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INTERVIEWING AND COUNSELING ACROSS CULTURES: HEURISTICS AND BIASES*

PAUL R. TREMBLAY**

Increasingly in recent years, critics and commentators have noted the importance of the role of culture within the lawyering process. Lawyers now understand better than they used to that culture matters in their day to day work with clients, and that not all cultures share the same habits, customs, values, traditions and preferences. This article explores how the reality of cultural diversity might affect some fundamental lawyering practices and models, and specifically the models for interviewing and counseling. In their work, lawyers must take cultural background into consideration expressly, but at the same time they must avoid harmful and unfair generalizations and stereotypes. This article proposes the concept of “heuristics” to capture the idea that lawyers might assume tentatively, but only tentatively, that a member of a recognized non-dominant cultural group will share the values, habits, and preferences of his or her group. It then employs the concept of “biases” to remind lawyers of the need to be aware of their own cultural preconceptions when working with different clients, if they hope to be effective counselors. Throughout, the article emphasizes a commitment to “disciplined naïveté” and “informed not-knowing”—reminding readers that individuals can only begin to appreciate the richness of cultures different from their own.

If we can make the subject of cross-cultural lawyering one that our students and we can talk about, our collective capacity to practice law in non-discriminatory and culturally-sensitive ways will increase access and substantive justice to our clients.¹

* With apologies to Kahneman, Tversky & Slovic. See note 39 *infra*.

** Clinical Professor, Boston College Law School. I presented an earlier version of this article at the UCLA/University of London International Clinical Conference in Lake Arrowhead, CA, and at an informal colloquium at Boston College Law School. I learned a great deal from the comments at both of those meetings. Thanks also to Shin Amai and Lynn Barenberg (whose critiques I concede have not adequately addressed here), Dick Huber, Sanford Katz, Carol Liebman and Carwina Weng for comments on these ideas, to Peter Durning, J. Miguel Flores, and Rocky LeAnn Pilgrim for invaluable research assistance (mostly on sophisticated social science topics about which I know so little), and to Hale and Dorr, LLP and Boston College Law School for financial support for this project. Finally, I owe much to Tony Varona for introducing to me many of the ideas that appear here. See note 9 *infra* for more about that. Any misjudgments or clumsiness are, of course, entirely my responsibility.

¹ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33, 99 (2001).

I. INTRODUCTION

A. *The Multicultural Critique of Models*

This paper sets out to explore how the interviewing and counseling processes taught in United States law schools might begin to accommodate differences in culture between a lawyer and her client. It attempts to learn from the rich literature on cross-cultural counseling in non-legal disciplines to suggest discrete changes to the prevailing models currently available to students.

Let's assume, as we begin, that you are a second year law student who has recently enrolled in a law school clinical program. Your clinical placement happens to be a civil program, where you will represent low income clients in family, housing, welfare and Social Security disputes. This is your first opportunity to practice law, and you are at once excited and very scared about your performance in this setting.

One of the primary missions of your clinical program, you notice, is to teach you basic skills in interviewing and counseling. That makes sense, of course. You've never done that stuff before, and you worry that if you interview poorly you may miss critical facts and end up less prepared for the advocacy you will be performing. Similarly, if you counsel ineptly, your client may make a decision she will later regret, or end up accepting a course of action that causes her serious harm. So you are quite open to the idea of learning these skills. You have purchased a textbook that your teachers use to help you understand the underlying theories and practice of these skills.²

These interviewing and counseling texts are interesting creatures, when you think about them. You notice when you study books on those topics that they tend to offer "models" for you to use, at least provisionally and tentatively, while you are learning a new professional skill. This makes sense to you. If books are to be of any help, they should suggest reasonably explicit and concrete ways to perform the skills that they purport to teach you. That seems pretty obvious. For instance, the most prominent interviewing and counseling book offers a very elegant model for conducting an initial interview with a

² For the sake of our discussion here, let us assume that you have been assigned one of the two leading textbooks on these topics, sources which were written about a decade ago and have not yet included in their pages a substantial component dedicated to the specific issues of cultural difference. I refer to DAVID BINDER, PAUL BERGMAN & SUSAN PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1990), and ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990). More recent textbooks have included at least some explicit attention to the cultural difference phenomenon. *See, e.g.*, ROBERT F. COCHRAN, JOHN M.A. DIPPIA & MARTHA M. PETERS, *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 203-21 (1999).

client.³ That authority suggests four stages of an interview. You begin with a “preliminary problem identification,” and transition through a “preparatory explanation” to the second “chronology” stage where you learn the time-generated narrative of your client. You then follow with an important “theory verification” segment where you return to topics to flesh out facts that are critical to your legal theory. Finally, you end with a “closing” stage where you try to conclude your session in a way that makes future agendas clear, offer provisional advice if possible, but resist premature diagnosis or judgment about the client’s case even if the client asks strongly for your opinion.⁴ The model endorsed by these authors not only helps you out with a very explicit agenda for your meeting, but it also suggests for each stage the kinds of questions that you ought to use (open ended during stages one and two, more narrow and focused during the theory verification stage, etc.),⁵ and teaches you about the importance of empathy, active listening, and rapport development—critical components of an interview.⁶

A model like that from *Lawyers as Counselors* develops from the learned experience of its authors, combined with some established theories of psychology and human interaction. It includes critical assumptions about your goals in the professional activity and about the ways that people tend to react to, and within, various interpersonal events. So, for instance, an interviewing model assumes that your goals in an initial interview are to learn all the relevant facts about the problem that a client comes to a lawyer for assistance with, to establish a rapport and a working relationship between you and your client, and to test for credibility in both directions (to gauge your client’s and to bolster yours with him). The model further assumes important things about the ways in which people interact. Some of those assumptions are pretty obvious (being kind and warm is more likely to establish good rapport than being unkind and brusque), while others are things which you learn from the book that you might not otherwise have known intuitively (for instance, open questions allow the client to speak more freely and tell his story more satisfactorily than closed questions; sustained eye contact is effective in showing concern and interest; open body language is more inviting and encouraging than folded-limbs, closed body language; a chronological narrative is a particularly effective vehicle for understanding a story most com-

³ See BINDER, ET AL., *supra* note 2 *passim*.

⁴ *Id.* at 228-30.

⁵ *Id.* at 69-81.

⁶ *Id.* at 46-68. The other books available to law students on these topics offer the same types of instruction, with many differences in substance as well as in the explicitness of the structure and model suggested. See sources cited in note 2, *supra*.

pletely and in a less distorted way; etc.⁷).

Now here's the puzzle for those of you who wish to learn a new skill from a course or a book or a model (as well as for those who create the books, courses, and models). The puzzle arises from the role of culture, background, and learning styles in our understanding of the effects of interpersonal behavior. Put simply, many of our assumptions about how people interact, and about the meaning of their expressions, are *culturally influenced*. If all the persons in the world, or, more modestly, all the persons in your lawyering community world, shared with you the same basic, overall way of communicating, interacting and understanding the world, then models for professional skills would be, or could be, pretty damned reliable. They wouldn't be *perfect*, because an occasional individual might have some idiosyncratic quirk that throws off your structured plan, but they'd be pretty effective just about all the time. If, though, the community in which you work is filled with a variety of interpersonal patterns, and a multiplicity of ways of understanding the world, then any "model" faces a distinctly more onerous challenge.

Of course, we now know that the latter is far more accurate a description of our experience than the former. Much of what we understand about interpersonal effectiveness is connected to cultural understandings, learned practices, and traditional customs. Your family background, race, gender, ethnicity, and sexual orientation, and those characteristics of your clients, matter a great deal in the interviewing and counseling process. In other fields, most notably social work and mental health counseling, researchers have been arguing and writing about the interplay of culture and technique for decades.⁸ In the field

⁷ As you read this list you may conclude that even *these* suggestions are not all that revolutionary as insights, an observation which invites two comments. First, if you have had that reaction, please read on, for one important task of this paper is to question our assumptions about the effectiveness of the usual techniques with all clients. Second, and perhaps in some defense of I&C books, even if most of the insights in these introductory skill books represent ideas that most of would recognize if we gave it a little thought, there is, seemingly, some substantial benefit in organizing our stock ideas into a coherent package, and then thinking about how one melds all of the common wisdom about interpersonal effectiveness into a meaningful meeting with a stranger.

⁸ For a sample of the literature on the topic of "multicultural counseling," or "counseling across cultures" in the mental health field, see, e.g., ALLEN E. IVEY & MARY BRADFORD IVEY, *INTENTIONAL INTERVIEWING AND COUNSELING: FACILITATING DEVELOPMENT IN A MULTICULTURAL SOCIETY* (4th ed. 1999); *COUNSELING AND PSYCHOTHERAPY: A MULTICULTURAL PERSPECTIVE* (Allen E. Ivey, Mary Bradford Ivey & Lynn Simek-Morgan, eds., 4th ed. 1997)[hereafter *COUNSELING AND PSYCHOTHERAPY*]; *ETHNICITY AND FAMILY THERAPY* (Monica McGoldrick, Joe Giordano & John K. Pearce eds., 2d ed., 1992); WOODROW M. PARKER, *CONSCIOUSNESS-RAISING: A PRIMER ON MULTICULTURAL COUNSELING* (2d ed. 1998); *COUNSELING ACROSS CULTURES* (Paul B. Pedersen ed. 1996); *HANDBOOK OF MULTICULTURAL COUNSELING* (Joseph G. Ponterotto, J. Manuel Casas, Lisa A. Suzuki & Charlene M. Alexander eds. 1995); DAVID SUE AND DERALD

of lawyering practice, this topic has begun to receive serious attention only in recent years.⁹

This paper intends to explore, begin to understand, and offer some practice suggestions about this critical aspect of learning interviewing and counseling skills.¹⁰ One plausible, and logical, inference available from the dissonance between culturally learned behaviors and the usefulness of models for professional skill development is that the dissonance and potential for misunderstanding caused by cultural differences¹¹ means that *no* model or skill set can ever work, since any such model or skill set would be bound to be based on some faulty, culture-bound assumptions. That inference, I argue, is too pessimistic, and overlooks the many ways in which persons from varying backgrounds share communicative and interactive traits, and the many

WING SUE, *COUNSELING THE CULTURALLY DIFFERENT* (3d ed. 1999) [hereafter SUE & SUE 1999]; DAVID SUE AND DERALD WING SUE, *COUNSELING THE CULTURALLY DIFFERENT* (2d ed. 1990) [hereafter SUE & SUE 1990].

⁹ An early student article raised these issues, but did not gain much attention. See Earleen Baggett, *Cross-Cultural Legal Counseling*, 18 CREIGHTON L. REV. 1475 (1985). A provocative article by Michelle Jacobs in 1997 did garner attention, however. See Michelle Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997). Since 1997 a new text on interviewing and counseling included a chapter on lawyer-client differences (see COCHRAN, ET AL., *supra* note 2, at 203-21), a supplement to a text on representing children added a chapter on the topic (see JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTION PROCEEDINGS* (1995)(2000 Cum. Supp. 165-239), and a recent Clinical Law Review article addresses this topic (see Bryant, *supra* note 1). While the recent literature adds immensely to our understanding of this topic, I write here to explore some questions which I find not yet resolved. In particular, this article explores the insights from non-legal literature to understand some of the concrete ways by which lawyers might change their behaviors when dealing with differences. My hope here is to suggest practical tools for those lawyers and students who respect the fact that a large part of their client community may not share dominant American practices, customs, and thinking.

An important additional law-based source upon which I rely is an unpublished manuscript by Tony Varona, now a professor at Pace Law School. See Anthony E. Varona, *Blind Justice and Invisible Walls: Exposing and Surmounting Barriers to Legal Services through Cultural-Sensitive Lawyering* (1992)(on file with the author). I supervised an independent study by Tony at Boston College Law School in 1992, and then filed his work away. I stumbled across his paper in 2002, after I had written most of what appears here. I am struck, as I read Tony's work, how many of his ideas I have worked into my article.

¹⁰ Culture will affect much more of the lawyering process than the skills of interviewing and counseling. Most importantly, cultural differences may affect how a client's story gets interpreted by a lawyer, or how a lawyer translates that story for advocacy purposes. See Clark D. Cunningham, *Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990). This article more modestly addresses only the interviewing and counseling skills, without intending to underestimate the significance of the topics I elide. I am particularly interested in how the effort to teach some basic, reliable *models* of lawyering practice is limited or adjusted when the significance of cultural difference is recognized.

¹¹ See text accompanying notes 30-31 *infra* for an account, and defense, of the dominant culture perspective that I adopt in this paper.

ways in which the client-centered models taught in law schools engender tolerance for difference. At the same time, a model that assumes too many shared communicative and interactive traits will surely fail in many ways. The first challenge, then, is to identify where models can serve reliably and where they are at risk of fostering misunderstanding.

The second challenge is to articulate for newer lawyers (and for experienced lawyers, who are always needing to learn more about how best to work with their clients) how they ought to proceed when some parts of the traditional models might not apply. The task here is to appreciate and respect the differences among your clients, but without resorting to stereotypes or stubborn myths about race, sex, ethnicity and culture. To ignore likely differences in culture is an invitation to malpractice in counseling; to presume you know what those differences will be once you know your client's race or sex or cultural background is an invitation to dehumanize or reify your client, and to assume generalizations that may not apply to him.¹² A primary ambition of this paper is to confront that not insignificant quandary, and to propose some lawyering process conceptions that might allow you to resolve the dilemma.¹³ My suggestions focus on the two constructs of *heuristics* and *biases*, as I describe immediately below. All of my suggestions proceed from an effort to be, as one writer has put it, "'cross-eyed,' with one eye always clearly focused on the differences, and the other eye clearly focused on the similarities"¹⁴ between dominant culture and minority culture clients.

This task seems especially critical to your training as a profes-

¹² In the movie *Annie Hall*, the comedian Alvy Singer, played by Woody Allen, meets at an Adlai Stevenson presidential rally Alison Porchnik, a campaign staffer for Stevenson, played by Carol Kane. After Alvy learns that that Alison's graduate thesis is entitled "Political Commitment in Twentieth Century Literature," he says,

Alvy: So you're, like, New York, Jewish, left-wing, liberal intellectual, Central Park West, Brandeis University, socialist summer camp, father with the Ben Shahn drawing on the wall, ah, strike-oriented, kind of—stop me before I make a complete imbecile of myself . . .

