us that human cognitive processes are not limited to those thoughts we can control. More specifically, it points out that many cognitive processes serve the larger goal of facilitating action in a specific environment and that cognition is grounded in actual bodily states.[10]

Many cognitive psychologists theorize that the brain produces mental models based on experience and culture.[11] These mental models are then tested by direct experiences with the world and adapt accordingly. The unconscious brain provides an expectation or predictive bias to the sensory input that creates probabilistic knowledge that influences perception, judgment, and problem-solving.[12] This phenomenon is increasingly being studied in relation to such things as eyewitness testimony and awareness of bias errors.[13] Many early developmental experiences actually create physical responses in the brain. For example, if a child grows up in an environment where the threat of violence is frequent, the experience of living with this threat can become "wired" into the brain (meaning there are actual physical changes in the brain from repeated incidents), leading to behaviors such as

7. For an accessible, well-articulated overview of recent brain research, see Chris Frith, Making Up the Mind: How the Brain Creates Our Mental World (2007).

8. Ap Dijksterhuis, *Think Different: The Merits of Unconscious Thought in Preference Development and Decision Making*, 87 J. Personality & Soc. Psychol. 586, 586 (2004).

9. *See, e.g.*, Anna Borghi & Felice Cimatti, *Embodied Cognition and Beyond: Acting and Sensing the Body*, 48 Neuropsychologia 763 (2010).

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

11. *See*, *e.g.*, Philip N. Johnson-Laird, *Mental Models and Deductive Reasoning, in* Reasoning: Studies in Human Inference and Its Foundations 206 (Jonathan E. Adler & Lance J. Rips eds., 2008); Philip N. Johnson-Laird, Mental Models: Towards a Cognitive Science of Language, Inference, and Consciousness (1983); Philip Johnson-Laird & Ruth Byrne, Deduction (1991); P.N. Johnson-Laird & Ruth M.J. Byrne, *Conditionals: A Theory of Meaning, Pragmatics, and Inference*, 109 Psychol. Rev. 646 (2002); William B. Rouse & Nancy M. Morris, *On Looking into the Black Box: Prospects and Limits in the Search for Mental Models,* 100 Psychol. Bull. 349 (1986).

12. *See* Frith, *supra* note 7.

13. *See* Brian L. Cutler & Gary L. Wells, *Expert Testimony Regarding Eyewitness Identification*, *in* Psychological Science in the Courtroom: Consensus and Controversy 100–23 (Jennifer L. Skeem et al. eds., 2009).

hypervigilance, constant scanning of the environment for risk, and strong reactions to stimuli that might not provoke others to action.[14]

Similarly, the amygdala region of the brain can process traumatic memories.[15] This small central section is the most primitive area of the brain and is essentially reactive. Rather than processing a memory in the prefrontal cortex where it can be integrated with a person's experiences and rationalized, the memory remains in the automatic, physical-response region.[16] Consider the traumatic memory arising from an assault. The victim might be walking in a similar area to where the original assault occurred with similar sensory inputs: isolated, dark location, and the sound of approaching footsteps. The amygdala enables the person to react to these sensory inputs without having to go through the more time-consuming process of activating the cognitive system.[17] When faced with a danger or threat, the amygdala immediately moves the body into a flight or fight mode because of the encoding of these memories.

These examples illustrate the evolving understanding that biology, culture, and experience combine to influence each person's development.[18] These factors lead to the construction of a world-view, a set of assumptions about physical and social realities that may have powerful effects on cognition and behavior.[19] Individuals thus process social information using *schemas*: mental structures that contain abstract representations of accumulated knowledge about similar characteristics or situations. People classify stimuli into categories and subsequently access prior knowledge about those categories (e.g., beliefs, expectations, inference patterns) to interpret and evaluate their present situation. It is schemas that "represent and store this knowledge in memory."[20] For example, an elderly woman in a wheelchair might generate a mental model of diminished intellect in an individual who has had such experiences with grandparents or neighbors or who carries this belief from media or family messaging. With both conscious and unconscious systems sending messages to the brain,[21] the perception of a particular situation can be strongly influenced by the

14. Robin Balbernie, *Circuits and Circumstances: The Neurobiological Consequences of Early Relationship Experiences and How They Shape Later Behaviour*, 27 J. Child Psychotherapy 237, 246 (2001).

15. For a review of recent research on posttraumatic stress disorder and brain activity, see Lisa M. Shin et al., *Amygdala, Medial Prefrontal Cortex, and Hippocampal Function in PTSD*, 1071 Ann. N.Y. Acad. Sci. 67, 68–69 (2006).

16. *See* Scott L. Rauch et al., *Exaggerated Amygdala Response to Masked Facial Stimuli in Posttraumatic Stress Disorder: A Functional MRI Study,* 47 Biological Psychiatry 769 (2000).

17. M. Deric Bownds, Biology of Mind: Origins and Structures of Mind, Brain, and Consciousness 248 (1999).

18. Shu-Chen Li, *Biocultural Orchestration of Developmental Plasticity Across Levels: The Interplay of Biology and Culture in Shaping the Mind and Behavior Across the Life Span*, 129 Psychol. Bull. 171, 187 (2003).

19. Mark E. Koltko-Rivera, *The Psychology of Worldviews,* 8 Rev. Gen. Psychol. 3 (2004).

20. Mark J. Landau et al., *A Metaphor-Enriched Social Cognition*. 136 Psychol. Bull. 1045, 1047 (2010).

21. Ziva Kunda, Social Cognition: Making Sense of People 276–78 (1999).

conceptual metaphors developed by an individual.[22] We "routinely use metaphors to reason, make inferences, and form judgments."[23]

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

Emotion and the unconscious must be viewed as important components of human cognition rather than as processes that detract from rationality.[24] "Importantly, context or situational factors do not simply modify what action, and thus, what cognitive process is appropriate, but rather they *define* the action."[25] Recognizing and integrating the data from feelings and emotions is a critical process in effective legal practice.[26] In addition, recognizing and integrating the data from our own perceptions as influenced by our unconscious are essential both to add clarity to information input and to improve self-awareness leading to more accurate judgments and communications.

III. TRADITIONAL NARRATIVES IN LEGAL EDUCATION: CREATING A PERSONAL EPISTEMOLOGY FOR LAW STUDENTS

> *Remember, what you are told is really threefold: shaped by the teller, reshaped by the listener, and concealed from them both by the dead man of the tale.*[27]

The scripts legal educators use to communicate legal knowledge and skills, as well as the myths created about the law, reinforce the dominant narratives of the legal profession and legal thinking. For example, the case method can be described

22. *See generally* Landau et al., *supra* note 20 (providing a contemporary review of research on the role of metaphors in cognition that integrates the concept of schemas and the role of embodied cognitions).

23. *Id.* at 1060.

24. Spellman & Schnall, *supra* note 10, at 133.

25. *Id.* at 135.

26. *See, e.g.*, Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 Law & Hum. Behav. 119 (2006); Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 Harv. Negot. L. Rev. 231 (2005).

27. Vladimir Nabokov, The Real Life of Sebastian Knight 52 (1941).

as the process of discerning legal doctrine or theories from a series of cases in which appellate judges apply legal principles to particular fact situations.[28] A law student is taught to use the case method to develop a level of certainty or truth about the law in a particular area. In addition, law students are taught to examine each side of a case and to construct the most favorable interpretation of the law, to identify analogous cases or competing statutes to support their argument. The construction of legal knowledge seems designed primarily for the adversarial system, where a theoretically impartial judge can independently examine the arguments of each side and render a winning verdict. The facts that many, if not most, legal cases never go to trial, are settled in negotiation or some form of dispute resolution,[29] and that many lawyers never litigate a case are not fully reflected in current legal education.[30] The adversarial preparation built into the education and enculturation of lawyers may actually create impediments to many of the processes fundamental to legal practice.

Reasoning from legal principles carries a presumption that the application will be value-neutral.[31] Pure legal reasoning directs the lawyer to focus on legally-relevant facts, spot the legal issue, and apply the rule of law to arrive at conclusions about legal strategy and argument. This objectivist position leads to the epistemology that has dominated legal thinking.[32] The resulting ontology (the common terms and prioritized categorizations, principles, etc., that reflect disciplinary meaning) is focused on traditional sources of law such as which statute, regulation, case, decision, etc. contains the answer to the legal issue. But, as important as legal reasoning is, this type of response fails on two levels of sufficiency. First, in the categorization of what is important, she may not be fully aware of a client's needs and wishes (they may be inaudible to her if she is listening only for the facts relevant to the legal issue). Secondly, if she is focused on objective legal information she may be unaware of the perceptions, biases, and emotions she is experiencing and that are influencing the perception of the client and the narrative being disclosed. This can lead to communication and trust issues within the lawyer-client relationship, judgmental messages, and missed information. An experientialist epistemology[33] or an emotional

28. For a discussion of the contributions of Langdell to the development of the case method in legal education, see Catharine Pierce Wells, *Langdell and the Invention of Legal Doctrines*, 58 Buff. L. Rev. 551 (2010).

