CROSS-CULTURAL LAWYERING BY THE BOOK: APPROACHES OF THE LATEST CLINICAL TEXTS AND AN AGENDA FOR EXPLORATION

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INTRODUCTION

In 1997, Michelle Jacobs forcefully argued that the leading clinical textbooks advocating a client-centered approach to law practice ignored racial and other cultural differences between attorneys and clients – a failing that impaired the representation of clients of color and lower-income clients.[1] She urged lawyers (and clinical teachers) to pursue cross-cultural training to explore the impact of their own race and class backgrounds on their interactions with clients.[2]

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[1] *See* Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U.L. REV. 345 (1997). The texts she critiqued were DAVID A. BINDER, PAUL BERGMAN & SUSAN PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991) [hereinafter BINDER ET AL., LAWYERS AS COUNSELORS I]; ROBERT M. BASTRESS & JOSEPH D. HARBOUGH, INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990). For an earlier critique of the client-centered model's failure to address issues of difference, such as power, race, gender, class, and age, see Ann Shalleck, *Constructions of the Client within Legal Education*, 45 STAN. L. REV. 1731, 1743-49 (1993).

[2] *See* Jacobs, *supra* note 1, at 361, 378-84, 395, 404-11. As she summarized her criticism of the client-centered model:

> The student/lawyer is not trained to reflect inwardly when probing, empathizing and listening to the client. She is not alerted to the possibilities of her own culpability when the communication dynamic fails. The student/lawyer is set up to conclude, prematurely and frequently erroneously at the initial interview stage[,] that the clients have some pathology. Never is she attuned to engage in critical self-reflection to determine whether some deficiency within her own understanding prohibits her from establishing rapport from the client. So long as we have not trained the student/lawyer to engage in critical self-reflection of this nature, we continue to train lawyers to engage in privileged decision-making without reference to the bottom and by so doing subvert the goals of client-centered counseling.

Id. at 361 (footnote omitted).

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In the decade since Jacobs' article, many clinicians have written thoughtfully about how students and attorneys might best prepare to work effectively with clients across dimensions of cultural difference – *i.e.*, across differences of race, ethnicity, nationality, class, gender, sexual orientation, etc.[3] Sue Bryant and Jean Koh Peters, who outline five key habits for lawyers to develop to attain cross-cultural effectiveness, have been particularly insightful.[4] Spurred in part by Jacobs and the burgeoning literature she prompted, a new generation of clinical textbooks on interviewing and counseling have recognized the importance of preparing student-lawyers to interact with clients from whom they culturally differ.[5]

Part I of this Essay discusses how these clinical textbooks prepare students for this cross-cultural work. It highlights differences in how

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[3] *See*, *e.g*., Jane Harris Aiken, *Striving to Teach Justice, Fairness and Morality*, 4 CLIN. L. REV. 1 (1997) (characterizing recognition of power and privilege as central to doing justice); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyering*, 8 CLIN. L. REV. 33 (2001) (describing approach developed with Jean Koh Peters); Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FL. COASTAL L.J. 219 (2002); Paul R. Tremblay*, Interviewing and Counseling across Cultures: Heuristics and Biases*, 9 CLIN. L. REV. 373 (2002) (proposing use of heuristics, *i.e*., tentative generalizations, concerning areas in which standard client-centered model may not fit clients from diverse cultures, while also urging lawyers to develop self-awareness of their cultural backgrounds and biases); Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLIN. L. REV. 369 (2005). *See also* Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901 (1997) (advocating race-sensitive, rather than colorblind, approach to lawyering, with appropriate training to practice it); Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081 (2005).

[4] Bryant and Koh Peters' "five habits" entail: (1) identifying areas of similarity and difference between lawyer and client (and reflecting on their potential significance for the relationship); (2) identifying areas of similarity and difference between the client and legal system and between the attorney and legal system; (3) brainstorming multiple alternative explanations for client conduct; (4) anticipating and planning for potentially problematic aspects of cross-cultural communication; and (5) becoming non-judgmentally aware of one's own biases and stereotypes and learning to detect and minimize their impact on interactions. *See* Bryant, *supra* note 3, at 64-78.

[5] *See* DAVID A. BINDER, PAUL BERGMAN, SUSAN PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (2d ed. 2004) [hereinafter BINDER ET AL., LAWYERS AS COUNSELORS II]; ROBERT F. COCHRAN, JR., JOHN M.A. DIPIPPA & MARTHA M. PETERS, THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING (1999) [hereinafter COCHRAN ET AL., THE COUNSELOR-AT-LAW]; STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, NEGOTIATION, COUNSELING, AND PERSUASIVE FACT ANALYSIS (2d ed. 2003) [hereinafter KRIEGER & NEUMANN, ESSENTIAL LAWYERING SKILLS II].

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broadly or narrowly the texts define culture and the measure of cross-cultural success, how they describe the dimensions along which cultures differ, on which side of the lawyer-client relationship they focus, and the behaviors they suggest. It argues that these texts are at their best when they employ a broad definition of culture, when they even-handedly describe the ways in which people and cultures differ, and when they pay astute attention both to what lawyers should learn about *others* and to what they must learn about *themselves*, their culture(s), and their reactions to and interactions with others.

These and other cross-cultural materials are at their best, in short, when they spark generous *curiosity*, nurture engaged, non-judgmental *inquiry*, and foster real *connection* with others. A central challenge is to encourage constructive attention to the influence that culture has, without implying that its influence is total, *i.e.*, without reducing anyone to a simple cardboard cutout or product of her or his culture. The measure of success is consequently the extent to which our attention and understanding are *broadened* to appreciate multiple facets of people, rather than narrowed to focus only on a few aspects or rules of thumb. Taken seriously, this is part of a lifetime's work of improving our ability to work with others (and to understand ourselves). Textbooks are but one tool of many in preparing ourselves for this work.

Part II sketches a tentative agenda for further exploration of cross-cultural issues that neither the latest textbooks nor the broader clinical lawyering literature have fully addressed. It suggests that to better prepare student-lawyers to work with diverse clients we might profitably focus attention on socioeconomic class and its cultural manifestations. It also suggests exploring in greater depth the latest studies on social cognition and sub-conscious social attitudes.

Before proceeding, let me disclose *my* cultural background. I am a White, male, clinical law professor in my forties. I am the oldest child of Italian, leftist parents who immigrated to the U.S. and became professors of medicine and architecture. As they encouraged, I identify more with my Italian heritage than my U.S. citizenship. I attended prestigious schools: a private, all-male elementary and middle school; a public, magnet high school; and an elite university for college and law school. I am married to a Chinese American woman, who also has a graduate degree and manages a non-profit community development organization. We have a Chinese daughter. An ex-New Yorker, raised in Greenwich Village and SoHo, I am now a long-time San Franciscan. My early legal work was done with low-income and working-class clients in Fresno and East Palo Alto. I identify as a progressive lawyer, and teacher, committed to working (and

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encouraging students to work) *with*, rather than *for*, clients and communities to make social change.[6] As an adult, I have strived – not always successfully – to think and act like an *aware* White, male, professional-middle-class, heterosexual, U.S. citizen, alert to the privileges and burdens our society attaches to different roles and identities

I. APPROACHES OF RECENT CLINICAL TEXTBOOKS

In the years since Jacobs' article, five new clinical textbooks (or revised editions of older ones) on interviewing and counseling have been published.[7] Three of these texts directly address the issue of cross-cultural interactions between lawyers and clients.[8] In so doing, they have decisively rejected the one-size-fits-all, culture-blind approach to teaching interviewing and counseling. After critically analyzing the approach of the dominant text at some length, this Essay explores the distinctive aspects of its two less-well-known competitors, omitting areas in which the texts are essentially similar.

A. *The Dominant Text: Binder, Bergman, Price and Tremblay's* Lawyers as Counselors

For the past three decades, David Binder and his collaborators have dominated the field of clinical textbooks on interviewing and counseling.[9] In 1977, Binder and Susan Price, in *Legal Interviewing and Counseling: A Client-Centered Approach*, [10] introduced the legal community to the notion of client-centered lawyering – with its emphasis on client autonomy and on ensuring that clients make key decisions based on their values and

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[6] *See* Piomelli, *Appreciating Collaborative Lawyering*, 6 CLIN. L. REV. 427 (2000); Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 417; Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLIN. L. REV. 541 (2006).

[7] In addition to the texts cited *supra* at note 5, see DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS (2002); THOMAS L. SHAFFER & JAMES R. ELKINS, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (4th ed. 2005).

[8] Neither CHAVKIN, *supra* note 7, nor SHAFFER & ELKINS, *supra* note 7, address the issue.

[9] In the years since 1999, when all three texts have been in print, a LEXIS search of U.S. and Canadian law reviews returned 152 citations to editions of the *Lawyer as Counselor*, compared with 30 references to editions of *Essential Lawyering Skills* and 36 citations to *The Counselor-at-Law*.

[10] DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977).

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priorities.[11] By 1991, when Binder and Price joined with Paul Bergman to publish *Lawyers as Counselors: A Client-Centered Approach*,[12] client-centered lawyering had become the dominant paradigm taught in almost every clinical program in the United States.[13] Binder and his co-authors' influence cannot be overstated; they revolutionized the way lawyering is analyzed, taught, and assessed. As a fellow legal clinician noted, "we are all client-centered lawyers now" – even if we each aspire to our own version of that ideal.[14]

In 2004, Binder, Bergman, and Price joined with Paul Tremblay, to publish a second edition of *Lawyers as Counselors*.[15] Tremblay's discerning work on the need to modify aspects of the client-centered model to better fit clients from non-dominant cultures,[16] and Jacobs' detailed critique of the previous edition,[17] augured well for how the new edition might address cross-cultural issues. The revised text does constitute an important step forward. But, as detailed below, it does not incorporate or acknowledge as many of Tremblay's and Jacobs' insights as it might have – in large part because it remains so intently focused on the *client's* culture that it directs little or no attention to the *lawyer* and the potential impact of his[18] culture(s), assumptions, attitudes, or behavior.[19]

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[11] For an excellent discussion of the different domains of autonomy that client-centeredness can be seen as protecting, see Katherine Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLIN. L. REV 369 (2006).

[12] BINDER ET AL., LAWYERS AS COUNSELORS I, *supra* note 1.

[13] *See, e.g.*, Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 504 (1990) (characterizing client-centered model as "primary influence" on clinical law professors and indicating 94 law schools had adopted initial edition of Binder & Price's textbook).

[14] The comment was made by Professor Stephen Ellman at the ceremony bestowing on David Binder the 2006 William Pincus Award for outstanding contribution to clinical legal education. Given Binder's formative and lasting imprint on the field, his recognition by the Clinical Section of the American Association of Law Schools was long overdue, as the Award has been given annually since 1981, *see* http://www.cleaweb.org/awards/pincus.html (last visited May 1, 2006).

[15] *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5.

[16] *See* Tremblay, *supra* note 3.

[17] *See* Jacobs, *supra* note 1.

[18] To acknowledge the gender diversity among lawyers and clients, the gender of pronouns shall randomly alternate from paragraph to paragraph.

[19] This failing is doubly disappointing. For one, Jacobs' critique explicitly and repeatedly identified the need to broaden the scope of attention. She wrote: "We cannot move forward if we are examining only one-half, the client half, of the problem of the lawyer-client dynamic." *Id*. at 407. The text's inattention to the lawyer side of the relation is

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1. *Initial Framing: An Issue of Motivation and Participation*

Lawyers as Counselors' primary discussion of "inter-cultural difference" occurs in its chapter on motivation in a nine-page sub-section entitled "Motivation in Inter-Cultural Contexts."[20] It describes itself as examining "common dimensions of inter-cultural difference that might inhibit active client participation in the interviewing and counseling process," and suggesting "how you might respond should you believe that such differences are inhibiting clients' participation."[21]

The text does not explicitly define what it means by "culture" or "inter-cultural difference." But it is clear from its discussion of the United States as a "multi-ethnic society" and its presentation of common dimensions of intercultural difference, that the text primarily understands culture as a function of ethnicity – based on national origin and perhaps race – and sometimes geographic region.[22] It makes no reference to class, gender, or professional socialization as aspects of culture that might have significance for lawyering.

