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Trying Differently: A Relationship-Centered Approach to Representing Clients With Cognitive Challenges

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Representing Clients with Cognitive Challenges

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Abstract

This article demonstrates the usefulness of an innovative framework called “Relationship-Centered Lawyering” to enhancing real world legal practice. It uses the example of lawyers, particularly criminal defense lawyers, who often deal with clients with cognitive challenges. The article developed out of a series of workshops conducted jointly by the co-authors, an American law professor with a social work background, and a Canadian criminal defense lawyer and family mediator who is an international expert on Fetal Alcohol Spectrum Disorder and other Neuro-Behavioral Disorders (FA/NB). The paper describes the relational theory Brooks developed (along with Robert Madden), along with the science of cognitive impairments, with a specific focus on FA/NB. The paper provides two illustrations of the relational framework by explaining Boulding’s strategy of creating what is called the “external brain” and his techniques of relational interviewing.

Introduction

A YOUNG DEFENSE LAWYER made her first appearance in criminal court in Melbourne, Australia on a summer’s day. Her client was about 35, male, and dressed in clean work clothes. He accompanied her to counsel table and stood by her as the Senior Police Sergeant read the facts.¹ The busy courtroom had a good laugh several times as the prosecutor advised the judge about what happened. A guilty plea was entered.

The lawyer sat down, then reached over and tugged at the sleeve of her client, who then also sat down. The prosecutor obviously had seen this fellow many times before, and he had recited his standard submissions. The judge was 60 plus years old, calm, polite, and her countenance was probably most of the reason many counsel were pleading guilty in her court this morning.

The terse prosecutor indicated he was seeking 30 days for the same reasons he always did.

¹ In Australia, the police handle the presentations work in the lower courts.

The young lawyer stood, adjusted her suit and began to advise the court of her client's circumstances. She was interrupted three times by the judge who asked: "Isn't there something else you want to tell me?"

The young lawyer obviously had a checklist. Puzzled, she consulted her notes, straightened her shoulders, and continued. Finally the judge stopped her and asked "Do you have any expert or medical reports"?

The lawyer was baffled as it was a simple crime. Her client presented in court as if he were a first time offender. He had done something stupid as if he were drunk--except that he did not drink and had a long record for doing this and other seemingly stupid offenses--all guilty pleas—all hallmarks of cognitively challenged clients.

Finally the young lawyer said she did not think Legal Aid paid for experts and sat down.

The sentence was 7 days.

This scenario could have taken place in almost any courtroom any place on the globe. It illustrates a number of issues about what is lacking in our current legal system. These issues are apparent at the macro-level, in terms of how the legal system responds to clients with cognitive challenges, regardless of whether those challenges result from trauma or developmental disabilities. The same issues also present themselves at the micro-level, in terms of the difficulties inherent in representing these clients from the attorney's standpoint.

The good news is that today many lawyers as well as judges and others working in the legal system are interested in finding creative and innovative ways of addressing these difficulties. Further, there is a wealth of knowledge that can inform this work,

particularly knowledge from other social science disciplines such as social work and psychology. A number of scholarly movements have emerged over the past two decades that have introduced many of these ideas to legal professionals. These movements include Therapeutic Jurisprudence, Preventive Law, Restorative Justice, and Transformative Mediation. Professor Susan Daicoff refers to these movements as “vectors” of the Comprehensive Law Movement.² Such approaches share the view that lawyers can be agents of positive change if they take a holistic approach to the individuals involved in legal matters, including a commitment to focusing on extra-legal concerns, including individual, family, and community well being.³

In addition to influencing practitioners and judges, this focus on importing knowledge from the social sciences has also affected legal education through the Humanizing Legal Education (“HLE”) movement,⁴ partly in recognition that changing the legal culture needs to begin with examining how we educate emerging legal professionals. Moreover, the recent and well-publicized Carnegie⁵ and Best Practices⁶ Reports have highlighted the need to educate lawyers differently, and, specifically, have

² Susan Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. L. REV. 1 (2006). The completed list of vectors includes collaborative law, creative problem solving, holistic justice, preventive law, problem solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation. These approaches tend to be interdisciplinary and to rely upon social science research to a large extent.

³ *Id.* at 5.

⁴ A handful of law professors in the U.S, along with the institutions in which they teach, are taking a leading role in this initiative, along with a handful of law professors. *See, e.g.*, http://www.law.fsu.edu/academic_programs/humanizing_lawschool/humanizing_lawschool.html (Professor Larry Krieger, and the Florida State University College of Law web site, last visited on December 4, 2009); <http://www.washburnlaw.edu/humanizinglegaleducation/> (Professor Michael Hunter Schwartz, and the Washburn University School of Law);

⁵ WILLIAM M. SULLIVAN, ET AL. EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 1 (2007) [hereinafter CARNEGIE REPORT].

⁶ ROY T. STUCKEY, ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 1 (2007) [hereinafter BEST PRACTICES REPORT].

identified the need to develop a “science of professionalism” to elevate the importance of helping future lawyers to develop their “professional identity and values.”

These important publications amplify the need to develop a framework for organizing this wealth of knowledge and presenting it in ways that are useful to a wide range of individuals working in the legal system. Susan Brooks and Robert Madden, both credentialed in the fields of social work and law, have articulated such a framework, which they refer to as “Relationship-Centered Lawyering.”⁷ Their relational framework identifies three areas of competency needed by all lawyers: (1) *substantive social science perspectives* representing ‘contextualized’ approaches to human development; (2) *process-oriented perspectives* focusing on justice as well as effectiveness; and (3) *affective and interpersonal perspectives* including cultural competence and emotional intelligence. Relationship-centeredness builds upon and enhances the Comprehensive Law Movement approaches by adopting a normative framework drawn principally from the mental health fields that focuses on understanding and relating to the client ‘in context’--with a narrative that goes beyond the legal controversy and includes the many people and systems with which the client interacts. The relational model also incorporates a focus on legal process, as well as considerations related to culture and other interpersonal and affective matters.

This article demonstrates the usefulness of this framework to enhancing real world legal practice. It uses the example of lawyers, particularly criminal defense lawyers, who often deal with clients with cognitive challenges. The article developed out

⁷ RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE 1 (Susan I. Brooks & Robert G. Madden, eds.) (2010); *See also*, Susan L. Brooks & Robert G. Madden, *Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice*, 78 REV. JUR. U.P.R. 23 (2009). Significant portions of this article describing their approach and its foundations have been taken from these publications.

of a series of workshops conducted jointly by the co-authors. Susan Brooks is an American law professor with a background in social work who directed a legal clinic for many years focusing on the representation of children and families in the child welfare system. She currently serves as an associate dean of a law school developing and overseeing experiential and public service aspects of the curriculum. David Boulding is a Canadian lawyer and mediator in private practice who has worked in the areas of criminal defense and family law, and is an international expert on Fetal Alcohol Spectrum Disorder and other Neuro-Behavioral Disorders (FA/NB). Professor Brooks describes the relational theory she developed (along with Robert Madden), while Mr. Boulding explains the science of cognitive impairments, with a specific focus on FA/NB. The co-authors then provide two illustrations of the relational framework by explaining Mr. Boulding's strategy of creating what is called the "external brain"⁸ and his techniques of relational interviewing. Part I of the article provides a brief overview of the Relationship-Centered framework. Part II explains the current state of knowledge about individuals with cognitive challenges. It makes the case for the prevalence of FA/NB among this population. Part III then applies the framework to offer concrete guidance for legal representation of individuals with FA/NB at both the macro and micro levels.⁹ At the macro level, it focuses on strategies for creating an external brain to assist clients with

⁸ This term needs to be understood using the scientific paradigm within which it was created, which is about *identification* and not about *labeling*. Dr. Sterling Clarren, who developed this idea, wanted to communicate that to be effective in working with clients with FA/NB, the focus cannot be on changing *them*, as we generally expect of our criminal clients. Instead, it is we who must change—we must reconfigure the world around our clients, meaning the families, friends, and helping professionals in their lives—to replace the brain cells that the clients lack through no fault of their own. Indeed, the whole notion of external brain is intended to be descriptive of what 'is' rather than evaluative or judgmental. It is only when we move away from blaming and judging that we will truly be able to face and to address FASD in an effective manner. See text accompanying notes 55-56; 72-73 *infra*.

⁹ As will be discussed, to the extent this representation relates to criminal cases, this approach, and the specific guidance offered at the macro-level (referred to here as setting up the "external brain") focuses on the sentencing or dispositional phase of the case. At the micro-level, the guidance about interviewing techniques applies to all phases and aspects of client representation.

cognitive challenges. The micro-level example focuses on interviewing and offers specific techniques to enhance the representation of this client population, and perhaps other clients as well. Part IV demonstrates how putting relationship-centered lawyering into practice can make a positive difference in the lives of clients and lawyers, and can lead to better outcomes.

I. Overview of Relationship-Centered Lawyering

A. The Need for a Relational Approach to the Practice of Law

For years social workers and other mental health professionals have known what many lawyers fail to appreciate—that is, you need to start by “meeting the client where the client is”.¹⁰ This phrase means that, in order to be effective in providing assistance, from the outset the helping professional needs to learn about the contexts in which the client exists. In fairness, it must be stated that unlike social workers, most lawyers have never been taught the theory behind this idea. Even law students in clinical programs, who are more likely to appreciate the importance of the client’s contexts, generally lack a theoretical base from which to build and develop such an understanding. As has been well-documented elsewhere, the conventional, traditional approaches to both legal education and practice have tended to emphasize the importance of the analysis and application of legal rules and precedents over all else.¹¹ This narrowness of focus is reinforced and in many ways compounded by the reigning structure and processes within

¹⁰ See, e.g., KAREN K. KIRST-ASHMAN AND GRAFTON H. HULL, JR., UNDERSTANDING GENERALIST PRACTICE 138-142 (Fourth Edition 2006) (describing importance of initial engagement process, including the importance of attending to the client effectively from the outset of the relationship); COMPTON, ET AL., SOCIAL WORK PROCESSES 72-74 (Seventh Edition 2005) (“[e]arly during the engagement phase, social workers encourage applicants to describe and discuss the problem of concern in their own words and in their own ways.”).

¹¹ See, e.g., CARNEGIE REPORT, note 5 *supra*; BEST PRACTICES REPORT, note 6 *supra*.

the adversarial system, which tend to reduce clients' lives to "cases" confined to *legally relevant* facts and issues, and, ultimately, a narrow focus on results.