Alison: No, that was *wonderful*. I love being reduced to a cultural stereotype.

Alvy: I'm a bigot, I know—but for the left . . .

ANNIE HALL (United Artists Films 1977).

¹³ This effort develops themes arising from a process outlined by Kimberly O'Leary. See Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLIN. L. REV. 65, 82 (1997). Professor O'Leary proposed a four-step process of introducing cultural differences into lawyering courses, the third step of which she describes as "research and understand diverse perspectives." *Id.* Her article does not pursue in depth how a student might accomplish this step, or how a student should change his lawyering behavior once having researched and understood a diverse culture. I try to answer those questions here.

¹⁴ PAUL B. PEDERSEN, *CULTURE-CENTERED COUNSELING INTERVENTIONS: STRIVING FOR ACCURACY* 28 (1997).

sional. Consider why your understanding of cultural influences makes a difference to your success as a lawyer. It matters in the obvious ways that we shall explore in this paper—as you interview and counsel clients, the communication patterns between you and your client need to be as accurate, as reliable, and as meaningful as possible. But it matters in other important ways as well. Your work for a client requires that you understand that individual client's story, and what values and goals he brings to your relationship. You should understand why he has approached a lawyer in the first place, and how he hopes to work with a professional, like you, who holds some status in American society. In your work for him you will need to translate his story into the instrumental language of your profession, to attain the results for which your client has retained you. You should also appreciate the web of relationships within which your client lives, works, sleeps, and plays, to know who he is and how you can assist him best. *All* of these factors connect, in large or small ways, to your client's culture. And your assumptions about each of these items cannot be separated from your culture, and who you are as a person and a lawyer.

B. *Setting the Stage for the Inquiry*

Before I introduce the heuristics and biases themes, I need to set the stage for the remainder of the discussion in several ways. Initially, I need to offer a working definition of the term "culture," which appears repeatedly not only in this paper but in all of the literature on which these ideas are based. While commentators describe or use the term in slightly different ways, the following definition seems appropriate for our purposes:

[C]ulture [is] all the customs, values, and traditions that are learned from one's environment. [I]n a culture there is a "set of people who have common and shared values, customs, habits, and rituals; systems of labeling, explanations, and evaluations; social rules of behavior; perceptions regarding human nature, natural phenomena, interpersonal relationships, time, and activity; symbols, art, and artifacts; and historical developments."¹⁵

We are all part of some culture, and likely many cultures, understanding culture in this way. At the same time, though, "[c]ulture is performed, . . . fluid/emergent . . . [and] improvisational."¹⁶ It is critically

¹⁵ Gargi Roysircar Sodowsky, Kwong-Liem Karl Kwan & Raji Pannu, *Ethnic Identity in the United States*, in HANDBOOK OF MULTICULTURAL COUNSELING, *supra* note 8, at 123, 132, quoting Gargi Roysircar Sodowsky, E.W.M. Lai & B. S. Plake, *Moderating Effects of Sociocultural Variables on Acculturation Variables of Hispanics and Asian Americans*, 70 J. COUNS. & DEV. 194 (1991).

¹⁶ Joan Laird, *Theorizing Culture: Narrative Ideas and Practice Principles*, in RE-VISIONING FAMILY THERAPY: RACE, CULTURE, AND GENDER IN CLINICAL PRACTICE 24

important to the lawyering process, but elusive in any particular interaction.

This Article focuses on the contrasts between what many see as the dominant United States culture, usually understood to mean White, American, and Eurocentric practices and patterns, and non-dominant cultures, representing the practices and patterns of ethnic and religious minority communities as well as members of the disabled, poor, and GLBT¹⁷ communities. One writer on cross-cultural social work skills has employed the term “minority” to refer to “a racial, religious, ethnic, or political group with less power than the controlling group in society.”¹⁸ Each such group might be considered a separate culture for our purposes here.

The theme of this Article is that discrete minority (as just defined) communities tend to share certain preferences, styles, patterns, and values, and that a better lawyer will understand that the cultural background of a lawyer or a client matters—it can affect how that person will respond to behaviors suggested by skill models or by your theories of good lawyering. So, given that theme, one might predict that a woman raised in, or living in, a Mexican-American family will possess certain characteristics which the lawyer ought to understand and anticipate. Her ethnic background, reflecting the culture in which she lives or was raised, is thus relevant to the task of good lawyering. The lesson for professionals is apparent: “It is not appropriate or helpful to insist that ethnic minority clients who come from a value system differing from the Eurocentric worldview be subjected to interventions that are often incompatible with their norms. . . . [I]t is mandatory that we know what [the cultural values] are for every client system of color with which we interact.”¹⁹

These background definitions and understandings invite a few thoughts about how the concept of *race*—as opposed, say, to ethnicity—ought to apply to this discussion. Some writers insist that cultur-

(Monica McGoldrick, ed. 1998)(hereafter RE-VISIONING FAMILY THERAPY). Compare PEDERSEN, *supra* note 14, at 29 (“Culture is complex, but not chaotic. There are *patterns* that make it possible to manage complexity.”).

¹⁷ “GLBT” is the preferred term for individuals who are not conventionally heterosexual in their orientation, covering gays, lesbians, bisexuals, and transgenders.

¹⁸ DOMAN LUM, *SOCIAL WORK PRACTICE AND PEOPLE OF COLOR: A PROCESS-STAGE APPROACH 7* (2d ed. 1991). Lum has reconsidered the term “minority” in his next edition of this work, in light of evidence that “the Caucasian race . . . is in a numerical minority globally.” He now prefers the term “culturally diverse groups” to the term “ethnic minorities.” DOMAN LUM, *SOCIAL WORK PRACTICE AND PEOPLE OF COLOR: A PROCESS-STAGE APPROACH 3* (3d ed. 2000).

¹⁹ Rowena Fong, *Culturally Competent Social Work Practice: Past and Present*, in *CULTURALLY COMPETENT PRACTICE: SKILLS, INTERVENTIONS, AND EVALUATIONS 4, 6* (Rowena Fong & Sharlene Furuto eds. 2001)[hereafter *CULTURALLY COMPETENT PRACTICE*].

ally competent lawyers account for race in their use of the lawyering skill models, and in their representation of clients generally.²⁰ At the same time, if a goal of this discussion is to identify certain preferences, styles, patterns, and values common to a shared cultural community, it seems a stretch to imagine racial groups as demonstrating such patterns.²¹ It seems, if I read the literature right, that race should matter in many ways but, at the same time, it will not serve as shorthand for an ethnic minority culture. Allow me to explain the distinction that I observe.

As Michelle Jacobs has shown so powerfully, lawyers cannot ignore the importance of race in working with clients of color.²² Her pioneering work notes the ill-fit of conventional models with minority clients and lawyers. She demonstrates the critical and identifiable ways that the attorney-client relationship is affected by racism's impact on the lives of people of color. Jacobs explains how clients of color own a worldview influenced by powerlessness and oppression, and argues that lawyers, especially lawyers from the dominant culture, must find ways to appreciate and respect that worldview.²³ What Jacobs does not suggest, however, is any way in which race is equivalent to culture in its connection to patterns, practices, habits and values. It is true that Jacobs, like other writers,²⁴ refers to certain norms of the African-American community about which lawyers should be aware,²⁵ but I see that description as one of an ethnic culture, rather than a characteristic of a racial group.²⁶

Other definitional challenges arise from this discussion of ethnicity and culture. Simply put, neither concept is static nor easily knowable, and even if each were so, the risks of misapplying cultural

²⁰ See, e.g., Jacobs, *supra* note 9; Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L. REV. 219 (forthcoming 2002)(manuscript on file with the author).

²¹ See JOHN A. AXELSON, COUNSELING AND DEVELOPMENT IN A MULTICULTURAL SOCIETY 153 (1999)(objecting to the tendency to treat the ideas of race and ethnicity as if they were interchangeable).

²² See Jacobs, *supra* note 9 at 378-91.

²³ See also Silver, *supra* note 20, at 18-19.

²⁴ See, e.g., Aminifu R. Harvey, *Individual and Family Intervention Skills with African Americans: An Africentric Approach*, in CULTURALLY COMPETENT PRACTICE, *supra* note 18, at 227, 227.

²⁵ See, e.g., Jacobs, *supra* note 9, at 358-59 (referring to eye contact norms).

²⁶ See Alfrieda Daly, *A Heuristic Perspective of Strengths in the African American Community*, in CULTURALLY COMPETENT PRACTICE: SKILLS, *supra* note 18, at 241, 242 (“[c]ultural differences suggest that African American is an ethnic designation, not racial”). But see Wynetta Devore, “Whence came these people?": An Exploration of the Values and Ethics of African American Individuals, Families, and Communities, in CULTURALLY COMPETENT PRACTICE: SKILLS, *supra* note 18, at 33, 34 (minimizing the homogeneity of the African American community and family). Devore, like Jacobs, does stress the common theme of the “experience [of] persistent racism.” *Id.*

generalizations to any individual client are obviously a source of some worry. So, not only does one learn that culture is “socially constructed, evolving, emergent, and occurring in language,”²⁷ but intersectionality²⁸ renders many cultural designations suspect. And the role of assimilation is similarly critical to any understanding of the influences of a traditional culture on a member of an ethnic minority community.²⁹

The suggestions developed below, especially those regarding heuristics, intend to recognize these objections and worries. As Ruth Dean and others have written, the realization that most dominant culture professionals will never become culturally competent does not mean that those professionals ought not continue to explore, with curiosity and humility, the ways in which cultures tend to express their traditions, values, and beliefs.³⁰ In this process, the client is the expert, and the lawyer tries to understand, as best she can, the life and worldview of her client.³¹ As one writer vividly describes it, the professional proceeds with “informed not-knowing.”³²

There is one final orienting topic to cover before we move on. In this Article, I will assume that the existing skill models will apply, at least presumptively, with dominant culture (usually understood as white American) clients, and that the pressing question for students and lawyers is how, if at all, the dominant culture models ought to be

²⁷ Ruth G. Dean, *The Myth of Cross-Cultural Competence*, 82 FAMILIES IN SOCIETY: THE JOURNAL OF CONTEMPORARY HUMAN SERVICES 623, 625 (2001). See also Laird, *supra* note 16.

²⁸ See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 10 LA RAZA L. J. 499 (1998), 85 CAL. L. REV. 1585 (1997); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 22 (1995); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995).

²⁹ See T.K. OOMMEN, CITIZENSHIP, NATIONALITY AND ETHNICITY 63 (1997); Varona, *supra* note 9, at 46-47.

³⁰ See Dean, *supra* note 27, at 624. As Professor Dean writes:

I . . . propose a model in which maintaining an awareness of one's lack of competence is the goal rather than the establishment of competence. With “lack of competence” as the focus, a different view of practicing across cultures emerges. The client is the “expert” and the clinician is in a position of seeking knowledge and trying to understand what life is like for the client. There is no thought of competence—instead one thinks of gaining understanding (always partial) of a phenomenon that is evolving and changing.

³¹ See *id.* See also Harlene Anderson & Harold Goolishian, *The Client Is the Expert: A Not-Knowing Approach to Therapy*, in SHEILA McNAMEE & KENNETH J. GERGEN, THERAPY AS SOCIAL CONSTRUCTION 25 (1992).

³² Laird, *supra* note 16, at 21 (quoting V. Shapiro, *Subjugated Knowledge and the Working Alliance: The Narratives of Russian Jewish Immigrants*, 1 IN SESSION: PSYCHOTHERAPY IN PRACTICE 9 (1995)).

adapted for clients who are not from that dominant culture.³³ This assumption or premise narrows the focus of this inquiry, of course. As many have written, and as the above definition of culture suggests, *all* counseling is cross-cultural³⁴—even an interaction between a male, WASP lawyer from Newton Centre, Massachusetts and his male, WASP client from the same city. But the traditionally taught lawyering skills models have been developed with an eye to suggesting behaviors most apt to work generally, and if there is a cultural skew in the models it would be in favor of the dominant, Western, Eurocentric conception of a personality. In working with client who may not share the expected personality conceptions, you want to consider how to adjust your skill sets.

Note, though, that this premise or assumption has left out *your* cultural background. Let us consider that question for a moment. There are two ways in which the lawyer's cultural background affects the work about which I write here. First, to the extent that the skills taught in law school seek to maximize your client's comfort and trust, you may rely on the traditional models when working with dominant culture clients, for those models are apt to be pretty reliable for that purpose. If you happen to share that client's dominant culture background, then, presumably, your use of the models will be uncomplicated (except to the extent that using the models themselves is a challenge, which we ought not underestimate,³⁵ and except to the extent, as just noted, that all counseling is cross-cultural). If you do not share your client's dominant culture background, then you will be working with models crafted with your client in mind, but not necessarily with your culture in mind. As we see below, a critical responsibility of cross-cultural practice is to understand, respect, and work with your client's preferences and values. The models help you do so in the

³³ Recall that there remains an important consideration which I do not address here in any depth. Many writers have noted the significance, in instrumental terms, of translating Outsider stories into Insider narratives in order to be persuasive as an advocate in courts or in similar dominant culture fora. See, e.g., Brook K. Baker, *In "doctrine" ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 J. MARSHALL L. REV. 131, 142-45 (2000). That endeavor is at once necessary to explore but subject to much concern if it undercuts the integrity of the original stories. See *id.*; Jacobs, *supra* note 9, at 365-69 (warning of the distortion and privileging of voice that can occur when lawyers assume that a client's goals must be accommodated within existing power structures).

³⁴ See, e.g., SUE & SUE 1999, *supra* note 8, at xii; PETERS, *supra* note 9, at 177; PEDERSEN, *supra* note 14, at 273.