The initial framing of inter-cultural difference as an issue of motivation to participate is unfortunate for several reasons. For one, it presents the issue as essentially a volitional matter: Is a client motivated or not to participate in his case? Attention is focused primarily on the client and his culture. To the extent that motivation is understood as an inner drive or spark, its absence will be seen by many as an internal failing of the client. Such a framing will likely encourage some students and attorneys – particularly those already prone to perceiving low-income and working-class clients as uninterested, lackadaisical, or uncommitted to

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further disappointing because Tremblay addressed it directly (and repeatedly) in his article too. He wrote, for example:

> 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 [*sic*] 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.

Tremblay, *supra* note 3, at 384.

[20] *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 32-40

[21] *Id*. at 32.

[22] Only two examples used in this sub-section explicitly identify specific cultural backgrounds of the participants. One involves a New York lawyer and a client from North California. *Id*. at 33. The other involves a client who grew up in China. *Id*. at 39-40. No additional cultural markers are provided. (It should be noted, however, that in each example, the text invites the reader to put herself in the position of the lawyer, so perhaps the expectation is that the reader will supply missing cultural markers.)

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bettering their situation[23] – to understand the issue as a deliberate choice their *clients* make. Without disagreeing that clients may sometimes willfully disengage, perhaps as a form of resistance to their attorney, there is a cost to assuming this is always true. Framing the issue as one of client volition, in which clients decide whether to engage with the lawyer or to deliberately withhold their participation, is not likely to discourage students from putting the onus for a successful relationship on clients.

Even though previous sections of this chapter on motivation discussed a number of facilitators and inhibitors of communication,[24] and placed some of the burden on lawyers to motivate their clients to participate fully,[25] students who most need help in understanding and accepting this burden will likely require more explicit encouragement. Phrasing the lawyer's task as "facilitating," "encouraging," "inviting," or "enabling" client participation (rather than "motivating" it) might better convey the lawyer's at-least-co-equal responsibility – and would not connote that a lack of client participation indicates a failing on her client's part. Another way of conveying the attorney's important role and influence in this regard could be to list the *attorney's culture* – and especially her inability to see or get beyond it – as an additional possible inhibitor of client participation.[26] Alternatively or additionally, "cross-cultural openness" could be included as an additional facilitator. Unfortunately, the text takes none of those routes.

Indeed, at times one gets the impression that the authors place almost exclusive attention on the *client's* cultural background and how it may lead him not to participate or engage with the attorney. The text also seems implicitly to presume that attorneys are from dominant social

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[23] Indeed, a phenomenon that seems to pervade law school clinics throughout the U.S. (at least based on anecdotal reports by clinicians) is the frequently voiced complaint from students that 'my client doesn't take her case nearly as seriously as I do.' *See*, *e.g*., Jacobs, *supra* note 1, at 382; Tremblay, *supra* note 3, at 395.

[24] Inhibitors include: ego threat, case threat, role expectations, etiquette barriers, trauma, perceived irrelevancy, and greater need. *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 19-26. Facilitators include: empathic understanding, fulfilling expectations, recognition, altruistic appeals, and extrinsic reward. *See id*. at 26-31.

[25] The text states: "client-centered counseling suggests that you take reasonable steps to motivate all clients to participate actively in the problem-solving process." *Id*. at 39. The key issue, of course, is how broadly or narrowly students and attorneys interpret the term "reasonable."

[26] Jacobs essentially suggested such an addition in her critique of the text's first edition. *See* Jacobs, *supra* note 1, at 356-357 ("noting that "[t]he issue of student/lawyer based inhibitors is not raised," and that "if the inhibiting factor is the race of the lawyer, and/or the lawyer's expectations regarding the client and the client's culture, knowledge of the facilitators will not provide the lawyer with the tools to break through the barrier.").

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backgrounds – an assumption that is not only inaccurate, but also serves to compound the exclusion or marginalization that people of color, those from low-income and working-class backgrounds, and other "outsiders" feel from the legal profession and system. Although the text typically uses the term "cultural difference," it never explicitly describes difference as a *relational* concept – in which an attorney and client are equally different from each other.[27] Instead, it seems to cast cultural difference as a *feature* or *trait* of the client or his culture, treating difference as deviation from an assumed, but unarticulated, mainstream norm.

"For example," the authors write, "clients' cultural traditions may inhibit participation by leaving them uncertain about how open they should be during counseling when they are asked to express their concerns."[28] Implicit is the notion that the appropriate norm is to be completely open and that 'lack of openness to expressing concerns' is a quirk of certain cultures. If one were truly to treat difference as relational, one would likely urge the attorney in such a situation to push herself to attend to potential nonverbal or indirectly phrased signs of concern.

Another example is the statement: *"*If you cannot assume that cultures are stable and that clients' values and practices are consistent with their cultural backgrounds, neither can you be oblivious to the potential for inter-cultural differences to affect clients' thinking and behavior."[29] Again, the text focuses on how "inter-cultural differences . . . affect

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[27] Perhaps the classic explication in the legal literature of difference as a relational concept is Martha Minow's. As she explained almost two decades ago:

> "Difference" is only meaningful as a comparison. I am no more different from you than you are from me. A short person is different only in relation to a tall one. Legal treatment of difference tends to take for granted an assumed point of comparison: women are compared to the unstated norm of men, "minority" races to whites, handicapped persons to the able-bodied . . . . Such assumptions work in part through the very structure of our language, which embeds the unstated points of comparison inside categories that bury their perspective and wrongly imply a natural fit with the world. The term "working mother," modifies the general category "mother," revealing that the general term carries some unstated common meanings (that is, a woman who cares for her children full-time without pay), which, even if unintended, must expressly be modified. Legal treatment of difference thus tends to treat as unproblematic the point of view from which difference is seen, assigned, or ignored, rather than acknowledging that the problem of difference can be described and understood from multiple points of view.

Martha Minow, *The Supreme Court 1986 Term - Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 13-14 (1987) [hereinafter Minow, *Justice Engendered*].

[28] BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 32.

[29] *Id*. at 34.

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clients' thinking and behavior," without discussing how those differences affect *attorneys'* thinking and behavior. The problem of inter-cultural difference, in such a framing, becomes an attribute of the client and his culture, rather than the gap between the client's culture and the lawyer's, or the way that the lawyer perceives and interacts with his client's trait(s). This framing fails to portray inter-cultural problems as a two-way dynamic in which lawyer and client are equally different from each other and thus *each* must struggle to communicate (and work together) effectively.

Limiting attention to *client participation* ignores the attorney's reaction to her client's participation. The issue in a cross-cultural interaction is not just client participation (in sharing information and making decisions) but also accurate understanding by the lawyer of the client's goals with regards to the outcomes sought and the methods used to pursue them. The success of an attorney-client relationship cannot adequately be assessed simply by looking at whether the client speaks and chooses from among the options her lawyer suggests. Assessment requires an examination of what the attorney actually hears (and perceives), what she conveys (both verbally and non-verbally) to her client, and how congruent her actions are with her client's intentions, desires, values, and interests.[30]

The text directs students' and lawyers' gaze outward toward their clients' cultures, without also directing it inward toward their own culture, assumptions, and reactions. Its strategies for addressing cross-cultural challenges depend upon the lawyer's recognition of a possible cross-cultural problem. In its own words, it "offers suggestions for how you might respond should you believe that such differences are inhibiting clients' participation."[31] But, as many have remarked, it is often difficult for people, especially those who fit comfortably within the dominant culture of a society, to even recognize the possibility of other legitimate ways of considering or structuring reality.[32]

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[30] Sue Bryant, making a similar point, characterizes the aim of cross-cultural training as to make "isomorphic attributions, *i.e.*, to attribute to behavior and communication that which is intended by the actor or speaker." Bryant, *supra* note 3, at 42-43, 56.

[31] BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 32.

[32] *See*, *e.g.*, Aiken, *supra* note 3, at 17-18 (1997) ("We do not experience the messages we receive culturally as explicit lessons. Instead we perceive them merely as the way things are. . . . [G]enerally, when privilege is exercised, the person is unaware of the role such privilege plays in perpetuating systematic oppression."); Minow, *Justice Engendered*, *supra* note 27, at 73-74 ("more powerful" people have difficulty recognizing that "the world coincides with [their] view precisely because [they] shaped it in accordance with those views," while "the more marginal" are "more likely . . . to glimpse a contrast between some people's perceptions of reality and . . . [their] own.").

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2. *Stereotyping*

Lawyers as Counselors opens its discussion of inter-cultural difference by warning of the dangers of stereotyping, which it defines as ascribing presumed attitudes and behaviors to members of other groups.[33] It cautions that efforts to bridge intercultural differences pose a danger of stereotyping, especially if one makes assumptions about "the values and practices associated with a particular cultural heritage" or assumes that a particular person with that heritage shares the traits ascribed to that culture.[34] Consequently, the text urges that all assertions regarding "cultural differences" be understood as "tentative," for cultures reflect a "continuum of values," with core or mainstream values lying at the mean of a normal distribution (*i.e.*, bell-shaped curve) of the population of that culture.[35]

All of these points are well taken. Stereotyping certainly is an evil to avoid and the struggle to refrain from ascribing presumed attitudes and traits to members of other groups and cultures is an essential one to wage. But it is not clear that the text offers much guidance in *how* to avoid stereotyping, other than 'just saying no' to non-tentative assumptions about others' beliefs or behaviors. It does not, for example, urge us to verbalize our assumptions about members of the group(s) to which our client belongs – so that we can compare how closely our observations comport with our expectations. Nor does it suggest that we articulate how the cultures involved in a case (the legal culture and those of key players) are likely to perceive or label the client or her story – for lawyers are not the only actors who may stereotype the client.[36]

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[33] BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 32-33.

[34] *Id*. at 33.

[35] *Id*. at 33-34. This usage of "cultural differences" seems again to indicate that the authors view "differences," "heritages," and "traits" as synonyms, *i.e*., that they are not using "difference" as a relational concept to describe a gap or relationship between two parties, so much as they are describing a trait of just one of those parties, whom they treat as "other." *See supra* notes 27-29 and accompanying text.

The presumption of a bell-shaped curve seems to assume that the dominance of certain traits or norms maps up with population, *i.e*., that numerical majorities define what becomes a cultural norm. I find such an assumption unsound, because I believe that dominant groups (who often comprise a minority of a population) tend to set cultural norms. *See infra* notes 109-10 and accompanying text.

[36] Binder, Bergman, and their colleague Albert Moore, do make a closely related suggestion in their text on trial advocacy, in which they urge lawyers to recognize and explicitly address "silent arguments" which may be influencing fact-finders, but are not voiced by them. *See* DAVID A. BINDER, ALBERT J. MOORE & PAUL B. BERGMAN, TRIAL ADVOCACY: INFERENCES, ARGUMENTS AND TECHNIQUES 80-86? (1996).

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Moreover, framing the central danger as stereotyping – when stereotyping is understood as the conscious ascription of traits and predilections to groups – seems again to cast cross-cultural interactions as completely volitional, as a matter of what we *choose* to believe or assume about others. One certainly ought never downplay the degree of will it takes to consciously monitor and change one's cross-cultural assumptions and skills. But, as explored in Part II.B. of this Essay, attention to guarding simply against conscious stereotyping ignores the extensive body of research documenting the completely unconscious dimensions of cross-cultural misunderstanding and antagonism.[37]

3. Dimensions of Intercultural Difference

Drawing heavily from the work of Dutch sociologist Geert Hofstede,[38] *Lawyers as Counselors* details six key dimensions of intercultural difference.[39] Hofstede, who defines culture as "the collective programming of the mind which distinguishes one human group from another," is a firm believer that national cultures exist and matter.[40] His work, growing out of extensive surveys of employees of IBM in 72 countries, seeks to identify and quantify how national cultures persistently differ.[41]

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[37] *See infra* notes 178-202 and accompanying text.