29. *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1256–63 (2005).

30. *See* Okianer Christian Dark, *Transitioning from Law Teaching to Practice and Back Again: Proposals for Developing Lawyers Within the Law School Program*, 28 J. Legal Prof. 17 (2003–2004) (discussing the need to broaden legal education to provide more access to ADR and other legal skills).

31. F. Stephen Knippenberg, *Future Nonadvance Obligations: Preferences Lost in Metaphor*, 72 Wash. U. L.Q. 1537, 1560 (1994).

32. *Id.* at 1556–61.

33. Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. Pa. L. Rev. 1105 (1989).

epistemology[34] would be practical and effective supplements to the traditional rational legal epistemology that has characterized most of legal education.

Signature pedagogy has been defined as a teaching and learning model that is distinctive to a profession and one that functions as a window into the priorities and, moreover, the very essence of a profession's work.[35] Beyond the need to prepare students for practice, the signature pedagogies of the profession serve a role as cultural markers instilling critical ideas, language, behaviors, customs, beliefs, and values of a professional group. "Culture is often referred to as the totality of ways being passed on from generation to generation."[36] The experiences of students in professional education socialize them to these subtle but influential characteristics common to the practice of their chosen field.

This professional acculturation process is embedded in the very interactions of the teaching/learning process. Flavio Marsiglia and Stephen Kulis describe acculturation as occurring in two distinct dimensions. Behavioral acculturation involves the adoption of the external aspects of the culture such as language and skills that allow the individual to assimilate. Psychological acculturation involves the adoption of the ideologies of the culture or the way the group sees the world.[37] In law school, competition over grades, a focus on the intellectual skills of legal analysis, and the combative skills of legal argument provide students with the foundation of legal culture they take with them into practice.[38]

Depending on the qualities of the supervising attorney, an externship or in-house clinic experience may reinforce this culture or challenge its relevance to legal practice. In the former case, students head into practice secure in the first principles of their discipline. In the latter case, students may well lack the opportunity to work through these conflicting messages. There is no legal knowledge or theoretical foundation in law schools that students can rely upon to analyze and inform questions of practice and standards for professional behavior.

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34. Ryan, *supra* note 26, at 276–77.

35. Charles R. Foster et al., Educating Clergy: Teaching Practices and the Pastoral Imagination 33 (2005).

36. Nat'l Ass'n of Soc. Workers, NASW Standards for Cultural Competence in Social Work Practice 9 (2001).

37. Flavio Francisco Marsiglia & Stephen Kulis, Diversity, Oppression, and Change 6 (2009).

38. For a detailed discussion on the extent to which legal education inculcates in students "a culture of competition and conformity," see Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 Vand. L. Rev. 515, 520 (2007). According to Sturm and Guinier,

> [l]aw school culture emerges from the adversarial idea of law that is inscribed in the dominant pedagogy. It is reinforced by the prevailing metrics of success, which rank students through relentless public competitions (for grades, jobs, law journals, moot court, and clerkships) and provide very little opportunity for feedback that encourages students to develop more contextually defined or internally generated measures of accomplishment.

Id. at 519–20.

In the traditional education of lawyers, legal epistemology is generally delivered through the signature pedagogy of the Socratic Method, and is often limited to cognitive analytic processes: reviewing appellate decisions and their specific legal reasoning and mastering legal principles and the language/style of legal analysis and communication. This method is extended into most lawyers' practice beginning with a set of facts, spotting the legal issues, applying relevant legal rules and cases, employing analogical thinking, and, based on this construction of legal knowledge, determining guilt or innocence, liability of a client, or exposure or risk of a particular course of action or behavior. However, legal issue-spotting creates a tendency in lawyers to objectify their clients by seeing clients not as people but as legal issues.[39] As Katherine Kruse argues:

> Consonant with their professional training, lawyers "issue-spot" their clients as they would the facts in a law school exam, reducing client objectives to bundles of legal rights and interests. Lawyers then pursue those legal interests in disregard of *both* their clients' actual wishes *and* the harm caused to others. In the process, lawyers disregard their clients' inclinations to be cooperative, moral and socially responsible and encourage the self-seeking behavior that accompanies legal interest maximization.[40]

Susan Haack makes the important point that there is a difference between inquiry and advocacy in the construction of legal knowledge and the development of legal truths.[41] Knowledge produced by the advocate may be "self-convinced" to support a desired outcome and may be lacking in ethical and contextual implications. Such legal knowledge may be purposefully interpreted to advance perceived client interests. Law school curriculum and pedagogy thus tend to focus the student's attention on the legal question at the expense of the broader inquiry into client interests or the social, psychological, and relational implications of pursuing a particular legal strategy. This construction of legal knowledge has the potential to produce legal professionals who undervalue ethical and humanistic factors in client situations.

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

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39. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 Geo. J. Legal Ethics 103, 124 (2010).

40. *Id.*

41. Susan Haack, *What's Wrong with Litigation-Driven Science? An Essay in Legal Epistemology*, 38 Seton Hall L. Rev. 1053, 1070–71 (2008).

IV. LEGAL EDUCATION REFORM

Repeated calls to reform legal education have focused on a number of these issues, including the gap between legal education and practice,[42] and the need for more humanistic approaches to improve law teaching and the institutional culture of law schools.[43] Central to all of these concerns are the questions of *whether* and *how* we can teach law students to be ethical and self-reflective professionals. Although the legal academy as a whole may be faulted for ignoring these questions to a large extent, clinical legal scholars have grappled with these issues for well over two decades and have come up with a wide range of responses. These responses include theories developed largely by clinicians, such as "client-centered counseling,"[44] "case theory,"[45] and "narrative theory,"[46] to clinical teaching methods such as "rounds,"[47] to concepts imported from other disciplines (including education, cognitive and social psychology, and philosophy), such as "adult learning theory"[48] "ecological learning,"[49] and "reflection-in-action."[50]

These pedagogical theories and methods contribute to the goal of graduating reflective and ethical professionals, although such approaches can only get us part of the way toward our professionalism goals. The key element that is missing from this

42. *See* Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907 (1933); Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools (1979) (sometimes referred to as the "Cramton Report") because the chair of the Task Force was then-Dean of Cornell Law School Roger Cramton, who eventually became president of the Association of American Law Schools); Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum (1992) (known as the "MacCrate Report" because the chair of the Task Force was Robert MacCrate, a professor at New York University School of Law); William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (2007) [hereinafter "Carnegie Report"]; Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map (2007) [hereinafter "Best Practices"].

43. *See, e.g.*, Barbara Glesner Fines, *Fundamental Principles and Challenges of Humanizing Legal Education*, 47 Washburn L.J. 313 (2008); Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 Personality & Soc. Psychol. Bull. 883 (2007); Sturm & Guinier, *supra* note 38.

44. *See infra* text accompanying notes 98–104.

45. *See* Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485, 487 (1994).

46. *See, e.g.*, Anthony G. Amsterdam, *Telling Stories and Stories About Them,* 1 Clinical L. Rev. 9 (1994); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1989); Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 Clinical L. Rev. 833 (2004).

47. *See* Susan Bryant & Elliott S. Milstein, *Rounds: A "Signature Pedagogy" For Clinical Education?*, 14 Clinical L. Rev. 195 (2007).

48. *See* discussion *infra* Part VIII.A–B.

49. *See* discussion *infra* Part VII.B.

50. *See* discussion *infra* Part VIII.E.

scholarship is the idea of openly embracing a normative framework upon which to ground our teaching as well as students' learning experiences (and yet the idea of a normative framework seems to be problematic to most legal scholars. The law operates with a normative framework, although it is a hidden one that is based on faulty assumptions. The "hidden norms" are premised on the idea that lawyers practice their profession as detached, neutral, and rational beings, and that they and their clients can be solely guided by legal precedent and statutory interpretation. One incorrect assumption of this legalistic framework is that emotion does not play a role in legal representation or legal decisionmaking. This fallacy has been dispelled by the growing number of legal scholars who have written about the role of emotion in the law.[51]

Other flaws with the legalistic framework have been identified by supporters of the globally significant Therapeutic Jurisprudence (TJ) field,[52] as well as other vectors of the Comprehensive Law movement,[53] which have gained increasing momentum in recent years. These and other developments point out the need for the legal educators and practitioners to adopt a more holistic and humanistic approach to legal practice. At the same time, there are legitimate concerns with simply stating that the law needs to be more "therapeutic" or "humanistic": Who gets to decide what these terms mean? And what ethics or values inform those decisions? If the normative framework amounts to lawyers or judges using their "gut feelings," the approach would certainly be problematic. And if the framework amounts to the lawyer doing whatever the client says under any circumstances, most would agree that would be problematic as well.

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

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

51. *See, e.g.*, Maroney, *supra* note 26; Ryan, *supra* note 26.

52. For additional information about Therapeutic Jurisprudence, including a detailed bibliography, see Int'l Network on Therapeutic Jurisprudence, http://www.law.arizona.edu/depts/upr-intj/ (last visited Oct. 26, 2011).