³⁵ This article suggests amendments to the "usual" interviewing and counseling skill sets, and in doing so it adds some complexity, richness and ambiguity to the process of learning those skills. But even without that added texture, the skill sets are themselves enormously challenging and difficult to master, if my clinical teaching experience is at all reliable.

setting where you are working with a dominant culture client, because they assume the dominant culture perspective (for both lawyers and clients).³⁶ In this respect the skills privilege your client's cultural preferences and values, but not yours.³⁷

The second point about your cultural background and preferences will be addressed at greater length below,³⁸ but warrants a quick mention here. In the section of this article discussing "bias," I note the importance for any lawyer of understanding his or her cultural identity, including biases, stereotypes, values, and comfort patterns. The sophisticated writers about cross-culture counseling help us understand that no lawyer enters into an attorney-client relationship without a complex package of learned behaviors, assumptions, and biases. Understanding your complex package and identifying its components explicitly is a critical step in becoming a better cross-cultural lawyer.

C. *Heuristics and Biases*

In searching for advice to good faith lawyers on the topic of cross-cultural counseling we might find the familiar concepts of *heuristics* and *biases* to be useful. These paired notions are of course famous from the setting of behavioral psychology,³⁹ but I use the terms in slightly different ways here.⁴⁰ *Heuristics* represent a method of inquiry which employs generalizations and maxims⁴¹ to guide education

³⁶ See Varona, *supra* note 9, at 8; cf. Gary Peller, *Race Consciousness*, 1990 DUKE L. J. 758, 772-79 (1990).

³⁷ On occasion in this paper I refer to those clients for whom the models were not written as "culturally different clients," even though those clients may not be "culturally different" from you, the lawyer. I use the "different" phrase as a short-hand term to capture ethnic minorities, disabled persons, GLBT individuals, and others whose diversity creates uncertainty whether the "usual" models ought to apply. At other times I use the phrase "ethnic minority" to refer, perhaps awkwardly, to non-dominant culture individuals. See Varona, *supra* note 9, at 3, n.2 (preferring the term "intercultural" to "minority").

³⁸ See *infra* notes 154-67 and accompanying text.

³⁹ See JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds. 1982)[hereafter JUDGMENT UNDER UNCERTAINTY].

⁴⁰ The dictionary definition of "heuristic" as a noun is "a heuristic method or procedure." As an adjective, the term means, "involving or serving as an aid to learning, discovery, or problem-solving by experimental and especially trial-and-error methods <heuristic techniques> <a heuristic assumption>; also: of or relating to exploratory problem-solving techniques that utilize self-educating techniques (as the evaluation of feedback) to improve performance." Miriam-Webster Dictionary On Line <<http://www.m-w.com/cgi-bin/dictionary>> (visited September 30, 2001). Amos Tversky and Daniel Kahneman use the term as a noun representing patterns of thought which human employ to organize ambiguous data and perceptions. See, e.g., Amos Tversky & Daniel Kahneman, *Judgments Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 39, at 3; Amos Tversky & Daniel Kahneman, *A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 39, at 163.

⁴¹ The use of pragmatic, tentative generalizations and maxims resembles a process

or a learning process. It has achieved particular significance in the past decade as a central component of the new behavioral psychology perspective, which attempts to explain human behavior not through classical economic rationality but instead through the operation of sometimes less-than-rational thinking patterns on which most of us rely to organize our worlds.⁴² In contrast to the behavioral psychologists' understanding of heuristics as reflexive operations guiding decisionmaking without much conscious deliberation, I employ the concept as a more explicitly deliberative operation. The key point about heuristics is that they rely on generalizations which are not absolute, but are more tentative and preliminary.

The central premise of the heuristics idea is this: A lawyer working with an ethnic minority client can neither assume that the client's cultural preferences do not matter (as some of the dominant culture models imply), nor be certain that the specific differences of which the lawyer is aware will call for predictable variations in their interaction. The former danger we label as cultural imperialism; the latter, stereotyping. What the good-faith lawyer needs is an orientation to cross-cultural practice which respects differences but does not guess incorrectly how the differences will matter.

If every aspect of the interviewing and counseling process were open for reconsideration in cross-cultural contexts, a lawyer would feel powerless about how to proceed. The models suggested for dominant culture interactions would have no guiding relevance. A review of the extensive literature on the topic of cross-cultural practice, though, shows that in those settings everything is not open to reconsideration. In fact, there are several identifiable, reasonably predictable ways in which cultures will differ, and will influence their members. A culturally competent lawyer can anticipate the areas

within ethical decisionmaking known as casuistry. See Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489 (1999)(exploring that process).

One might refer to "rules of thumb" as a phrase that captures the pragmatic tentativeness intended here. The use of the phrase "rules of thumb" may be exemplary of the concerns addressed in this paper, since that saying, common in the dominant culture, has been considered by many as offensive to women because of its purported origin as a measure of the size of stick permitted by English law to be used by husbands to beat wives in some earlier society. Some argue, though, is that this professed origin is in fact an urban legend, and a myth. See, e.g., <http://www.shu.ac.uk/phrases/list/307000.html> (visited September 30, 2001). But see Jennifer Freyd & J. Q. Johnson, *Commentary: Domestic Violence, Folk Etymologies, and "Rule of Thumb,"* <http://dynamic.uoregon.edu/~jjf/essays/ruleofthumb.html> (visited September 30, 2001)(reviewing historical documents to show that evidence exists for the domestic violence etymology).

⁴² See, e.g., BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 97 MICH. L. REV. 107 (1994).

where difference is most likely to arise, and, equally importantly, the direction in which the differences are most likely to proceed. Knowing that, the lawyer can anticipate provisionally the places where her model's world view might not be the same as that of her culturally different client, remaining open to possible misunderstanding and the possibility of conversation about the differences, if appropriate.

It is in this fashion that I suggest you consider the idea of heuristics. By identifying the places where cultures are most apt to differ, and by knowing a bit about how each culture differs on these scores, you can plan for a session with a culturally different client by the use of tentative generalizations accompanied by a disciplined *naïveté*⁴³ about interpersonal dynamics about which you previously may have felt some real, but possibly misplaced, confidence. Part II describes several areas in which you might expect predictable differences among cultures, and proposes heuristics to employ when working with clients from those non-mainstream cultures.

The second construct borrowed from the work of the behavioral psychologists is that of *bias*.⁴⁴ If the heuristics idea informs and organizes your consideration of the ways that other cultures may differ from the dominant culture, the bias idea turns the focus back on you, on your cultural presuppositions, and on the distortions and prejudices you bring to the client interaction. Not only do you need to know something about how different cultures might respect different values, customs and practices, but you also must "move[] from being culturally unaware to being aware and sensitive to [your] own cultural issues and to the ways that [your] own values and biases affect culturally diverse clients."⁴⁵ As one authority has written concerning teach-

⁴³ The idea of disciplined naïveté as a critical virtue of cross-cultural counseling has been suggested by David Sue and Derald Wing Sue, see SUE & SUE 1999, *supra* note 8, at 115, and by Jean Koh Peters and Sue Bryant, see Bryant, *supra* note 1, at 62; PETERS, *supra* note 9, at 225-29. See also Dean, *supra* note 27, at 623 (proposing "a model based on acceptance of one's lack of competence in cross-cultural matters"); Laird, *supra* note 16, at 23 (describing "informed not-knowing").

⁴⁴ See JUDGMENT UNDER UNCERTAINTY, *supra* note 39. Tversky and Kahneman use the concept of bias to explain distorted psychological workings that lead to economically irrational decisions. See Tversky & Kahneman, *supra* note 40, at 18-19. See also Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1075 (describing "hindsight bias," the term that describes the tendency of actors to overestimate the ex ante prediction that they had concerning the likelihood of an event's occurrence after learning that it actually did occur). The Tversky and Kahneman interpretation is more descriptive than normative (except on the maximizing economic value scale). I use the phrase here in its more common, and normatively loaded, understanding.

⁴⁵ Donald B. Pope-Davis & Jonathan G. Dings, *The Assessment of Multicultural Counseling Competencies*, in HANDBOOK OF MULTICULTURAL COUNSELING, *supra* note 8, at 287, 287-88.

ing cross-cultural counseling to members of the dominant culture, "Attempts to teach effective cross-cultural counseling will be doomed unless trainees address their own White racism."⁴⁶ Part III explores the importance in seeking to attain "cultural competence" by your own self-examination for biases and prejudices, and offers some suggestions and exercises mined from the literature to aid you in that goal.

II. HEURISTICS

The heuristics concept is an effort to resolve, in a pragmatic kind of way, two apparent hurdles that arise upon the discovery that the typical law school models are constructed upon dominant culture assumptions, which may not apply necessarily in minority-culture contexts. The two hurdles are (1) confronting your uncertainty whether *any* of the suggestions from a previously acceptable model ought to apply in cross-cultural practice (or, put another way, your not knowing which of the assumptions underlying the models ought to be rethought in any given encounter); and (2) your worry that in responding to culturally different clients you will rely on stereotypes which might not work with the particular individual with whom you happen to be working. These hurdles are no small challenge. If you use dominant culture models faithfully regardless of the cultural background of your client, you will no doubt fail in some respects as a lawyer. So you opt to adapt the models, but you wish to know which parts of the model are likely to be inappropriate for culturally different clients. And, even if you can figure out that puzzle, you encounter the further worry that you will presume in some kind of slavish way that your client must share some characteristics of her culture, and that feels like unfair stereotyping.

The idea of heuristics might help you on both of these counts. First, as we see, a limited range of heuristics will apply. That responds to your first concern. Not everything is subject to revision in cross-cultural practice, but certain predictable items ought to command your attention. Each one of those areas (including kinesics, proxemics, paralanguage, relational qualities, scientific orientation, perhaps a few others) qualifies for a set of heuristics. Otherwise, the wisdom of the models seems to have continued effect. In addition, because you work with heuristics and not rules or models, you minimize the stereotyping risk. The idea of a heuristic is that you assume tentatively—with your "disciplined naïveté" and "informed not-know-

⁴⁶ SUE & SUE 1990, *supra* note 8, at 73.

ing"⁴⁷—a certain presumption about the behavior you're about to encounter, and better to assume some culturally predominant qualities than some culturally unlikely ones. Because you're applying heuristics, many of your presumptions prove to have been mistaken, but with some training you'll be flexible enough to adjust when your expectations seem unfounded.

The vast literature on cross-cultural counseling in the fields of social work and psychotherapy has identified several important areas in which cultures are most apt to differ.⁴⁸ A lawyer who fails to understand these differences, or to anticipate that some such differences might exist, risks misunderstanding, insulting, or offending her client. The following sections summarize some of the most critical areas, with a brief explanation of how certain cultures tend to differ from the dominant American culture. A culturally competent lawyer ought to have available in her library resource materials which would explain the cultural traits, customs, and values that she can expect to encounter in her work with diverse clients.⁴⁹ That kind of book-research might be supplemented with other means of understanding ethnic culture, including attending cultural events in the community where your clients live, and speaking with your clients about these topics.⁵⁰ As one writer has cautioned, "Be tactful and discreet and quietly compare any book learning against the actual situation. Use book learning as an aid to understanding, *not* as a template into which the world will actually be fitted."⁵¹

In reviewing these places where cultures tend to differ in some predictable ways, I attempt to suggest a level of practical application for concepts which sometimes remain a bit theoretical in their discussions. It is quite common, in textbooks written for social work or mental health professions as well as in the few resources emerging for lawyers, to observe authors insisting that professionals anticipate and understand cultural differences in their work with clients, but without

⁴⁷ See *supra* note 43.

⁴⁸ Many of the texts developed for counseling psychology students and practitioners include chapters dedicated to specific cultural groups, and what to expect within those cultures. See, e.g., *COUNSELING AMERICAN MINORITIES: A CROSS-CULTURAL PERSPECTIVE* (Donald R. Atkinson, George Morten & Derald Wing Sue eds., 4th ed. 1993); *HANDBOOK OF MULTICULTURAL COUNSELING*, *supra* note 8; WANDA M. L. LEE, *AN INTRODUCTION TO MULTICULTURAL COUNSELING* 104-13 (1999); *ETHNICITY AND FAMILY THERAPY* (Monica McGoldrick, Joe Giordano & John K. Pearce eds., 2d ed., 1992); PEDERSEN, *supra* note 14; SUE & SUE 1999, *supra* note 8.

⁴⁹ See *supra* note 48 for a list of some such resources.

⁵⁰ "What matters is that you seek information and experience of other cultures in all possible ways that are around you." PATRICIA D'ARDENNE & ARUNA MAHTANI, *TRANS-CULTURAL COUNSELING IN ACTION* 41 (2d ed. 1999).

⁵¹ FRAN CRAWFORD, *JALINARDI WAYS: WHITEFELLAS WORKING IN ABORIGINAL COMMUNITIES* 56 (1989), *quoted in* Dean, *supra* note 27, at 629.

offering adequate guidance to the professionals about *how* to accomplish those tasks.⁵² The areas I am about to describe hardly achieve the goal of adequate guidance, but they do represent a beginning effort to turn the discussion to a more concrete level.

A. Proxemics

The concept of *proxemics* refers to “perception and use of personal and interpersonal space.”⁵³ Cultures tend to develop relatively unambiguous norms concerning appropriate physical distance in social interactions. Most lawyering counseling texts attend to proxemics, and do so with the expected dominant culture norms in mind. For instance, one respected interviewing and counseling text reports on the research available on the effect of distance, including the respect for some “critical space,” on effectiveness of communication, and reporting that “experiments indicate that . . . five and one-half feet is the preferred distance between people. . . .”⁵⁴ Another central text refers its readers to the “[s]ubstantial literature . . . devoted to how offices should be decorated and arranged to put clients at ease,”⁵⁵ after suggesting that lawyers “[h]ave an area of your office which is conducive to personal conversation rather than attempting to communicate across a large and often messy desk.”⁵⁶ A very common suggestion in interviewing and counseling texts is to reduce the psychological barriers between lawyer and client by meeting face-to-face rather than across a desk.⁵⁷

⁵² The impressive article by Susan Bryant is an apt example. Throughout her extremely thoughtful and comprehensive article, Bryant makes repeated references to the need for students to know more about the cultures that differ from dominant culture. See, e.g., Bryant, *supra* note 1, at 43 (“[s]tudents need to recognize these [cultural] differences and plan for a representation strategy that takes them into account”); at 50 (“the teacher should identify culture-general and culture-specific information that is important to the students’ clinical work and future learning”); at 55 (“[s]tudents may also want to focus on skills that are valued in the client’s culture”). The present project is an effort to make concrete the places where those differences and culture-sensitive topics are apt to appear, and in what fashion.