Over the past twenty years, legal professionals across a wide spectrum—including academics, practitioners, and judges, have begun to recognize the need for the legal system and those who work in it to take account of knowledge drawn from the social sciences. The interests that have driven this work are also broad-based—from criminal lawyers concerned about their clients' mental states, to judges convinced that non-adversarial processes might better serve individuals with substance abuse issues, to legal educators believing that humanizing the culture within law schools might better inculcate the values of caring and compassion within the profession.

These concerns have sparked a series of movements representing perspectives and practice approaches that draw lessons from empirical research within the social sciences and aim toward the goal of more holistic and humanistic client representation.

Therapeutic Jurisprudence ("TJ"), described as the study of law as a therapeutic agent,¹² epitomizes these efforts, and has come to symbolize this new orientation. TJ has been described as a "lens" on the law that embraces the use of social science expertise as a basis of critique and possible reform. Susan Daicoff has described a number of these movements as 'vectors' in a larger phenomenon she called the "Comprehensive Law Movement."¹³

Therapeutic Jurisprudence, similar to the other perspectives and practice approaches described by Daicoff, does not adopt any particular normative framework within the social sciences. The movement's co-founders, Professors David Wexler and

¹² See David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL., PUB. POL'Y & L 220 (1995); ESSAYS IN THERAPEUTIC JURISPRUDENCE 1 (David B. Wexler & J. Winick, eds. 1991).

¹³ See Susan Daicoff, note 2 *supra*.

Bruce Winick, continue to maintain an inclusive and open-ended posture toward the use of social science as a means of critiquing the law.¹⁴

In the past few years, however, several key developments have paved the way for, and in many ways have spurred the need to articulate an approach that embraces a specific normative framework, while still attending to other important dimensions, such as just and fair process, and interpersonal and cultural concerns. These developments include the Humanizing Legal Education (“HLE”) movement, as well as two important and influential publications that came out nearly simultaneously within the past three years—the Carnegie and Best Practices Reports.

While legal scholars have long offered numerous critiques of legal education, much of the recent criticism has coalesced around the need to create a more humanistic culture within law schools. Professor Barbara Glesner Fines, a leading voice in this movement, describes three components: (1) eliminating or minimizing unnecessary stressors; (2) assisting students in becoming “confident, caring, reflective professionals;” and (3) aiming toward humanizing the profession by recapturing the essential professional values of peacemaking, problem-solving and justice work.¹⁵ The HLE movement has quickly grown in popularity within the legal academy to the point that in

¹⁴ This open-ended and inclusive stance has invited criticism of the TJ movement as being vague and amorphous. See Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y & L 193 (1995). It has also perhaps contributed to the persistent concern that pursuit of TJ will inevitably undermine the essential values of due process and fairness. For additional information about Therapeutic Jurisprudence, including a detailed bibliography, see www.therapeuticjurisprudence.org (last visited on December 4, 2009).

¹⁵ Barbara Glesner Fines, *Fundamental Principles and Challenges of Humanizing Legal Education*, cited by Michael Hunter Schwartz, *An Introduction to a Symposium Whose Time Came*, 47 Washburn L.J. 2, 239-240. Other leading voices include Professors Michael Hunter Schwartz, Gerry Hess, Larry Krieger, Bob Schuwerk, Susan Daicoff, Marjorie Silver, and Bruce Winick.

2006 the Association for American Law Schools (“AALS”) established a new section focused on “Balance in Legal Education.”¹⁶

The HLE movement has gained added momentum because of the Carnegie and Best Practices Reports, both of which were published in 2007. These highly publicized reports have instantly become a call to action by law schools that reinforces the concerns raised by the proponents of this movement. Accordingly, the reports focus on the extent to which legal education has not given sufficient attention or emphasis to the inculcation of a professional identity and values among law students. The Carnegie Report specifically calls for law schools to consider the need for a ‘science of professionalism.’ The Best Practices Report similarly focuses on the need for law schools to teach students how to understand clients and legal issues *in context*.

Taken together, these reports invite legal educators and practitioners to consider normative theories that reflect contextualized approaches to human development, as well as other considerations essential to the development of a professional identity and values. Such considerations should include extra-legal issues that are interpersonal and/or cultural.

Relationship-centered lawyering offers an organized three-part framework that supplies the necessary scientific grounding to address these concerns, and can also be easily translated into concrete applications that can be useful to real lawyers facing day-to-day challenges.

The three components, or as Brooks & Madden refer to them, areas of competency, include: (a) substantive theory, (b) process-oriented considerations, and (c) interpersonal and cultural considerations.

¹⁶ See http://www.aals.org/services_sections_ble.php (last visited on December 4, 2009).

1. Substantive Theory-Contextualized Approaches to Human Development

Perhaps the most fundamental question for the social sciences is: what makes people act as they do? Although many Western legal systems, particularly the American legal system, stress individualism, in reality all of us live our lives as a part of many systems. Immediate and extended families, neighbors, networks of friends, and work colleagues, are examples of social systems that provide each of us with support, resources, and identity. When faced with stress or when changes to membership occur in a system, each member of that system must adapt. In addition, what occurs to individual members has a ripple effect on the larger systems to which they belong. These approaches explain why legal professionals need to consider the context and environment in order to understand individual clients and to improve their decisions and strategies.

Such theory incorporates family systems theory, human development, attachment theory, as well as network theory, which is a recent effort to bridge the gaps in these complementary approaches. All of these theoretical approaches are interconnected and build upon each other in significant ways. These theories are also normative in that they pertain to all individuals and families across a wide range of circumstances. Most importantly perhaps, all of these approaches focus on interdependency in human relationships.

A basic understanding of these important social science perspectives is not only valuable to individual client representation and other types of direct legal services. It is also valuable from the standpoint of legal policy development and law reform. Although law generally can be viewed as a set of rules governing the relationships of people in a society, there is much more substance to the law than a codification of morals and values.

Law is deeply embedded in and reflective of its own context--the culture in which it is situated. As a result, the social sciences are essential to our understanding of the creation and construction of the law. By focusing on systems, lawyers can gain insight into the social context of the case and will be more likely to act in ways that are relevant to a client's experience.

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

2. Process-Oriented Considerations-Fairness, Justice, and ADR

The second competency area explores the skills that are necessary to provide clients with a sense of trust and respect for the law and its actors, as well as the underlying values that guide the analysis of issues and decision making. A foundational element of the family systems perspective is the idea that a legal system, specifically lawyers and judges, should act in ways that increase clients' views that they were treated fairly. For non-lawyers who "participate" in (or are subjected to) the legal system, knowledge of the law and legal procedures is insufficient to ensure effective functioning of the legal system. Social science researchers have studied the relationship between fairness in legal proceedings and the resulting trust in legal authorities. This important research calls into question the efficacy of many parts of the judicial system. Social science researchers offer the opportunity to evaluate legal policy based on empirical studies of human motivation and behavior as well.

Communication plays an important role in the development of trust in legal authorities and procedures. It is important to consider how the communication between

legal professionals and clients influences clients' perceptions of fairness. One perspective is that the sense of being treated fairly is largely dependent on processes in which clients are fully informed in accessible language about the procedures and criteria for legal decisions, and are shown respect in the way they are treated by the legal professionals.

An understanding of theory may assist lawyers to be less judgmental of their clients. The responses to many client actions may be blame, anger, or pity. What the literature suggests, however, is the need for lawyers to focus on strengths and capabilities, to reinforce the client's sense of competency, and to provide the client with hope where possible. Obviously, some of these responses are dependent on the circumstance, as many legal roles are not conducive to all of these responses. However, many lawyer/client relationships can thrive and be the source of changing narratives about self and the future.

3. Interpersonal and Cultural Considerations

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

The first of the affective and interpersonal perspectives is culture. “Cultural competence” has become a term of art in the helping professions, and has engendered much discussion as to its legitimacy. Many argue that true cultural competence is not possible. Every person with whom we interact has had a unique experience of culture because ethnic, racial, group, gender, socioeconomic, or other primary contextual aspects of that person’s life have shaped how culture is interpreted. Family-specific experiences also factor into such issues as which values and communication styles are favored. Cultural competence is never a state that a professional actually reaches; rather, it is a career long process of recognizing difference, withholding judgments about the difference, being open to learning, and being able to adjust our communication and other aspects of interaction so that we are more culturally connected to our clients. Cultural competence is as much about how one’s communication is received as it is about how it is intended.

An important component of the struggle for improved cultural understanding is the concept of “racial microaggression”: day-to-day verbal, behavioral, or environmental indignities, which may be intentional or unintentional, which nonetheless communicate racial slights or insults toward people of color.¹⁷ Microaggressions can occur at times without intention and sometimes without knowledge on the part of the privileged person that anything untoward has occurred. Additionally, microaggressions can be experienced without certainty on the part of the person receiving the communication that it was done with bad intent. It is worthwhile to consider the ways lawyers and judges may become

¹⁷ Peggy C. Davis, *Law as Microaggression*. 98 YALE L. J. 1557 (1988-1989); *See also*, Derald W. Sue et al., *Racial Microaggressions in Everyday Life*, 62 AM. PSYCHOLOGIST 271, 272-73 (2007).

sensitized to the subtleties of this form of cross-cultural communication. This groundbreaking work on cultural difference and its impact on helping relationships promises to open new channels of conversation and exploration about how we can better address issues of bridging cultural and racial differences in our work.

Cultural competence may also be linked to other critical perspectives, such as Therapeutic Jurisprudence, procedural justice, and ecological theory. Research supports the importance of inculcating greater cultural competency among helping professionals, as well as examining the legal education context. With respect to legal education, it is important to focus on institutional as well as individual change.

“Empowerment” and “Strengths” perspectives are two practice models that have become fundamental components of social work training and education. Despite the co-option of the term “empowerment” by many political factions, it remains meaningful as a way of referring to the examination of the power dynamics in client/professional relationships. As such, it refers to a set of specific skills and strategies to help keep clients in control of important decisions. Empowerment is also a philosophical stance and a set of beliefs that influence behavior, with the ultimate goal being authentic collaboration between professionals and clients. The connection between empowerment practice and social justice is clear and may be the most important argument for the legal community to transform practices accordingly. Empowerment strategies can enhance a client’s experience of the law as being procedurally just and fair.