53. *See generally* Susan Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 Pepp. Disp. Resol. L.J. 1 (2006). According to Daicoff, the completed list of vectors includes "(1) collaborative law, (2) creative problem-solving, (3) holistic justice, (4) preventive law, (5) problem-solving courts, (6) procedural justice, (7) restorative justice, (8) therapeutic jurisprudence, and (9) transformative mediation." *Id.* at 1–2 (footnotes omitted). These approaches are all interdisciplinary and rely upon social science research to a large extent.

which they refer to as "Relationship-Centered Lawyering" (RCL).[54] Relationship-centeredness builds upon and enhances the client-centered approach, as well as the Comprehensive Law movement approaches, by adopting a normative framework drawn principally from the mental health fields that focuses on understanding and relating to the client "in context." RCL thus contemplates a narrative that goes beyond the legal controversy and includes the many people and systems with which the client interacts. As such, relationship-centeredness draws attention to the significance of the entire range of professional relationships, including those involving co-counsel, other associates/partners, judges, witnesses, opposing counsel, and non-lawyers who may be involved in legal matters. It also includes the lawyer's self-awareness of extra-legal concerns that may affect his or her own effectiveness.

V. RELATIONSHIP-CENTERED LAWYERING: THREE AREAS OF COMPETENCY

The relationship-centered approach calls upon lawyers to gain competency in three important and distinct areas: (1) substantive theory related to a contextualized understanding of human development; (2) principles of just and effective legal process; and (3) perspectives on affective and interpersonal competence, including cultural competence and emotional intelligence.[55] This relational framework provides an evidentiary base for its notions surrounding professionalism, by relying heavily on (empirically tested) theoretical approaches principally drawn from the mental health fields of social work and psychology. These include theories of human development and social interaction, particularly family systems and attachment theories. They also include approaches to procedural justice and practice approaches, such as those focused on strengths and empowerment, as well as cultural competence.

A. Substantive Theory: Contextualized Approaches to Human Development

Western legal systems, particularly the American legal system, stress individualism.[56] Nevertheless, the social sciences, which essentially study what makes humans behave as they do, recognize that all of us are truly social beings and we live our lives as a part of many systems. Immediate and extended families, neighbors, networks of friends, and work colleagues are examples of social systems that provide each of us with support, resources, and identity. When faced with stress or when changes in membership occur in a system, each member of that system must adapt.[57]

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54. For a detailed description of the framework, see Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice (Susan L. Brooks & Robert G. Madden eds., 2010) [hereinafter Relationship-Centered Lawyering]. Significant portions of this article describing the relationship-centered approach and its components have been taken directly from this book.

55. Susan L. Brooks & Robert G. Madden, *Relationship-Centered Lawyering: The Emerging 'Science' of Professionalism*, *in* Relationship-Centered Lawyering, *supra* note 54, at 3, 14.

56. Kerry Dunn & Paul J. Kaplan, *The Ironies of Helping: Social Interventions and Executable Subjects*, 43 Law & Soc'y Rev. 337, 341–43 (2009).

57. For example, the loss of a family member through death or desertion can impact the roles of each remaining family member.

In addition, what happens to individual members has a ripple effect on the larger systems to which they belong. These interpersonal dynamics help explain the need for legal professionals to consider context and environment in order to understand individual clients and to improve their own decisions and strategies.

In the relationship-centered approach, lawyers must be prepared to understand clients and others they will encounter in their professional lives "in context." This contextualized understanding requires an appreciation of extra-legal issues, such as the complex life circumstances facing clients or struggles within a law office culture. Most lawyers, however, lack a theoretical model from which to operate when assessing these types of needs and interests. Three theoretical perspectives provide the most up-to-date and useful research-based knowledge for this contextualized knowledge: family systems theory, developmental theory, and attachment theory.[58]

Before discussing these theories, it may be useful to explain how we selected these particular approaches from among the vast number of theoretical models that exist in the social sciences, and even within the mental health fields, by which we mean psychology, psychiatry, and social work. This exploration originated with the authors' shared interest in TJ, the field of inquiry alluded to earlier that examines the extent to which the law may have helpful or deleterious effects on the well-being of its subjects.[59] As scholars and practitioners trained in the field of social work now engaged in the field of law, both of us were constantly struck by the gap between law as it was being practiced and fundamental principles we had learned and integrated into our work as social workers. We observed this gap starkly in family law, the area in which both of us were practicing and teaching. Once we were introduced to the critical lens of TJ, it gave us the language with which to express the bases of our critique of the law, as well as the invitation to introduce the normative framework drawn from social work to provide its content. Although our initial thinking was focused solely on family law, the more we thought about the teaching and practice of law in broader terms, the more we became convinced that these well-grounded social work theories can be useful to lawyers across all areas of practice.

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

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58. Brooks & Madden, *supra* note 55, at 4, 14.

59. *See* David Wexler, *Therapeutic Jurisprudence: An Overview*, Int'l Network on Therapeutic Jurisprudence, *supra* note 52.

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

The first foundational social science theory is family systems theory, which is an organizing theoretical perspective to structure a lawyer's thinking about the life circumstances of individuals, such as herself, her clients, her co-workers, and her opponents.[60] This theory explains basic systems concepts including family communication and transactional patterns, relationship factors, human development within the context of the family's experiences, and the adaptability of systems to stress and change.[61]

As knowledge of human development across the lifespan is central to effective assessment of behavior and emotions, the second foundational theory is developmental theory. For instance, a lawyer who understands her client's life context is better able to counsel her client and to work for outcomes that support healthy development. This knowledge also pertains to other professional relationships, such as understanding one's opponent in a litigation context or even in a transactional context. Developmental theory placed within family systems thinking allows the practitioner to appreciate both the stability of structure and the fluidity of change within a system.[62]

The third foundational social science theory is attachment theory, one of the most significant developments in psychological research over the past fifty years.[63] It is not enough for a lawyer to understand the current family system context and developmental stage of clients if they experienced early problems with attachment relationships to caregivers. Attachment problems can impact long-term functioning, although the effects of disrupted attachments can be overcome with a supportive environment.[64] Early attachment problems can create a powerful and enduring narrative, an internal representation about self that influences future relationships, including the lawyer-client relationship.[65]

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60. Robert G. Madden, *From Theory to Practice: A Family Systems Approach to the Law,* 30 T. Jefferson L. Rev. 429, 431 (2008).

61. Karen L. Fingerman & Eric Bermann, *Applications of Family Systems Theory to the Study of Adulthood*, 51 Int'l J. of Aging & Hum. Dev. 5, 9 (2000).

62. *Id.* at 18–19 (describing this stability and change as "continuity" within a family system and discussing the impact of enduring roles and patterns on family members over time).

63. Alan Sroufe & Daniel Siegel, *The Verdict Is In: The Case for Attachment Theory*, Psychotherapy Networker Mag., March–April 2011, http://www.psychotherapynetworker.org/magazine/recentissues/1271-the-verdict-is-in.

64. Ross A. Thompson, *The Legacy of Early Attachments*, 71 Child Dev. 145, 146–47 (2000).

65. *Id.* at 149.

All of these theoretical approaches are interconnected and build upon each other in significant ways. These theories are also normative in that they pertain to all individuals and families across a wide range of circumstances and are somewhat prescriptive in terms of how to approach and understand clients. Most importantly perhaps, all of these approaches focus on the interdependency in human relationships. A basic understanding of these important social science perspectives is not only valuable to individual client representation and other types of direct legal services. It is also valuable from the standpoint of legal policy development and law reform.[66] Although law generally can be viewed as a set of rules governing the relationships of people in a society, there is much more substance to the law than a codification of morals and values. Law is deeply embedded in and reflective of its own context—the culture in which it is situated. As a result, the social sciences are essential to our understanding of the creation and construction of the law. By focusing on systems, lawyers can gain insight into the social context of the case and will be more likely to act in ways that are relevant to a client's experience.

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

B. Process-Oriented Considerations: Fairness, Justice, and Alternative Dispute Resolution

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

All encounters with the legal system, whether or not they are voluntary, involve process issues such as questions of trust, respect, fair-mindedness, judgment, and perceptions around the opportunity to be heard.[67] Relationship-centeredness requires attending to psychological factors, enhancing positive feelings, and minimizing anti-therapeutic costs, all of which generally support alternatives to traditional adversarialism. Empirical research recognizes the importance of fair and just process inasmuch as when people are treated fairly they are more likely to have respect for

66. An examination of the usefulness of RCL to the development of legal policy and law reform is a promising area for future exploration.

67. Brooks & Madden, *supra* note 55, at 2–4.

the system, which leads to increased compliance with decisions of legal authorities.[68] This important research calls into question the efficacy of many parts of the judicial system. Social science researchers offer the opportunity to evaluate legal policy based on studies of human motivation and behavior.