For one of the earliest discussions of social cognition research in the legal literature, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-1217 (1995). For an earlier argument, based in Freudian psychology, on the unconsciousness of much modern racism, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[38] *See* GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES (1980); GEERT HOFSTEDE, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND (1991) (less scholarly, more reader-friendly popularization); GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS (2d ed. 2001) [hereinafter HOFSTEDE, CULTURE'S CONSEQUENCES II].

[39] See BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 34-37.

[40] *See* HOFSTEDE, CULTURE'S CONSEQUENCES II, *supra* note 38, at 25.

[41] Those surveys were conducted twice, in 1967-69 and in 1971-73, generating 116,000 responses. *Id*. at xix, 34. Hofstede contends that a multiplicity of studies in the intervening years confirm his generalizations of his findings and he predicts that countries' relative position on his indices of cultural difference are unlikely to change significantly over the next century. *Id*. at 36. [I have not found his response to the semi-obvious criticism that his sample is skewed to reflect primarily upper-middle-class beliefs, attitudes, and patterns.]

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The first of these dimensions that *Lawyers as Counselors* discusses is "uncertainty avoidance," or tolerance of unpredictability – with high-avoiders preferring formal rules and structured situations, while low-avoiders are "more flexible and comfortable" in the absence of bright-line rules.[42] A second dimension is "power distance," the willingness to accept an unequal distribution of power.[43] A third is "individualism/ collectivism."[44] A fourth dimension of intercultural difference is "Masculinity/Femininity" – with masculine cultures, according to *Lawyers as Counselors*, preferring defined gender roles, valuing work outside of the home, and being task-oriented, competitive, and aggressive, while feminine cultures prefer interchangeable gender roles, resolve conflicts through compromise, and value teamwork and relationships.[45] A fifth dimension is "Long Term/Short Term Orientation," which refers to preferred time horizons.[46] The final cultural distinction *Lawyers as Counselors* highlights is "High Context/High Content Communication" – with high-content cultures attending primarily to the precise words

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[42] *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 34-35. Hofstede summarizes the issue as "the extent to which a culture programs its members to feel either uncomfortable or comfortable in unstructured situations." HOFSTEDE, CULTURE'S CONSEQUENCES II, *supra* note 38, at xix.

[43] *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 35. Hofstede makes plain that he is discussing "the extent to which the less powerful members of organizations and institutions accept and expect that power is distributed unequally." HOFSTEDE, CULTURE'S CONSEQUENCES II, *supra* note 38, at xix.

[44] *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 35. Hofstede summarizes the issue as "the degree to which individuals are supposed to look after themselves or remain integrated into groups." HOFSTEDE, CULTURE'S CONSEQUENCES II, *supra* note 38, at xix.

[45] *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 35. Hofstede's distinction focuses primarily on the relative valuing of "masculine" assertiveness, toughness, and focus on ego enhancement and material success versus "feminine" nurturance, tenderness, and focus on relationship enhancement and quality of life. *See* HOFSTEDE, CULTURE'S CONSEQUENCES II, *supra* note 38, at 279-97. He also explains that "Masculinity stands for a society in which social gender roles are clearly distinct" and "Femininity stands for a society in which gender roles overlap: both men and women are supposed to be modest, tender, and concerned with the quality of life." *Id*. at 297.

[46] *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 35. Short-term-oriented cultures strive toward punctuality, seek "to make every moment productive," and tend to look for immediate consequences and returns; a long-term orientation, by contrast, emphasizes tradition, minimizes the significance of strict chronographic time, and focuses on long-term goals and consequences. *Id*. at 35. (Hofstede summarizes this dimension as "the extent to which a culture programs its members to accept delayed gratification of their material, social, and emotional needs." HOFSTEDE, CULTURE'S CONSEQUENCES II, *supra* note 38, at xx.)

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actually spoken or written and high-context cultures drawing meaning from the larger context, indirect allusion, and unspoken cues.[47]

Although the text refers to these as "dimensions" of intercultural difference, it actually treats these distinctions more like dichotomies. It portrays cultures as belonging on one side or the other of each of these divides.[48] Thus, after describing each of these ways in which cultures differ, it presents a table listing the national cultures that manifest one side or the other of each dimension.[49] (The U.S., for example, is categorized as an individualistic, masculine, small-power-distance, short-term oriented society that relies on high-content communication.[50]) This assignment of cultures to sides of these divides is jarring – as both a matter of principle[51] and application.[52]

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[47] *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 35-36. Although the text makes no mention of it, this dimension of cultural difference is not from Hofstede, but from cultural anthropologist Edward Twitchell Hall, who identified a continuum between high-context and low-context cultures. *See* EDWARD T. HALL, BEYOND CULTURE 74-101 (1976).

[48] *Lawyers as Counselors* lists the last four of these dimensions as opposed pairs separated by slashes. *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 35-36. Hofstede, however, created indices scoring cultures along a continuum on each of the first five of these dimensions. *See* HOFSTEDE, CULTURE'S CONSEQUENCES II, *supra* note 38, at 28-29.

[49] *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 37.

[50] *See id*. The only dimension along which the U.S. is not identified is uncertainty avoidance. Japan is identified at the opposite pole as the U.S. on all five of the dimensions along which the U.S. is identified. *See id*. *See also infra* note 52 (identifying mistaken attribution of Japanese masculinity/femininity).

[51] It took me several readings to understand how such an assignment was consistent with the statement, immediately preceding the exposition of these dimensions of intercultural difference, that "Hofstede's dimensions provide you with a heuristic for thinking about culture [sic] differences without requiring that you attribute cultural attitudes or practices to people from specific ethnic, religious, or national origins." BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 34. Apparently, assigning traits to *national* cultures is not such an attribution, because it is understood that not all *individuals* will share the attitudes and practices of their national culture. *See supra* note 35. (In Tremblay's article, which the text does not reference, he explicitly defines a heuristic as a tentative generalization subject to modification or abandonment upon the discovery of more specific information. *See* Tremblay, *supra* note 3, at 386-88.) To be fair, on the page immediately preceding the table assigning national cultures along these dimensions, the text does reiterate its "earlier proviso about the difficulty inherent in identifying broad cultural characteristics and . . . the dangers of stereotyping." BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 36. My concern, though, is that seeing cultures categorized in chart form makes it difficult to recall such provisos.

[52] In terms of application, I was surprised to see *Lawyers as Counselors* label Japan, Spain, Ireland, Mexico, Chile, and Austria, as "feminine societies," *see id.* at 37, which

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Placing cultures in a matrix seems likely to make it more difficult for readers to heed the text's earlier call to take broad statements about cultures as tentative.[53] It seems, as well, to neglect the dynamism of people and cultures – the continuous evolution in which we (individually and collectively) are always engaged – especially in an era distinctive for its increasing intercultural contact. While the desire to guide student-lawyers and to provide answers is understandable, this approach seems likely to sate, rather than spur, the curious inquiry and mutual engagement essential for cross-cultural and interpersonal success.

Moreover, in describing dimensions of cultural difference, the authors occasionally betray more respect for some cultural approaches than for others. For example, high uncertainty avoiders are described as sometimes appearing anxious or compulsive, while low-avoiders are depicted as "flexible and comfortable" in situations without bright lines.[54] The phrasing betrays a normative preference for low-avoiders over high-avoiders. Similarly, rather than focusing on high-context communicators' ability to recognize nuances and implications from unspoken cues, the text highlights instead the danger that members of such cultures will not understand the terms of written agreements – or may be unfamiliar with "common terms such as 'corporation,' 'internet,' 'web page, or 'SEC.'"[55]

4. Suggested Strategies

Lawyers as Counselors suggests six principles that may aid in "overcoming inhibitions that may be due to" inter-cultural differences.[56] The first four of these suggestions are unproblematic. The text advises that "not all differences are appropriate for you to overcome . . . [for] at the end of the day the client's values trump yours."[57] It encourages lawyers to take concerted steps to become familiar with different cultures with which

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carries with it a preference for interchangeable gender roles. It turns out that Hofstede actually placed Japan as the most "masculine" culture, Austria the second, Mexico the sixth, and Ireland tied for seventh most masculine out of 53 countries or regions. *See* HOFSTEDE, CULTURE'S CONSEQUENCES II, *supra* note 38, at 285-86. (Similarly, *Lawyers as Counselors* labels the U.S., Australia, France, and the Scandinavian countries as masculine societies, *see* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 37, but Hofstede actually labels all but the first two "feminine," ranking France tied for 35th, Finland 47th, Norway 52nd, and Sweden 53rd of 53 on his masculinity scale. *See* HOFSTEDE, CULTURE'S CONSEQUENCES II, *supra* note 38, at 285-86.)

53 *See supra* note 35.

54 *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 34-35.

55 *Id*. at 36.

56 BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 38.

57 *Id*.

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one interacts, both by studying their history and by attending events and meeting people from those cultures.[58] The text urges lawyers to "conduct counseling sessions in a way that anticipates the preferences of clients from other cultures" – for example, by acceding to client preferences for greater formality or by having a male attorney ask a female client if she would prefer another woman to sit on a discussion of uncomfortable topics.[59] It also suggests it may be important for attorneys to explain the reasons behind aspects of the U.S. legal system and U.S. lawyers' behavior that might otherwise puzzle clients.[60]

Problematically, however, the text warns lawyers not to be too "afraid of trampling on a client's cultural preferences" and urges lawyers to "[g]ive clients credit – if they have strong cultural preferences, they are likely to inform you about them."[61] Such an assertion ignores the likelihood that clients accustomed to large "power distance" will consider it inappropriate to challenge or confront an attorney's default approach to practice. It seems too to assume that clients must (and will) engage in "high-content" communication – explicitly informing their attorney of their discomfort and preferences – rather than expressing reservations and preferences more subtly, through "high-context" communication. Such advice puts an untoward burden on clients to verbalize cultural preferences and to take initiative and responsibility for identifying and bridging cultural gaps.

The final principle the text offers lawyers also seems to undermine much of the earlier material in the sub-chapter. In urging lawyers not to "abandon . . . [the] need for pertinent information in an effort to avoid encroaching on a client's cultural preferences," the text asserts that in the end, a lawyer's ability to help clients "will generally entail *their* understanding what *you* have to say about American laws and processes rather than *your* understanding *their* cultures' alternatives."[62] Such advice seems to abandon the emphasis on contextualized problem-solving – based on thoroughly understanding clients' values, preferences, expectations, and reactions to options – that I had always understood as at the heart of client-centered lawyering.[63] For only by pushing ourselves,

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[58] *Id*.

[59] *Id*.

[60] *Id*. at 38-39

[61] *Id*. at 39. The example given is that if a female client is "strongly disinclined to discuss case-related sexual matters" with a male lawyer, the lawyer can "reasonably expect" the client to ask for another woman to be present for such a conversation. *Id*.

[62] *Id*. at 39 (emphasis added).

[63] *See* Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 6, at 488-90.

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with clients' help, to understand how they look at things can we try to fully understand the context within which they frame their problem and react to possible solutions.

Taken together, these final suggestions seem likely to imply – at least to those most attracted to such a suggestion – that, when all is said and done, it is *clients* who must adjust themselves to *lawyers'* preferences and to dominant U.S. cultural norms.[64] At the very least, these passages send a markedly mixed message about how hard lawyers should work to understand and adjust to clients' cultural backgrounds and patterns. But exactly because it *is* so difficult to adapt one's ways of thinking and acting to fit the patterns, views, and preferences of another, it is imperative that we not encourage ourselves (or our students) to give up when the going gets tough, to just wait for clients to traverse the cultural distance that separates them from us (and us from them). We owe ourselves and our clients more – especially those of us who aspire to making progressive social change through our lawyering.

B. *A More Consistent Approach: Krieger and Neumann's* Essential Lawyering Skills

The latest edition of Stefan Krieger and Richard Neumann's *Essential Lawyering Skills,*[65] published in 2003, addresses cross-cultural lawyering skills in a separate, nine-page chapter entitled "Multicultural Lawyering."[66] While not nearly as dominant in the market as *Lawyers as Counselors*,[67] in several respects it does a significantly better job of preparing students for cross-cultural lawyering – at least in terms of how lawyers should consider and respond to other cultures.