⁵³ SUE & SUE 1990, *supra* note 8, at 53.

⁵⁴ THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 225 (3d ed. 1997). While this book seems to assume some universality of the effect of distance and other proxemics on communication and rapport, it is in fact quite vivid in its recognition of the importance of the particular client’s needs, including a partly-in-jest suggestion that lawyers use furniture on wheels and permit clients to choose which office furniture arrangement works best for them. See *id.* at 224.

⁵⁵ BINDER, ET AL., *supra* note 2, at 86 n.6 (citing Paul Marcotte, *Was It Something I Said? Office Decor Can Help Determine Whether You Keep Clients*, 73 ABA J. 34 (August, 1987); Steven G. Fey & Steven Goldberg, *Legal Interviewing from a Psychological Perspective: An Attorney’s Handbook*, 14 WILLAMETTE L.J. 217, 221-24 (1978)).

⁵⁶ *Id.* at 85-86.

⁵⁷ See, e.g., FRED E. JANDT, *EFFECTIVE INTERVIEWING* 31-32 (1990); BASTRESS & HAR-

All of these suggestions make important sense, and are necessary for beginning lawyers to understand.⁵⁸ But, as Derald Sue and David Sue remind us, "different cultures dictate different distances in personal space."⁵⁹ Many cultures, including Latin American, African, Black American, Indonesian, Arab, South American, and French, prefer discourse at a much closer distance than White American culture finds comfortable or appropriate.⁶⁰ Other cultures, such as the British, maintain a greater distance than traditional American custom.⁶¹

You now may see for the first time in this discussion how a set of heuristics about proxemics might assist you when you are working with a minority culture client. The academy's dominant culture training will have established for you certain relatively reflexive feelings about social distance, and you would in a dominant culture meeting rely on those understandings in deciding how close to your client you will sit, how you might arrange your furniture, and so forth. When you meet with a client from a different culture, however, you might want to assume a bit more naïveté about these issues. You can rely on some generalizations (the heuristic) about how your client will react to social distance. If you have read that "[m]any Latina/o people often prefer half [the dominant culture] distance, and those from the Middle East may talk practically eyeball to eyeball,"⁶² you might assume—with some tentativeness—that your usual social distances might inaccurately imply aloofness or disinterest in meetings with Latina/o or Middle Eastern clients, and therefore attempt a bit closer contact. Of course, your own social background and cultural influences cannot be ignored either, so you will search for a setting that accommodates the (possibly) different preferences of your client with your own comfort levels.⁶³

This first example of the use of heuristics invites consideration of the risk of error. The perhaps most respected work on cross-cultural

BAUGH, *supra* note 2, at 135-36.

⁵⁸ Or, for experienced lawyers to hear. I find it striking how often I observe professionals who meet clients and other guests from behind a formal desk, despite the many suggestions about the effect of that barrier on comfort, rapport, and power relationships.

⁵⁹ SUE & SUE 1990, *supra* note 8, at 53 (citing Nan M. Sussman & Howard M. Rosenfeld, *Influence of Culture, Language and Sex on Conversation Distance*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 66 (1982); Aaron Wolfgang, *The Function and Importance of Non-verbal Behavior in Intercultural Counseling*, in HANDBOOK OF CROSS-CULTURAL COUNSELING AND THERAPY (Paul B. Pedersen ed. 1985)).

⁶⁰ *Id.* See also IVEY & IVEY, *supra* note 8, at 35.

⁶¹ IVEY & IVEY, *supra* note 8, at 35.

⁶² *Id.*

⁶³ Sue and Sue report that "U.S. Americans . . . like to keep a desk between them and the other person," see SUE & SUE 1990, *supra* note 8, at 54, so my observation above about professionals I encounter (see *supra* note 58) is quite consistent with research into the dominant culture.

counseling in the psychotherapy literature offers the following caveat to its readers:

It is extremely difficult to speak specifically about the application of multicultural strategies and techniques in minority families because of the great variations not only among Asian Americans, African Americans, Latino/Hispanic Americans, Native Americans, and Euro-Americans, but because large variations exist within the groups themselves. . . . Worse yet, we might foster overgeneralizations that would border on being stereotypes. Likewise, to attempt an extremely specific discussion would mean dealing with literally thousands of racial, ethnic, and cultural combinations, a task that is not humanly possible.⁶⁴

These sophisticated observers of cultural patterns concede that cultural competence is anything but a precise science, and that making assumptions about an individual because of her race or cultural background may lead to mistakes. How do you work with this uncertainty?

The concept of heuristics is intended to respond to precisely this problem of uncertainty.⁶⁵ The argument I offer to you is this: If you were to apply automatically the dominant culture model and ignore the cultural differences which might be in play (because of your legitimate worry about being wrong), you would face a risk of error in that direction. It seems far more prudent, given the risks of error in both directions, to assume tentatively that the known generalizations *apply*, rather than that they do not apply. The heuristics are just that—preliminary orientations from which you will deviate based upon your own pragmatic judgments arising from your interaction with the culturally different client. It is better, in short, to err by assuming provisionally that the cultural generalizations will apply, than to err by assuming provisionally that they do not.⁶⁶

This first heuristic example also invites another consideration which will arise in each heuristics area that we explore in this paper—whether you might simply talk to your client about the matters that you suspect will be different from the model's suggestions. The concern is this: Might you, amidst conditions of uncertainty, *ask the client* about his cultural preferences and any differences that you might be expecting?⁶⁷ The answer to this question will often be “yes,” but not

⁶⁴ SUE & SUE 1999, *supra* note 8, at 115.

⁶⁵ Indeed, the heuristics commonly studied apply to general patterns of decisionmaking “under uncertainty.” See JUDGMENT UNDER UNCERTAINTY, *supra* note 39.

⁶⁶ But recall, as Ruth Dean has emphasized, that the goal of this endeavor is to maintain an awareness of just how much we do not know—the idea of “informed not-knowing.” See Dean, *supra* note 27, at 628; see also *supra* note 31.

⁶⁷ See *supra* note 54, describing the Shaffer and Elkins suggestion that a lawyer furnish

necessarily always. Later parts of this paper will address some ways cultures differ in their reactions to and respect for an attorney's status, comfort level with engaging in dialogue, and valuing autonomy. The culturally different client's preferences on *those* items may affect significantly the prospect for the attorney and client to engage in a mutual exploration of the differences.⁶⁸

In the case of proxemics, some decisions will simply not be subject to collaborative decisionmaking. It would be hard, I imagine, for you to have a productive conversation with a new client about how close to him you ought to stand. You might, by contrast, set up your office in a way that permits you to offer him a choice that includes your provisional assessment of how his culture would arrange such a meeting room, but that interaction might be distorted by his need to defer to your authority, if that cultural value is central to him.⁶⁹

This discussion of heuristics about proxemics invites one final thought about the enterprise of working as a lawyer with culturally different clients. Without an appreciation of cultural preferences about proxemics, many lawyers might interpret "inappropriate" (from a dominant culture perspective) use of physical space as odd, deviant, or "difficult."⁷⁰ Similar culturally-specific behaviors might even lead a professional inappropriately to suspect mental illness.⁷¹ The benefits of provisional heuristics and reinforced naïveté include a more sustained appreciation and tolerance for "difficult" behaviors,⁷² especially when combined with an examination of the lawyer's own personal cultural assumptions, values, and biases.⁷³

B. Kinesics

The term *kinesics* refers to the way in which bodily movements are used and interpreted. It includes such things as facial expressions, eye contact, hand shakes, posture, gestures, and similar physical

an office with furniture on wheels, so the client may choose the arrangement that is most comfortable for him.

⁶⁸ For a more elaborate consideration of explicit discussion between client and lawyer of cultural differences, see PETERS, *supra* note 9, at 177-78, 190-93; Bryant, *supra* note 1, at 55.

⁶⁹ See, e.g., LEE, *supra* note 48, at 104-13 (describing Asian American culture's commitment to respect for authority). See also text accompanying notes 108-10 *infra*.

⁷⁰ See, e.g., Jacobs, *supra* note 9, at 356 (criticizing some traditional skills books for interpreting difference as deviance and labeling clients "difficult").

⁷¹ See, e.g., SUE & SUE 1999, *supra* note 8, at 21, 224-30 (describing ways in which therapists work to aid their culturally different clients to change qualities which are culturally-established, and noting that some therapists label culturally-deviant behavior as the basis for a psychological diagnosis).

⁷² See Bryant, *supra* note 1, at 12-13 (recommending development of a nonjudgmental perspective about different customs and practices).

⁷³ See Part III, *infra*.

movements. “[K]inesics appears to be culturally conditioned, with the meaning for body movements strongly linked to culture.”⁷⁴

The role of kinesics in legal interviewing and counseling is sometimes quite explicit and central, and in other ways it is more subtle. It seems clear, though, that your attempts to achieve effective and meaningful communication and rapport with your clients will be influenced (and evaluated) by your reading of kinesics. A culturally inept lawyer will misread cues, to the detriment of the relationship; and a culturally competent lawyer will understand her clients’ cues more accurately, to the benefit of the relationship.

As with proxemics, kinesics may be approached by the employment of heuristics. You can learn about patterns of physical behavior common to various cultures, and approach a meeting with a culturally different client with the tentative expectation that your client will act consistently with her culture. Some of the most common sources of misunderstanding, or of offending another, include the following:

Eye contact: We rely on eye contact, or its absence, to communicate a great deal about feelings, truthfulness, confidence, and comfort level. In the dominant culture, eye contact has some very reliable meaning. Those in the dominant culture understand a strong, unwavering gaze to indicate honesty, self-assurance, and comfort. By contrast, shifting eye contact or very little eye contact tends to communicate, in the dominant culture, just the opposite—lack of self-esteem, discomfort, and possibly untruthfulness.⁷⁵ The textbooks that teach effective lawyer/client relations rely on these generalizations in recommending that lawyers master eye contact as an appropriate rapport-building tool.⁷⁶

Both the dominant culture and less mainstream cultures recognize that messages are sent by eye contact, but not all cultures agree on the positive/negative valences of this cue. For instance, studies of

⁷⁴ SUE & SUE 1990, *supra* note 8, at 54.

⁷⁵ An inability to sustain eye contact for more than a second or two at a time can be informative. Client persistence in glancing away from you immediately after making eye contact evidences nervousness or, possibly, deceit (hence the term “shifty-eyed”). A client who never, or almost never, looks at you indicates a severe state—perhaps a total breakdown in trust, an intense dislike, extreme nervousness, psychiatric or physical illness, or some combination of these.

BASTRESS & HARBAUGH, *supra* note 2, at 139.

⁷⁶ See, e.g., COCHRAN, ET AL., *supra* note 2, at 63 (“[G]eneral factors that contribute to an effective interview include . . . making and keeping eye contact throughout the interview”); BINDER, ET AL., *supra* note 2, at 50 (in using silence as a facilitator, you should “keep your attention on the client and give other non-verbal cues (such as leaning forward, maintaining eye contact, or nodding your head) to indicate your expectation that the client will continue speaking”); *id.* at 254 (suggesting the use of “[d]irect eye contact,” a serious expression, and a few shakes of the head to communicate to a suspected lying client that you are not fooled by his lie).

kinesics within Black communities have shown that Blacks make less frequent eye contact than Whites, especially when listening. White Americans tend to engage in more sustained eye contact when listening and less when speaking; Black Americans tend to exhibit the reverse pattern—more eye contact when speaking and less when listening.⁷⁷ This latter phenomenon can, within dominant culture circles, lead to an inference that the listener is inattentive, uncomfortable, or bored. Eye contact patterns are also different in some Asian cultures, notably Japanese and Chinese, where avoiding eye contact is considered a sign of respect,⁷⁸ and in traditional Navajo society where eye contact is also deemed inappropriate.⁷⁹

Facial Expressiveness: Within the dominant culture individuals intuit a great deal from the facial expressions of those with whom they interact. They take pleasure in the smile, and attribute positive qualities, including intelligence and personality, to those who smile often.⁸⁰ If their clients demonstrate “inappropriate” facial expressions (not smiling when politeness or the pleasurable context would call for a smile, or not frowning at painful moments), they might assume that the clients are somehow “off.” Again, as with proxemics or with eye contact, those cues and inferences are valuable and frequently reliable, but they are almost entirely culturally determined (and, even within the dominant culture, may be gender-based as well⁸¹). Certain Asian cultures in particular teach that restraint of strong feelings is a virtue, and a sign of maturity and wisdom.⁸² Thus, smiling may indicate discomfort.⁸³ That cultural trait has led dominant culture observers to misconstrue Asians as inscrutable, unfeeling, deceptive, and

⁷⁷ SUE & SUE 1990, *supra* note 8, at 56; Jacobs, *supra* note 9, at 358-59.

⁷⁸ See LEE, *supra* note 48, at 104-13.

⁷⁹ IVEY & IVEY, *supra* note 8, at 87.

⁸⁰ SUE & SUE 1990, *supra* note 8, at 54 (citing Sing Lau, *The Effect of Smiling on Person Perception*, 117 J. SOC. PSYCHOL. 63 (1982)).

⁸¹ Substantial literature reflects the differing experiences of female law students and female law professors in law schools, reflecting in some respects the differing preferences described in the text. See, e.g., Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow & Deborah Lee Stachel, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53 (1999); Morrison Torrey, Jennifer Ries & Elaine Spiliopoulos, *What Every First-Year Female Law Student Should Know*, 7 COLUM. J. GENDER & LAW 267 (1998). For a discussion of social science evidence for gender differences in expressiveness, see Bryna Bogoch, *Gendered Lawyering: Difference and Dominance in Lawyer-Client Interaction*, 31 LAW & SOC'Y REV. 677, 681 (1997).

⁸² SUE & SUE 1990, *supra* note 8, at 54 (citing Joe Yamamoto & Mitsuru Kubota, *The Japanese American Family*, in THE PSYCHOSOCIAL DEVELOPMENT OF MINORITY GROUP CHILDREN (Joe Yamamoto, Annelisa Ramero & Armando Morales, eds. 1983)).