Communication plays an important role in the development of trust in legal authorities and procedures. It is important to consider how the communication between legal professionals and clients influences clients' perceptions of fairness.[69] The authors' perspective, based on the procedural justice literature, is that the sense of being treated fairly is largely dependent on a process where clients are fully informed in accessible language about the procedures and criteria for legal decisions and are shown respect in the way they are treated by the legal professionals.[70]

C. Interpersonal and Cultural Considerations

Knowledge of systems and human development alone does not make one an effective practitioner. The social science theories also direct lawyers' attitude and behavior toward clients. Effective client interactions require specialized skills and perspectives to arrive at positive client outcomes. The relational approach focuses on four key dimensions for approaching clients to build positive relationships consistent with a family systems perspective: (1) culture, (2) empowerment, (3) strengths, and (4) emotion. None of these perspectives is monolithic, but rather each reflects a rich and diverse body of research.[71]

Clinical legal scholars have made rich contributions to our understanding of the role of cultural considerations in the teaching and practice of law.[72] A relatively new field worth noting is the increasingly studied phenomenon of "racial microaggression"

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68. Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. Rev. 361 (2001).

69. *Id.* at 370–72.

70. *See, e.g.*, Kevin Burke & Steven Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction: A White Paper of the American Judges Association*, 44 Ct. Rev. 4 (2007–08), *reprinted in* Relationship-Centered Lawyering, *supra* note 54, at 215, 217–18 ("The belief that one can go to legal authorities with a problem and receive a respectful hearing in which one's concerns are taken seriously is central to most people's definition of their rights as citizens in a democracy."); E. Allan Lind et al., *Procedural Context & Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. of Personality & Soc. Psychol. 767 (1997), *reprinted in* Relationship-Centered Lawyering, *supra* note 54, 211–15.

71. David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 Psychol. Pub. Pol'y & L. 220 (1995), *reprinted in* Relationship-centered lawyering, *supra* note 54, at 25.

72. *See, e.g.*, Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers,* 8 Clinical L. Rev. 33 (2001); 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 (1993); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345, 346–47 (1997); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases,* 9 Clinical L. Rev. 373 (2002); Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 Clinical L. Rev. 369 (2005); Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 Clinical L. Rev. 557 (1999).

day-to-day verbal, behavioral, or environmental indignities, which may be intentional or unintentional, but which nonetheless communicate racial slights or insults toward people of color or other historically oppressed groups.[73] Although the recognition of the existence of this phenomenon is not new, social scientists have recently found innovative ways to categorize and study these seemingly invisible and innocuous interpersonal dynamics.[74]

The next two components, the *empowerment* and *strengths* perspectives, represent two practice models that have become fundamental components of social work training and education.[75] The common and consistent theme of the empowerment perspective[76] is one of facilitating the empowerment of clients against a socio-political and historical backdrop of understanding and critiquing oppression in all of its forms. This perspective is particularly useful with client populations that have traditionally been lacking in any kind of political power, yet it is also useful for clients that might otherwise be perceived as powerful in society. The point is that a fundamental aspect of the lawyer's work is to ensure that the client is able to give voice to his or her unique perspective and to remind the lawyer that no matter how much the lawyer empathizes or understands the client's situation, each client's situation is unique.

The strengths perspective focuses on the notion that all people and environments have significant strengths that can be marshaled to improve the quality of clients' lives.[77] This shift toward a deeper respect for a particular client's frame of reference is especially important in the context of practicing with diverse groups. As such, this approach is consonant with and reinforces both the cultural competence and empowerment perspectives.[78] A strengths-based practitioner is like an ethnographer with a goal of learning about the lived experiences, meaning, and values of the client.[79] Approaching a client with this orientation enables a client to express those things that are important from the client's perspective.

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73. *See, e.g.*, Peggy C. Davis, *Law as Microaggression*, 98 Yale L.J. 1559 (1989), *reprinted in* Relationship-Centered Lawyering, *supra* note 54, at 239; Derald Wing Sue et al., *Racial Microaggressions in Everyday Life*, 62 Am. Psychologist 271 (2007), *reprinted in* Relationship-Centered Lawyering, *supra* note 54, at 253.

74. This discussion draws from previous work found in our book, Relationship-Centered Lawyering, *supra* note 54. *See, e.g.*, Wing Sue et al., *supra* note 73, at 256–58.

75. Peter De Jong & Scott D. Miller, *How to Interview for Client Strengths*, 40 Soc. Work 729 (1995), *reprinted in* Relationship-Centered Lawyering, *supra* note 54, at 294; L.M. Gutierrez et al., *A Model for Empowerment Practice*, *in* Empowerment in Social Work Practice: A Sourcebook (L.M. Guitierrez et al. eds., 1998), *reprinted in* Relationship-Centered Lawyering, *supra* note 54, at 288.

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

77. Other important aspects include the need to partner with clients to define their strengths and the notion that a consistent emphasis on strengths will improve the client's motivation to make changes tailored to his or her specific needs. *See* De Jong & Miller, *supra* note 75, at 295.

78. *Id.* at 294.

79. Dennis Saleebey, The Strengths Perspective in Social Work Practice 63 (5th ed. 2009).

Finally, as noted elsewhere in this article,[80] analytical thinking is only one subset of what is needed to make a successful lawyer.[81] Lawyer satisfaction depends on interpersonal and intrapersonal capacities and thus argues for the cultivation of emotional intelligence for lawyers. High levels of emotional intelligence can lead to greater competencies in professional skills such as all forms of communication and persuasion.[82] Emotional intelligence also allows lawyers to have increased capacity for empathy, which supports their ability to be sensitive to and accepting of the emotional lives of others.[83]

Legal thinking tends to be linear, based on sequential steps that move in some logical order. For these tasks, traditional analytical skills are necessary. RCL requires a more nuanced form of analysis that includes the personal, social, cultural, and psychological aspects of a situation. For these tasks, new theoretical and psychological/emotional skills are required.[84]

The investigation of emotion by legal scholars has recently moved into a more theoretical and conceptual realm with respect to the role of emotion in legal decisionmaking and negotiation. Alongside the ascendance of these esoteric endeavors, there is a persistent drumbeat to try to teach lawyers how to perform better at interviewing and counseling their clients using well-tested and proven knowledge drawn from the mental health professions. Mental health professionals have come forward to offer lawyers concrete guidance about incorporating knowledge drawn from the mental health fields to carry out their daily work as counselors and interviewers of clients more effectively.

VI. LEGAL EDUCATION CRITIQUES

Two recent high-profile reports, *Educating Lawyers: Preparation for the Profession of Law* (the "Carnegie Report")[85] and *Best Practices for Legal Education* (the "Best Practices Report")[86] support the need for RCL as an organized theoretical framework that can be used to educate future lawyers as well as current practitioners in a more

80. *See* discussion *supra* Parts II–IV and *infra* Part VI.

81. *See generally* Marjorie A. Silver, *Emotional Intelligence and Legal Education,* 5 Psychol. Pub. Pol'y & L. 1173, 1173–80 (1999) (discussing how emotional intelligence is essential to good lawyering and arguing that it can and should be cultivated in law schools). Marjorie Silver has been a leading scholar in the effort to educate the legal community about emotional intelligence. *See also* Marjorie A. Silver, *Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship*, *in* Relationship-Centered Lawyering, *supra* note 54, at 303, 305 ("Lawyers must develop awareness of the unconscious behavioral traits and impulses that affect their interactions with clients and others.").

82. John Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. Tol. L. Rev. 323 (2008).

83. Silver, *Emotional Intelligence and Legal Education*, *supra* note 81, at 1178; *see also infra* Part IX.A–B.

84. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 Psychol. Pub. Pol'y & L. 193 (1995), *reprinted in* Relationship-Centered Lawyering, *supra* note 54, at 28.

85. *See generally* Carnegie Report, *supra* note 42.

86. *See generally* Best Practices, *supra* note 42.

holistic and humanistic manner. The highly influential Carnegie Report emphasizes the need for legal education to focus more attention on the formation of professional identity along with teaching theory and practice.[87] The Carnegie Report refers to three "apprenticeships" that are essential components of legal education: (1) intellectual or cognitive, (2) practice-based/performance skills, and (3) identity and purpose.[88] The Carnegie Report's concern is the lack of a body of theory or science for the third apprenticeship. The Carnegie Report therefore advocates that the apprenticeships related to practice and to the ethics and values of the profession be "scientified," or articulated in terms of theories and principles that can be taught and applied to different contexts.[89]

RCL represents an important first step in the development of a "science" of legal professionalism, as captured by the "components of expert practice" mentioned in the Carnegie Report.[90] These components include interviewing and counseling, as well as the intangible qualities of expert judgment and discernment.[91] When viewed as a cohesive body of theory, this relational model can, in the words of the Carnegie Report's authors, "serv[e] to legitimate the construction of new forms of recognized competence."[92] One element of this model, which is highlighted within the report, is the role of lawyer as "cooperative problem-solver," which is described as a new normative model of professionalism for the student and could equally be presented as a new normative model for the practice of law.[93]

The Best Practices Report advocates the development of competence—the ability to resolve legal problems effectively and responsibly—as a primary goal for legal education.[94] Competence requires the integrative application of knowledge, skills, and values similar to the Carnegie Report's three apprenticeships. The Best Practices Report's authors point out that competence is "context-dependent" in that it represents the interplay between the lawyer, the lawyer's task, and the legal framework in which the tasks must take place.[95] The Best Practices Report thus advocates the need for "context-based" education in order to develop practical wisdom or practical judgment, which is identified as essential to creative problem-solving.