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[64] Following these suggestions, the text states: "Another strategy you can pursue is to look upon your clients as resources rather than guessing at the reasons for their seeming reluctance to participate actively or to seek outcomes that strike you as strange or perhaps even improper." BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 39. Treating clients (and their communities) as resourceful partners with whom a lawyer collaborates to solve problems is at the heart of the vision of law practice that I have discussed at length. *See* works cited *supra* at note 6. Unfortunately, *Lawyers as Counselors*' suggestion in this regard does not receive the saliency it deserves, because it is immediately preceded by the mixed messages just described, *see supra* notes 61-62 and accompanying text, and is phrased as optional: "[a]nother strategy" that a lawyer "can" pursue. BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 39.

[65] KRIEGER & NEUMANN, ESSENTIAL LAWYERING SKILLS II, *supra* note 5.

[66] *See id.* at 49-57. This chapter was not part of the first edition of their text, published in 1999. *See* STEFAN H. KRIEGER, RICHARD K. NEUMANN, JR., KATHLEEN H. MCMANUS & STEVEN D. JAMAR, ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS.

[67] BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5.

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1. *Unambivalent Insistence on Importance of Lawyers' Recognizing and Adjusting to Clients' Cultures*

Essential Lawyering Skills opens its chapter by insisting: "*A lawyer can be effective only if the lawyer understands cultural differences and knows how to recognize and deal with them*."[68] It consistently reinforces the point that cross-cultural competency is a fundamental skill at the heart of client-centered representation, not just something a lawyer only uses occasionally – to deal with atypical, difficult clients.[69] Krieger and Neumann's text emphasizes that

> to respect the cultural, racial, ethnic, and gender differences that exist between us and our clients . . . means that we recognize the differences and adapt to them rather than assume that the client will adapt to us. . . . And we adapt . . . sincerely because insincerity is condescension. [70]

It also reinforces that ignoring difference is not a viable option, for it "alienate[s] clients, witnesses, other lawyers, and judges" and it "cuts . . . [one] off from a great deal of information."[71]

In all of these regards, the text forcefully presents a consistent message that cultural differences between a lawyer and client must be recognized, appreciated, respected, and traversed – and that a lawyer must learn to leave his cultural comfort zone to meet a client in hers.

2. *Broad Definition of Culture*

Krieger and Neumann define culture broadly as "a body of values, customs, and ways of looking at the world shared by a group of people."[72] They explicitly note that cultures are not just based on ethnicity, race, locality, or geography, but also upon gender, age, religion, immigration status, disability, sexual orientation, socioeconomic status (*i.e.*, "income, education, or both"), occupation, and even "the organization in which one works."[73] Their text also repeatedly discusses the existence of multiple cultures within the U.S., a "majority culture" and numerous "minority

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[68] *See* KRIEGER & NEUMANN, ESSENTIAL LAWYERING SKILLS II, *supra* note 5, at 49.

[69] *See id*. at 52. Jacobs argued that the first edition of *Lawyers as Counselors*, BINDER ET AL., LAWYERS AS COUNSELORS I, *supra* note 1, was likely to deem clients of color and low-income clients as atypical and difficult. *See* Jacobs, *supra* note 1, at 353-61.

[70] KRIEGER & NEUMANN, ESSENTIAL LAWYERING SKILLS II, *supra* note 5, at 52.

[71] *Id*. at 49-50.

[72] *Id*. at 49.

[73] *Id.*

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cultures."[74] The final four pages of the chapter are excerpts from linguist Deborah Tannen's works describing how women and men practice law, converse, and interact differently.[75]

A broad definition of culture is important for a several reasons. It alerts students and lawyers to a fuller range of background influences that can shape people and interactions. It thus encourages us to broaden our horizons and to attend to multiple layers of potential meaning.[76] It also highlights that a lawyer cannot become complacent simply because she shares one or more cultural traits with her client. Although the text does not articulate the point, others have addressed the risks that such complacency can lead lawyers to presume, rather than to explore, clients' values and preferences, and to ignore dynamics – such as other dimensions of cultural difference – that lead clients to still perceive the lawyer as an outsider.[77] A broad definition of culture, in short, makes cross-cultural competency relevant for all lawyers.

3. *Non-Judgmental, Nuanced Presentation of Dimensions of Cultural Difference*

Kreiger and Neumann non-judgmentally portray the many dimensions along which cultures can differ and explain how those differences can affect one's lawyering.[78] Their text explicitly discusses cultural differences as a matter of placement along a spectrum, rather than simply assigning cultures to one side or another of a dichotomy. For example, it notes:

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[74] *See id*. at 50-52. This terminology is potentially misleading in its emphasis on population size, rather than social dominance, as the relevant distinguishing feature of cultures within the U.S. *See infra* notes 109-10 and accompanying text.

[75] *See id*. at 54-57. The excerpts are from DEBORAH TANNEN, TALKING FROM 9 TO 5: WOMEN AND MEN AT WORK 124-25 (1994); DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION 14-17, 49-50, 297-98 (1990).

[76] Sue Bryant notes that a broad definition of culture "teach[es] students that no single characteristic will completely define the lawyer's or client's culture." Bryant, *supra* note 3, at 41.

[77] Jerry L∴pez, for example, has explored both of these phenomena. He has described, "Teresa," a fictionalized Latina impact litigator who presumes to know what her Latino clients want and need, and contrasted her with "Amos" an African American attorney who grew up in the community to which he has returned to practice, but recognizes that his law degree, and the very fact he was able to leave, may lead many in his community to view him as an outsider. *See* GERALD P. L∴PEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 13-17, 34-37 (1992).

[78] The text notes, for example, that cultural norms and patterns impact not only what people say and do, but even what they remember about events. *See* KRIEGER & NEUMANN, ESSENTIAL LAWYERING SKILLS II, *supra* note 5, at 50.

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> The world is not divided into conflict-tolerant cultures and conflict-intolerant cultures. Instead cultures have a broad range of attitudes toward conflict, from those that honor conflict (such as the majority U.S. culture) to those that dishonor it, with many cultures somewhere in between. And in some cultures some kinds of conflict are acceptable but others are not.[79]

Kreiger and Neumann cover many of the same dimensions of cultural difference as *Lawyers as Counselors*[80] – which came out a year *later* – but they do so more artfully and non-judgmentally. Their text routinely brings the issue back to the possible consequence of each potential cultural difference between lawyer and client. It poses each dimension of cultural difference as a question, without betraying a preference for one answer or another. Instead of framing the issue as "power distance," for example, it asks: "Is hierarchy valued?"[81] It breaks up "masculinity/ femininity" into two questions: "How is conflict viewed?"[82] and "How acceptable is it to show emotion or talk about emotion?"[83] Instead of categorizing "uncertainty avoidance," it asks: "Is formality valued?"[84] It also asks: "Which is more important, the individual or the group?"[85] and "What does body language communicate?"[86] With each of these questions, the text discusses the mainstream U.S. answer and mentions that some other cultures come out differently. But it does not identify those other cultures – an approach that leaves more for lawyers to attend to and inquire about, rather than looking up an expert's categorization of the client's culture.

Refreshingly, the text heeds its own advice that one shows "respect for a culture by trying to understand it and all its complexities. Respect includes genuine curiosity and a willingness to accept the culture on its own terms rather than judging it."[87] It demonstrates this approach best in its discussion of "How much is typically said in words, and how much is left to implication or context?"[88] After noting that "majority U.S. culture"

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[79] *Id*. I thank Patti Chang for pointing out that the dominant U.S. culture does not always honor conflict, particularly in the areas of politics or religion, which are often treated as taboo subjects to avoid raising with acquaintances, friends, and even family.

[80] BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5.

[81] NEUMANN, ESSENTIAL LAWYERING SKILLS II, *supra* note 5, at 51.

[82] *Id*. at 50-51.

[83] *Id*. at 51.

[84] *Id*.

[85] *Id*. at 52.

[86] *Id*.

[87] *Id*.

[88] *Id*. at 51.

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communicates largely expressly by focusing on the precise words spoken or written, and that many other cultures consider such communication "unsubtle or rudely blunt," the text notes that in some other cultures, "words are carefully chosen to imply messages that are not spoken."[89] It then describes, as a relational matter, the potential for misunderstanding when someone from such a culture interacts with someone who communicates as the mainstream U.S. culture does. Instead of focusing on what the more subtle (*i.e.*, high-context) communicator will not understand,[90] the text emphasizes that "the person from the majority U.S. culture might not hear the other person's implications and might become impatient, wrongly assuming that the other person is uncommunicative."[91] And it goes further, noting that in the context of negotiation, "American lawyers, who otherwise may be among the wordiest and most blunt people on earth, communicate a great deal through implication and context" in order to send messages without having a blunt statement used against them.[92] The text's method helps students to appreciate the value of the approaches of other cultures and, by showing that lawyers may sometimes adopt such approaches, makes them seem less exotically "Other."

4. *Suggested Strategies*

Kreiger and Neumann's text offers only a few broad suggestions. It counsels that rather than striving vainly to try to memorize the purported traits and customs of a vast array of other cultures, lawyers should seek to develop an instinctual feel for situations where another's cultural assumptions differ from one's own.[93] The text encourages the lawyer: (1) to learn not only the customs and values of her clients' cultures, but also the way those cultures view the world in general and the lawyer's culture specifically; (2) to attempt to foresee potential trouble spots and plan adaptations to the client's culture that will neither stereotype nor offend her client; and (3) to apologize promptly and succinctly for any cross-cultural mistakes she makes.[94] Finally, and most importantly, it implores lawyers "to be open-minded and curious about how other people think and act and why they think and act that way. A generous frame of mind on

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[89] *Id*.
[90] *See supra* note 47 and accompanying text.
[91] KRIEGER & NEUMANN, ESSENTIAL LAWYERING SKILLS II, *supra* note 5, at 51.
[92] *Id*.
[93] *Id*. at 53.
[94] *Id*.

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your part and a genuine liking for other people – and their differences – go a long way in this respect."[95]

In emphasizing the lawyer's need to adapt to other cultures,[96] and to remain open-minded, curious, and generous,[97] the text begins to direct at least some attention to the lawyer side of the attorney-client relationship.[98] Although largely focused on what a lawyer – again, problematically presumed to come from the dominant U.S. culture[99] – should know about diverse others, it takes this small, but important, step toward attending to the lawyer's frame of mind and attitudinal stance toward her clients. Ultimately, however, larger strides are required in this direction.

C. *The Attention to Clients and Lawyers of Cochran, DiPippa, and Peters'* The Counselor-at-Law

The clinical text on interviewing and counseling that does place significant emphasis on the lawyer's side of the cross-cultural relationship is Robert Cochran, John DiPippa, and Martha Peters' *The Counselor-at-Law*.[100] The text, published in 1999, frames the issue as "Dealing with Client-Lawyer Difference" and devotes a nineteen-page chapter to it.[101] Instead of focusing on the culturally different client's motivation to participate,[102] or concentrating on understanding and adapting to the client's culture,[103] Cochran, DiPippa, and Peters emphasize that lawyers must develop both an understanding of clients' cultures and a self-awareness of their own culture – and its impact on themselves and on their

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[95] *Id*.

[96] *See supra* note 70.

[97] *See supra* note 95.

[98] I share Carwina Weng's conviction that it is essential to encourage lawyers to develop cultural self-awareness and her dismay that in Kreiger and Neumann's text "awareness of the other, rather than of the self, takes precedence." *See* Weng, *supra* note 3, at 383-84. Weng overstates the critique, however, in asserting that Kreiger and Neumann fail completely to "delv[e] into developing cultural self-awareness" and to "detail cultural differences." *Id*. Their text certainly does detail cultural differences, *see supra* notes 78-92, and in doing so it always identifies how mainstream U.S. culture values or handles various issues. What their text fails to highlight, however, is the importance of knowing oneself and monitoring one's reactions to and interactions with others.

[99] *See supra* text preceding note 27.

[100] COCHRAN ET AL., THE COUNSELOR-AT-LAW, *supra* note 5.