The strengths perspective focuses on the notion that all people and environments have significant strengths that can be marshaled to improve the quality of clients’ lives. Other important aspects include the need to partner with clients to define their strengths,

and the notion that a consistent emphasis on strengths will improve the client's motivation to make changes tailored to his or her specific needs. This shift toward a deeper respect for a particular client's frame of reference is especially important in the context of practicing with diverse groups. As such, this approach is consonant with and reinforces both the cultural competence and empowerment perspectives.

Finally, there is the perspective of emotion. There has been an outpouring of scholarly exploration of this perspective within the legal field within the last twenty years. It began with an effort to educate law students and practitioners at a basic level about the impact of 'non-legal' emotional and psychological factors on their work with clients. This pioneering work used the rubric of 'emotional intelligence' to raise the collective conscience of the legal profession as to the critical nature of considering such factors, which often make or break a professional relationship, not to mention the success of the case at hand.

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

B. How Relationship-Centeredness Enhances Client Representation: the Next Generation of Legal Counseling

How do we develop the capacity of lawyers to think contextually about human relationships? Those who believe that it is the role of the lawyer to remain neutral and objective, to be unclouded and unaffected by emotional responses to clients and their situations, deny the reality of experience. Facts are always subjectively analyzed: affected by the values, cultural influences, emotions and the life experiences of the lawyer.

What is often missing is a way to make these realities apparent to lawyers. In the relationship-centered approach, lawyers engage in an iterative process applying social science theory to real life practice situations. The resulting practice decisions are theoretically and empirically informed and thus are more relevant to the actual needs and concerns of the client. The final step of this process is reflection on the outcomes of the case in order to apply this learning to the next practice experience. In this way, theory informs practice. However, practice can also inform theory by continuous testing and challenging of accepted notions and the application of new theoretical frameworks to better explain and understand practice phenomena.

It is also important to address some of the misconceptions about how lawyers should apply these concepts. The relationship-centered approach to lawyering does not require lawyers to work to enhance and sustain every relationship encountered in practice. Nor does it suggest that all interactions among legal professionals can or should be non-adversarial. Social science theory helps lawyers to appreciate the significance of negative relationships such as domestic violence or predatory employment and can help clients who seek assistance with these harmful associations. Similarly, the assessment of

power differentials, strongly held biases, racism, oppression, or other structural and ideological obstacles to change may recommend strategies that are higher on the conflict scale in order to achieve socially just results for a client or a population. In these examples, the nature of theory becomes clear. It is not prescriptive in the sense that it results in specific conclusions, but rather social science theory is *descriptive* of the social and psychological dynamics so that lawyers can analyze context, present options to clients, and use effective legal counseling skills to reach just and helpful outcomes.

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

An example of this contrast would be an attorney whose client is extremely angry toward the opposing party, perhaps one of two divorcing spouses. This client wants to litigate the divorce to the bitter end, regardless of the fact that the couple has two school-

aged children who are already upset about their parents' divorce. The parties come before the judge, who refers them to mediation and urges them to try to resolve as many issues as possible through mediation—at least for the sake of their children. Despite the judge's urging, a purely client-centered attorney might simply let the client go through the motions of the mediation without exerting any real effort if that is the client's inclination, and instead take the entire case to trial. Litigating the entire case, though, is almost certainly contrary to the children's best interests. It will also anger the judge and may well backfire on the client.

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

This example demonstrates that the old rubric simply does not go far enough in taking account of the wealth of knowledge our profession has gained since client-centeredness was first introduced.¹⁸ Relationship-centeredness is not merely a new

¹⁸ In Kruse's case, she ultimately uses the notion of "client autonomy" as a unifying principle to organize the disparate threads she has identified within the evolved client-centered model.

term—it reflects a comprehensive approach that reshapes and reframes lawyers’ perspectives on how best and most effectively to serve our clients. This approach not only has tremendous potential to improve attorney-client relationships at the micro-level. Relationship-centeredness can ultimately transform the professional culture of lawyers and their role in society. The relationship-centered approach provides the theory and skills to assess the client, the client’s systems, the context of the case, and many other factors that lead to enhanced client-centered practice.

II. The Science of Cognitive Impairments and Fetal Alcohol Spectrum Disorders and other Neuro-Behavioral Disorders (FA/NB)

A. Cognitive Challenges and the Criminal Justice System

Many, if not most, criminal clients have cognitive challenges.¹⁹ To any lawyer who works daily in criminal courts, the claim that our clients have cognitive challenges is not news. However, too many lawyers have failed to create positive life changes for our clients—beyond possibly ending up with a good deal on a sentence. This failure to contribute positively means that lawyers share some responsibility for the common cycle of repeated crime. Most lawyers enjoy the descriptor, “stupid crimes”²⁰, because it is accurate and reflects their daily experience. We are entertained by and keep our distance from such clients because we fail to see them as human, as our brother and sisters. We see them as things, rather than people like ourselves.²¹

One central difficulty is that the taxonomy of cognitive challenges is as elusive as what is defined as a “stupid crime”. Underlying this difficulty is the hidden reality that

¹⁹ Dennis Bolen, a Canadian parole officer, offers his seasoned opinion that most of the people he has encountered in the federal prison system have reduced cognitive abilities. *See* Dennis Bolen, *STUPID CRIMES 1* (1992). His novel is valuable reading telling the stories of our clients. It is a book only a senior experienced parole officer could write and one that most criminal practitioners recognize as true.

²⁰ *See id.*

²¹ *See* Peter Burger & Thomas Luckmann, *THE SOCIAL CONSTRUCTION OF REALITY* 89 (1972) (describing this phenomenon, which they call “reification”).

many if not most criminal clients with cognitive challenges are affected by Fetal Alcohol Spectrum Disorders and other Neuro-Behavioral Disorders (“FA/NB”). As discussed in detail below, the science linking cognitive challenges and FA/NB is well-developed. Yet, despite this undeniable scientific evidence, FA/NB is not formally recognized in the DSM-IV- TR, the widely recognized authority on mental health that has been adopted by the legal systems within the US and Canada.

Statutes, such as the Criminal Code of Canada (“Code”), are not helpful here either. A “mental disease” is notoriously hard to define according to the Code.²² It is easier to read the long list of human ailments that do *not* qualify a client for relief under the Code, than it is to specify the level of a cognitive challenge that must be present before the system acts differently.

The general failure of our legal institutions to take account of brain-based birth defects fits with other noted blind spots in many modern, Western societies--those we consider to be “civilized democracies”--that can be characterized in terms of the “haves” and “have nots.”²³ This response is not unlike the failure to acknowledge race or class or gender differences in terms of discrimination.²⁴ In part, the reason for this failure may be attributable to the lack of easy solutions for clients with cognitive challenges. As stated

²² Section two of the Code defines mental disorder as a disease of the mind. Section sixteen clarifies that Canada does not recognize a defense of “diminished responsibility.” *R. v. Chartrand*, 1 SCR 314 (1977). However, mental status may sometimes be inferred in the negative, meaning a lack of the specific intent required for a particular offense. For example, the mental status of the ‘accused’ may reduce murder to manslaughter. This is an offense-by-offense process in Canada. The ultimate assessment of whether the accused has “a disease of the mind” is a decision made by the trial judge. If the judge is knowledgeable about FA/NB, he or she may call it a disease of the mind or a mental disorder. The bottom line is that this determination is a question of expert evidence and the judge’s call. Even without formal recognition of FA/NB as a mental disorder, it goes without saying that the legal system would benefit greatly from judges and lawyers educating themselves about FA/NB.

²³ See Saul Alinsky, *RULES FOR RADICALS* 18 (1971).

²⁴ The documentary filmmaker Michael Moore has observed that few members of the US Congress have sons in Iraq, and equally few rich White people live in crack-infested ghettos and send their children to substandard schools. See *Fahrenheit 9/11* (2004).

by Diane Malbin, M.S.W., a renowned expert in FA/NB,²⁵ “if there is no solution, then there is no problem.” Her point is that FA/NB is either ignored, or completely misunderstood through an unworkable paradigm, because there is no pharmaceutical solution, no successful talk therapy, no amount of jail time, and no probation order that will re-grow brain cells. To change the criminal behavior of people with cognitive challenges, *we* must act differently rather than expecting our clients to be capable of doing so.

This is not to suggest that having FA/NB should be a ‘get out of jail free’ card, or that it should exculpate a criminal defendant at trial. FA/NB is not an excuse: it is an explanation for behavior. The focus for reform here is not on the adjudication of ‘guilt’ or ‘innocence’—rather it is on the dispositional or sentencing phase. For example, Justice David Vickers of the British Columbia Supreme Court identified the correct path in a case he heard in 1990.²⁶ He sent the defendant to jail for four months for robbery. Then, the Judge showed up to the defendant’s release planning committee meeting, which was held at the penitentiary, and refused to leave until all of the twenty or so professionals from about as many different agencies came up with a plan to prevent the defendant from committing further crime.²⁷ The Supreme Court Justice insisted on supervision twenty four (24) hours a day, seven days a week, as well as housing, and emotional and community support. He knew from personal experience that the defendant did not grow new brain cells while in jail, and used the power and prestige of his judicial

²⁵ See text accompanying notes 74-77 *infra*.

²⁶ *R. v. Victor Williams*, B.C.J. no 3160, British Columbia Supreme Court (November 24, 1994).

²⁷ This is the kind of planning that can also be called creating the “external brain.” See text accompanying notes 72-81 *infra*. See also *Talking with Victor* (demonstrating the external brain by showing a judge who orders a group of professionals to stand in for the defendant’s ‘missing brain cells’), available at www.asantecentre.org (last visited on December 4, 2009).

office to ensure that the defendant's incarceration would be more than simply a roadside motel in the defendant's life.

Another more recent example of a court that got it right is His Honor Heino Lilles, a judge in the northern part of Canada called the Yukon, who had the courage to reject the conclusions of a medical "expert" who refused to accept that the defendant had FASD, despite an exhaustive assessment conducted by a multi-disciplinary team.