This notion of the need for "contextualization" of legal education and practice, or "context-based education"[96] is an essential aspect of a relational approach, as reflected in the systems-based approaches that are central to this framework. Both reports

87. Carnegie Report, *supra* note 42, at 13.

88. *Id.* at 27–29.

89. *Id.* at 104.

90. *See id.* at 115–20.

91. *Id.* at 115.

92. *Id.* at 113.

93. *Id.* at 102.

94. Best Practices, *supra* note 42, at 60.

95. *Id.*

96. Carnegie Report, *supra* note 42, at 95 (citing Best Practices, *supra* note 42).

recognize that the expert legal professional needs to comprehend fully a highly contextualized understanding of the client, case, and situation.[97] Contextualization also means the exploration of moral and ethical-social issues as integral elements of legal representation, including the qualities of compassion, respectfulness, and commitment.[98]

Similar to the Carnegie Report, the Best Practices Report makes the case for greater emphasis and intentionality connected to the teaching of what it calls "affective skills."[99] These skills include values, attitudes, and beliefs such as how students related to clients, how they respond to ethical concerns, and how their values inform their role.[100] Roy Stuckey and the other contributors to the Best Practices Report strongly support "supervised practice" as more effective than classroom instruction for purposes of teaching the standards and values of the legal profession and for inculcating a commitment to professionalism. "[S]upervised practice is more effective than classroom instruction for teaching the standards and values of the legal profession and instilling in students a commitment to professionalism."[101] At the same time, the Best Practices Report cautions that there are a number of important criteria for achieving these goals through externships. These criteria include the need for high-quality supervision, a high level of engagement between the institution and the field placement, and significant student preparedness and interaction with faculty as well as field supervisors.

In addition to these two highly influential publications, a third source of critique has been the Humanizing Legal Education (HLE) movement. The rapid growth and increasing popularity[102] of this movement lends further support to the case for a relational approach to the teaching and practice of law. Part of the impetus for this movement has been the recognition that bringing about changes in the legal culture needs to begin with focusing on how we educate emerging legal professionals. Professor Barbara Glesner Fines, a leading voice in this movement, describes three components: (1) eliminating or minimizing unnecessary stressors; (2) assisting students in becoming "confident, caring, reflective professionals"; and (3) aiming toward humanizing the profession by recapturing the essential professional values of

97. *Id.* at 115.

98. *Id.* at 144, 146.

99. Best Practices, *supra* note 42, at 167.

100. *Id.*

101. *Id.* at 154.

102. At the two most recent Annual Meetings of the Association of American Law Schools, which took place in January 2009 and January 2010, the sessions sponsored by this section (known as the "Section on Balance in Legal Education") were delivered to a packed audience. For additional information on the section and its activities, see *Section on Balance in Legal Education*, The Ass'n of Am. L. Schs., http://memberaccess.aals.org/eWeb/dynamicpage.aspx?webcode=ChpDetail&chp_cst_key=9fb324e8-e515-4fd3-b6db-a1723feeb799 (last visited Oct. 4, 2011).

peacemaking, problem-solving, and justice work.[103] The HLE movement has quickly grown in popularity within the legal academy to the point that in 2006 the AALS established a new section focused on "Balance in Legal Education."

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

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

VII. HIGHLIGHTS OF RELEVANT CLINICAL SCHOLARSHIP

A. How Relationship-Centeredness Enhances Client-Centeredness

Since its development, the dominant approach to legal counseling has been the client-centered approach.[104] Relationship-centeredness specifically and directly builds upon and enhances client-centered lawyering and is in no way a departure from it. In contrasting relationship-centeredness with client-centeredness, it is important to remember that these approaches are entirely *consistent*. Indeed, client-centered representation is a subset of the relationship-centered approach, and a visual depiction of the two models could easily be concentric circles, with the relational model as the outer circle. By illuminating the broader context in which the lawyer-client relationship exists, the elements of relationship-centeredness sharpen the lawyer's ability to counsel and advise the client more effectively. On the other hand, a lawyer who is not an effective counselor and advisor may be genuinely client-centered, but will nonetheless be ineffective.

103. Michael Hunter Schwartz, *Humanizing Legal Education: An Introduction to a Symposium Whose Time Came*, 47 Washburn L.J. 235, 239–40 (2008) (citing Barbara Glesner Fines, *Fundamental Principles and Challenges of Humanizing Legal Education*, 47 Washburn L.J. 313, 313 (2008)). Other leading voices include Professors Gerry Hess, Larry Krieger, Bob Schuwerk, Susan Daicoff, and Marjorie Silver. For additional information, see *Humanizing Law School,* The Fla. State Univ., http://www.law.fsu.edu/academic_programs/humanizing_lawschool/humanizing_lawschool.html (last visited Oct. 13, 2011).

104. *See generally* Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation,* 12 Clinical L. Rev. 369 (2006).

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

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

A lawyer who practices in a relationship-centered manner will thus counsel the client on a number of issues, including educating the client about the impact of divorce, particularly high-conflict divorces on children, as well as the potential legal consequences of ignoring the judge's guidance. Such a lawyer will try to assist the client in determining the client's genuine interests, and in thinking through whether mediation may be a more advantageous route to achieving the client's broader goals than adversarial litigation. The relationship-centered lawyer will also try to gain a better understanding of the basis for the client's anger, and will try to help the client to separate out the angry feelings such that they do not interfere with the client's ability to focus on the true interests related to the legal matter at hand, such as the children's needs or the protection of the parenting relationship. The lawyer may also counsel the client to seek professional or informal help to address the client's angry feelings in order to distinguish them from the legal process.

This example demonstrates that a pure client-centered rubric simply does not go far enough in taking account of the wealth of knowledge our profession has gained since that approach was first introduced.[105] Relationship-centeredness is not merely a new term—it reflects a comprehensive framework that reshapes lawyers' perspectives on how best and most effectively to serve our clients. The relational approach provides the theory and skills to assess the client, the client's systems, the context of the case, and many other factors that lead to enhanced client-centered practice. As such, relationship-centeredness can greatly enhance attorney-client relationships at the

105. Indeed, recent scholarship on client-centered counseling draws a similar distinction between a "traditional" client-centered approach and "engaged client-centeredness." *See* Stephen Ellmann et al., Lawyers and Clients: Critical Issues in Interviewing and Counseling 6–7, 72–76 (2009).

micro-level, and, ultimately, has the potential to transform the professional culture of lawyers and their role in society.

Some scholars might argue that the approach articulated above, which takes account of the client's context as well as the other relationships involved, *is* essentially a client-centered approach. One of the difficulties with this admittedly popular and influential model is that it has come to mean different things to different people. Katherine Kruse, in a 2006 *Clinical Law Review* article summarizing the development of the client-centered model, acknowledges that rather than representing a single, coherent approach, client-centered representation "has evolved naturally into what might be called a plurality of approaches, which expand aspects of the original client-centered approach in different directions."[106] Kruse goes on to say that while perhaps the common thread among interpretations of this model is an emphasis on lawyer neutrality, different proponents have emphasized a wide range of values, including lawyer-client collaboration, narrative theory, holistic lawyering, client empowerment, and even traditional zealous adversarialism.[107] Although Kruse's article makes a valiant attempt to reconcile these disparate approaches, her nearly 100-page article is itself a testament to the timeliness of introducing a new rubric and new terminology to capture the important influences on our work as lawyers, judges, and law teachers, as well as changes within the legal profession in the past three decades.

Kruse expresses concern about the narrowness of a strict interpretation of client-centeredness:

> [T]he client-centered approach to problem-solving can obscure important factors such as the client's personal connections and responsibilities toward others; the larger context of the systems within which the client operates; and the connections between the client's individual problems and social justice issues at stake in the representation.[108]

She further states that "[b]y limiting lawyer intervention to a strategy of last resort, the client-centered approach misses the opportunity to theorize the more subtle, interactive, collaborative, and client-empowering interventions that have arisen in its wake."[109] Yet, even if we acknowledge, as does Kruse, that client-centered representation is under-theorized and is more pluralistic than it was at its conception, critiques such as hers limit themselves to the same terminology and do not reflect the current state of knowledge within our profession.[110]

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106. Kruse, *supra* note 104, at 371.

107. *Id.* at 371–72.

108. *Id.* at 392.

109. *Id.* at 399.

110. Kruse ultimately uses the notion of "client autonomy" as a unifying principle to organize the disparate threads she has identified within the evolved client-centered model. *See* Kruse, *supra* note 104. While we support the importance of autonomy as an aspect of client empowerment, RCL also emphasizes the importance of appreciating the client-in-context, including the context of and those surrounding the attorney-client relationship.