⁸³ IVEY & IVEY, *supra* note 8, at 87.

sneaky.⁸⁴ In the American Black culture the customs may also be different about expressing emotions, facially and otherwise, including less smiling and more expressions of unhappiness than the dominant culture custom finds appropriate.⁸⁵

Hand Shaking: It is a universally expected ritual in the dominant American culture for two persons when meeting in a professional or work context to shake hands, and guide books on successful professional behavior will offer suggestions about how to communicate the best messages when shaking hands.⁸⁶ Obviously hand shaking is a cultural artifact, and as such it may develop variations in differing cultures. Latinos, for instance, tend to shake hands more vigorously, frequently, and for a longer period of time than in the dominant American culture, according to the literature.⁸⁷ In some Moslem and Asian countries, touching with the left hand is considered taboo,⁸⁸ while in some Asian cultures assertive hand shaking, especially by women, is not considered proper.⁸⁹

C. Time and Priority Considerations

Most clinical teachers can relate stories of their students' (and of their) frustration with clients who miss appointments, or show up late, and seem not at all apologetic about the inconsiderateness of their behavior. "I really wonder whether [name the client here] really cares about this case as much as I do. And s/he's getting these valuable legal services free!" is a comment heard in most of our clinics at some time. Such reactions are entirely sensible given the dominant culture world view shared by most of our students, and by most of their teachers. Prevailing American culture, especially as it is known in the law office, respects time as a commodity and an appointment as an organizing construct for allocating that scarce commodity.

Clients who "abuse" our allocation of this resource *may well be*

⁸⁴ SUE & SUE 1990, *supra* note 8, at 54. In watching and listening to Boston Red Sox baseball games a year ago (a perverse, culturally determined ritual in itself, one might say), I frequently heard the television or radio commentators refer to the on-field demeanor of the Red Sox' star Asian pitcher, Hideo Nomo, as "stoic," unemotional, and the like. These observers are viewing the kinesics of culturally different players through the accepted lens of their dominant culture, drawing inferences which might have some reliability within the dominant culture but which are less reliable across cultures.

⁸⁵ See LEE, *supra* note 48, at 76-87.

⁸⁶ See, e.g., TERENCE BRAKE, DANIELLE MEDINA WALKER & THOMAS (TIM) WALKER, *DOING BUSINESS INTERNATIONALLY: THE GUIDE TO CROSS-CULTURAL SUCCESS* 118 (1995).

⁸⁷ SUE & SUE 1990, *supra* note at 8, at 55.

⁸⁸ *Id.*

⁸⁹ See, e.g., ANN CADDELL CRAWFORD, *CUSTOMS AND CULTURE OF VIETNAM* 108 (1966).

inconsiderate and uninterested in their legal problem. But the cross-cultural perspective suggests other explanations, which your disciplined naïveté might encourage you to consider. In some cultures, time considerations simply have a different meaning than in our dominant culture.⁹⁰ Hispanic culture, the researchers tell us, does not consider time in the same literal and specific fashion that most law offices tend to do.⁹¹ Sue and Sue distinguish between the “future” time orientation of middle-class White Americans, the “past-present” time orientation of Asian Americans and Latino Americans, and the “present” orientation of American Indians and African Americans.⁹² It is very easy, but culturally hegemonic, to assume that the rest of the world views time and appointments in the same way that the dominant culture does.

Another explanation for the difference in respecting appointments rests with our clients’ lived experience in poverty. Not only do our clients have frequent bureaucratic experiences in which a 9:00 a.m. appointment means being called at 10:30 a.m., but their lives will often be filled with more stresses and crises than we can imagine in our organized law firm world. Sue Bryant’s and Jean Koh Peters’ suggested habit of imagining “parallel universes” is especially appropriate in settings like missed appointments, where we may tend to attribute the worst motives to understandable behaviors, if we only knew our clients’ lives better.⁹³

D. Narrative Preferences

The dominant culture models for interviewing and counseling encourage you to provide the maximum space for an undistorted client narrative. The goal of most legal interviewing and counseling books is to suggest the best techniques for learning the client’s story from the client’s point of view.⁹⁴ It is hard to disagree with that goal, one which

⁹⁰ See, e.g., SUE & SUE 1990, *supra* note 8, at 44.

⁹¹ See FREDDY A. PANIAGUA, *ASSESSING AND TREATING CULTURALLY DIVERSE CLIENTS: A PRACTICE GUIDE* 37 (1994); Baggett, *supra* note 9, at 1490; Harold Cheatham, Allan E. Ivey, Mary Bradford Ivey, Paul Pedersen, Sandra Rigazio-DiGilio, Lynn Simek-Morgan & Derald Wing Sue, *Multicultural Counseling and Therapy II: Integrative Practice, in COUNSELING AND PSYCHOTHERAPY*, *supra* note 8, at 170, 177.

⁹² SUE & SUE 1990, *supra* note 8, at 125-29.

⁹³ See PETERS, *supra* note 9, at 224-29. The “parallel universe” habit asks lawyers to “brainstorm . . . different explanations for the client’s behavior,” and “to identify alternatives to assumptions [the lawyer] may make about her client’s behavior.” *Id.* at 225. See also Bryant, *supra* note 1, at 70-72.

⁹⁴ See, e.g., BASTRESS & HARBAUGH, *supra* note 2, at 94-96; BINDER, ET AL., *supra* note 2, at 73-74, 118-21; COCHRAN, ET AL., *supra* note 2, at 83-85; STEFAN H. KRIEGER, RICHARD K. NEWMANN, JR., KATHLEEN H. MCMANUS & STEVEN D. JAMAR, *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 69-72 (1999).

seems to hold across differing cultures, since a lawyer cannot begin to do a lawyer's job without knowing the facts of the client's case and the solutions that the client has in mind.⁹⁵ This shared goal serves as an apt example of the point made earlier in this paper—that cross-cultural interactions will not call into question *everything* that one might learn about the lawyering process from within the dominant culture.⁹⁶

This unambiguous goal of the counseling process does encounter some complications in the context of culturally different clients, however, even if it is not a culturally-driven goal. The complications arise from two assumptions of the dominant culture models. First, the models wisely advise the use of open-ended, undirected questions as primary vehicles by which to learn a client's story,⁹⁷ but individuals from some cultures will resist that narrative technique. Second, the models implicitly (and at times explicitly⁹⁸) assume a commitment to autonomy as a critical premise of the lawyer/client interaction. The dedication to autonomy may in fact be a culturally-manifested construct in the dominant American culture. To the extent that models assume autonomy as a "good," they may fail to achieve their aims with some culturally different clients.

To the extent that we are looking for workable heuristics, it is fair to conclude that the narrative-based focus of the dominant culture models will work in most settings, and hence can serve as a reliable technique most of the time.⁹⁹ But some cultures, and some persons within some cultures, may resist the fundamental techniques of silence

⁹⁵ It is noteworthy that those texts which teach multicultural approaches to interviewing and counseling stress models which will apply, with some exceptions, across cultures. See, e.g., COCHRAN, ET AL., *supra* note 2; IVEY & IVEY, *supra* note 8.

⁹⁶ A good reinforcing example of this might be found in IVEY & IVEY, *supra* note 8. This text, whose subtitle is "Facilitating Client Development in a Multicultural Society," is authored by two pioneers in the field of cross-cultural counseling. It is an "interviewing and counseling" text primarily, but includes a number of insights about the cross-cultural implications of the counselor-client relationship. This book, sensitive as it is to the nuances of cultural difference, still offers highly sophisticated advice to students about how to obtain honest, full client narratives, how to develop effective rapport, and how to respect the values of the client. See also Charles R. Ridley & Danielle W. Lingle, *Cultural Empathy in Multicultural Counseling: A Multidimensional Process Model*, in COUNSELING ACROSS CULTURES, *supra* note 8, at 21; Cheatham et al., *supra* note 91.

As Paul Pedersen points out, our *expectations* (for success, fairness, safety, accuracy) are apt to be shared across cultures even if our *behaviors* are not. PEDERSEN, *supra* note 14, at 9. Pedersen distinguishes between "emic" considerations, which are culture-specific, and "etic" factors, which are culture general. *Id.* at 6. See also PARKER, *supra* note 8, at 26 (also developing the emic and etic themes); Juris G. Draguns, *Human Universal and Culturally Distinctive: Charting the Course of Cultural Counseling*, in COUNSELING ACROSS CULTURES, *supra* note 8, at 1, 6 (same).

⁹⁷ See, e.g., COCHRAN, ET AL., *supra* note 2, at 76.

⁹⁸ See, e.g., BINDER, ET AL., *supra* note at 261.

⁹⁹ See IVEY & IVEY, *supra* note 8, at 27.

and open questions used to encourage the client to talk most of the time. A culturally competent counselor might alter her heuristics in settings where this risk appears to be a possibility. For instance, Michelle Jacobs reminds us that Black clients may feel considerable distrust of a White professional.¹⁰⁰ With such clients techniques that call for open, free-flowing narrative by the client might not be effective until a trusting relationship has been affirmed. Other observers tell us that some cultures might respond less well to unstructured, non-directive techniques, especially those cultures which favor verbal restraint over verbal expressiveness.¹⁰¹

The commitment to autonomy affects the counseling process in significant, if perhaps subtle, ways. That value, so deeply-entrenched in American culture,¹⁰² causes lawyers to strive for strict neutrality in their counseling processes (a paradigmatic quality of "client-centered counseling"¹⁰³) and to search hard for evidence of the client's *personal* values.¹⁰⁴ These important elements of the dominant culture counseling models will be appropriate most of the time, but not always. Research has shown that some non-Western cultures find non-directiveness in counseling to be much less effective than the American models assume. Parallels to psychotherapy may be apt here. Critics of the dominant psychotherapy schools observe that "therapists tend to prefer clients who exhibit the YAVIS syndrome: young, attractive, verbal, intelligent, and successful."¹⁰⁵ Therapy works best when the clients are verbally, emotionally, and behaviorally expressive, and, conversely, less well when the clients are not so expressive. In cultures which discourage self-disclosure, such as Japanese or some Latino cultures, an interviewer expecting the client to provide a narrative tale may be disappointed.¹⁰⁶ Once again, there is the accompanying risk that the lawyer will perceive a client who does not participate in

¹⁰⁰ Jacobs, *supra* note 9, at 384-91.

¹⁰¹ See SUE & SUE 1990, *supra* note 8, at 71 (noting the resistance of Asian cultures to "attending" (non-directive) techniques versus "influencing" (directive) techniques).

¹⁰² See William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 225 (1991).

¹⁰³ See Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697 (1992); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990)[hereafter Dinerstein, *Reappraisal*].

¹⁰⁴ See BINDER, ET AL., *supra* note 2, at 21.

¹⁰⁵ SUE & SUE 1990, *supra* note 8, at 33 (citing W. SCHOFIELD, *PSYCHOTHERAPY: THE PURCHASE OF FRIENDSHIP* (1964)). Sue and Sue report a later commentator's label for the obvious reciprocal less-preferred clients: "QUOID," for quiet, ugly, old, indigent, and culturally dissimilar. *Id.*, citing N.D. Sundberg, *Cross-Cultural Counseling and Psychotherapy: A Research Overview*, in *CROSS-CULTURAL COUNSELING AND PSYCHOTHERAPY* (A. J. Mansella & Paul B. Pedersen eds. 1981). For further discussion of the YAVIS preference, see D'ARDENNE & MAHTANI, *supra* note 50, at 87.

¹⁰⁶ See SUE & SUE 1990, *supra* note 8, at 31-32, 39-40.

the narrative, revealing process as difficult, dishonest, or uncooperative.¹⁰⁷

In similar fashion, the client-centered model of counseling assumes a “Rogerian” non-directive stance on the part of the lawyer.¹⁰⁸ This fundamental premise of dominant culture counseling models flows from the value of autonomy, with its insistence that a client’s choices be determined by the client and not by the lawyer. That goal of the counseling process¹⁰⁹ may seem to many law students quite self-evident, but it, too, is influenced by cultural assumptions and Western value structures. Many culturally different clients find a non-directive process frustrating and unhelpful. Cultures which value action and results more highly than process, insight, and deliberation look for more active direction from professionals.¹¹⁰ Relying on the dominant models with clients whose world orientation is different from that underpinning the dominant culture models can cause difficulty in the process and unhappiness on the part of the clients.¹¹¹

¹⁰⁷ See Jacobs, *supra* note 9, at 355-60 (fearing that Blacks who experience well-grounded mistrust of professionals, and therefore may participate less enthusiastically in the lawyer’s agenda, will be deemed deviant or “difficult”).

¹⁰⁸ See, e.g., BASTRESS & HARBAUGH, *supra* note 2, at 26-27 (citing CARL ROGERS, CLIENT-CENTERED THERAPY (1951)).

¹⁰⁹ See Simon, *supra* note 102, at 223 (pointing out that in the established counseling structures autonomy is both a *goal* of the interaction as well as a *premise* of it).

¹¹⁰ See, e.g., SUE & SUE 1990, *supra* note 8, at 69; James Alfini, John Barkai, Robert Baruch Bush, Michele Hermann, Jonathan Hyman, Kimberlee Kovach, Carol Liebman, Sharon Press & Leonard Riskin, *What Happens When Mediation Is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307, 320 (1994) (Asians typically prefer more directive counseling).

¹¹¹ Some readers at this point might perceive a seeming contradiction in the arguments surrounding the relative value of autonomy. Recall that the autonomy principle in traditional counseling discussions earns its importance from the empirical likelihood that a lawyer’s values will be sufficiently different from her client’s values that the lawyer cannot presume to decide matters for the client. The “client-centeredness” doctrine is one of the strictest neutrality among competing visions of the world. See Dinerstein, *Reappraisal*, *supra* note 101, at 405-05. Seen that way, this doctrine is entirely consistent with the arguments offered by cross-cultural counseling writers, who critique dominant culture models for their hegemonic assumptions that their world views are the only world views. The cross-cultural counseling reformers seem, then, to value autonomy, and self-determination, as something of a universal good.