[101] *Id*. at 203-21.

[102] As discussed above, *see supra* notes 20-32, this is the central concern of BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5.

[103] As discussed above, *see supra* notes 68-71, this is the focus of KRIEGER & NEUMANN, ESSENTIAL LAWYERING SKILLS II, *supra* note 5.

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clients from different cultures. Their text argues that bridging difference requires both a commitment to familiarize oneself with "cultural patterns, world views, and life experiences of diverse populations" and "a personal commitment to increase self-awareness."[104]

1. A Broad Understanding of Relevant Difference

Sometimes the text frames the issue as achieving "cross-cultural understanding" and other times it discusses it in terms of dealing with, or bridging, difference.[105] Regardless of the terminology employed, it makes plain that the issues are "not merely a matter of race and ethnicity," but also involve the broad range of differences in "gender, sexual orientation, disability, religio[n], socioeconomic status, [and] age," as well as "micro-cultural differences" (such as differentiations among "Hispanics" within the U.S. or between different socio-economic classes within a racial or ethnic group).[106] The text underscores the importance of a broad understanding of the dimensions of difference, noting that "[p]articularly when client and lawyer are both from the United States, but from different regions, social classes, or cultural heritages, there may be false assumptions of similar perception."[107] The text casts these differences as "compos[ing] and focus[ing] the lenses through which clients and lawyers experience the world"; these lenses, "embedded in the identity of people," constitute potential barriers to trust – both the client's trust of the lawyer and the lawyer's of the client – and to "congruent perceptions and interpretations."[108]

The text makes explicit that the differences it discusses are linked to, and relevant in large part because of, disparities in power. It often speaks, for example, of "dominant" cultures and groups, rather than simply "majority" and "minority" ones.[109] Such a framing highlights the importance of the unequal social power of groups – many of whom are numerical minorities – to set the cultural norms and standards to which others must adapt. Examples of such norm-setting numerical minorities include men, Whites in many cities and some metropolitan areas of the U.S., as well as the professional middle class.[110]

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[104] COCHRAN ET AL., THE COUNSELOR-AT-LAW, *supra* note 5, at 204.

[105] *See*, *e.g.*, *id*. at 203-04.

[106] *Id*. at 204, 208.

[107] *Id*. at 210.

[108] *Id*. at 204.

[109] *See*, *e.g.*, *id*. at 206, 214.

[110] *See*, *e.g.*, Silver, *supra* note 3, at 229 ("Nearly half of the nation's 100 largest cities are home to more minorities than whites."), citing Eric Schmitt, *Whites in Minority in Largest Cities, the Census Shows*, N. Y. TIMES, Apr. 30, 2001, at A1; D'Vera Cohn, *Area*

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2. The Importance of Self-Awareness and Escaping Cultural Encapsulation

In addition to fostering client participation, Cochran, DiPippa, and Peters emphasize that a lawyer must develop sufficient cross-cultural skill to avoid misinterpreting her client's information by failing to appreciate his cultural concerns and convictions.[111] They note that a lawyer must monitor not only what her client says, but also how she feels about him and his culture.[112] Their text urges the lawyer to develop a contextualized understanding not only of her client and his problem, but also of herself. This requires vigilant attention to "one's own cultural perspectives and their impact on attitudes, communication patterns, interactional habits, and cultural assumptions."[113]

The text states that the "first and perhaps greatest challenge in legal interviewing and counseling is to become *aware* of and *sensitive* to personal biases and subjective attitudes that unknowingly affect one's relationships with clients."[114] It urges lawyers to develop *self-awareness* of themselves and their culture so that they can break out of "cultural encapsulation."[115] By this Cochran, DiPippa, and Peters mean lawyers must learn not to "unconsciously apply[] their own cultural methods and strategies as if they were universal," but rather must "adapt their habits, patterns, behaviors, and attitudes when working with diverse clients.[116] To transcend cultural encapsulation, the text insists a lawyer must become aware "of the ways one's own culture influences beliefs, values, experiences of the world, and interactions with others."[117] Once identified,

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Soon to be Mostly Minority: Shift in 4-8 Years Will Reshape Politics, Priorities, Experts Say, WASHINGTON POST, Mar. 25, 2006, at A1 (Whites already minority in greater metropolitan areas of Miami, Houston, Los Angeles, and San Francisco, soon to be joined by New York and Washington, D.C. areas); Michael Zweig, *Introduction – The Challenge of Working Class Studies*, *in* WHAT'S CLASS GOT TO DO WITH IT?: AMERICAN SOCIETY IN THE TWENTY-FIRST CENTURY 1, 7 (Michael Zweig ed. 2004) (middle class – of professionals, supervisors, and small business owners – comprises 36% of U.S. population)..

[111] *Id*. at 203.

[112] *Id*. at 211-12.

[113] *Id* at 211.

[114] *Id*. at 205.

[115] *Id*. The text credits the concept of cultural encapsulation to C.G Wrenn. *See* C.G. Wrenn, *The Culturally Encapsulated Counselor*, 32 HARV. EDUC. REV. 444-49 (1962).

[116] COCHRAN ET AL., THE COUNSELOR-AT-LAW, *supra* note 5, at 205.

[117] *Id*. at 220.

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the objective is then to be able "to step outside of our strong perceptual fields" to meaningfully engage with others.[118]

This emphasis on truly understanding ourselves, and how our cultures have shaped us, is a basic tenet of the literature on cross-cultural lawyering[119] and psychological counseling.[120] It is therefore surprising that among the latest clinical textbooks, only Cochran, DiPippa, and Peters' book focuses explicitly on lawyer self-knowledge and cultural introspection as a necessary cross-cultural skill.[121]

The text also emphasizes that a lawyer must pay attention to how his culturally conditioned perceptions of his clients can impact his expectations about their cases – as well as his own and his clients' behavior and performance.[122] Noting that "[e]xpectations of success affect

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[118] *Id*. at 205.

[119] *See*, *e.g*., Bryant, *supra* note 3, at 49 ("knowing yourself as a cultural being is an on-going and necessary process for cross-cultural competence"); Jacobs, *supra* note 1, at 395 ("if we can help a student become self-aware, it may lead the student to reduce the level of cultural insensitivity displayed toward the client. Becoming self-aware may enable the student to display a heightened awareness of possible negative nonverbal cuing she may be transmitting to the client."); Silver, *supra* note 3, at 230 ("Learning about another culture's customs is only one component of multicultural competence. Acquiring such competence also requires a deliberate exploration of the deeply rooted cultural assumptions that claim us. This, in turn, requires an exploration of our own biases and stereotypes about individuals and groups different from ourselves."); Weng, *supra* note 3, at 389 ("key to developing multicultural competence is cultural self-awareness")

[120] *See*, *e.g*., *id*. at 372 n.16, citing PAUL B. PEDERSEN, CULTURE-CENTERED COUNSELING INTERVENTIONS: STRIVING FOR ACCURACY 203 (1997); DERALD W. SUE & DAVID SUE, COUNSELING THE CULTURALLY DIFFERENT: THEORY AND PRACTICE 17 (3d ed. 1999).

[121] *Lawyers as Counselors*' silence in this regard is odd because Tremblay, who helped to revise the text, clearly emphasizes the point in his article on the importance of attention to heuristics and biases in cross-cultural lawyering. *See* Tremblay, *supra* note 3. In addition to the passage quoted *supra* at note 19, Tremblay explained that he introduced his second key concept of "bias" to

> turn[] 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.'

Id. at 386 (quoting Donald B. Pope-Davis & Jonathan G. Dings, *The Assessment of Multicultural Counseling Competencies*, *in* HANDBOOK OF MULTICULTURAL COUNSELING 287, 287-88 (Joseph G. Ponterotto et al. eds. 1995)). Indeed, Tremblay identified "the most central message" of multicultural counseling scholarship as "the need for counselors, including lawyers, to confront their own cultural identity, including the biases and prejudices that accompany that identity . . . ." *Id*. at 415-16.

[122] *See* COCHRAN ET AL., THE COUNSELOR-AT-LAW II, *supra* note 5, at 211-12.

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actual outcomes," it explains that penetrating introspection is essential because "[w]e can [only] modify our reactions once we are aware of our less conscious, culturally learned reactions."[123] Again, the text is unique among its competitors in stressing (at least in the discussion of cross-cultural issues) the *interactive* nature of the attorney-client relationship, the ways in which the attitudes, expectations, and conduct of each actor shape the other – indeed the ways in which one's attitudes, expectations, and conduct (whether one recognizes them or not) reverberate through the relationship.[124]

The text also notes that power differences impact the ease with which people can (and the frequency with which they must) recognize their cultural assumptions. It declares:

> Generally, the more characteristics a person has that are dominant within a society, the harder the person has to work to challenge his own assumptions. On the other hand, minority and subordinate groups must frequently confront the differences between their own cultural learning and the standards of majority and dominant cultures.[125]

This notion of the dual consciousness of people from subordinated groups was, of course, explored over a century ago by W.E.B. Dubois.[126]

3. *Additional Dimensions of Difference, Including Some from Lawyer's Professional Socialization*

The text also attends to aspects of non-U.S. and non-White cultures. It suggests lawyers should "take the time to learn about different cultural patterns and expectations, because a lawyer's knowledge indicates to clients respect for their diversity, interest and concern for them and their identified group, and a commitment to learning about their culture."[127] The text describes, for example, diversity in "cultural rapport-building rituals and patterns," such as different reactions to the use of first names, shaking hands, physical distance between lawyers and clients, and eye contact or aversion.[128] In doing so, it ascribes patterns and positions to

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[123] *Id*. at 211-12.

[124] *See id*. at 211-15. Jacobs clearly identified and discussed the importance of "expectancies" and self-fulfilling prophecies. *See* Jacobs, *supra* note 1, at 377-84.

[125] COCHRAN ET AL., THE COUNSELOR-AT-LAW, *supra* note 5, at 206.

[126] *See* W.E.B. DUBOIS, THE SOULS OF BLACK FOLKS (1903). *See also* THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherrie Moraga & Gloria Anzaldua eds., 1981).

[127] COCHRAN ET AL., THE COUNSELOR-AT-LAW, *supra* note 5, at 208.

[128] *Id*. at 207-08.

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particular groups, such as Moslems, African Americans, and White Americans – sometimes clearly couching the ascriptions as tentative, other times not.[129]

The text discusses ways in which some common assumptions of mainstream U.S. professionals may be out of step with other cultures. Like its competitors, *The Counselor-at-Law* notes that commitments to the individual as the basic unit of society and to independence over interdependence are not universal.[130] But it also raises other important differences. It points out, for example, that mainstream U.S. lawyers may assume problems are effectively categorized (and resolved) by academic or professional discipline (*i.e*., that an issue is a legal problem, or a psychological, or social work one), an assumption that may prove problematic for clients who "operate from more holistic frameworks and traditions."[131] The text also warns that a tendency to "value linear thinking over nonlinear thinking" can cause lawyers to tune out and write off some clients, destroying prospects for communication.[132] Additionally, it suggests that a "critical assumption" of many mainstream U.S. lawyers that warrants questioning is the notion that "the 'problem' is with the individual and not with the system," for "[t]he system is part of the cultural encapsulation of those who benefit from it."[133]

Each of the last three potential differences flows at least in part from, or is amplified by, U.S. lawyers' professional socialization. As a vast literature explores in great detail, lawyers interested in working to effect social change are well advised to pay close attention to our professional culture and the impact it can have on our relationships with low-income and working-class clients and communities.[134]

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[129] *See id*. The text, for example, states as a matter of "fact" that "it is a huge affront to offer the left hand or to give something with the left hand to a Moslem." *Id*. at 207. It uses adverbs such as "generally" and "likely" and verbs such as "tends" to discuss White American and African American preferences with regard to physical distance and eye contact. *Id*.

[130] *See id*. at 210. *See also supra* notes 44, 85 and accompanying text.

[131] *Id*. at 210.

[132] *See id*.

[133] *Id*.