B. How a Relational Model Informs Experiential Pedagogy: The Debate over "Ecological Learning"

The reframing from client-centeredness to relationship-centeredness also requires a rethinking of what, how, and where we teach certain competencies within the law school curriculum. For the purposes of answering the question as to whether we can teach students to be ethical professionals, it is useful to examine the question of what we know about how students learn. As stated earlier, there is a small, yet significant body of work within clinical scholarship focused on how students learn.[111] Within that literature, there has been some exploration about how exactly students learn "experientially." Much of this discussion has been framed in terms of the curricular structure or clinical model that has been used: whether the course is an "in-house" clinic, or some sort of field placement or externship. Pursuing that discussion or, as it is often framed, that debate, on conventional terms may well be misguided, particularly for the purposes of this article.[112] Another perhaps more useful thread of this discussion focuses on whether students' learning needs to be more "top-down," meaning that the learning is driven by the person directly supervising their work, or whether students can learn more effectively from exposure to colleagues and the many other inputs that are part of a real-world work environment. This debate, which is captured by the work of two prominent legal scholars, Brook Baker and Robert Condlin, provides a helpful illustration of how the organized and comprehensive normative framework of RCL can contribute significantly toward filling in the gaps, meaning that it can aid in providing the needed foundation for student learning. The value of the relational model transcends the particular modality through which the learning is experienced. Thus, a relational approach can inform experiential learning regardless of whether the educational experience is structured as an in-house clinic or a field placement.

Professor Brook Baker and others representing the Northeastern Law School have been proponents of what they refer to as the "ecological learning model." They developed this pedagogical model based on their school's unique co-op model,[113] which is in many ways akin to a more typical work experience than most clinical programs. Indeed, Baker's ecological model focuses mainly on the value of the work experience itself—apart from any input that may be provided by law school faculty.

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111. *See infra* Part IV.

112. In a forthcoming article, Susan Brooks sets out an alternative pedagogical scheme for contrasting different experiential modalities (i.e., simulations, field placements, and in-house clinics). *See* Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 U. Balt. L. Rev. (forthcoming 2011).

113. For a list of the key features of Northeastern's co-op model, see Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. Legal Educ. 1, 6–7 (1995) ("The most important points about Northeastern's program are these: the school requires successful completion of four different internships ('co-ops') for graduation; each co-op involves three months of full-time legal work in a law office under the supervision of a legal practitioner; and the school's co-op office provides extensive guidance and administrative support to keep the process working but does not 'place' the students.").

Baker contrasts the clinical model, which he describes as "role-centered, education-focused, and supervisor-centric"[114] with the ecological model, which he describes as participatory, contextualized, and collaborative.[115] He describes his preferred model as follows:

> In the complex interpersonal ecology of practice, students can learn, and learn well, through the central, fluid dyad involving the supervisor/expert and the student/novice—a dyad emphasized in current clinical theory. However, they can also learn from participation itself and from collaborative interaction with [a] broader array of legal workers and peers—additional social resources emphasized by a theory of ecological learning.[116]

Baker's model provides an extensive analysis of how students learn through participation in a law office, irrespective of the particular strengths and weaknesses of their supervising attorneys. Nevertheless, he describes his model as incomplete and acknowledges the need to develop further guidance related to self-directiveness, self-realization, and identity formation, which he calls the "personal dimension" of ecological learning, as well as other workplace or societal barriers to participation.[117]

It is these potential hazards of learning from participation itself and from the social milieu of the workplace with which Robert Condlin has taken issue. A few years after Baker and his colleagues presented their ecological learning model, Condlin conducted what he termed a "modest" empirical study of students' reflections on their externship experiences. After finding that "students—and supervisors—frequently were more secretive than open, more controlling than curious, more indirect than candid, more locked into pre-set views than interested in discovering new perspectives, and more intent on taking unilateral control than on sharing authority,"[118] Condlin concluded that "legal education's longstanding nervousness about apprenticeship or externship instruction has a basis in fact."[119] More importantly for our purposes, Condlin was worried that the communication patterns in the practice world might end up discouraging student reflection rather than enhancing it, because of the persistence of students' fear of "looking stupid," in the face of supervisors who, at least from the students' perception, were *not* their colleagues, and could not be trusted with their candid criticisms or questions.[120] He was also concerned that potential solutions, such as trying to teach students interpersonal

114. Brook K. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 Clinical L. Rev. 1, 8 (1999).

115. *Id.* at 23–40.

116. *Id.* at 23.

117. *Id.* at 81. For Baker's proposed approach to filling that gaps, see Brook K. Baker, *Practice-Based Learning: Emphasizing Practice and Offering Critical Perspectives on the Dangers of "Co-op"tation*, 56 N.Y.L. Sch. L. Rev. 619 (2011–12).

118. Robert J Condlin, *Learning from Colleagues: A Case Study in the Relationship Between "Academic" and "Ecological" Clinical Legal Education*, 3 Clinical L. Rev. 337, 416–17 (1997) (citation omitted).

119. *Id.* at 417.

120. *Id.* at 414–22.

skills, or as he refers to them, the skills of "relational agency" might not succeed because "the obligations of relational agency are complicated, occasionally work at cross purposes, and differ from one setting to the next."

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

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

VIII. STRATEGIES FOR TEACHING ETHICAL AND PROFESSIONAL CONDUCT

In addition to Baker and Condlin, many other clinical scholars have introduced useful perspectives on how to inculcate ethical and professional conduct in students in the context of experiential learning, particularly with respect to "live client" clinics.[121] This section highlights five salient concepts drawn mainly from the field

121. A great deal of this literature has been captured and excerpted in Clinical Anthology: Readings for Live-Client Clinics (Alex J. Hurder et al. eds., 2d ed. 2011). Additionally, since the publication of the Carnegie and Best Practices Reports, there has been a proliferation of writing on teaching ethics and professionalism throughout the legal academy, including, notably, by law school deans and directors

of education that have been well accepted by clinicians, and are compatible with the relational framework. Taken as a whole, they offer guidance about effective places in the curriculum, as well as techniques and methods for teaching ethics and professionalism using the content of RCL.

A. Andragogy vs. Pedagogy

What we know from these scholars is that adults learn differently than children. The term "andragogy," which refers to adult education, has become part of the lexicon of clinicians, thanks to scholars such as Frank Bloch and Fran Quigley, who imported the work of Malcolm Knowles and others in that field.[122] The distinctive qualities of adult learners include an interest in being self-directed, an ability to draw on their personal experiences, an inclination toward learning subject matter that is relevant to their social roles, and an interest in being able to apply their learning immediately to solve problems.[123] Knowles' approach supports teaching ethical and professional conduct using methods that involve law students in decisionmaking and planning, and that create learning experiences in which students are actively engaged and can relate their own life experiences to helping to resolve the issues at hand.[124] Bloch and Quigley share the view that an andragogically-based model would emphasize actual client representation with close supervision.[125] Both also agree that simulations are less effective as a teaching method, although they may have some value if they are sufficiently connected to real experiences.

B. Democratic Teaching

Quigley's work highlights the idea of "democratic teaching," drawing upon "critical theorists of adult learning" such as Paulo Freire and Jack Mezirow.[126] Democratic teaching builds upon Knowles' emphasis on involving students in decisionmaking and planning, and is "based on adults' capacity to learn through critical scrutiny of both their own and their culture's values, assumptions, and beliefs."[127] His understanding of democratic teaching also draws upon the work of

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of legal writing programs. The latter group in particular stresses the importance of beginning this teaching in the first year, and focuses on opportunities to do so using creative methods, such as simulation-based exercises and literature drawn from the humanities.

122. *See* Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 Vand. L. Rev. 321 (1982) (citing Malcolm S. Knowles, The Modern Practice of Adult Education: Andragogy Versus Pedagogy (1970)) (pointing out that Knowles relied on the work of clinical psychologists Abraham Maslow and Carl Rogers); *see also* Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 Clinical L. Rev. 37 (1995) (citing Malcolm Knowles, The Adult Learner: A Neglected Species (4th ed. 1990)).

123. Bloch, *supra* note 122, at 328; Quigley, *supra* note 122, at 46–47.

124. *See* Bloch, supra note 122, at 331–32.

125. *Id.* at 346; Quigley, *supra* note 122, at 52–69.

126. Quigley, supra note 122, at 47–48.

127. *Id.* at 47.

John Dewey, whose "philosophy of adult education focuses on the extension of the skills of deliberation, civic awareness, and public advocacy to learners previously shut out of the democratic process."[128] Democratic teaching emphasizes "self-directed learning," an idea that has become familiar in clinical legal education and is a common refrain in externship programs around the country in which students' "clinical" supervision is provided by practitioners in the field. Self-directed learning, according to Quigley, suggests that legal educators should "loosen the reins" both in and outside of the clinic, and allow students to be involved in the selection of their clinical and other educational experiences.[129] This approach is consistent with another well-accepted notion among educators, which is that different students learn in different ways.[130]

C. Disorienting Moments

Quigley's other major contribution to the clinical lexicon is the idea of the "disorienting moment," which also draws upon adult learning theory, specifically the work of Jack Mezirow.[131] The idea of the disorienting moment is that opportunities for significant—"transformative"—learning arise when the learner confronts an experience that is unsettling or disturbing because it cannot be easily explained by reference to the learner's prior knowledge.[132] The change that can result from such moments is known as "perspective transformation" insofar as a single trigger event may cause the learner critically to reassess societal and personal beliefs, values, and norms.[133] Disorienting moments have three stages: first, the experience, second, the exploration and reflection, and third, the reorientation.[134] This theory has been tested and proven empirically, and those of us who have been teaching for a long time, particularly in clinical settings, know it to be true as part of our felt experience with students.