Although a decision of Canada's 'lowest' court, it is noteworthy because the judge specifically found that the defendant was suffering from a mental disorder (i.e., fetal alcohol spectrum disorder)--one that until recently has been ignored by Canadian courts. Given the important milestone this case represents, it is unsurprising that this same judge hosted a national conference on FASD in Whitehorse, Yukon, Canada, in 2008, at which Mr. Boulding was a presenter. The conference was unique in that the attendance was restricted to decision makers at the highest levels of government, and it produced an important and influential report. Two years later, the report from that Whitehorse FASD conference has brought about what may be the most remarkable and significant development to date. Just as this paper is going to press, the Canadian Bar Association (CBA) has passed a resolution entitled *Fetal Alcohol Spectrum Disorder in the Criminal Justice System*. The resolution states, in pertinent part:

Be it resolved that the Canadian Bar Association:

1. support the initiative of Federal, Provincial and Territorial Ministers responsible for Justice with respect to access to justice for people with FASD and urge all levels of government to allocated additional resources for alternatives to the current practice of criminalizing individuals with FASD;

2. urge the federal, territorial and provincial governments to develop policies designed to assist and enhance the lives of those with FASD and to prevent persistent over-representation of FASD affected individuals in the criminal justice system; and
3. urge the federal government to amend criminal sentencing laws to accommodate the disability of those with FASD.²⁸

B. The Scientific Link between Cognitive Challenges and FA/NB

Despite individual success stories, and even promising developments such as the CBA Resolution, cognitive challenges sadly are defined by most professionals--including judges, policy makers, doctors, and school systems--by IQ tests--with 70 points being the magical cut-off point.

This outmoded cranial science which emerged in the 1950's, uses IQ testing as the baseline to define "others" whose brains are different.²⁹ A number says it all. A cut-off point arbitrarily at 70 has established a point for funding--69 and you are considered "retarded" and are entitled to government money, special schools and other benefits. Whenever a person is reduced to a number, there are powerfully insidious forces at work disconnecting the powerful from the powerless.³⁰

²⁸ The case referred to here is *R. v. Jason Harper*, YKTC 18 (2009). In the face of all the evidence to the contrary, the doctor had found that the defendant "was not suffering from a mental disorder...." Judge Lilles responded by pointing out that terms such as "mental disorder" are legal concepts that must be decided by the trial judge rather than the medical practitioner. *See Id.*; *See also*, Criminal Code of Canada, Sections 2 & 16. The conference report is called THE PATH TO JUSTICE, and is available at: http://www.justice.gov.yk.ca/pdf/Path_to_Justice_Conference_Final_Report_FINAL_Eng.pdf (last visited on 8/25/2010). The CBA resolution is available at: <http://www.cba.org/CBA/resolutions/pdf/10-02-A.pdf> (last visited on 8/25/10).

²⁹ This "othering" is simply another way of reifying, or making people into inferior objects. *See Burger & Luckmann, supra* note 23, at 89.

See id. Once we de-personalize those who are different, we can distance them from ourselves, which allows us to disconnect from them. Thus depersonalized and disconnected from our clients, we cease to be relational. The phenomenon of "othering" is commonly seen in wartime situations in which the enemy is de-humanized. Yet, othering is also common among those who work in the criminal justice system.

³⁰ Michel Foucault, *Discipline and Punishment: The Birth of the Prison* (Second Edition 1995).

Nevertheless, highly respected experts, including psychologists such as Dr. Diane L. Russell, have for decades chosen to focus instead on “adaptive functioning” as a way of differentiating among brains.³¹ Dr. Russell has long maintained that using IQ as a tool to help people is too simple and does not assist professionals to make good decisions with these individuals. She defines adaptive functioning as “an individual’s ability to effectively meet social and community expectations from establishing personal independence, maintaining physical needs, conforming to social norms, and sustaining personal relationships “. ³² Dr. Russell further explains that:

[c]ompetence in areas of functional independence is expected to change with age and /or developmental stage. Adaptive behavior changes can occur at all stages from early life to adulthood. For example, in early life, the main focus is on mastering maturational skills (e.g., talking, walking, toileting, etc.) The focus then shifts in early childhood to learning academic skills and concepts. In late adolescence and early adulthood, the focus is on making personal, social and vocational adjustments. An individual’s performance must always be considered within the context of the environments and social expectations that affect his or her functioning.³³

Dr. Russell is one of several pioneers who have researched and written about the important link between cognitive challenges and FA/NB. She used extensive neuropsychological research to support her conclusions. Further, in 1970, Dr. Christy Ulleland, then a pediatric resident at a Seattle hospital, observed a group of children identified as “failure to thrive.” Even when special treatment regimes were designed for them, these children did not get on track with other children their age. At first, she was

³¹ See Diane L. Russell, *IQ Doesn’t Matter: The Role of Adaptive Functioning in Individuals with FAS/FAE/ARND*, paper delivered at the 2003 Vancouver fetal alcohol conference (on file with authors). Dr. Russell lives and works in Nanaimo British Columbia., Canada.

³² Scales of Independent Behavior-Revised (SIB-R) Manual at 9 (1996).

³³ Russell, *IQ Doesn’t Matter: The Role of Adaptive Functioning in Individuals with FAS/FAE/ARND*, *supra* note 33.

puzzled, but once she investigated more, she found that the common element among these children was that their mothers drank during pregnancy. Dr. Ulleland 's supervisors, Dr. Ken Jones and Dr. Ken Smith, used her insights to continue her research, and ended up publishing their own their findings in the prestigious British journal LANCET. Doctors Jones and Smith coined the terms “Fetal Alcohol Syndrome,” “Partial Fetal Alcohol,” and “Fetal Alcohol Effects.” Their groundbreaking work established Seattle as a world leader in fetal alcohol research. Many more peer-reviewed articles followed--over 2000 by the end of the 1980's. Yet, the news did not largely get out until the new century.

In understanding the emergence of the science and how it might affect attitudes around FA/NB, the comparison to the HIV-AIDS epidemic is a useful one. Lawyers working in the criminal courts in Vancouver, British Columbia, in the 1980s had their first experiences with clients affected by HIV and AIDS. These diseases roared into the courthouse, and the system had to adjust all of its closely held beliefs about sex, infections, viruses versus bacteria, the true dangers of street drugs, and, sadly, the important fact that the mere diagnosis meant that these clients had already been given a death sentence. The court system adapted mostly because once judges and lawyers observed the often swift process from diagnosis to death, they believed the science. In any case, judges learned quickly that they could not simply hospitalize criminal defendants affected by HIV and AIDS in order to get them healthy enough to punish. The defendants simply died too fast. So, the court shifted the paradigm for these defendants, and tailored its sentences to reflect medical realities. Those who committed minor offenses were simply given probation or had their charges virtually dismissed.

Viewed in this light, it certainly seems like courts could make a similar paradigm shift with respect to FA/NB. The science is present, as is the accumulated evidence of repeated stupid crimes and an unworkable paradigm in which punishment for one stupid offense will lead to some deterrence or rehabilitation that will prevent a recurrence.

Unlike AIDS, however, fetal alcohol confronts many dearly held positions and challenges many cherished beliefs. Whereas HIV/AIDS, especially at the outset, afflicted already marginalized (“othered”) populations, specifically homosexuals, FA/NB has broader implications. Indeed, statistics demonstrate that the demographic with the highest incidence are upper middle class women.³⁴

Distinct enemies of the scientific knowledge at hand have stifled the flow of specialized medical information to women. The alcohol, hospitality, advertising, and sports industries quietly and at times vociferously have opposed the overwhelming evidence that drinking alcohol during pregnancy causes permanent brain-based birth defects.³⁵ Doctors have proven to be particularly ill-equipped to deal with these larger forces. Yet, the most difficult institution to change has been the court system.

Meanwhile the science has quietly accumulated. As detailed in the next section, there is now thirty (30) years of in-depth, longitudinal research conducted by top notch scientists based in a number of distinguished universities, all pointing to the same conclusions linking FA/NB to a wide range of generally misdiagnosed conditions.

³⁴ 2003 California Study (on file with authors). Workers in the field have repeatedly observed that ‘rich, White people do not have fetal alcohol babies; their children are diagnosed with attention deficit issues.’

³⁵ A vivid example from Mr. Boulding’s own life experience occurred in 2006 when he was invited to speak at a fetal alcohol conference in Melbourne Australia. Everything was booked and prepared, when only a few days before the conference he received a panicked call from the conference director. An alcohol lobby group had successfully convinced the government to pull the group’s annual operating budget if the conference went forward. On another occasion, Mr. Boulding witnessed an FASD task force in Chicago inviting a representative from the Illinois Alcohol and Beverage Association to make a successful pitch to be on its board. The representative baldly stated that he had money to spend on research, and proceeded to buy the influence of that board.

Indeed, a narrow focus on “cognitive challenges” misunderstands these individuals, as, sadly, cognitive challenges are only one of many kinds of challenges or losses they face. Alcohol in the womb may damage any aspect of the infant’s development: the face, the digestive system, the skin, the internal organs, the eyes, ears, heart, and all the other body systems can be affected.³⁶ Excessive alcohol can cause a miscarriage and premature death, as well as severe deformities. The damage done depends on many factors including the amount and timing of alcohol consumption, genetic conditions, nutrition, and other issues. It is not a simple insult like a blow, or like missing folic acid, or like being oxygen-starved during delivery.

As lawyers know, we can be trapped by taxonomies. Sometimes the name says it all. Sometimes the name is totally misleading. An assault becomes attempted murder and sometimes it was just an accident. Here the notion of “terministic screens”³⁷ provides useful insights. This term refers to how we use language as “symbolic action.” Through word choice--terministic screens--we “direct attention” to “A” and thus we effectively do not direct our (the readers’) attention to “B”. Our diction limits meanings by screening out certain interpretations, and our word choice causes the reader to focus in one direction, not another. Two examples of how terministic screens inform and direct science are, eerily, two child psychologists, both named John: John B. Watson, the rigid behaviorist and John Bowlby, the champion of attachment theory,³⁸ and a forerunner of relationship-centered understandings of human behavior. Watson literally scared children

³⁶ The photographs of Dr. Kathleen Sulik show with stark clarity the range of effects on the entire body of the fetus. *See* text accompanying notes 53-54 *infra*.

³⁷ *See generally* KENNETH BURKE, LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD 1 (1966) (citing Pascal).

³⁸ Attachment theory is one of the contextualized approaches to human development that comprise the first competency area of relationship-centered lawyering. *See generally* Brooks & Madden, note 7 *supra*.

(in his behaviorist research), while Bowlby sought to understand them as a central player in sets of relationships.

As applied to the topic at hand, “terministic screens” sheds light on how it is that the terms “fetal alcohol” and “culpable homicide” lead the reader to focus in a way that is quite different from the terms “anti-social personality” and “accidental death.”