In the above paragraphs, though, we see the critics of dominant models including in their critique the assumption that autonomy is a shared value, and we find arguments that in many cultures the commitment to autonomy is far less significant than it is in Western circles. See, e.g., LEE, *supra* note 48, at . This seeming contradiction may not be so difficult to resolve conceptually, however. The critics’ argument might proceed as follows: “Some non-Western cultures do not include as strong a commitment to individual self-determination as the traditional American culture seems to foster. That difference in philosophy of living and choosing ought to be respected by lawyers, who will, in appropriate circumstances, act in a more directive and interventionist way.” In some respects this argument resembles an early criticism of the first Binder and Price counseling model, where Stephen Ellmann argued that the client-centeredness philosophy deprived clients of the choice not

E. Relational Perspectives: Individualism versus Collectivism

The concern about presuming a commitment to autonomy and therefore to non-directiveness in counseling connects to another very common issue in multicultural counseling settings. The dominant culture models are largely individualistic, reflecting quite understandably the individualistic themes of the legal profession's ethics generally. Most interviewing and counseling models assume a single client describing his or her legal issue, making decisions for himself or herself, and grounding those decisions on the client's personal values. On occasion that world is expanded to include spouses, but even that scenario is exceptional.¹¹² The profession's ethics rules regarding confidentiality¹¹³ and conflicts of interests¹¹⁴ discourage lawyers from "pluralizing" the lawyer-client relationship,¹¹⁵ and the lawyering models tend to follow that lead.

The literature on cross-cultural interactions is rich with examples where the dominant cultural assumption of individual deliberation about personal values is quite inconsistent with minority cultural understandings and customs.¹¹⁶ In her brilliant and evocative account of the American medical profession's interaction with a very dissimilar culture, the anthropologist Anne Fadiman documents how deep differences in world view can cause enormous misunderstanding in a

to engage in client-centered counseling. See Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987)(discussing DAVID BINDER & SUSAN PRICE, LEGAL INTERVIEWING AND COUNSELING (1977)).

¹¹² See, e.g., Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1523 (1994).

¹¹³ According to most doctrine, the attorney-client privilege is waived if a friend, relative, or other non-essential person joins a meeting between the lawyer and the client. See Fed. R. Evidence 503(a)(4); *United States v. Evans*, 113 F.2d 1457, 1464 (7th Cir. 1997)(privilege inapplicable absent showing that third party's presence was necessary to accomplish the object of the consultation).

¹¹⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(forbidding allegiances to several persons whose interests are not congruent); Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1985) (discussing the "The Case of the Unwanted Will," where a lawyer represents both husband and wife, treating each as individuals and finding himself in an irreconcilable conflict of interests).

¹¹⁵ See John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825 (1982); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

¹¹⁶ For a vivid account of this tension, see Charles Waldegrave, *The Challenge of Culture to Psychology and Postmodern Theory*, in RE-VISIONING FAMILY THERAPY, *supra* note 16, at 404, 407. Waldegrave quotes a Samoan individual who has been asked "what do you think?":

"It is so hard for me to answer that question. I have to think. 'What does my mother think? What does my grandmother think? What does my father think? What does my uncle think? What does my sister think? What is the consensus of those thoughts? Ah, that must be what I think.'"

professional relationship, even where both sides act in good faith toward a common goal.¹¹⁷ Fadiman recounts the experiences of the Lees, a Hmong family living in Merced, California, after their daughter Lia suffers a mysterious and life-threatening illness. The well-meaning doctors at the Merced community hospital diagnose Lia's symptoms as a serious form of epilepsy; to the Hmong family, Lia is experiencing "when the spirit catches you and you fall down," an event caused by the evil *dab* spirit and most likely related to some important earlier ritual having been missed in Lia's life.¹¹⁸ Amidst the scores of agonizing stories Fadiman reports of intolerable frustrations felt by the Lee family toward the medical staff, and the medical staff toward the family, we learn of the implicit and deep connections among the extended Hmong family and community as they collectively care for Lia and search for her cure.¹¹⁹ The story one encounters is far from that of a nuclear family deciding in "substituted judgment" fashion what Lia would want.¹²⁰ The Hmong traditions and world views do not distinguish between immediate family, extended family, the larger Hmong community, and the historical Hmong ancestry—all are vividly present as implicit context for the ways that the Lees live their lives and raise their daughter.¹²¹

Lia's story arises in the context of medicine, and shows dramatically the dangers of misunderstanding across cultural gulfs. A recent research study of Latino families in litigation arrived at similar conclusions, in a more empirical fashion than the Fadiman account. The study¹²² investigated the experiences of recently-arrived Latino families, primarily from Mexico and Central America, in court-annexed mediation services in family law disputes. The authors found, in concluding that "[t]he justice system needs to better understand the culture of Latino family life and the ways in which Latinos interact with government authority,"¹²³ that the traditional mediation service offer-

¹¹⁷ ANNE FADIMAN, *THE SPIRIT CATCHES YOU AND YOU FALL DOWN: A HMONG CHILD, HER AMERICAN DOCTORS, AND THE COLLISION OF TWO CULTURES* (1997).

¹¹⁸ *Id.* at 20.

¹¹⁹ *E.g., id.* at 70-71. Fadiman describes elaborate ceremonies performed by Hmong friends and neighbors in elaborate rituals thousands of years old, including chanting, dancing, sacrificing animals (including pigs and cows), applying ointments and medicinal blends to Lia's skin, and other measures well established in Hmong culture but "bizarre" to many dominant culture Americans.

¹²⁰ *Compare* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728 (1977)(requiring a form of substituted judgment for medical decisionmaking on behalf of an incompetent psychiatric patient).

¹²¹ FADIMAN, *supra* note117, at *passim*.

¹²² See Steven Weller, John A. Martin & John Paul Lederach, *Fostering Culturally Responsive Courts: The Case of Family Dispute Resolution for Latinos*, 39 FAM. CT. REV. 185 (2001).

¹²³ *Id.* at 185.

ings failed to account for the “collectivist orientation” of Latino families.¹²⁴ The well-intended diversion methods offered by the court system misunderstood the significant influence of extended family and community leaders in Latino culture, and the “holistic” problem-solving orientation of that culture.¹²⁵

These two examples show us the need for a heuristic for the collectivist world view when working with culturally different clients. The Hmong and Latino cultures are hardly alone in their implicit acceptance of a connectedness to a larger family or community. Cross-cultural therapy researchers point out similar orientations among Haitians,¹²⁶ African Americans,¹²⁷ Asian Americans,¹²⁸ and Native Americans.¹²⁹ The individualism so cherished in the dominant culture may, in fact, be a less prevailing orientation overall. Your counseling practices could be affected significantly by this shift in world view, as you explore consequences to and values not only of your client, but also of his extended community. Less apparent, but equally important, are the changes that this heuristic might suggest for your interviewing practices. Not only might you invite more “strangers” into your interview meetings,¹³⁰ but you may alter your strategy of “learning the client’s story” in order to learn the story as it might look to others in the client’s immediate circle.¹³¹

¹²⁴ *Id.* at 191.

¹²⁵ *Id.* at 194. The study suggested that mediation services will be more effective with Latino families if they recognize the role of extended family and community leaders in solving problems, understand that Latino families will tend not to seek help from strangers who are not part of that network, bring mediation into the community (rather than leaving it at the institutional courthouse setting), and look for collective, holistic interests in addition to individual interests. *Id.* at 94-95.

¹²⁶ See Amy Bibb & Georges J. Casimir, *Haitian Families*, in *ETHNICITY AND FAMILY THERAPY* 97, 105 (Monica McGoldrick, Joe Giordano & John K. Pearce eds., 2d ed. 1992).

¹²⁷ “In contrast to the European premise, ‘I think, therefore, I am,’ the prevailing African philosophy is ‘We are, therefore, I am.’” Paulette Moore Hines & Nancy Boyd-Franklin, *African American Families*, in *ETHNICITY AND FAMILY THERAPY*, *supra* note 124, at 66, 70.

¹²⁸ See SUE & SUE 1990, *supra* note 8, at 36.

¹²⁹ See Michael Yellow Bird, *Critical Values and First Nations Peoples*, in *CULTURALLY COMPETENT PRACTICE*, *supra* note 19, at 61, 64-67.

¹³⁰ See IVEY & IVEY, *supra* note 8, at 68-69 (recounting a story in which a therapist asked a godfather to remain outside of a meeting with a Hispanic family, wishing to meet only with the “immediate family,” and the difficulties engendered by that move); SUE & SUE 1999, *supra* note 8, at 97-102 (recounting a similar story, also involving a Hispanic family and a godfather). Note that your decision to include a larger circle of individuals in the interview process has implications for the application of the attorney-client privilege, unless you can succeed in an argument that, for culturally-significant reasons, the presence of the others in the meeting is “necessary to accomplish the object of the consultation.” See *supra* note 113.

¹³¹ See, e.g., *COUNSELING AND PSYCHOTHERAPY*, *supra* note 8, at 68, 70 (recommending finding “multiple perspectives on the story”).

Tolerance about difference is not necessarily without its anxieties, especially when the difference clashes with important values of our own. The Western preference for individuality and autonomy tends to include a strong commitment to egalitarianism in relationships. We may consider it our goal in "client-centered" counseling to achieve a measure of independence for our clients in their decisionmaking capacity. In working with cultures different from the dominant one, some lawyers may encounter a tension between the feminist, egalitarian norms and the well-established sex roles of a minority culture. David Sue and Derald Wing Sue tell a story of an ineffective therapist who failed to appreciate the importance of a woman's expected role in a Hispanic family, and the power of *Machismo* within that culture. The counselor worked from his established world view that resisted patriarchy, and in doing so he failed to understand the needs of both members of the couple with whom he worked.¹³² "Therapists," Sue and Sue caution us, "should not judge the health of a family on the basis of the romantic egalitarian model characteristic of White culture."¹³³ Another pair of commentators offer the same advice in the context of Southeast Asian American clients. They write that we may need to accept "chauvinism to tolerate Confucius's teaching and centuries-old traditions."¹³⁴

F. *The Limits of Scientific Rationality*

Our final heuristic is one that has frequent significance in the medical/psychotherapeutic field, and may have similar importance to your work with clients on legal matters. The dominant culture is, not surprisingly, deeply committed to scientific rationality, and its coun-

¹³² SUE & SUE 1999, *supra* note 8, at 97-102. The importance of *machismo* as a deeply-seated value in Latino culture has been noted by many commentators. See, e.g., Lirio K. Negroni-Rodriguez & Julio Morales, *Individual and Family Assessment Skills with Latino/Hispanic Americans*, in CULTURALLY COMPETENT PRACTICE, *supra* note 19, at 132, 135.

¹³³ SUE & SUE 1999, *supra* note 8, at 116.

¹³⁴ Kazumi Nishio & Murray Bilmes, *Psychotherapy with Southeast Asian American Clients*, in COUNSELING AMERICAN MINORITIES, *supra* note 48. It is important to note, however, that the tolerance defended in the text is not a universally accepted moral or political position, at least with respect to some controversial cultural practices. As Joan Laird writes, "Others, more concerned about subjugation and injustice, take a very different stance. [One author], for example, argues that every therapeutic act is a political one, and that clients need to be helped to deconstruct not only their self-narratives but also the dominant culture narratives and discursive practices that constitute their lives." Laird, *supra* note 16, at 33. One particularly troubling cultural practice that offends most moral sensibilities is female genital mutilation. For a discussion of the multicultural feminist reaction to that practice, see Isabelle R. Gunning, *Global Feminism at the Local Level: Criminal and Asylum Laws regarding Female Genital Surgeries*, 3 J. GENDER RACE & JUST. 45 (1999); Isabelle R. Gunning, *Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 194-97 (1992).

selling models reflect that orientation. One primary aim in legal counseling is to predict for clients the likelihood of differing outcomes, allowing a careful comparison of the available alternatives so that the client may choose the one which best serves his purposes.¹³⁵ This structure allows for the most careful, reasoned client decisionmaking, even if recent work in the behavioral psychology field demonstrates that individuals rely on distorted reasoning in making many important decisions.¹³⁶

While conventional counseling models vow to respect the idiosyncratic wishes and values of the clients (and insist upon an anti-paternalistic stance on the part of lawyers¹³⁷), it is fair to say that the models do not easily accommodate mysticism, voodoo, and other “bizarre”¹³⁸ or irrational decisionmaking vehicles.¹³⁹ Cross-cultural theorists tell us, though, that many non-Western cultures rely importantly on native rituals, beliefs and practices which are not likely to be seen by United States-educated lawyers as “scientifically rational.”

Anne Fadiman’s story of the Hmong family and community in Merced, California is an apt example of how impatient dominant culture professionals can be when faced with unconventional rituals.¹⁴⁰ To her American doctors, Lia suffered from a complex seizure disorder treatable with sophisticated medical intervention, including significant medication regimens. To her Hmong family, Lia’s spirit had been invaded by an evil *dab* spirit, and the only way to banish the *dab* was through indigenous healing arts, rituals, dermal treatments, and

¹³⁵ All of the dominant models include this aim in a more or less explicit fashion. See, e.g., BINDER, ET AL., *supra* note 2, at 272-75; BASTRESS & HARBAUGH, *supra* note 2, at 237-40; ROGER S. HAYDOCK, PETER B. KNAPP, ANN JUERGENS, DAVID F. HERR & JEFFREY W. STEMPEL, *LAWYERING: PRACTICE & PLANNING* 79-94 (1996); KRIEGER, ET AL., *supra* note 92, at 211-12; AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* (1992)(the “MacCrate Report”).

¹³⁶ See *supra* note 44.

¹³⁷ See Mark Spiegel, *The Story of Mr. G: Reflections Upon the Questionably Competent Client*, 69 *FORDHAM L. REV.* 1179 (2000). The only exception to the anti-paternalist stance in traditional ethics doctrine is when working with a client who is not competent to make his own reasoned decisions. *Id.* at 1190. See also David Luban, *Paternalism and the Legal Profession*, 1981 *WIS. L. REV.* 454, 479 (arguing that paternalism is only justified when the client cannot offer “inference[s] from real facts”).