Quigley focuses on "seizing" disorienting moments experienced by students in clinical settings as a tool for teaching social justice, although it seems like he could just as easily have been talking about teaching ethics and professionalism. He emphasizes the importance of providing an environment for exploration and reflection, as well as providing the opportunity for reorientation, as necessary conditions for such transformative experiences to occur. The array of methods for

128. *Id.* at 48 (citing Kenneth Teitelbaum & Michael W. Apple, *John Dewey*, *in* The American Radical 183, 186 (Mari Jo Buhle et al. eds., 1994)).

129. *Id.* at 65–68.

130. For a thorough discussion of how legal educators can be responsive to a range of student learning styles, see Michael Hunter Schwartz et al., Teaching Law By Design: Engaging Students from the Syllabus to the Final Exam (2009).

131. Quigley, *supra* note 122, at 51–52 (citing Jack Mezirow et al., Fostering Critical Reflection in Adulthood: A Guide to Transformative and Emancipatory Learning 12–14 (1990)).

132. *Id.* at 51.

133. *Id.* at 52.

134. *Id.*

facilitating this type of process in the classroom will be familiar to many of us. They include: student-to-student discussions, such as case rounds; student self-evaluation, such as the use of reflective journals; and supervision sessions with individual students.[135]

D. Parallel Universe Thinking

Sue Bryant and Jean Koh Peters have given us what might be interpreted as another lens on disorienting or disturbing moments that student experience: "parallel universe thinking."[136] Parallel universe thinking is one of the six "habits" they suggest can be inculcated in students that will help student achieve better cultural proficiency.[137] It requires the learner to seek "other possible explanations or meanings for clients' words and actions."[138] Parallel universe thinking bears a strong resemblance to "reframing," a fundamental technique in social work practice.[139] Reframing is defined as viewing a problem or an issue with a new outlook or understanding it in a new way. Both of these concepts provide useful tools for helping a student who has experienced a disorienting moment reflect on that experience in a way that promotes ethical and professional behavior.

Bryant and Peters also describe three dynamics that help to contribute to a student's cross-cultural sensitivity, which is a subset of ethical and professional conduct. These dynamics are: (1) nonjudgment, (2) isomorphic attribution, and (3) daily practice and learnable skill.[140] Isomorphic attribution asks the learner to try to attribute the same meaning to the client's conduct that was intended by the client, rather than solely as understood from the lawyer's perspective. This dynamic requires an understanding of countertransference, as well as an appreciation of one's own cultural biases. Further, it is significant that Bryant and Peters emphasize the importance of daily application of the skills and dynamics they discuss. Their work reminds us that genuine student learning can only effectively be integrated through constant reinforcement as well as thoughtful and reflective practice.

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135. *Id.* at 57–62.

136. *See* Bryant, *supra* note 72, at 70–72.

137. The six practices are essentially: (1) employ narrative as a way of seeing the client in context, *see id.* at 65; (2) listen mindfully, *see id.* at 68–70; (3) use parallel universe thinking, *see id.* at 70–72; (4) speak mindfully, taking into account the client's culture, *see id.* at 72–73; (5) work effectively with interpreters, *see id.* at 77–78 (encouraging students to "create settings in which bias and stereotype are less likely to govern"); and (6) apply the Habit Four analytical process continuously to identify miscommunication and appropriate corrective measures, *see id.* at 76.

138. *Id.* at 70. The authors identify this habit as playing a vital role in cross-cultural communication. *Id.* at 94.

139. Social workers often use reframing to try to offer a more positive perspective on something that is seemingly negative. *See* Karen K. Kirst-Ashman & Grafton H. Hull, Jr., Understanding Generalist Practice 324–25, 330, 332–33 (4th ed. 2006); Beulah Compton et al., Social Work Processes 412 (7th ed. 2005). In this way, reframing can potentially help one person—the lawyer—to empathize more effectively with another person—the client—or to understand content more clearly from the client's perspective.

140. Bryant, *supra* note 72, at 90–100.

E. Reflection-in-Action

Another highly regarded set of ideas that complement and build upon what has already been discussed come from Donald Schon's work on educating the reflective practitioner. Schon is a scholar of educational theory and his ideas on inculcating professional confidence and judgment, published in the *Clinical Law Review*, have become a must-read for every new clinician.[141] He discusses "indeterminate zones of practice," problematic situations in which the learner experiences uncertainty, including situations that are unique to the learner or in which the learner experiences some conflict in trying to come up with a workable solution. These indeterminate zones may well be the kinds of experiences that produce disorienting moments as described earlier.

Similar to Quigley, Schon emphasizes that indeterminacy can potentially be a rich source of professional education. Schon emphasizes that the ability to navigate a problematic situation requires acting and reflecting essentially simultaneously, that this "reflection-in-action" is what seasoned professionals do, and that such reflection is what we need to inculcate in our students.[142] Essential to that process is "reflection on reflection-in-action," meaning that learning professional competence requires discussions after the fact that help generate an understanding of what occurred in that disorienting moment. Schon calls this "educating for artistry," and suggests that it can best be taught in a reflective practicum, which has the elements of learning by doing: close supervision, group process, and a context that is representative of the professional practice to which students aspire. Like Quigley (and those he borrows from), Schon also emphasizes that to be successful education must be a self-directed, self-learning process.

IX. PSYCHOLOGICAL RESEARCH TO SUPPORT AN EXPERIENTIAL EPISTEMOLOGY

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

> *The view here is that we have lost our sense of how to foster virtue because we have neglected to develop intuitions for being present in the here and now, interdependently engaged with one another and deeply related to the natural ecosystem in which we live.*[143]

One important practical issue this article addresses is the question of whether a relationship-based approach to the law and experiential learning can enhance the development of professionalism in law students. In other words, are ethical lawyers born, made, or some combination of both? Can the epistemological approach in the curriculum and pedagogy of law school create practitioners with a different moral view and a higher level of professionalism in practice? How does the educational

141. Donald A. Schon, *Educating the Reflective Legal Practitioner*, 2 Clinical L. Rev. 231 (1995).

142. *Id.* at 247.

143. Darcia Narvaez, *The Neurobiology of Moral Formation*, *in* After You. The Ethics of the Pastoral Counselling Process (Marina Riemslagh et al. eds.) (forthcoming).

process produce attitude change and/or ethical professional practice? We have argued that through education in specific social science theories, law students can be taught principles of relationship-building that can enhance attention to and understanding of the context of a client's life and empathic connection with the client's feelings. Then, through guided experiential education, students can have opportunities to apply the theory, practice relationship-building techniques, and explore the ethical issues that emerge in clinical practice. What is the evidence that an education guided by such an epistemology will create a generation of lawyers that is more ethical and professional in dealing with client situations?

As discussed in Part II, the way people interpret particular situations is related to underlying moral character, which is informed by their background, experiences, and education. Furthermore, individuals will differ in their ability to recognize particular aspects of a situation and will evaluate and judge those situations as informed by their understanding of particular moral concepts.[144] Darcia Narvaez argues that cultural practices actually shape the physical brain in child development,[145] and further, the child's cultural narratives establish what is considered normal.[146]

Recent literature from the branch of psychology known as moral development provides further support for the positions taken in this article. Ariel Knafo and colleagues explored the factors that create a disposition toward empathy and the pro-social behaviors associated with it. They identify compassion, an enhanced concern for the well-being of others in distress, as an important aspect of interpersonal responsibility and ethical behavior.[147] Darcia Narvaez has explored the processes by which professionals develop ethical expertise integrating the enhanced understanding of human cognition based on the principle discussed earlier in this article that emotions precede thought and action. She argues for a "novice to expert" approach that provides opportunities to experience ethical dilemmas in examples and actual practice.[148] While acknowledging that morality is self-authored, moral development can be facilitated with immersion experiences accompanied by a mentor who can guide the learner by offering discernment, explanation, and support through reflective experiences.[149] The mentor can provide facts and skills that the student internalizes and that become patterned responses. Narvaez concludes that cultivating the right affect toward others creates an enhanced motivation for helping that person[150] and

144. *See* Lawrence Blum, Moral Perception and Particularity (1994).

145. Narvaez, *supra* note 143.

146. *Id.*

147. *See* Ariel Knafo et al., *The Developmental Origins of a Disposition Toward Empathy: Genetic and Environmental Contributions*, 8 Emotion 737, 737 (2008).

148. Darcia Narvaez, *Integrative Ethical Education*, *in* Handbook of Moral Development 703 (Melanie Killen & Judith Smetana eds., 2005).