If your client has fetal alcohol, and has been found guilty of murder, he is in a different kettle than a client found guilty of an accidental death who has a “word salad” diagnosis from the Diagnostic and Statistical Manual IV-Text Revision (“DSM-IV TR”)³⁹.

Needless to say, FA/NB is not listed in the DSM-IV TR. The primary difference is that the term fetal alcohol tells you the cause, and the cause is a brain-based birth defect.

Intention, a required element for a prosecutor, thus becomes very difficult to prove.

Terministic screens may well explain why prosecutors avoid the words “fetal alcohol” and choose the popular term “anti-social personality.”

The murder case of *R. v David Trott*⁴⁰ provides a dramatic illustration of this notion. Mr. Trott was guilty: no doubt about the actus reus! The issue was his mental state. He fired several of British Columbia’s top criminal lawyers, all of whom wanted to mount an “intention defense.” He pled guilty by himself, with no lawyer assisting, because the guard mentioned an anomaly of British Columbia criminal law. You cannot smoke in provincial remand jails; you can smoke in federal jails. David Trott wanted to smoke. Sentencing took fifteen (15) minutes and Mr. Justice Grist applied the law in Canada: an automatic 25 years in jail.

³⁹ The DSM-IV-TR (Fourth Edition 2000).

⁴⁰ British Columbia Supreme Court (2003).

At the obligatory press conference, the prosecutor, a hard working woman with more than ten years experience, mentioned that Mr. Trott had had two earlier childhood diagnoses of fetal alcohol, and the Crown believed he “had outgrown the teenage condition and now was a violent adult sex offender.” Tragically, no one in the press asked the prosecutor how one “outgrows” a brain-based birth defect.⁴¹ There is no argument here that David Trott must not be kept locked up forever. No. The argument here goes to the heart of what lawyers do: we send folks to jail for the right reason, not the wrong reason.

In spite of such boldfaced, systemic denial, the science of fetal alcohol has continued to improve, and the taxonomy of fetal alcohol likewise has gone through several name changes. What was Fetal Alcohol Syndrome, Fetal Alcohol Effects or Partial Fetal Alcohol, has been replaced with the umbrella term Fetal Alcohol Spectrum Disorder. A diagnostic four-digit code using the Likert Scale⁴² was developed, which led researchers to see the field as a spectrum, an umbrella term, a range of linked birth defects with a single common cause: maternal drinking during pregnancy. Within this umbrella, cognitive loss is only one result from brain-based birth defects. Moreover, fetal alcohol is a spectrum because we all metabolize alcohol differently, and pregnant women drink differently and have different physical, genetic, nutritional, cultural, ethnic, social, family and personal backgrounds.

There is now an accepted spectrum that can be visualized on an “X” and “Y” axis graph. The horizontal axis, X, lists FAS (with confirmed alcohol exposure), then FAS (without confirmed alcohol exposure), then partial FAS (with confirmed alcohol

⁴¹ Somehow, Mr. Trott had evidently grown new brain cells. If this were true, then instead of prison, he should have been consigned to a research institute so that he could be studied for the benefit of humankind

⁴² The Likert Scale is a psychometric scale used in social science survey research.

exposure), and then ARND (alcohol-related neurodevelopmental disorder). The vertical axis, Y, is a measurement of severity. Part of generating a fetal alcohol diagnosis is eliminating other conditions and syndromes, including “Fragile X Syndrome” and other fetal syndromes such as Toluene Embryopathy, Williams, Dubowitz, Brachmann-Delange, and Noonan Syndromes.⁴³ Countless numbers of people with FA/NB, including many if not most individuals in the criminal justice system, are incorrectly given the following diagnoses, rather than the fetal alcohol diagnosis:

- Pervasive Developmental Delay
- Attention Deficit Disorder (with or without Hyperactivity)
- Reactive Attachment Disorder
- Autism (or Asperger’s Syndrome)
- Learning Disability
- Developmental Receptive Language Disorder
- Sensory Integration Dysfunction
- Conduct Disorder
- Serious Emotional Disturbance
- Oppositional Defiance Disorder
- Bi-Polar Disorder

Diagnostic experts advise criminal lawyers that, if a client has two or more of the above “word salad” diagnoses, or other diagnoses from the DSM-IV TR, the client probably has FA/NB. As stated earlier, fetal alcohol is not listed in the DSM-IV TR. This list of

⁴³ National Center on Birth Defect and Developmental Disabilities, CDC, DHHS National Task Force on FAS FAE (July 2004) (on file with authors).

diagnoses often given to clients with FA/NB indicates that some clarity and new thinking is required for people exposed to alcohol in the womb.⁴⁴

Returning to the issue of IQ, for persons with FA/NB this number is wildly inaccurate. Persons with accepted diagnoses of fetal alcohol are successful lawyers,⁴⁵ psychologists, welders, mechanics, and performers, as well as mothers and fathers without criminal records. IQ is not an accurate predictor of much, except perhaps how well one can do on IQ tests. We all know this, yet we cling to the utility of IQ because of our attachment to the past, and our reluctance to change.⁴⁶

It is worth noting in this vein that in 2008 the Chief Judge of the Federal Court based in Dallas, Texas, the Honorable Sidney Fitzwater, stayed the execution of a death row inmate in part based upon the court's conclusion that the defendant made a "prima facie showing of mental retardation,"⁴⁷ because of compelling evidence of the defendant's "neuropsychological deficits and fetal alcohol syndrome."⁴⁸ Judge Fitzwater made this finding despite IQ testing that would have suggested otherwise, had he only relied upon the numbers.⁴⁹ The judge was persuaded by the testimony of Dr. Stephen Greenspan, a renowned expert on mental retardation—or, as he believes it should be renamed--"Intellectual Disabilities (ID)." Dr. Greenspan stated that it is legitimate to examine "significant limitations on intellectual functioning" as part of the assessment,

⁴⁴ For doctors, believing in the science and, therefore, the existence of FA/NB, generally means challenging the reigning medical authorities.

⁴⁵ With respect to the legal profession, consider how many lawyers would want to be labeled according to their score on the LSAT. It would be interesting to note how many successful lawyers today underperformed on that test.

⁴⁶ Here, a parallel may exist between how smoking was approached by doctors who graduated from good medical schools and then worked for tobacco companies, and who used their medical imprimatur to lie to the public for 50 years. Their standard line, "I smoke and I do not have cancer," bears a tragic resemblance to the line often heard from medical professionals employed by the drug industry regarding fetal alcohol: "my mom drank and I am okay."

⁴⁷ *Hearn v. Quarterman*, 2008 WL 3362041 (N.D. Tex., August 12, 2008, at *7) (Fitzwater, C.J.).

⁴⁸ _____, 2008 WL 679030 (N.D. Tex., March 13, 2008) (Fitzwater, C.J.).

⁴⁹ The defendant, Yoakam Hearn, tested with IQ scores between 87-93 (Patton Decl. at 3-4).

rather than relying solely on IQ scores. He essentially agreed with the position taken here that the IQ score of a defendant such as Hearn, who has been diagnosed with FA/NB, “masks the true extent of the individual’s limitations in learning and in other areas of adaptive functioning, including social vulnerability.”⁵⁰ While we recognize that this decision carries limited precedential value, it may prove to be an important milestone toward the ultimate goal of a legal system that takes proper account of the relationship between FA/NB and “intellectual disabilities,” and moreover, applies that understanding to a broader rethinking of criminal law.

C. The State-of-the-Art Scientific Knowledge on FA/NB

Today’s science provides further support for earlier research findings and conclusions about FA/NB. For people in the legal system, or anyone that wants peer-reviewed science that is digestible and persuasive, five main sources point the way to understanding fetal alcohol issues. First, the photography of Dr. Kathleen Sulik, of the University of North Carolina Bowles Center for Alcohol Studies⁵¹, provides perhaps the most persuasive evidence. For years, Dr. Sulik and her team have been administering alcohol to pregnant mice and then examining the offspring to study the defects that result. Currently the work of her lab focuses on determining the result of alcohol exposure at very specific times during the development of the embryos. Among the important findings of this research group and others is that alcohol kills specific cells (including some in the developing brain) and causes permanent damage. Which cells are killed

⁵⁰ Greenspan Decl. at 11. Dr. Greenspan’s report beautifully encapsulates the current science regarding what is usually thought of as mental retardation. We highly recommend it—especially to criminal defense lawyers for use in the sentencing phase.

⁵¹ See www.unc.med.edu/alcohol/sulik (last visited on December 6, 2009).

depends on the time during development when the embryo or fetus is exposed to alcohol. The pictures of the damaged mice that the Sulik group have published show remarkable similarities to children with fetal alcohol syndrome,⁵² The photographs of the mouse brains are not the smoking gun of detective novels: this is the cutting edge science of brain imaging, and it shows the damage alcohol can do even at very early stages of development. What makes her photographs most persuasive is that her work does not only focus on the brain. She shows how many of the body regions and systems are affected: faces, palates, lips, hearts, kidneys, etc. Dr. Sulik creates a birth defect with alcohol in a mouse, and can readily compare it to a child with the same defect. This is evidence all criminal lawyers need to see before they continue with a case where the facts make no sense or their client is possibly mislabeled with one of the previously mentioned diagnoses.

The second source of evidence about cognitive loss--permanently impaired brain functions--and fetal alcohol, is a pair of groundbreaking researchers based in Seattle, Washington: Dr. Sterling Clarren, and his professional partner, Dr. Susan Astley, of the University of Washington, who have produced a body of work on fetal alcohol that spans 25 years. Dr. Clarren also developed the idea and coined the term “external brain,” which is described in detail in Part III.

An illustration of how the legal system has at best lagged behind, and at worst, ignored the scientific knowledge in this area occurred in 2000, during a trial in which Mr. Boulding was representing a client accused of armed robbery. He asked the doctor in

⁵² Dr. Sulik’s photographs are readily available on her web site, and copies of power point presentations containing her photographs can be obtained by contacting her office by telephone.

charge of the Provincial Forensic Psychiatric Institute (FPI),⁵³ an expert with thirty-seven (37) years of experience, about her familiarity with Clarren and Astley's work.⁵⁴ For years, Doctors Clarren and Astley gave free three-day clinical trainings in Seattle to any doctor in Canada or the U.S. about diagnosing fetal alcohol using their guide, which was first published in 1989. Seattle is two hours away by car from the courthouse in which Mr. Boulding was appearing. The chief psychiatrist responded that she had never heard of Fetal Alcohol Syndrome. Further, in preparation for court, she had asked her twenty (20) colleagues at the FPI if they had heard of the condition, or had seen any cases of fetal alcohol while working there. She is a competent and caring doctor, and one would assume the same was true of her staff. The doctor stated neither she nor any of her staff had EVER seen a case of fetal alcohol. She was also completely unaware of the work of Clarren and Astley.