[134] Jerry L∴pez, Lucie White, Luke Cole, Jennifer Gordon, Louise Trubek, I, and many others, advocate transforming the lawyer-client relationship and scope of lawyering activity to encourage joint, collaborative efforts between lawyers, clients, communities, and other allies to push collectively for social change. *See, e.g*., Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992); Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA.

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4. Suggested Strategies

Cochran, DiPippa, and Peters offer a long list of "Do's and Don'ts" for interacting across difference.[135] Some of these suggestions for lawyer behavior reflect their text's emphasis on the centrality of developing self-awareness and guarding against cultural encapsulation. For example, it urges the lawyer to "monitor yourself so that you do not fall into stereotyping clients" and to "be genuine."[136] The text also emphasizes the importance of attorney-client dialogue, urging lawyers "not [to] be afraid to [respectfully] ask" clients when something about their story, conduct, preferences, or beliefs is puzzling or unclear. Unlike its competitors, it also explicitly notes that "cultural diversity not only poses a challenge for building lawyer-client rapport, but also damages clients when differences are not understood and valued by legal decision makers."[137]

ENVTL. L.J. 687 (1995); LUKE COLE & SHEILA FOSTER, FROM THE GROUND UP - ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001); JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005); Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, the Workplace Project and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV 407 (1995); Gerald P. López, *Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041 (2005); LÓPEZ, REBELLIOUS LAWYERING, *supra* note 77; Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59 (2004); Shauna I. Marshall, *Mission Impossible? Ethical Community Lawyering*, 7 CLIN. L. REV. 147 (2000); Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 6; Piomelli, *Democratic Roots of Collaborative Lawyering*, *supra* note 6; Piomelli, *Foucault's Approach to Power*, *supra* note 6; Dean Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed*, 66 TENN. L. REV. 467 (1999); Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49 (1991); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996); Lucie E. White, *"Democracy" in Development Practice: Essays on a Fugitive Theme*, 64 TENN. L. REV. 1073 (1997); Lucie E. White, *Facing South: Lawyering for Poor Communities in the Twenty-First Century*, 25 FORDHAM URB. L.J. 813 (1998); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987–88); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699. Anthony Alfieri has also associated his work with this approach to lawyering. *See, e.g.,* Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987–88); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

[135] *See* COCHRAN ET AL., THE COUNSELOR-AT-LAW, *supra* note 5, at 218-20.

[136] *Id*. at 218.

[137] *Id*. at 218-19.

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D. Overall Assessment of the Texts

As a group, the texts reviewed are a significant advance over their predecessors. The only one whose section on cross-cultural lawyering I would not recommend is Binder, Bergman, Price and Tremblay's *Lawyers as Counselors*.[138] Krieger and Neumann's *Essential Lawyering Skills* shares a problematically lopsided focus on the client's side of the attorney-client cross-cultural relationship, but its presentation of that aspect is so strong, I would still assign it to students – with supplementing materials that pay greater attention to the attorney's side.[139] I would also endorse Cochran, DiPippa and Peters' *The Counselor-at-Law*, for its emphasis on the importance of lawyer self-awareness and of recognizing and escaping cultural encapsulation.[140] Indeed a combination of the relevant chapters of the latter two texts might be particularly effective.

Of course, a textbook is unlikely, on its own, to prepare students to lawyer effectively across cultural difference. Such preparation must occur on cognitive, affective, and behavioral levels – directing attention to what we know about others (and ourselves), how we feel about them (and ourselves), and how we act on our knowledge and feelings.[141] Only immersing cultural issues pervasively throughout a clinical curriculum, with repeated opportunities to address, practice, and reflect upon them, is likely to maximize student-lawyers' competence.[142] But clinical texts can highlight the importance of such competence, provide cognitive tools for understanding the dynamics at play, and suggest areas for behavioral change.

Recognizing the space limitations and ensuing difficult choices of what to include in a textbook, there are several respects in which these

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[138] BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5. *See supra* notes 15-64 and accompanying text.

[139] KRIEGER & NEUMANN, ESSENTIAL LAWYERING SKILLS II, *supra* note 5. *See supra* notes 65-99 and accompanying text.

[140] COCHRAN ET AL., THE COUNSELOR-AT-LAW, *supra* note 5. *See supra* notes 100-36 and accompanying text.

[141] *See* Bryant, *supra* note 3, at 48.

[142] In our core, semester-long offering in the Civil Justice Clinic at U.C. Hastings, my teaching colleagues (Miye Goishi, Shauna Marshall, Donna Ryu, Eumi Lee, and Gail Silverstein) and I devote six full class sessions spread across the semester, *i.e.*, thirteen hours of seminar discussion, as well as three writing assignments, to exploring issues of cross-cultural difference. Mark Aaronson, who used to teach the course with us, has previously described some of these sessions. *See* Mark Neal Aaronson, *We Ask You to Consider: Learning about Practical Judgment in Lawyering*, 4 CLIN. L. REV. 247, 311-18 (1998). *See also infra* notes 150-54 and accompanying text for additional description of our approach.

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texts could productively expand their horizons by incorporating insights from the larger clinical literature on cross-cultural lawyering. Without extensively lengthening their chapters, the texts could benefit by reconceptualizing their goal as imparting habits rather than just information, expanding their attention from the cognitive and behavioral realms to the affective domain, and also exploring the challenges that flow from cultural sameness, not just cultural difference.

Framing the issue, as Sue Bryant and Jean Koh Peters do,[143] as the acquisition of habits, rather than simply information, reinforces the insight that cross-cultural competence necessarily entails cognitive, emotional, and behavioral dimensions, each of which is most effectively developed and enhanced through repeated practice and use.[144] Attention to fostering habits also potentially accentuates a different understanding of the central goal of cross-cultural competence: The aim is not simply to learn a few *techniques* for how to understand or to manage people who differ from us, but instead *to learn how best to change our orientations and ourselves* to maximize our ability to interact with and learn from each other. Reformulating the goal as developing habits radically shifts the relevant timeframe: it connotes – more accurately – a concerted, long-term effort likely to last not just a class session or two, or a semester, but a lifetime.

As outlined above, the textbooks' consideration of cross-cultural lawyering focuses primarily on what student-lawyers should know, with some suggestions on how they might act. But cross-cultural lawyering theorists, again led by Bryant and Koh Peters, direct important attention to the affective or emotional level too. They note, as the textbooks do not, that cross-cultural interactions and self-critical introspection can be stressful and anxiety-provoking, as can cross-cultural training itself.[145] The stress stems in part from the change-oriented goal of the training and inquiry.[146] Thus Bryant and Koh Peters underscore the importance of

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[143] *See* Bryant, *supra* note 3, and my summary, *supra* note 4. Bryant recognizes Koh Peters as an author of the "Five Habits" approach, even though she did not author the work cited. *See* Bryant, *supra* note 3, at 33, 35. Koh Peters includes a chapter on "the Habits" in JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001).

[144] *See* Bryant, *supra* note 3, at 48.

[145] Describing those aspects of diversity trainings that they sought to avoid, Bryant discusses what Koh Peters labels the three "Ghosts of Diversity Past": (1) designing training exclusively for White students; (2) placing "unfair burdens on students of color to educate white students;" and (3) "the ghost of judgment that often resulted in naming and blaming or the fear of such occurrences during a diversity training" *Id*. at 57.

[146] As Bryant explains:

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providing students the emotional support and motivation to grow and change.[147] Consequently they emphasize the importance of remaining non-judgmental, not only of our clients, but also of ourselves.[148] Indeed they deem non-judgmental thinking "a core cross-cultural skill," one that is particularly challenging given lawyers' professional socialization.[149]

This attention to creating an emotional atmosphere that fosters students' willingness and ability to honestly look at and strive to change themselves is, of course, a central responsibility of the clinical faculty who teach the courses in which the textbooks are used. One of the ways my colleagues and I at the Civil Justice Clinic attempt to reach students on the affective level is by showing an extraordinary film, *The Color of Fear*.[150] The film is an exploration of the impact of race on the lives of nine men, as revealed through their discussion at a weekend retreat.[151] We use the

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> We are training students to be non-judgmental and to develop new levels of tolerance, new modes of thinking and valuing as well as new behavior. Students may experience this as a threat to their cultural identity. In addition, some students may experience stress because classmates articulate world views that are painful. Other students may experience stress because they have done something that exposed biases that they are embarrassed to acknowledge.

Id. at 59-60 (footnotes omitted).

[147] *See id*. at 57 ("teachers need to take into account the emotional needs of cross-cultural learners").

[148] As Bryant writes:

> Refraining from judgments and being open to difference is an essential skill for effective cross-cultural lawyers. . . . To honestly unearth our own cultural assumptions, stereotypes and biases and examine them, we need to view them without shame or judgment or self-condemnation, but with an eye towards understanding them and, where necessary, rectifying or eradicating them. To understand our clients, we need to use the same kind of non-judgmental approach.

Id. at n.54. *See also id*. at 58 ("We use a teaching approach that asks students to be non-judgmental towards themselves, as they inevitably will make mistakes, yet at the same time stresses the importance of lawyering in a way that addresses stereotypes and biases.").

[149] *See id*. at 56 n.83. Regarding lawyers and law students, Bryant notes that: "Our training includes being called upon in classroom discussion to judge a case based on limited, digested casebook facts. . . . Students are often taught that assessing client credibility is a critical piece of the lawyers' role that begins in the initial interview." *Id*.

[150] THE COLOR OF FEAR (Stir-Fry Productions 1994). *See also* http://www.stirfryseminars.com/pages/coloroffear.htm (last visited May 1, 2006).

[151] The gathering was convened by Lee Mun Wah, a community therapist, who invited two other Asian men (David Lee and Yutaka Matsumato), two Black men (Victor Lewis and Loren Moye), two Latino men (Roberto Almanzan and Hugh Vazquez), and two White men (David Christensen and Gordon Clay). The men, from the greater San Francisco Bay Area, span a wide range of ages. They combine deeply insightful

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film – well into the semester, once the class has bonded as a community – because it grounds abstract principles about dealing with difference,[152] triggers and explores intense emotional reactions,[153] and models genuine compassion for and engagement with one's own experience and with others'.[154] A central theme of the film is that to talk honestly about race in the U.S. we must first explore the fear, pain, and hurt we each have experienced; only by becoming self-aware of how race shapes our own existence can we hope to tackle the issue constructively.[155]

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intellectual analyses of race and extraordinary abilities to recognize and discuss their emotions.

[152] We use the film in conjunction with excerpts from Minow, *Justice Engendered*, *supra* note 27; Martha Minow, *Differences Among Difference*, 1 UCLA WOMEN'S L.J. 165 (1991); Stephanie M. Wildman with Adrienne D. Davis, *Making Systems of Privilege Visible*, *in* PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (Stephanie M. Wildman ed. 1996). We also assign a powerful essay by Thai anthropologist Maiv>n Clech L>m, describing and theorizing a series of interactions in which a series of White women presume to know better than, speak for, and instruct her and other formerly colonized people of color. *See* Maiv>n Clech L>m, *Feeling Foreign in Feminism*, 19 SIGNS 865 (1994).

We precede the showing of THE COLOR OF FEAR, *supra* note 150, with a 20-minute segment from a television magazine show, *Primetime Live*: *True Colors* (ABC television broadcast Sept. 26, 1991), which uses hidden cameras to document the experiences of two discrimination testers – one White, one Black – when they move to St. Louis. The segment documents discrimination in shopping for shoes, music, and cars, and in looking for jobs and rental housing.

We devote three hours of discussion, over the course of two class sessions, to the films and readings, and ask students to write a paper as well.

[153] Well into the film, for example, Lee Mun Wah, the facilitator and director, reveals that his mother was murdered by an African-American man and that he is in part driven to make the film to repudiate his father's conviction that different races cannot live together in harmony or understanding. *See* THE COLOR OF FEAR, *supra* note 150.

[154] Cognizant of the emotional power of the film and the topic, we begin discussion by asking students to focus on a particular man in the film (whom we assign to them in advance) and then to describe him (drawing on both empathy and detachment), to describe his general world view and how he approaches issues of difference, and – if they feel comfortable – to describe how his views compare to their own.