149. Narvaez, *supra* note 143.

150. Darcia Narvaez, *Moral Complexity: The Fatal Attraction of Truthiness and the Importance of MatureMoral Functioning*, 5 Persps. on Psychol. Sci. 163, 172 (2010) (citing Kristen Renwick Monroe with the assistance of Connie Epperson, *But What Else Could I Do? Choice, Identity and a Cognitive-Perceptual*

this takes the learner beyond the ability to manage hypothetical situations to include managing real emotions and responses to actual clients.

Consistent with the ecological learning approach, as well as Quigley's discussion of disorienting moments, attitudinal change can even occur implicitly through the experience alone, and without conscious awareness.[151] For example, when students experience discrepancy between closely held attitudes or beliefs and events that contradict them, they can respond to the cognitive dissonance with either changed attitudes and beliefs or judgmental self-justifying interpretations.[152] While either response can reduce the discomfort caused by the dissonance, the social science foundation combined with a reflective practice approach would be more likely to produce the former response, even where the student has the experience without the level of supervision we would hope for in an optimal experiential learning environment.

B. The Reasons Empathy Matters

In exploring the connections among professional roles, relationship experiences, and professional practice, we must address the concept of empathy. How is empathy developed? Is empathy an essential component of effective legal practice? Can empathy be influenced by education and experience, or is it more likely that self-selection in professional education drives those more attuned to the emotions to professions like social work and psychology, and those more attuned to intellectual/cognitive analysis to fields such as law and accounting?[153] Recent cognitive/brain research has provided empirical understanding of how we develop empathy and learn from interactions with other people. For example, most psychologists now accept the presence of mirror neurons, which can be described as the corresponding firing of neurons in one person (in the same regions of the brain where they would be if the person had experienced the event personally) by observing or listening to the experience of another person. As Cristian Keysers and Valerie Gazzola write, this process involves:

> [T]he actions, emotions and sensations of others are "translated" into the neural language of our own actions, emotions and sensations. By doing so, they have been transformed into what are called primary representations of these states. This could generate an implicit sharing and hence understanding of the states of others.[154]

Theory of Ethical Political Behavior, 15 Pol. Psychol. 201 (1994); Samuel Oliner, *Extraordinary Acts of Ordinary People: Faces of Heroism and Altruism*, *in* Altruistic Love: Science, Philosophy, and Religion in Dialogue 123 (Stephen G. Post et al. eds., 2002)).

151. Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*. 56 Am. Psychologist 717, 721–22 (2001).

152. *See* Leon Festinger, A Theory of Cognitive Dissonance (1957).

153. *See* J.D. Trout, Why Empathy Matters: The Science and Psychology of Better Judgment (2009).

154. Christian Keysers & Valeria Gazzola, *Towards a Unifying Neural Theory of Social Cognition, in* 156 Progress in Brain Research, 379, 396 (Silke Anders et al. eds., 2006).

It is reasonable to conclude from this research that increased opportunities for law students to personally experience client stories first-hand would create more empathy, especially when the experience is enhanced by skill development and personal insights gained as students reflect on the experience.

Can being more empathic lead to improvement in legal practice? Research over the past twenty years documents a number of areas of interpersonal relationships that are improved with the presence of empathy.[155] We empathize more with those people we have formed an affective link with and who we perceive are acting in a fair and non-biased manner towards us. This process is not random or imagined but is actually managed by a series of neural responses in the brain.[156] It follows that the development of trusting professional relationships characterized by improved empathy between lawyers and clients would add to the effectiveness of the representation. Compassion, the concern for the well being of others in distress, is an important aspect of interpersonal responsibility and ethical behavior.[157]

Empathy can be defined as an affective state that is elicited by the observation or imagination of another person's affective state.[158] Ariel Knafo and colleagues add to the definition by distinguishing the cognitive and emotional components of empathy. "The cognitive aspect of empathy entails an ability to effectively comprehend a distressing situation, to recognize another's emotions and assume that person's perspective. . . . The affective aspect of empathy requires an individual to experience a vicarious emotional response to others' expressed emotions."[159] Training and supervised practice helps law students and emerging legal professionals to recognize and articulate the expressed emotion and to formulate supportive statements and follow-up questions. In addition, through high-quality training and supervision, students can manage the felt experience of the expressed emotion and communicate, verbally or nonverbally, a sense of understanding to the client.[160]

155. For a detailed review, see Mark H. Davis, *Empathy: Negotiating the Border Between Self and Other*, *in* The Social Life of Emotions 19, 19–42 (Larissa Z. Tiedens & Colin Wayne Leach eds., 2004) (reviewing studies showing, for example, that perspective-taking has been linked with acting in less aggressive ways, experiencing less interpersonal conflict, being more helpful to those in need, and providing supportive responses to peers).

156. Tania Singer et al., *Empathic Neural Responses Are Modulated by the Perceived Fairness of Others*, 439 Nature 466, 467 (2006).

157. Knafo et al., *supra* note 147, at 737.

158. Frederique de Vignemont & Tania Singer, *The Empathic Brain: How, When and Why?*, 10 Trends in Cognitive Sci. 435, 435–36 (2006).

159. Knafo et al., *supra* note 147, at 737.

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

X. CONCLUDING THOUGHTS AND RECOMMENDATIONS

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

At the macro-level, law schools must undertake a close examination of the entire curriculum, beginning with the first year. There are undoubtedly rich opportunities for experiential and other creative teaching methods to be used so that students are engaged in the ways described above and are encouraged to experience disorienting moments upon which they can reflect and begin to acculturate in the direction toward RCL. Part of this examination needs to include re-thinking our teaching methods that encourage more democratic teaching, in which faculty loosen the reins and give students more of a voice in the classroom.

Perhaps beginning in the first year and as a core aspect of the upper-level curriculum, we need to maximize the opportunities for meaningful experiential learning in non-clinical courses by connecting them up with service learning projects or other real-world experiences wherever possible. At the same time, students need to be encouraged to develop competencies around collaboration, peer-to-peer learning, and team building. Hand-in-hand with these competencies, students can begin to develop greater empathy and other interpersonal and affective competencies that will help shape their professional identities in a more relational mode.

We also need to incorporate multiple pedagogical methods, including the use of literature, film, and other materials drawn from the humanities to build students' capacity for insight into the human condition and their ability to feel as well as think as they engage in experiences. Exploring the narratives of people engaged in legal cases can provide a foundation for the assumption of a relationship-centered approach to practice.

Not surprisingly, the most effective teaching vehicles based on the research presented here will be actual clinical experiences—supervised practice, both in the externships and other field placements and clinics. "Reflection on reflection in action" is a key, so the effectiveness of these experiences will be enhanced by the quality of the supervision and other opportunities for student reflection. As described (and as well-known to this audience), the use of individual supervision sessions, peer learning, such as through case rounds discussions, and opportunities for student self-reflection, such as through journals, are all useful methods.

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

At the micro-level, the content of the discussions that take place, whether one-on-one or in a group setting, can be guided and informed through exploration of the core

competencies within the RCL framework. What can be learned from an understanding of the client in context—be that the family system, neighborhood, or community? How do procedural justice issues affect the client and/or the situation? What is the interplay of cultural and interpersonal issues, including those that arise between (student) lawyer and client, and in other contexts, such as the student's encounters with co-counsel or opposing counsel, and the client's encounters with others in the legal system?

As we begin to re-think these aspects of our legal institutions and to implement changes, we must develop fair, accurate, and reliable mechanisms for assessing whether and to what extent we succeed in accomplishing our goals. Specifically, we need to figure out the most effective ways of evaluating students' achievements regarding the competencies within RCL, both at the individual student level, and at the curricular and programmatic level. The assessment at all levels should include the effectiveness of the processes, meaning what takes place in and outside the classroom, as well as identifying ways to measure our outcomes.

Effective outcome assessment will thus require legal education to consider a broad vision of the competencies every law school graduate should master by graduation. Essential competencies should not be limited to those conventional analytical and communication skills measured in traditional law school exams. It should also include such things as interactional, relational, and negotiation skills, and the ability to analyze ethical dilemmas arising in legal practice. These latter competencies can be observed and measured in clinical practice experiences and in students' written reflections, enabling law schools to certify through outcome assessment that every law school graduate has attained competency in a more comprehensive understanding of the areas essential to effective legal practice. Like our colleagues in the other professional preparation schools, we will achieve student readiness for the profession with universal, robust, and meaningful practice experiences that are fully integrated into the curriculum.

Further outcome assessment research might focus on the professionalism and ethical behavior of legal practitioners once they are in practice. Does the exposure to a legal education model that integrates relational social science content and provides enhanced practicum experiences make a difference in post-graduate practice? We must develop outcome measures to assess these issues: Are there differences in the number of ethics complaints or malpractice actions filed against lawyers coming out of programs that move to this educational model? Is there higher satisfaction with legal practice? Is there any change in public perception of the profession? It is essential that we identify outcome measures that will inform the evaluation of the changes we are proposing and that this research is used to shape future directions for the legal academy.

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