¹³⁸ See Bryant, *supra* note 1, at 2 (describing, as a trait of a culturally competent professional, “the capacity to make ‘isomorphic attributions’ . . . the capacity to enter the cultural imagination of another, as ‘perceiving as normal things that at first seem bizarre or strange’” (quoting RAYMONDE CARROLL, *CULTURAL MISUNDERSTANDINGS: THE FRENCH/AMERICAN EXPERIENCE* 2 (1988)).

¹³⁹ See Luban, *supra* note 137, at 479 (paternalism, and overriding client decisionmaking, justified when there are no “inference[s] from real facts” supporting a client’s choice).

¹⁴⁰ FADIMAN, *supra* note 117.

shamanism.¹⁴¹ The Hmong shaman was known as a *txiv neeb*, who was believed to have the ability to enter a trance, summon a posse of helpful familiars, ride a winged horse over the twelve mountains between the earth and the sky, cross an ocean inhabited by dragons, and (starting with bribes of food and money and, if necessary, working up to a necromantic sword) negotiate for his patients' health with the spirits who lived in the realm of the unseen.¹⁴²

The *txiv neeb*, his rituals and his advice were enormously important to the Lees and their Hmong community, but his suggestions were of no use whatsoever to the medical staff at Lia's hospital. Indeed, at one deeply painful juncture in Fadiman's story of Lia's illness the local Department of Child Protective Services obtained a court order and removed Lia from the Lee home, because the Lees were relying on indigenous Hmong remedies and refusing (or failing) to comply with the medical directives from the hospital.¹⁴³

The Fadiman account does not, and cannot, conclude that the doctors were *wrong* in their medical treatment of Lia or that they were negligent in fulfilling their professional medical obligations to her.¹⁴⁴ Nor does her narrative imply necessarily that the Lees were wrong in their noncompliance with the medical treatment plans ordered by the hospital staff. It does convey acutely, though, the depth of misunderstanding, distrust, and frustration engendered on both sides of the cultural gulf by the narrow and limited focus of the medical personnel on their well-established traditional medical assumptions.

Fadiman's history is perhaps the most elaborate account of the centrality of non-scientific rituals and beliefs in a different culture, but it is hardly the only one. The literature on cross-cultural counseling shows us that many other cultures hold strong attachments to deep-seated traditions which conventional thinking might find less than sci-

¹⁴¹ *Id.* at 34-35, 100.

¹⁴² *Id.* at 4.

¹⁴³ *Id.* at 78-92; 250-61.

¹⁴⁴ One of the most powerful achievements of the Fadiman book is its author's diplomatic but honest unwillingness to assign blame for the tragedy that befell Lia. Lia's medical condition ebbs and flows throughout the story, with some ebbs seemingly (but not assuredly) connected to her parents' disinterest in the rigors of the medicinal treatment plans, and some flows seemingly (but not assuredly) associated with the family's non-traditional efforts and practices. After a series of improvements and declines, however, Lia suffered a catastrophic seizure which caused her to become, essentially, brain dead. The doctors understood that Lia would die within a day or two, and permitted her to return home to die. For reasons unexplained by the prevailing United States medical wisdoms, Lia has survived for years once she was left to her family's traditional care. FADIMAN, *supra* note 117, at 250-61. Indeed, as of late September, 2002, Lia was still alive. (Presentation by Anne Fadiman at Boston College, September 23, 2002.)

entific. A form of witchcraft, or "Obeah," is common and important in Jamaican society.¹⁴⁵ Voodoo practice is deeply respected and common in Haitian culture.¹⁴⁶ American Indians have long practiced traditional healing rituals.¹⁴⁷ Puerto Rican children have been shown to respond best to native folk-tale therapy when compared to more traditional Western therapy.¹⁴⁸ Many other cultures no doubt respect similar traditional practices and rituals.

Your heuristic on this topic will encourage a nurturing of your "isomorphic attributions"¹⁴⁹ and your disciplined naïveté when working with culturally different clients. Your open-mindedness and tolerant acceptance of very different ways of thinking about problem-solving will reduce the likelihood of serious misunderstanding between you and your culturally different clients, and will forestall your concluding that the "bizarre" ways in which your clients respond to your carefully reasoned legal analyses of their problems means that something is seriously amiss with your clients.

III. BIASES

Part II of this exploration of cross-cultural counseling has identified several heuristics which you might employ to reduce the risk of misunderstanding when you work with culturally different clients. The "heuristic" idea is intended to guide your work generally and provisionally, suggesting topics and areas where differences between cultures are most apt to exist.

The latter part of this paper intends to complicate your life a bit more, but necessarily and importantly so. We turn here to the idea of "bias," and how it affects and interferes with your likely success even with the best heuristics and the most forthright discipline about naïveté. Unlike its use in the work of the decisional theorists,¹⁵⁰ the term bias in this context refers to its more common meaning—

¹⁴⁵ See Janet Brice Baker, *Jamaican Families*, in *ETHNICITY AND FAMILY THERAPY*, *supra* note 126, at 85, 92-93.

¹⁴⁶ Bibb & Casimir, *supra* note 126, at 101.

¹⁴⁷ Sandra K. Choney, Elise Berryhill-Paapke & Rockey R. Robbins, *The Acculturation of American Indians: Developing Frameworks for Research and Practice*, in *HANDBOOK OF MULTICULTURAL COUNSELING*, *supra* note 8, at 73, 87.

¹⁴⁸ Donald R. Atkinson & Susana M. Lowe, *The Role of Ethnicity, Cultural Knowledge, and Conventional Techniques in Counseling and Psychotherapy*, in *HANDBOOK OF MULTICULTURAL COUNSELING*, *supra* note 8, at 387, 404.

¹⁴⁹ See Bryant, *supra* note 1, at 56. "Isomorphic attribution" means "to attribute the same meaning to behavior and words that the person intended to convey." *Id.*

¹⁵⁰ Recall that I have borrowed the phrase "heuristics and biases" from the pioneering text of Kahneman, Slovic and Tversky. See *JUDGMENT UNDER UNCERTAINTY*, *supra* note 39. In that work the authors employ the term bias to capture a psychological distortion in perception and understanding. See Tversky & Kahneman, *supra* note 40, at 3-4. I use the term in its more familiar understanding.

prejudice, intolerance, distrust, belief in the inferiority of others. I explore briefly the role of your (and my, and our colleagues') bias in the cross-cultural counseling endeavor. The biases that we need to consider are not as much the conscious, deliberate ones—most, if not all, readers of a paper such as this are likely deeply opposed to institutional prejudice and discrimination—as the implicit, unconscious ways in which our own cultural heritages, whatever they may be, influence our world view and our deep-seated assumptions about how the world works.

The heuristics project described above might readily be seen as a relatively nonjudgmental, largely analytical process. The dominant culture lawyering models employ a collection of culturally-influenced assumptions and develop from a collection of culturally-driven values. Other less mainstream groups celebrate customs and practices, and embrace values and beliefs, that might not be the same as those in the dominant culture. The heuristics project aims to train lawyers in the discipline of naïveté and in accepting the tentativeness of our assumptions, with “informed not-knowing.”¹⁵¹

The problem with that analytical view of the heuristics project is that it does not account adequately for racism, sexism, homophobia, and ethnic and cultural imperialism. You do not need to read a footnote listing research references to remind you of the magnitude of that reality.¹⁵² All of your lawyering work takes place within this world of institutional unfairness, with its long history of oppression of ethnic minorities, women, gays and lesbians, and the poor. If you belong to the dominant culture, your membership in that group will have influenced you in important ways. If you hail from outside the mainstream American culture, your status as an outsider undoubtedly affects your identity as a person and a lawyer.

There are at least three ways in which the “bias” reality might

¹⁵¹ See Dean, *supra* note 27, at 625.

¹⁵² But you will get one. The “Race-Crit” movement in legal scholarship has documented the many ways that race pervades our lives, both in the law and otherwise. See, e.g., Peggy Davis, *Law as Microaggression*, 98 *YALE L.J.* 1559 (1989); Leslie G. Espinoza, *Legal Narratives, Therapeutic Norms: The Invisibility and Omnipresence of Race and Gender*, 95 *MICH. L. REV.* 901 (1996); Ian F. Haney Lopez, *Social Construction of Race: Some Observation on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1 (1994); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 *STAN. L. REV.* 1807, 1809 (1993); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987). The multicultural counseling literature within psychotherapy explores the invidious effects of racism on therapy and therapeutic models. See, e.g., Allen E. Ivey, *Psychotherapy as Liberation: Toward Specific Skills and Strategies in Multicultural Counseling and Therapy*, in *HANDBOOK OF MULTICULTURAL COUNSELING*, *supra* note 8, at 53 (suggesting methods of developing critical consciousness as well as understanding cultural identity theory); PARKER, *supra* note 8, at 15-34.

affect your work with clients, and the rich literature from disciplines outside of law might help us understand each of these. First, as a professional you need to explore and confront your own cultural influences and the extent of your unconscious (or conscious) biases, including your own racism, sexism, and homophobia. Second, your learned preferences might interfere with your appreciation of your clients' stories, to the detriment of your client's legal case. And third, it is important to your effectiveness as a lawyer to understand how societal and historical racism affects, and has affected, your clients' lives and the stories they bring to you as a helping professional. To develop as a culturally competent counselor you might wish to learn about racial and ethnic identity theories. Those theories can begin to aid professionals to understand how ethnic minority individuals accommodate their cultural identity within a largely White male American social system.

Let us explore each of these ideas separately. For each of these topics, the discussion here is tentative and preliminary. Talking about race, class, gender, and power is complicated and often threatening to professionals, especially within law schools.¹⁵³ The suggestions here, observed from other professional worlds, might begin to expand their discussion in the legal academy.

A. *Self-Awareness*

In their portrayal of the "five habits of cross-cultural lawyering," Sue Bryant and Jean Koh Peters suggest a three-step process "for good cross-cultural lawyering":

1. Identify assumptions in our daily practice.
2. Challenge assumptions with fact.
3. Lawyer based on fact.¹⁵⁴

That first step—where you identify explicitly the assumptions which form the basis of your work—is essential to good lawyering generally, and especially so in cross-cultural practice. There are two components of this idea, both rather challenging, but one more easily confronted than the other.

The first, and more accessible, component touches on the rela-

¹⁵³ In the therapeutic counseling field, where these issues are studied much more forthrightly and deeply, and where students obviously expect to explore their own cognitive and emotional makeup, issues of race and power still remain threatening and uncomfortable to confront. See, e.g., Julie R. Ancis & Janis V. Sanchez-Hucles, *A Preliminary Analysis of Counseling Students' Attitudes Toward Counseling Women and Women of Color: Implications for Competency Training*, 28 J. MULTICULTURAL COUN. & DEV. 16, 27 (2000). It is not unexpected, then, that the more analytically-inclined law students will find these topics even more uncomfortable.

¹⁵⁴ PETERS, *supra* note 9, at 170; Bryant, *supra* note 1, at 64-99.

tionship between your cultural identity and your lawyering performance. You possess some cultural identity (or identities) and have learned from your community (or communities) certain beliefs, habits, customs, ways of thinking, and values. These elements help define who you are, and your lawyering activities cannot but reflect them. You may not think very explicitly about those beliefs, habits, values, and so forth—they are just part of who you are and how you see the world. Now, your clients (and your colleagues, and any one else who is not you) will possess different identities, instilled from different communities, with different beliefs, customs, values, and so forth. Some will be very dissimilar from you; others, less so. But nobody will share all of your preferences with you.

So the first part of the Peters and Bryant challenge is to understand where your assumptions come from, what they are, and how they influence your professional work. Having done so, you can better anticipate where your clients' preferences might depart from yours. You probably won't easily or necessarily change who you are, but you might appreciate better why your clients (and your colleagues) seem to see the world in ways that you do not.

The researchers and theorists of multicultural counseling regularly include this important advice, which is at the heart of the "cultural competence" movement.¹⁵⁵ Some of these sources offer exercises to unpack cultural assumptions and refine cultural identity. Certain exercises are intended for groups or for pairs, allowing a person to appreciate his or her cultural influences comparatively. Others may be performed alone. The exercises often require the participants to identify "who [they] are," as well as what values and practices are most important to them.¹⁵⁶ Other experts recommend developing a

¹⁵⁵ See, e.g., D'ARDENNE & MAHTANI, *supra* note 50, at 44; COCHRAN, ET AL., *supra* note at 205; SUE & SUE 1999, *supra* note 8, at 225-27; Jacobs, *supra* note 9, at 377-84.

¹⁵⁶ For instance, one popular college course text offers a "Describing Cultural Identity" exercise which works as follows in a classroom setting:

Objective

To identify the complex culturally learned roles and perspectives that contribute to an individual's identity[.]

Instructions

In the blanks below, please write answers in a word or phrase to the simple question "Who are you?" Give as many answers as you can think of but try to identify at least 20 descriptors. Write the answers in the order that they occur to you. You will have 7 minutes to complete the list.

I AM _____

I AM _____

[Repeated 18 more times]

Debriefing

Ask volunteers to read their list out loud and count the numbers of others in the class who also used approximately the same label. Keep count of all the labels on a

“family genogram,” a map of your immediate and extended family which includes “your own perceptions of the relationships with and between family members.”¹⁵⁷ The genogram will help you understand your intergenerational context and situate you within a wider culture. Jean Koh Peters and Sue Bryant use a similar device of Venn diagrams to chart “degrees of separation/connection” between a lawyer and her client.¹⁵⁸

The story of Lia Lee, the Hmong child whose medical crises were documented in Ann Fadiman’s book,¹⁵⁹ offered powerful insights about a medical culture far short on reflection about its own unexamined assumptions. At the end of her book, Fadiman reports a conversation with the anthropologist and psychiatrist Arthur Kleinman, of Harvard Medical School, about the Lee saga. Kleinman’s observations about the Merced doctors’ interactions with the Hmong family apply with equal force to the legal community:

[Y]ou need to understand that as powerful an influence as the culture of the Hmong patient and her family in this case, the culture of biomedicine is equally powerful. If you can’t see that your own culture has its own set of interests, emotions, and biases, how can you expect to deal successfully with someone else’s culture?¹⁶⁰

The Kleinman quote provides an apt segue to the second component of the Peters and Bryant “identify your assumptions” (or, perhaps, “know thyself”¹⁶¹) suggestion.¹⁶² This second component is the more challenging one, but no less important to effective lawyering practice. Here, the task is not simply to understand your identity and its preferences and values; it is also to understand how your cultural background has influenced your own views about race, sex, class, and sexual orientation. It asks you to confront your own biases, your own stereotypes, and your own participation in oppressive societal practices.