[155] The film's closing theme song, written by Peter Barclay in a didactic style completely different from that of the film itself, begins:

> You think someone is going to destroy you
> If you don't have the upper hand.
> You are afraid of the differences of people.
> You must destroy them.
> Can't you see it's fear that's driving you insane,
> Eating you alive and causing you much pain?
> You've got to walk right through your fear. . . .

THE COLOR OF FEAR, *supra* note 150.

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One of the key moments in the film occurs when a White man who has steadfastly denied the validity of the attitudes and experiences recounted by the men of color finally appears to understand enough about himself and his formative experience (as a child of an abusive and racist father) to be willing and able to hear and consider the experiences of the other men. Shortly after that moment, in a subsequently filmed narration, participant Roberto Almanzan urges the audience: "Stretch out your arms and take hold of the cloth that covers you. The cure for the pain is *in* the pain. Good and bad are mixed. If you do not have both, you don't belong with us."[156] His emphasis on searching not for unattainable purity, but for a commitment to recognize and work to change the utterly human imperfections in each of us, exemplifies the introspective but non-judgmental engagement that we, Bryant and Koh Peters, and other cross-cultural theorists seek to encourage and aspire to model.

The final way in which the textbooks examined could beneficially incorporate aspects of the cross-cultural lawyering literature would be to highlight that a lawyer must not only attend to cultural *difference*, but also to the dangers of cultural *sameness*. As Bryant & Koh Peters note, situations where lawyers perceive shared cultural backgrounds with their clients pose a risk that lawyers may "substitut[e] their own judgment for the client's as a result of over-identification or transference."[157] Such situations may also lead lawyers to fail to explore issues in sufficient depth, because they assume the client's cultural similarity leads him to similar thinking and motivation.[158] To avoid both possibilities, one must consistently encourage far-reaching discussion with clients to gather and

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[156] *Id*.

[157] Bryant, *supra* note 3, at 42. This possibility is one of the reasons behind the call for students to identify elements of cultural similarity and difference between them and their clients. L∴pez's description of his fictionalized impact litigator, "Teresa," is an example of this phenomenon. *See supra* note 77.

[158] Bryant insightfully observes:

> Lawyers usually ask questions based on differences that they perceive between themselves and their clients. Thus, lawyers tend to ask questions when clients make choices that the lawyers would not have made or when the lawyers perceive an inconsistency between what the clients are saying and doing. Lawyers tend not to ask questions about choices that clients have made when the lawyers would have made the same choices; in such a situation, the lawyer usually assumes that the clients' thought processes and reasoning are the same as his or her own.

Bryant, *supra* note 3, at 66 (footnote omitted).

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confirm needed information, rather than relying on assumptions or projections.[159]

A key insight embodied in such an approach is the recognition of the centrality of fostering an embracing *curiosity* about ourselves and others – a curiosity that engenders probing, genuine interest in how culture shapes each of us and in how each of us expresses our individuality, often in opposition to our culture(s). Such a deeply internalized, genuine, and generous curiosity about ourselves and others is essential. For at its best and its root, cross-cultural competence is a matter not simply of the mind to be learned from a book, but a matter of the heart and the spirit to be experienced in thoroughgoing (and mutual) *connection and engagement with others*.

II. Sketch of an Agenda for Further Exploration

Just as the textbooks omit some key insights of the larger cross-cultural lawyering literature, that literature itself has failed to cover at least two important cross-cultural topics that warrant more detailed exploration.

A. More Explicit Focus on Socioeconomic Class

A realm of potential difference between lawyers and clients that has not yet received the attention it warrants is socio-economic class and its cultural impact. Such a failure is consistent, of course, with the widespread refusal in the U.S. to scrutinize class – no doubt due in part to historic notions of "American exceptionalism" to the import and intractability of class.[160] In the cross-cultural lawyering literature, while class is often listed with race and gender as one of the three central dimensions of difference in the U.S., it is rarely discussed directly; it tends instead to be tacitly subsumed under race.[161] Without discounting the importance of its

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[159] Bryant, for example, shares the advice of cross-cultural trainers that an important cross-cultural practice "is to ask 'I wonder if there is another piece of information that, if I had it, would help me interpret what is going on?'" *Id*. at 72 (quoting RICHARD BRISLIN & TOMOKO YOSHIDA, INTERCULTURAL COMMUNICATION TRAINING: AN INTRODUCTION (1994)).

[160] **Need cite for American exceptionalism/aversion to class**

[161] Krieger and Neumann list class as one of many potential sources of culture (which they define as a shared "body of values, customs, and ways of looking at the world"), but do not explore it further. *See* KRIEGER & NEUMANN, ESSENTIAL LAWYERING SKILLS II, *supra* note 5, at 49. Cochran, DiPippa, and Peters refer to class specifically twice. *See* COCHRAN ET AL., THE COUNSELOR-AT-LAW, *supra* note 5, at 204, 208-09.

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intersectionality with race, and gender, class alone warrants greater attention.[162]

Indeed, the lack of clearly established terminology to even identify the major classes in U.S. society is an indication of how much work remains to be done in this area. For purposes of this essay, I will use a taxonomy adapted from the work of Betsy Leondar-Wright.[163] She describes a four-class hierarchy. At the bottom are the low-income/working-poor, who struggle, often unsuccessfully, to meet minimal subsistence needs and to maintain steady work.[164] Above the working-poor is the working class, whose members perform physical labor and/or have little control of their workplace environment, have little or no college education, and low or negative net worth.[165] Above the working class (and the lower middle class that she subsumes within it),[166] is the professional middle class, populated by college- or graduate-school educated, salaried professionals or managers, who have autonomy over their work environment and often authority over subordinates, as well as the status and connections to help their children stay in this class.[167] Above the professional middle class is the owning class, whose members need not work because of their investment income.[168]

Given the class backgrounds of their clients – most of whom tend to be low-income or working-class – students in law school clinics and lawyers who aspire to effecting progressive social change can benefit from specific examination of class-linked cultural patterns and the dynamics of cross-class interaction. To be sure, many clinical programs use readings and

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[162] As Michael Zweig notes: "[N]o meaning of class is fully independent of race and gender, because a person's experience of class position depends on the person's race, ethnicity, and gender. At the same time, . . . an appreciation of class can illuminate some of the complexities of racial and gender experience." Zweig, *supra* note 110, at 2.

[163] *See* BETSY LEONDAR-WRIGHT, CLASS MATTERS: CROSS-CLASS ALLIANCE BUILDING FOR MIDDLE-CLASS ACTIVISTS (2005).

[164] *See id*. at 1-2. Leondar-Wright refers to this as the "poverty class," a term I prefer to avoid. Because of the unwieldiness of my alternative term, I will hereafter refer to this class interchangeably as either low-income or working-poor.

[165] *See id*. at 1.

[166] Leondar-Wright includes the lower middle class as a sub-class of the working class, because even though members of the former may be more economically secure and comfortable, they tend to share with the working class the lack of 4-year college degrees "and/or less control over their work and/or fewer assets than professional middle-class families. If they own a small business, it can only survive by the proprietor's hands-on work." *Id*.

[167] *See id*. at 2.

[168] *See id*.

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exercises to try to ensure that students are aware of the *circumstances* in which working-poor and working-class clients live.[169] Such devices are important to help foster empathy. But it is also important to explore the role that people's economic circumstances and ensuing life experiences play in shaping their *culture* – *i.e*., their beliefs, attitudes, and ways of thinking and acting.

In urging attention to class culture, I do not imply that anyone is completely shaped or described by such culture. We each are constantly evolving products of a multitude of experiences that need to be explored, not presumed. Nor do I assume that all lawyers come from professional-middle-class backgrounds. Indeed, it is in part because many students come from working-poor or working-class families, but are being socialized into the professional middle class, that direct attention to issues of class culture is so important.[170]

I believe an examination of cultural differences between the working-poor, working class, and professional middle class would benefit students and lawyers navigating cross-class interactions. Like the rest of the cross-cultural domain, such an exploration, to be fully effective, will entail not only learning about other class cultures, but also about how to recognize and reflect on one's own class-linked socialization. "Law and society" theorists have discussed some aspects of the class culture of low-income people, particularly with regard to their attitudes toward law and lawyers.[171] "Working-class studies" is on the upswing.[172] Analysts have

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[169] In the Civil Justice Clinic, for example, we assign excerpts from Katherine Boo, *After Welfare*, THE NEW YORKER (Apr. 9, 2001); BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001); JONATHAN KOZOL, RACHEL AND HER CHILDREN (1988); Austin Sarat, *". . . The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990).

Many clinics assign some sort of budgeting exercise that leads students to appreciate the challenge of meeting family necessities at low-income and even working-class wage rates. *See*, *e.g*., Fran Quigley, *Seizing The Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLIN L. REV. 37, 68 n.105 (1995) (describing such an exercise).

[170] For a powerful exploration of the challenges and pain of 'crossing over' from the working class to the professional middle class, see Barbara Jensen, *Across the Class Divide: Crossing Classes and Clashing Cultures*, *in* ZWEIG, *supra* note 110, at 168. *See also* JOANNA KADI, THINKING CLASS: SKETCHES FROM A CULTURAL WORKER (1996).

[171] *See, e.g.,* Sarat, *supra* note 168.

[172] *See*, *e.g*., Center for Study of Working Class Life at SUNY Stonybrook, https://naples.cc.sunysb.edu/CAS/wcm.nsf (last visited 5/1/2006); The Center for Working Class Studies at Youngstown State University, http://www.as.ysu.edu/~cwcs/ (last visited 5/1/2006).

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studied the professional middle class.[173] And a number of recent works have examined what they refer to as "the class divide" between professional-middle-class activists (and service providers) and the working-poor and working class.[174] It is time to identify and integrate the best of these works on class culture into our teaching and scholarship on cross-cultural lawyering.

I write to urge such an inquiry, not to report the results of having completed it; but I can posit a few of the beneficial explorations it might encourage. Attention to class cultures might, for example, prime students to explore whether U.S. culture (and particularly White U.S. culture) is as extremely and uniformly individualistic as it is often depicted. Is such a generalization more likely to be true of professional-middle-class people than of low-income or working-class people? Do we differ in class-linked ways in the extent to which we are rooted in local community, value close family ties, and/or prioritize connection and loyalty to those we consider our own?[175] Do most of us in the U.S. share an expectation that our needs and desires can and should be met? That we can and should insist on it? Is this sense of "entitlement" less readily shared by low-income or working-class people.[176] Is there a professional-middle-class tendency to view low-income and working-class people as unaware and in need of education and information about social issues or rights?[177] Might what outsiders perceive

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[173] *See*, *e.g.*, BARBARA EHRENREICH, FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS (1989); Barbara Ehrenreich and John Ehrenreich, *The Professional Managerial Class*, *in* BETWEEN LABOR AND CAPITAL 5 (Pat Walker ed. 1979).

[174] *See*, *e.g.*, DAVID CROTEAU, POLITICS AND THE CLASS DIVIDE: WORKING PEOPLE AND THE MIDDLE-CLASS LEFT (1995); Jensen, *supra* note 169; LEONDAR-WRIGHT, *supra* note 162; FRED ROSE, COALITIONS ACROSS THE CLASS DIVIDE: LESSONS FROM THE LABOR, PEACE, AND ENVIRONMENTAL MOVEMENTS (2000); LINDA STOUT, BRIDGING THE CLASS DIVIDE: AND OTHER LESSONS FOR GRASSROOTS ORGANIZING (1996).

[175] For an argument that there is a class difference between the working-class and the professional middle class in this regard, see ROSE, *supra* note 173, at 67, 73 (contrasting middle class, which "teaches its children individualism and a focus on personal development to prepare them for professional work" and encourages internalization of a "striving to accomplish, so that personal self-worth depends on their ability to perform at work" with working class, for whom "[i]dentity comes from being accepted and known, so that stable friendships and work relationships are important. These relations with family members, peers in school and work, and neighbors tend to be inherited in working-class communities.")