This was not an isolated incident. Any time one of Mr. Boulding's criminal clients was sent to the FPI for a psychiatric workup with a request that the staff consider fetal alcohol, he received a form letter saying FPI had no expertise in that area. The highly experienced psychiatrist and her staff are not unusual, as this diagnosis has not been well known until very recently. It was only in 2007 that the Law Society of British Columbia first began including consideration of fetal alcohol issues as a separate point in its criminal law interview checklist, which is designed for law students and diligent counsel.

⁵³ The FPI is the government run hospital in Coquitlam, where the Criminal Court sends people with mental health issues for opinions on mental status and fitness for trial.

⁵⁴ See SUSAN J. ASTLEY & STERLING CLARREN, *DIAGNOSTIC GUIDE FOR FETAL ALCOHOL SYNDROME AND RELATED CONDITIONS 1* (Second Edition 1999).

This anecdote from the chief psychiatrist at FPI illustrates as much about science as it does about a legal system that is unprepared for most of its customers. Even a rudimentary literature review reveals that Clarren and Astley's work is well-publicized, and a mildly interested person would begin by reading his work after viewing the Sulik photographs.

The third persuasive source is the now-retired Dr. Anne Streissguth, also at the University of Washington.⁵⁵ She established the Fetal Alcohol and Drug Unit (FADU), which is a sort of brain trust for fetal alcohol research. If one "Googles" FADU, her site pops up first. Every judge, lawyer, police or probation officer, correction worker, not to mention all policy writers, would be well-advised to review the impressive body of work available free from this site. Dr. Streissguth has also published numerous peer-reviewed papers, and has authored the most accessible books on fetal alcohol.⁵⁶

These experts agree that the primary disability we see in the criminal justice system is a result of missing brain cells. It could be a learning disability, attention difficulties, reasoning problems, poor impulse control, not understanding number and value, and a host of other neurological deficits. These primary disabilities cause the person not to fit well into his or her environment. Without a constructive societal response, this poor fit generally leads to secondary behavioral characteristics, which often

⁵⁵ Much of the original work of fetal alcohol was done in Seattle, Washington, and specifically, at the University of Seattle. Other pioneering researchers mentioned earlier, namely Smith, Jones, and Ulleland, have gone on to do other valuable work. *See* text accompanying notes 35-36 *supra*.

⁵⁶ For instance, every criminal lawyer must have on his shelf: ANNE STREISSGUTH, FETAL ALCOHOL SYNDROME: A GUIDE FOR FAMILIES AND COMMUNITIES (1997); THE CHALLENGE OF FETAL ALCOHOL SYNDROME: OVERCOMING SECONDARY DISABILITIES (Ann Streissguth and Jonathan Kanter, eds. 1997). Many years ago, Dr. Streissguth and her staff at FADU set up a web page that includes all of the scholarly papers produced by her unit, a database listing every court case in Canada and the US where fetal alcohol is mentioned, and advice to lawyers, parents, doctors, and anyone else who might be interested. The Unit also sends speakers who have done the peer-reviewed science to conferences and universities to discuss and disseminate their research.

result in crimes. These behaviors arise because the chronic poor fit causes emotional pain, which in turn contributes to defensive behaviors that reflect the individual's attempt at self-protection.⁵⁷

Dr. Streissguth's statistics are widely used because she has about 25 years of longitudinal data on families and individuals with fetal alcohol. In the late 1990's, she hired Kay Kelly from Los Angeles Probation Office where Kay had worked as a probation officer for 30 years. Then, she encouraged other scholars like Doctors Paul Connor, Fred Bookstein, and Kieran O'Malley,⁵⁸ to continue her work with their own specialized training. Their books reflect the leading science, especially Dr. O'Malley's 2008 publication dealing with the relationship between Attention Deficit Hyperactivity Disorder and FA/NB.⁵⁹

The fourth leg of persuasive fetal research is Dr. Ed Riley, of San Diego, California.⁶⁰ Like Anne Streissguth, he has an equally impressive list of papers concentrating on the brain and the behaviors that trouble police, judges and juries. Dr. Riley's work is also available by contacting his lab (by telephone or e-mail). He can explain what happens when a person has a brain that was affected by alcohol in the womb. If a specific brain structure or part in the brain is reduced in size or compromised or damaged, then Dr. Riley can predict what types of behaviors will likely appear. He can predict the behaviors because the missing brain cells have specific functions, and that

⁵⁷ Diane V. Malbin, FETAL ALCOHOL SYNDROME AND FETAL ALCOHOL EFFECTS: TRYING DIFFERENTLY RATHER THAN HARDER (2nd edition 2002) (available www.fascets.org) (last visited on April 14, 2010).

⁵⁸ These researchers all worked together in Seattle. Additional information can be found by "googling" "FADU."

⁵⁹ ADHD AND FETAL ALCOHOL SPECTRUM DISORDERS 1 (2008) (Kieran O'Malley, ed.).

⁶⁰ Dr. Riley is a psychologist on the faculty at San Diego State University, and can be reached at eriley@mail.sdsu.edu.

persons with alcohol-affected brains are born without these critical brain cells, or with highly compromised brain functions.

Finally, the fifth and perhaps the most important fetal alcohol investigators today are located in Canada, two hours north of Seattle in Maple Ridge, British Columbia (B.C.), at the Asante Centre.⁶¹ For 30 years, Dr. Kwadwo Asante was the pediatrician for a sizeable section of B.C. and the Yukon, starting north of Prince George and continuing to the North Pole. Like Dr. Smith and his investigators in Seattle during the 1970's, Dr. Asante continually saw cases that puzzled him. The children he saw with brain problems looked like brothers or sisters, but were 1000 miles apart. As his knowledge increased in the 1990's, he established a clinic less than 3 miles from Mr. Boulding's home.⁶² Dr. Asante, too, has a professional partner, named Dr. Julianne Conry.⁶³ If a legal professional were to read only one peer-reviewed paper on FA/NB, it should be Dr. Conry's paper on the prevalence of fetal alcohol in jails.⁶⁴ Written ten years ago, it remains the only peer-reviewed science on the prevalence of fetal alcohol in Canada's jails. Dr. Conry and her team randomly selected a day, and then gave every young person in custody in the province of British Columbia a psychiatric workup. The result was that 24% had one of the available fetal alcohol diagnoses. Dr. Conry's team of investigating psychologists acknowledge that there were design flaws in the study, and believe the number is more like 40%. The Canadian Penitentiary Service has been quietly

⁶¹ For additional information on Dr. Asante and his work, see www.asantecentre.org (last visited on December 3, 2009).

⁶² As a lawyer who practiced criminal law for over 20 years, Mr. Boulding wonders how his work might have been different had he met Dr. Asante in 1984, rather than in 2001: how many clients he could have saved from jail had the latest science been available to him in law school.

⁶³ Julianne Conry, Ph.D., is a retired professor of educational psychology and neurology at the University of British Columbia, in Vancouver, Canada.

⁶⁴ Diane Fast, Julianne Conry & Christine Looock, 20 DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS 370-72 (October 1999).

doing follow-up surveys and is finding that between 50% and 80% of inmates in federal institutions, who have sentences of more than two years, have the diagnosis of FA/NB.

Dr. Asante does diagnostic work from his clinic and is available to lawyers and their clients. One barrier is cost. A workup up costs about \$3000.00 and legal aid only pays if forced by a court order, and if the young person is in government childcare.

Meanwhile, as indicated above, many prominent forensic psychologists and psychiatrists do not recognize FA/NB. Further, the highly regarded mental health court in Toronto sees no cases of fetal alcohol, according to the Supreme Court Judge who designed the court.⁶⁵ The same judge has a Ph.D. in Psychology, teaches at Canada's most prestigious law school, has written the two central texts on mental disorders and the law, and is a compassionate and caring person. This court's failure to acknowledge FA/NB is difficult to fathom, especially given that we know somewhere between 24% and 80% of the criminal population has FA/NB.⁶⁶ How can the specialized mental health court downtown in Canada's largest city not see even a single case of fetal alcohol? Captain Jack Sparrow from *Pirates of the Caribbean* has the answer: "the treasure you find depends on the map you use!"

How can this population be invisible to such legal experts, and at the same time routinely be seen on a daily basis by criminal lawyers? Dr. O' Malley has a suggestion. In *ADHD AND FETAL ALCOHOL SPECTRUM DISORDERS*⁶⁷ he states that many children

⁶⁵ Judge Richard Schneider has made statements to this effect in speeches he has given at various conferences. Mr. Boulding also visited the court in 2008 and heard the same refrain from a judge hearing cases at the mental health court at that time. This is perhaps unsurprising because the judges limit their role to hearing matters related to mental health diagnoses identified in the DSM-IV TR. As has been stated, fetal alcohol is not listed there.

⁶⁶ See text accompanying notes 21-29 *supra*.

⁶⁷ See note 61 *supra*.

with FA/NB are masquerading as attention deficit patients.⁶⁸ He believes that because fetal alcohol is not in the DSM-IV TR, to most medical professionals (and thus judges) it therefore does not exist. We are again trapped by our taxonomies.

The science will straighten out in time. The problem is that every day clients are imprisoned without a proper diagnosis, and without any help. Eventually, they are released, whereupon they quickly re-offend--and everyone is surprised. It is as if someone who needs major dental work keeps seeing a transmission mechanic, and we are surprised when all his teeth fall out. We need the science to help judges do the right thing, and we cannot wait: we must rely on what is available today. Ample knowledge is available. All of the researchers mentioned offer more than enough help to get started. These scholars need to be on first-year criminal law course reading lists.

III. Using Relationship-Centered Lawyering to Assist Clients with Cognitive Challenges

For many years, Mr. Boulding has been using a relational framework in his criminal law practice in B.C., Canada. While not relying on formal mental health training, he has been fortunate enough to be mentored by many experienced, caring and knowledgeable professionals, including at least one family therapist. In this section he describes his work at two levels. The first, called the “external brain,” is a broad-based strategy that involves creating an overarching structure to assist clients with FA/NB. This is referred to as the ‘macro-level’ because it is aimed at working with the larger system in which the client lives. As such, the external brain exemplifies the first competency area in the relationship-centered framework—understanding the client in context. It requires the lawyer to take account of the various systems in which the client

⁶⁸ *Id.* at 51.

functions, including the family system,⁶⁹ the client's neighborhood and community. All of these systems fit into the contextualized understanding of the client.