Many writers on cross-cultural counseling emphasize the impor-

flipchart, blackboard, overhead, or whiteboard[, identifying which responses were] given by all, by many, by some, by few, or by only one to demonstrate the extent of similarity or difference in the group. If students would prefer to keep their identity labels confidential, their lists can be turned in anonymously and coded by the instructor for feedback to the class later. The instructor may use these data to discuss the importance of between-group and within-group differences.

PEDERSEN, *supra* note 14, at 271.

¹⁵⁷ COUNSELING AND PSYCHOTHERAPY, *supra* note 8, at 43. See also IVEY & IVEY, *supra* note 8, at 236-37.

¹⁵⁸ PETERS, *supra* note at 9, 165; Bryant, *supra* note 1, at 64.

¹⁵⁹ FADIMAN, *supra* note 117. See discussion of Lia’s story *supra* at notes 117-21 and 140-44.

¹⁶⁰ *Id.* at 261.

¹⁶¹ See SUE & SUE 1999, *supra* note 8, at (“Counselor, know thyself”).

¹⁶² See *supra* note 153 and accompanying text.

tance of this self-reflection, especially, but not only, for members of the dominant culture.¹⁶³ Our cultural assumptions are important to understand not just because they explain what we prefer and what we value; some of them show deep prejudices that we may or may not understand well enough. Those biases will have a substantial effect on our work if we do not confront them.

But confronting them will never be easy; as Marjorie Silver writes, "Few of us want to admit to being racists."¹⁶⁴ The same researchers who developed exercises to help people explore their cultural identities¹⁶⁵ have also developed similar modules to try to uncover biases and prejudices.¹⁶⁶ Perhaps such assessments will work in law schools or other settings where lawyers explore these issues. In the cross-cultural lawyering setting, this task is of some importance. As Patricia D'Ardenne and Aruna Mahtani demonstrate in the therapeutic counseling context,

When the counsellor and client are from differing cultural backgrounds, countertransference invades the therapeutic relationship in a particularly insidious way. Counsellors are unlikely to examine their own racism and cultural prejudice. As a consequence of this neglect, unacknowledged prejudice is reflected back unconsciously in the therapeutic relationship. . . . The dissonance in the relationship results in both parties having their beliefs about the other's cul-

¹⁶³ See, e.g., D'ARDENNE & MAHTANI, *supra* note 50, at 92-93; SUE & SUE 1999, *supra* note 8, at; Lisa M. Brown, *Subjectivity and Practice: Stereotyping and Other Results of Imposed Perspective*, in PARKER, *supra* note 8, at 123; Laird, *supra* note 16, at 29-32.

¹⁶⁴ Silver, *supra* note 20, at 15.

¹⁶⁵ See *supra* note 156.

¹⁶⁶ A college-level text offers the following exercise which focuses more explicitly on cultural prejudices:

Exercise 2: Questions About Culture

Answer the following questions about yourself:

- What are some of the prejudices of your ethnic group, your religion, your gender group, or other subcultures to which you belong?
- In what ways are those prejudices expressed?
- What are your personal prejudices?
- How does your socioeconomic level affect your attitude toward people of other economic groups?
- How might your cultural prejudice give you difficulty in connecting to others in your professional role?
- How would you describe your own state of mental health, culturally speaking?
- Have you ever gone through a period of confusion and uncertainty about any of the values and practices with which you were raised?
- Have you borrowed any other culture's ways to help you live a better life? List all of them. What have they done for you?

LEE, *supra* note 48, at 18 (adapting the exercise from D.S. Murphy, *From Multicultural Infusion Theory to Multicultural Infusion Practice in a Weekend!*, 2 MEI Center Connection #2, 3-5 (Spring 1994) and M. K. HO, *FAMILY THERAPY WITH ETHNIC MINORITIES* (1987)).

ture reinforced.¹⁶⁷

There is little reason to believe that the risks within the lawyer/client relationship are any less substantial.

B. *Understanding and Respecting Clients' Stories*

The previous section described how you will bring your own bundle of preferences and values to your work with clients, and how that package will almost always be different, in greater or lesser extent, from the bundle your client comes with. This section reminds us of a particular concern within that larger context. As you work with different clients, you will filter their stories through the lens of your own cultural identity and your bundle of preferences and values. In doing so, you run a risk of misunderstanding your clients. Your misunderstanding may lead to frustration on your part ("My client just isn't making any sense!") and, of greater worry, your failing to achieve what your client really wants.¹⁶⁸

The remedy for this worry is easy to articulate but perhaps rather difficult to accomplish. First, the disciplined naïveté and informed not-knowing that we stressed in the discussion of heuristics play an equal role here. The client story that seems to make little sense, the strategy direction that you cannot understand, that tactic that you see as self-defeating—each might be perfectly reasonable with another's lens and another's bundle of preferences and values.¹⁶⁹ Second, the better that you understand the ways in which your own bundle of preferences and values skews your thinking about stories, strategies, tactics and the like, the better you are likely to be in remaining less judgmental about your clients' different preferences and values.

All that said, it is important to remember that your judgments are not necessarily *wrong* just because they are part of your bundle of preferences and values. Correspondingly, your clients' choices indeed may be wrong or ill-advised. Your commitment to disciplined naïveté does not imply an abdication of your responsibility to talk directly and frankly with your clients about the hard lawyering topics on your agenda. What it does imply, though, is greater humility about the universality or inevitability of your perspective.

¹⁶⁷ D'ARDENNE & MAHTANI, *supra* note 50, at 92-93.

¹⁶⁸ A vivid example of this point, and one commented upon with some frequency, is Clark Cunningham's story of his work on behalf of a Black man accused of disorderly conduct after an interaction with a white police officer. See Cunningham, *supra* note 10. For commentary, see Jacobs, *supra* note 9; Silver, *supra* note 20.

¹⁶⁹ This is the idea of "parallel universes," one of Sue Bryant's and Jean Koh Peters' "five habits." See PETERS, *supra* note 9, at 225-29; Bryant, *supra* note 1, at 90.

C. *Understanding the Effects of Oppression on Your Clients' Lives*

Multicultural competency experts advise professionals to understand more than the culturally linked preferences and values of their clients. They would urge you to understand at a deeper level how your clients have been formed and affected by the forces of racism, ethnocentrism, sexism, and homophobia.¹⁷⁰ If you are from the dominant culture and your client is not, that gulf between you will affect your relationship in many ways. Your client may distrust you and suspect that you will never understand him adequately. His preferences and values will likely be shaped by his experiences with bigotry and hatred. Your ability to empathize with him and to share his worldview will be limited because of your cultural differences, but you might increase your empathic connection to him by becoming more aware of his history and struggles.¹⁷¹

There may not be any simple clinical method to accomplish this goal, but the multicultural theorists offer some suggestions, including a greater appreciation for narrative and stories.¹⁷² Michelle Jacobs explains how a lawyer and a student could have understood a client and the meaning to him of a legal dispute by exploring the role of race in that dispute and in the lawyer-client interactions.¹⁷³ Leslie Espinoza Garvey in similar fashion recounts a family law case from her clinic and shows us that her clients' story can never be fully understood without accounting for race and racism.¹⁷⁴ Lucie White's moving story of a welfare hearing is another well-known example of the power of narrative and context to expose the workings of racism, sexism, and poverty.¹⁷⁵

Other writers stress the importance of honest conversation with your client about the racial and cultural differences between you.¹⁷⁶ For many of us conversations about difference will be difficult, but a lot of professional learning will be challenging. If you share that discomfort, your effectiveness may hinge on your developing comfort

¹⁷⁰ See, e.g., SUE & SUE 1999, *supra* note 8, at 31-39.

¹⁷¹ See *id.*; Ridley & Lingle, *supra* note 96, at 33-40.

¹⁷² See, e.g., Marc Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Education*, 82 GEO. L. J. 1845 (1994).

¹⁷³ Jacobs, *supra* note 9, at 362-74, 386-88 (commenting on a narrative offered by Clark Cunningham; see Cunningham, *supra* note 10).

¹⁷⁴ Espinoza, *supra* note 152, at 930-36.

¹⁷⁵ White, *supra* note 10.

¹⁷⁶ See PANIAGUA, *supra* note 91, at 24 (recommending a discussion about race with African American clients early in the relationship); SUE & SUE 1999, *supra* note 8, at 231 (same); IVEY & IVEY, *supra* note 8, at 166 ("[a]uthorities are in increasing agreement that cultural and ethnic differences need to be addressed straightforwardly relatively early in counseling, often in the first interview" (citing H. CHEATHAM & J. STEWART, *BLACK FAMILIES: INTERDISCIPLINARY PERSPECTIVES* (1990))).

with this skill. In appropriate circumstances, by acknowledging the effect of racism, sexism, or other injustices on the problems your client has come to you with, or by asking about the ways he sees oppression and the exercise of privilege as having influenced his story, you can begin to reduce the mistrust that a culturally different client may feel in the professional relationship.¹⁷⁷

You may also benefit from learning about cultural identity development theory, whose refinement and influence has grown in recent years. Because culture is necessarily “performative[,] improvisational[,] fluid[, and] emergent,”¹⁷⁸ a member of a cultural community may participate deeply, or very little, in its rituals and practices. The degree of assimilation of a cultural minority client into mainstream American traditions will be important to understand, and will affect how reliably the heuristics we explored above will fit that person’s life experiences.¹⁷⁹

Therapists and other helping professionals understand that to be effective in cross-cultural contexts they must appreciate not only larger cultural differences but also the degree to which a particular client has identified with his ethnic/racial background. Sophisticated models have been developed to assist in this process. One such vehicle, known as R/CID (Race/Culture Identity Development Model), suggests a conceptual framework with “five stages of development that oppressed people experience as they struggle to understand themselves in terms of their *own culture*, the *dominant culture*, and the *oppressive relationship* between the two cultures: *conformity*, *dissonance*, *resistance and immersion*, *introspection*, and *integrative awareness*.”¹⁸⁰ A more recent iteration of this model uses these five stages: naïveté, encounter, naming, reflections on self as a cultural being, and multiperspective internalization.¹⁸¹ The models recognize a progression of consciousness about one’s ethnic/racial backgrounds, and anticipate the emotional and psychological implications of each stage of that progression. Separate models have been developed for many discrete ethnic or minority groups.¹⁸² Each member of an oppressed mi-

¹⁷⁷ See SUE & SUE 1990, *supra* note 8, at 75-92.

¹⁷⁸ Laird, *supra* note 16, at 24.

¹⁷⁹ See Varona, *supra* note 9, at 46-47.

¹⁸⁰ SUE & SUE 1990, *supra* note 8, at 96 (italics in original).

¹⁸¹ Harold Cheatham, Allan E. Ivey, Mary Bradford Ivey, Paul Pedersen, Sandra Rigazio-DiGilio, Lynn Simek-Morgan & Derald Wing Sue, *Multicultural Counseling and Therapy II: Integrative Practice*, in COUNSELING AND PSYCHOTHERAPY, *supra* note 8, at 133, 163. Another similar model for African Americans is known as the “Nigrescence model.” See William E. Cross, Jr., *The Psychology of Nigrescence: Revising the Cross Model*, in HANDBOOK OF MULTICULTURAL COUNSELING, *supra* note 8, at 93; PARKER, *supra* note 8, at 35-70.

¹⁸² See Cheatham et al., *supra* note 181, at 162 (listing African-Americans, Asian-Amer-

nority group “will constantly cycle through the five levels again and again as new issues are discovered. . . . [T]here is no end to development of consciousness as a cultural being.”¹⁸³

As lawyers and law students, we will probably not study identity development, either of ourselves or of our clients, with the dedication and resourcefulness of the therapeutic professionals. It seems valuable, though, for legal counselors to understand at least a little bit about the development of ethnic consciousness in the face of an oppressive larger society. Lawyers who hope to become culturally competent practitioners ought to have some familiarity with this topic, and take advantage of the rich literature that a related discipline is developing.

CONCLUSION

In this Article I have sought to address some issues that seem both important but elusive in lawyering practice and clinical teaching. Good lawyers, as we know, need to master sophisticated skills in interviewing and counseling, usually by studying and refining developed models for those skills. At the same time, good lawyers must recognize the cultural underpinnings of those models, and adapt their practice for clients, usually ethnic minorities, whose values, preferences and norms differ from those represented by the standard protocols. Those good lawyers must furthermore understand their own cultural biases and influences, while respecting the individuality of each of their clients, regardless of the client’s background. Plainly, this is a formidable challenge.

I contribute to meeting this challenge in some modest ways. I first offer a rather practical, concrete set of ideas for adapting the conventional protocols in those settings where the protocols might not fit well. I borrow the concept of heuristics to suggest a set of tentative maxims or guidelines that lawyers might use in working with members of particular cultural groups. The heuristics both predict likely preferences of minority clients and emphasize for lawyers how little confidence they can have in any of their assumptions. The heuristics idea aims to confront the need for adaptation and flexibility while avoiding the companion risks of gross stereotypes, on the one hand, and lack of structure, on the other.

I then borrow the concept of “bias” to emphasize the most central message I see in the multicultural counseling scholarship—the need for counselors, including lawyers, to confront their own cultural

icans, Latinas/os, biracial groups, women, and Whites).

¹⁸³ *Id.*

identity, including the biases and prejudices that accompany that identity, and to begin to understand the role of racism and oppression on the lives of ethnic minority clients and communities.

What I have not done here is to address with any depth the more daunting challenge about how one teaches lawyers and law students about these topics. That topic has been addressed by others with far greater insight than mine,¹⁸⁴ and I imagine, and hope, that the pedagogy in this area will continue to advance as this topic attracts more and more attention in law school and in the profession.

¹⁸⁴ See, e.g., PETERS, *supra* note 9; Bryant, *supra* note 9; Silver, *supra* note 20, at 20-26.