[176] For an argument that the sense of "entitlement" is a trait of the middle class that the working class and working poor typically do not share, see CROTEAU, *supra* note 173, at 140-42, citing Robert Coles, *Entitlement*, ATLANTIC 52 (Sept 1977); MARK KAHN, MIDDLE CLASS RADICALISM IN SANTA MONICA 279-80 (1986).

[177] David Croteau contends that professional middle class activists tend to assume – incorrectly – that working-class people lack not just education and information about

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as acquiescence to the status quo flow not from ignorance, but from a pragmatic calculation, grounded in part in one's economic circumstances, of the likelihood of defeat and/or the ability to withstand retaliation?[178] To put these and other questions on lawyers' agendas for inquiry, the cross-cultural lawyering literature needs to focus more concentrated attention on socioeconomic class and the cultural differences it may engender.

B. Addressing the Latest Research on the Social Cognition of Bias

Each of the clinical textbooks on interviewing and counseling discussed above caution against the danger of stereotyping, which they implicitly treat as an issue of what we choose to believe about groups of "others."[179] Neither these texts, nor the cross-cultural lawyering literature generally, have, however, fully explored the burgeoning research of cognitive scientists on "the social cognition of bias."[180] That research has begun to document the extent and influence of "implicit" (or "automatic") biases in how we feel about, think about, and treat members of other groups (as well as our own groups) – biases which our minds deploy without our even being conscious or aware.[181]

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social problems, but even awareness of such problems. CROTEAU, *supra* note 173, at 148-60.

[178] I have argued as much. *See* Piomelli, *Foucault's Approach to Power*, *supra* note 6, at 472-73.

[179] For example, *Lawyers as Counselors*, in noting the risks of stereotyping in efforts to bridge cross-cultural differences, characterizes stereotypes as assumptions "that you may make" about others. *See* BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5, at 33. *Essential Lawyering Skills* discusses stereotyping as the application of oversimplified and exaggerated cultural characteristics to all members of a group; it casts "showing respect for a culture" by trying to understand it in all its complexity as the opposite of stereotyping. *See* KRIEGER & NEUMANN, ESSENTIAL LAWYERING SKILLS II, *supra* note 5, at 52-53. *The Counselor-at-Law* characterizes stereotyping as "attributing group preferences to individuals." *See* COCHRAN ET AL., THE COUNSELOR-AT-LAW, *supra* note 5, at 217.

[180] Carwina Weng has advocated for teaching basic cognitive psychology to students (to reassure them that they need not feel defensive about having stereotypes) and discussed the prevalence of mental schemas (or scripts) and their often unconscious application. *See* Weng, *supra* note 3, at 391-96. However she has not extensively discussed the experimental research described *infra* at notes 181-202 and accompanying text.

[181] For introductions to and summaries of the field, see ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE (1999); GORDON B. MOSKOWITZ, SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS (2004). Kunda defines automatic processes as those that occur outside awareness, without intention, uncontrollably once begun, and require few cognitive resources (so that people can be thinking about or doing other things simultaneously). *See* KUNDA, *supra*, at 256. She notes that many cognitive processes are "automatic in some regards but controllable in others." *Id*. at 257.

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Legal academics Jerry Kang[182] and Gary Blasi[183] have reported extensively on the latest cognitive research on bias.[184] This literature often distinguishes between two forms of bias: stereotypes, which are beliefs about or traits associated with a social category, and prejudice, which is an attitude or feeling (negative or positive) toward a group.[185] Kang has largely directed his work at how one might craft policy in light of the research;[186] Blasi has focused more on how one might best advocate against stereotypes that *others* hold.[187] Neither have focused as intently as the cross-cultural lawyer must on what the research might tell us about how to renounce or work around the biases that we ourselves may hold so that we can interact effectively with clients across dimensions of difference.[188]

The social cognition literature on bias warrants detailed exploration. Using a variety of experimental methods, cognitive scientists have

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[182] *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005). *See also* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV 1130, 1138-46 (2000); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action'"*, 94 CALIF. L. REV. (2006) (forthcoming). For one of the earliest discussions of social cognition research in the legal literature, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-1217 (1995). For an earlier argument, based in Freudian psychology, on the unconsciousness of much modern racism, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[183] Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002)

[184] *See also* Symposium, *Behavioral Realism in Law: Implicit Cognition and Social Justice*, 94 CALIF. L. REV. (2006) (forthcoming).

[185] *See*, *e.g*., Kang, *Trojan Horses of Race*, *supra* note 181, at 1500; MOSKOWITZ, *supra* note 180, at 444.

[186] Thus in *Trojan Horses of Race*, *supra* note 181, Kang argued that the FCC should not use hours of local news coverage as an indicator of a broadcaster's operation in the public interest, because local news' coverage of crime stories fuels implicit bias against Blacks and Latinos. *See also id.* at 1536-37 outlining areas of law that might be informed and revised by social cognition research. In *Fair Measures*, *supra* note 181, Kang and his co-author deploy the research findings on implicit social cognition to reframe affirmative action as a response to current, not just past, discrimination.

[187] *See* Blasi, *supra* note 182.

[188] Jody Armour (also focusing on how to reach others) has argued that conscious or controlled processes are "the key to escaping unconscious discrimination" by activating non-prejudiced or egalitarian personal beliefs. *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF L. REV 733, 738 (1995). Kang has also begun to address "debiasing" techniques. *See* Kang & Banaji, *supra* note 181.

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exposed a significant divergence between our reports – to others and to ourselves – of our attitudes toward outsiders and the subconscious operations of our minds. Perhaps the best known of these experimental devices is the Implicit Association Test (IAT), which measures implicit attitudes toward or associations with a range of social categories.[189] The IAT, which is available online,[190] and highly worth the time to take, reveals widespread implicit bias against many social groups, including the elderly, Blacks, Latinos, Asians, Arab-Muslims, gays and lesbians.[191] Those findings of implicit or automatic bias often conflict with the self-reported attitudes and beliefs of the test-takers.[192] Indeed, results sometimes reveal implicit bias against groups to which subjects themselves belong.[193]

Experiments reveal powerful impacts of implicit bias on how we interpret or evaluate others, how we interact with others, and how we ourselves perform. I hope that sharing a few of the most intriguing results will suffice to encourage lawyers and theorists interested in cross-cultural interactions to explore the literature in greater depth. For example, people who solve puzzles with a few words that sub-consciously evoke concepts linked with the elderly walk more slowly after the testing.[194] People subliminally shown black faces before a computer crashes get angrier at the crash than those subliminally shown white faces.[195] Asian women subconsciously primed to emphasize their Asian identity do better on a hard math test, and those primed to focus on their female identity do

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[189] *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998). For a concise explanation in the legal literature of the IAT, see Michael S. Shin, *Comment: Redressing Wounds: Finding a Legal Framework to Remedy Racial Disparities in Medical Care*, 90 CALIF. L. REV. 2047, 2066-68 (2002)

[190] *See* https://implicit.harvard.edu/implicit/demo/measureyourattitudes.html (last visited May 1, 2006).

[191] *See* Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146-47 (2004), cited in Kang, *Trojan Horses of Race*, *supra* note 181, at 1512 n.104; Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U.L. REV. 155, 238 n.418 (2005).

[192] *See* Kang, *Trojan Horses of Race*, *supra* note 181, at 1512-13.

[193] For example, approximately half of Blacks show anti-Black bias on the IAT. *See* Kang & Banaji, *supra* note 181.

[194] *See* Blasi, *supra* note 182, at 1247-48, citing John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 236-38 (1996).

[195] *See* Blasi, *supra* note 182, at 1248; Kang, *Trojan Horses of Race*, *supra* note 181, at 1491, citing Bargh et al., *supra* note 193, at 238-39.

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worse, than those who receive neither priming.[196] African-Americans told that a challenging test they are taking is ability diagnostic do significantly worse than equally talented White students, a performance drop that disappears when the test is described as a nondiagnostic problem-solving exercise.[197] Studies also seem to show that implicit bias (identified, for example, by the IAT) may often "leak out," particularly into non-verbal aspects of interactions.[198] Kang likens the pervasive, subconscious operation of biases to a Trojan Horse computer virus that operates surreptitiously, without the user's knowledge, to alter operations in ways that the user would reject if she were aware of them.[199]

To be sure, studies do show that these automatic processes can potentially be over-ridden – if a person has the appropriate awareness, motivation, and ability to do so.[200] But researchers stress how difficult it can be to achieve and maintain all three of these prerequisites.[201] A number of experiments also indicate there is a strong possibility of a rebound effect, in which a short-term suppression or rejection of stereotyping leads to *more* stereotyping later.[202] Other research indicates that our emotional state and level of self-esteem plays a significant role in the likelihood of applying negative stereotypes.[203]

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[196] *See* Blasi, *supra* note 182, at 1249; Kang, *Trojan Horses of Race, supra* note 181, at 1492-93, each citing Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 J. PSYCHOL. SCI. 80 (1999).

[197] *See* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (June 1997); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995). For a particularly accessible summary by Steele of his and his colleagues' work on "stereotype threat," *see* Claude M. Steele, *Expert Report of Claude M. Steele*, 5 MICH. J. RACE & L. 439 (1999) (expert testimony in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bolinger*, 539 U.S. 306 (2003)).

[198] *See*, *e.g*., Kang, *Trojan Horses of Race*, *supra* note 181, at 1523-25; Kang & Banaji, *supra* note 181. *See also* MOSKOWITZ, *supra* note 180, at 450.

[199] *See* Kang, *Trojan Horses of Race*, *supra* note 172, at 1554.

[200] *See*, *e.g*., Blasi, *supra* note 182, at 1252-54; Kang, *Trojan Horses of* Race, *supra* note 172, at 1529-30; MOSKOWITZ, *supra* note 180, at 493.

[201] *See*, *e.g*., Blasi, *supra* note 182, at 1253, citing John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effect*, *in* DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY 361, 376 (Shelly Chaiken & Yaacov Trope eds. 1999); Kang, *Trojan Horses of* Race, *supra* note 181, at 1529-31.

[202] *See*, *e.g*., Blasi, *supra* note 182, at 1253-54; Kang, *Trojan Horses of Race*, *supra* note 181, at 1530 n.213; KUNDA, *supra* note 180, at 343-46; MOSKOWITZ, *supra* note 180, at 499-501.

[203] *See*, *e.g*., Blasi, *supra* note 182, at 1250-52; KUNDA, *supra* note 180, at 259-62.

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The literature on cross-cultural lawyering would do well to address in depth this research on social cognition and implicit bias. Can cross-cultural theorists' emphasis on introspection and cultural self-awareness be reconciled with cognitive scientists' findings on the automatic nature of much stereotyping? Are lawyering theorists' suggestions for cross-cultural competency consistent with social cognitionists' findings on debiasing strategies? The answers to these questions deserve explicit, detailed attention.

CONCLUSION

The one-size-fits-all, culture-blind approach to teaching interviewing and counseling is thankfully now a relic of the past. Although I have criticized aspects of the new edition of *Lawyers as Counselors*'[204] approach to the issue, I appreciate that at it has tackled the subject and I recognize the difficulty of the task. I have sought to highlight two lesser-known texts, *Essential Lawyering Skills*[205] and *The Counselor-at-Law*,[206] that have materially advanced the cause. These texts, and the larger clinical literature on cross-cultural lawyering, have in the past decade improved significantly the odds that lawyers will recognize such issues and be equipped to address them.

To be sure there is more work to be done. I hope we will make comparable advances in preparing lawyers to explore potentially class-linked cross-cultural issues and to understand the insights that social cognition research sheds on the operation and overcoming of bias.

To make good on any of these cross-cultural aspirations, texts and articles cannot be read as recipes for how to understand and manage others adeptly. They must be read, and their suggestions internalized, as a fundamental commitment to learn with and from others about how we might connect effectively to change our world. For cross-cultural competence is not about cataloguing what we think we already know about ourselves and others, so much as it is about emphasizing what we still and always must learn.

[204] BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 5.

[205] KRIEGER & NEUMANN, ESSENTIAL LAWYERING SKILLS II, *supra* note 5.

[206] COCHRAN ET AL., THE COUNSELOR-AT-LAW, *supra* note 5.

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