In order for the external brain to work properly, it may often be necessary for all parties to develop a plan outside of the conventional adversarial criminal justice system. In this respect, the external brain also illustrates the second competency area—effective legal process. The lawyer must be skilled at navigating between the criminal justice system and other systems, such as those involving the delivery of social services.

The second level, which is referred to as “micro,” focuses on the interpersonal dynamics between attorney and client. While this level also requires the lawyer to understand the client's context, it relies heavily on the third competency area within the relational framework: interpersonal and affective skills. To effectively manage the interpersonal dynamics that arise within the lawyer-client relationship, the lawyer must appreciate the role of “culture.”⁷⁰ The lawyer must also empower the client and focus on the client's strengths. These competencies require a non-judgmental posture, as Mr. Boulding describes below. Finally, the lawyer must be able to appreciate the role of emotion—the client's as well as the lawyer's—and manage the emotions within the professional relationship in the manner most helpful to achieving the client's goals.

Mr. Boulding illustrates this interpersonal level by describing a set of relational interviewing techniques that can be used effectively by all helping professionals. In describing both the strategy of the external brain and his relational interviewing

⁶⁹ The family system is not limited to the client's nuclear family. Extended family members, trusted friends, and neighbors may all be part of the family system when viewed from the client's perspective. See Susan L. Brooks, *Representing Children in Families*, 6 NEVADA L. J. 724, 725 (2006).

⁷⁰ Culture is also broadly understood to refer to how a person defines their own identity. See Susan L. Brooks & Ya'ir Ronen, *The Notion of Interdependence and its Implications for Child and Family Policy*, 17 J. OF FEMINIST FAMILY THERAPY 23, 37 (citing Ya'ir Ronen, *Redefining the Child's Right to an Identity*, 18 INT'L J.L., POL'Y & THE FAMILY 147 (2004)). See also, Brooks, *Representing Children in Families*, *supra* note 71, at 738-39.

techniques, Mr. Boulding uses his own conversational tone, speaking in the first person. As the reader will no doubt appreciate, any attempt to present these illustrations in any other style would interfere with the richness and usefulness of this information.

A. Macro-Level: Setting up the “External Brain”

The short story is that clients with the brain-based birth defect called FA/NB are missing brain cells. They are born with the disability of missing cells--think amputated legs-- and imagine judges and the whole system complaining that a client is not running fast enough.

We must recognize this disability as permanent. People with fetal alcohol are simply unable to grow new brain cells. Therefore, our job is to put structures in place to replace the missing cells. Missing cells mean reduced cognitive ability. We must design structures to increase cognitive ability.

As stated, Dr. Clarren coined the term “external brain.”⁷¹ This term refers to an overarching structure for all our interventions. This structure essentially boils down to a committee of good hearted, skilled, caring people who stand in as volunteers to supervise the individual with FA/NB who is committing the stupid crimes. This committee stands in and *functionally* replaces the missing brain cells and behaviors. For lawyers, it means making sure that someone takes responsibility for getting clients with FA/NB to probation on time, monitoring their friends, helping them observe curfews, helping them shop, getting them to job interviews, and regularly checking in on them. It also means explaining all about FA/NB to employers, and helping them implement structures for success in the workplace.

⁷¹ As stated earlier, this term was coined by Dr. Sterling Clarren. *See* text accompanying note 10 *supra*.

Implementing the external brain has its own complications. There are boundary and autonomy issues, as well as debates over the ethics of intense supervision, and degrees of responsibility.⁷² Almost everyone I have met who is charged with caring for a person with FA/NB is aware of these difficulties, and yet can recognize the important benefits of these structures. Each case is different. The following are samples of effective strategies.

- ✓ Some parents take an 8x10 photo of their son to the local police with all the relevant information on the back. Their message is: “you will meet my son. Here is what you might consider before arrest. Call us; call the doctor; call his worker. Read this information about how his brain works. It does not work like yours!”
- ✓ Some parents use cell phone technology such as alarms, curfew reminders, and communication devices that have restrictions that allow calling only a few people.
- ✓ Some probation officers have involved the community to the extent that people who own or operate stores have a client’s picture at the cash register, and the staff reminds the client when it is time to go home according to the terms of the probation order.
- ✓ Some judges have enlisted the assistance of football coaches, teachers, retired elderly citizens, and volunteer organizations. As the person with FA/NB is the ideal mule, gopher, and accessory to crime, regular check-ins with persons who know about the disability, his criminal record, and fetal alcohol brains are the best way to stop further crimes.

It goes without saying that Dr. Clarren’s external brain is cheaper than incarceration. Nevertheless, the paradigm that frames the solution as the external brain contradicts all of the philosophic sacred cows and loudly proclaimed core values of most doctors, lawyers, judges, and legislators—all of our dearly held traditional notions surrounding crime and punishment.

⁷² An in-depth exploration of these issues is beyond the scope of this article, although it suggests an important potential direction for future work on these issues.

The external brain is the community response to a brain that is not going to change. It is our duty of care to a person with FA/NB and the best way to assist our community. On an interpersonal level, the key is the professional relationship.

The scholars who have discussed this key piece of relationship-centeredness with respect to individuals with FA/NB include Diane Malbin⁷³, the author of TRYING DIFFERENTLY, NOT HARDER⁷⁴, and Drs. Brenda Knight and Sandra Bernstein, both eminent psychologists.⁷⁵ These working professionals have patients with the disorder and have developed lasting relationships that have been the key to their successes.

Diane Malbin points out that if we keep repeating the same remedial behaviors that fail each time, even if we keep trying harder and harder and harder, nothing is accomplished. At least, that is, not for our clients, or their families, or even their victims. Malbin has identified four steps to working effectively with people with FA/NB. First, **identify your assumptions**. Second, **“match the brain to the task.”** Third, **adjust your expectations**—“increase the bandwidth of your idea of success” because your clients will fail over and over again. Fourth, **change their environment**.⁷⁶

David Raithby, Dip.C., M.Ed., R.S.W., a family therapist whose specific techniques for relational interviewing are detailed below, offers many helpful suggestions

⁷³ Diane Malbin is a social worker who has developed what she calls the “Neuro-Behavioral Model” for approaching individuals with fetal alcohol and other Neuro-Behavioral disorders. Additional information about her and her work can be found at www.fascets.org.

⁷⁴ Malbin, FETAL ALCOHOL SYNDROME AND FETAL ALCOHOL EFFECTS: TRYING DIFFERENTLY RATHER THAN HARDER, note 59 *supra*.

⁷⁵ As it happens, Dr. Sandra Bernstein is married to Sterling Clarren.

⁷⁶ See generally, David M. Boulding, *Lawyers Brief* (available at www.davidboulding.com) (last visited on December 3, 2009).

that can guide how to approach these clients. He urges first and foremost for lawyers to be “relational” with criminal clients.⁷⁷

Professor Bruce D. Perry, an M.D. and Ph.D in neurology who specializes in child trauma,⁷⁸ has published widely and has encapsulated the current wisdom in six “R” words⁷⁹:

1. RELATIONAL
2. RELEVANT
3. REPETITIVE
4. REWARDING
5. RHYTHMIC
6. RESPECTFUL

In beginning his list with the term “relational” Dr. Perry demonstrates the compatibility between his approach and the relationship-centered framework outlined in Part I. He emphasizes that relational means not that we lose our professional boundaries; it means that we see the person first, not the offender.

Relevant has two aspects. First, focus on the present, as in “right here right now,” and second, focus on what is appropriate to this situation. This emphasis on grasping “what is” in the present is integral to family systems theory, which reflects many of the essential elements of relationship-centered lawyering.

⁷⁷ This information has been gleaned through numerous conversations between David Boulding and David Raithby.

⁷⁸ Dr. Perry is based in Houston, TX. For additional information about him and his work, *see* www.childtrauma.org (last visited on December 3, 2009).

⁷⁹ He shared this list in an impassioned keynote address at the Edmonton International FASD conference, which took place in February 2009.

If your client is presenting as a “serial” first offender and does not seem to comprehend how much trouble he faces, what you have been doing is not working. Try differently, not harder. What is relevant is what you’re missing. Relevant for the client may mean that as counsel you need to examine your assumptions⁸⁰ and see what you have missed. What does he need now? This does not mean to forget about outcomes. Relevance means seeing the obvious and creating ways for the client to succeed on his terms, not yours.

Repetitive means that the client’s brain needs repetition, even though the lawyer’s brain may not. The client’s brain needs repetition because the client likely has a problem with memory, as he may well be missing brain cells due to maternal consumption of alcohol.

Rewarding--as Diane Malbin says--means building on success. According to Jan Lutke, another Vancouver-based advocate for fetal alcohol: distinguish between non-comprehension and non-compliance. If the client comes to his probation appointment the same week, congratulate him and build on that success. Rewarding is closely tied to a strengths perspective, discussed earlier as a key aspect of the affective and interpersonal area of competency within a relational approach.

We have rhythms in life: day, night, seasons, meals, schedules. Skillful lawyers will use them to their client’s advantage. An Alaskan couple adopted a fetal alcohol child at birth. Because they were university professors in Anchorage, they did some research

⁸⁰ Examining our assumptions as lawyers falls into the third competency area within relationship-centered lawyering, pertaining to affective and interpersonal issues. This examination begins with accepting that all of us bring our own personal lenses to our work as lawyers, which means we carry with us biases and judgments based largely on our own perceptions and life experiences. Part of our ongoing work is endeavoring to make the unconscious conscious, so that we are able to separate our own issues from those of our clients.

on brains. They gave their adopted daughter - three vitamins a day. One was a multi-vitamin, one a sugar pill, and the third was a supplement they were advised was best for her developing brain. When she was fourteen (14), the sugar pill was replaced with a birth control pill. At last report, she was twenty-eight (28), was living in semi-independence and was not pregnant., Rhythm means that you must find ways to use repetition as a lawyer dealing with clients with cognitive challenges The rhythm of repetition has a soothing effect..

Respect means look again. All of the above can be encapsulated in respect. Respect connects up other essential elements of relationship-centeredness—empowerment and a non-judgmental posture. For lawyers especially, respect means: stop. Really stop. Stop all your “smartypants lawyerisms,” your Latinate legalisms, and university-educated styles of behavior. Just stop and see the person anew. Discard all your formulaic answers and craft your legal responses based on what is before you: a brain not like yours and a person who needs your sophisticated learning more than most.

Respect is not easy because these clients have behaviors that piss off everyone. Thus, respect the person; don’t react to the behaviors.

B. Micro-Level: Relational Interviewing

The scholars and practitioners mentioned above all know a great deal about brains and how they work. These experts come from helping professions. The question is what lawyers can learn from them.

A simple way to start is with the first interview.

The Oxford English Dictionary says interviewing is a meeting of persons face to face, especially for the purpose of consultation.⁸¹ Interrogation, according to Oxford, is asking questions to obtain information. One term describes a positive relationship, and the other, as the Guantanamo experience has shown, can be negative and even unhelpful. Many lawyers' early interviews are difficult for clients, because like Jack Webb⁸² all they want is "the facts, just the facts."⁸³ At best, they extract these legally relevant facts with fabulous efficiency. Such lawyers may well succeed in getting their clients out on bail. Nonetheless, they miss *the person* because their goal is limited to becoming a good interrogator by getting all the "good facts. "

Relational interviewing techniques demonstrate how relationship-centeredness builds upon and enhances client-centeredness. Lawyers can learn to use relational skills in professional settings. Talented lawyers in areas such as criminal and family law exhibit these abilities and use them to achieve wonderful results. Experienced mediators train lawyers in these techniques, and they can also be learned from mental health professionals, such as family therapists and other social workers and psychologists, as well as some doctors, senior police officers, and older probation officers. The successful track records of professionals who embrace relational interviewing techniques are living proof of the effectiveness of these techniques.

All persons in trouble--and arrests qualify as trouble--have a wide spectrum of experience: their story. Lawyers generally require a thin slice of a client's spectrum to do

⁸¹ THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (1982).

⁸² Jack Webb was the actor who played a police detective named Sergeant Joe Friday of the Los Angeles Police Department on a once-popular television series called "Dragnet." He was famous for telling victims and witnesses he wanted "just the facts."

⁸³ David Boulding, a seasoned criminal defense lawyer, identifies with this as the approach he took early in his career.

their job. This extraction of the legally relevant facts, this interrogation process, generally is not a relational process. Often the client feels disconnected, distant, cool to cold toward the lawyer, and there is little if any trust. Often the client feels closer to the guards than to the lawyer assigned to the case. Clients have said to me what a “great guy” the sheriff is as the handcuffs come off. One may observe fake punches and small touches between jail staff and clients. The client and the jail staff have developed some form of close bond not shared with the lawyer. Often, my legal advice is measured against what the guards have said to my clients. This is puzzling, until one realizes the client is closer to the jail staff than the lawyer in terms of relationship. He may well trust the jail staff and their advice more than his own lawyer and that lawyer’s “expert” advice.

A common result of a lack of trust between clients and lawyers is that clients will not volunteer or disclose difficult personal information or negative facts about themselves. Few clients, if any, will disclose: “I have impulse control issues”, or “I have a temper problem”, or “the school psychologist in high school said I needed help”. Even fewer will reveal past DSM-IV TR-type diagnoses--“word salad” diagnoses that suggest they have identified problems.

Thus, it is hard to get an accurate read on the client’s brain if we rely solely on an extraction style of information gathering. This is a core belief of relational lawyering and relational interviewing. Who we are as people, as lawyers, can be seen in how we question clients. Not surprisingly, we bring all our own stuff to our professional processes.⁸⁴ All of criminal law (actus reus facts aside) can be reduced to the single question: WHAT WERE YOU THINKING? For clients with brain issues, this question

⁸⁴ Our own “stuff” fits into the affective and interpersonal competency area of relationship-centered lawyering, as discussed earlier. See text accompanying notes 19-21 *supra*.

can be difficult to answer. The answer may require uncomfortable disclosures that the client is unwilling to make to a person he does not trust. The legal consequence is that possible defenses are not seen, or worse, critical facts are not uncovered that may make the difference between prison and probation.

We ask our lawyerly questions from our viewpoint, not from the point of view of the client in jail. This fact extraction method is not a bad habit, especially if you are addressing primary and secondary grounds in a bail hearing, and the facts are the issue. The point is to uncover what we are missing when we select and rely exclusively upon an interrogation style of information collection. Scholars call this noticing your assumptions.

Lawyers expect clients to answer questions with the same skill as the lawyer has used to ask the questions because we assume all brains are more or less the same. For example, we tell other lawyers, “my client is a little slow,” or, “my client forgets almost everything,” or, “my client is as dumb as a post, so I gotta explain everything three times.” We do not say, “My client has a brain based birth defect and I need to do something different.”

Unless your client is a clear-minded criminal lawyer (or a clear minded, successful contract killer), there is always a gap between what is expected as an answer and what is answered. We need to examine our expectations of our clients. And we need to look at the differences between our possible answers and the actual answers. This looking further requires curiosity. And curiosity begins by considering the brain before you.

Obviously, if your client has brain issues, brain problems, brain defects, and you do not catch that there is a brain problem, you may misinterpret answers, or get wrong

answers thinking they are correct. There is no easy guaranteed fix. These clients are not suddenly going to be found not guilty by your new interviewing stance. You will get new answers and, by creating an external brain, you will hopefully understand what is required to stop more crime.

If we develop a relationship with clients at the first meeting, we can get answers that will lead us to do better work for our clients. If we can build a body of facts that leads us to investigate the client's brain, not just the facts of his charges, we can go different places. In large part, this involves focusing on creating the external brain, as described above. If we do not look at the brain of the client, we will often decide not to create an external brain, and the client is soon back in jail.

Unsurprisingly, persons with FA/NB will try to pass as if they have a complete brain just like yours, as no one likes to advertise qualities that are seen as negative. Here, ask yourself how many clients have you had that disguised that they were illiterate or unable to do arithmetic.

Faking a relational approach is easily spotted by clients. The consequence of you the lawyer being seen as a fake by your client is a disaster for the client. Then you will never be trusted and never learn what you need most. The answer gap caused by a lack of trust can be repaired by a relational approach toward attorney-client communications.

The approach outlined below is not new or controversial--except possibly to lawyers. There are many reasons why lawyers prefer interrogation over interviewing, including interpretations of legal rules,⁸⁵ concerns over the costs of running a law office, notions of legal professionalism, and personal fears of failing at something new.

⁸⁵ See, e.g., McNaghten rules, collateral evidence rule, hearsay exceptions.

These techniques focus on interviewing clients who are in trouble in a legal setting, and may have FA/NB, or a related brain injury that results in reduced cognitive function. The lawyer has been hired to make the situation better for the client.

The relational interviewing approach is referred to here as the “Raithby Method,” as these specific techniques were imparted by David Raithby, a social worker and family therapist based in Nanaimo, B.C.⁸⁶ Mr. Raithby’s approach illustrates how interviewing is taught differently to graduate social work students in a Masters Degree in Social Work (M.S.W.) program than it is in law schools. As stated above, lawyers tend to think that their life or death depends on legally relevant facts, and that bad facts indicate a bad outcome. As shown in Part I, social workers and many other helping professionals, including most senior probation officers, are less concerned with outcomes and more concerned with relationships. They believe they can achieve more positive outcomes when they have a positive relationship.⁸⁷

Today, for most clients with brain-based birth defects, the outcome is almost always some form of guilty plea. We all know most of what we do is to speak to a sentence in terms of statistics, which indicate that upwards of 80% of persons arrested are eventually found guilty of something. For persons with fetal alcohol issues and other cognitive challenges, the number might be 99%. This 99% number will likely drop if we investigate our client’s brain, the mental issues, that is, if we look at our client’s brain right from the start.

⁸⁶ See text accompanying note 79 *supra*.

⁸⁷ It has always baffled me that in English “old style” trial lawyering, the barrister never spoke to the client. He took instructions from the instructing solicitor. The barrister argued facts and law. The barrister system reifies clients, and today we tend to treat our clients as objects even without an instructing solicitor.

The legal task, then, is to help the client to stop re-offending. To be effective in criminal courts, lawyers must break the cycle of crime. This new direction requires a change from the fact extraction/arguing about categories tirade to a business where we can create authentic relationships with our clients that truly assist them. Often our clients do not have the brain we have. We must stop framing the problem as “I would not do that” and begin to see what they were thinking during the acts that caused their arrest. Again, this is not news, except to lawyers. My point here is a version of Judge Cronin’s oft repeated rule that we must walk a mile or so in another man’s shoes/moccassins before we sentence him. The first step is to see if there is a problem with the brain. Is there a brain-based birth defect?

You will be surprised about your assumptions. Remember the interviews you did ten years ago and how much better you are now. Review your past mistakes. Credit yourself with your successes. The answers you get by asking these questions of someone you suspect may be cognitively challenged will give you much-needed new information, and if you are lucky, a new relationship that will go a long way toward helping your client perhaps avoid some future crimes.

The relationship here is distinctly the professional relationship. You are not the client’s mom, grandma, or big brother. There are other professional relationships that include the social worker, psychologist, pastor, coach, doctor, and probation officer, all of which can rely on these same methods. David Raithby, like many other mental health and other non-legal helping professionals, has developed relational methods that work effectively with clients while maintaining professional boundaries. It is a common statement that interviewing involves the head and the heart. This kind of statement may

offend some lawyers. It may be news to others. Lawyers are often seen as heartless. And we all know that many clients find our lawyerly styles difficult to appreciate. Here, Mr. Raithby also uses the word “relational”. Ask yourself if you were in this interview, would you describe it as relational or as an extraction process?⁸⁸

The following are general guidelines for relational interviewing:

- a) Establish clear professional boundaries;
- b) Focus genuine attention on the person before you. Notice details of being, manner, speech, dress, and what is not said that you might expect to be said;
- c) Respect the context of the person--this includes emotions, and physical cues to state of mind;
- d) Ask permission to ask certain questions, to touch appropriately, and to maintain eye contact;
- e) State a shared desire for a positive outcome;
- f) Maintain an appropriate pace. Be mindful that some brains need more time, and some people need more time to create relationships. Trust takes time.
- g) Attempt as much as possible to be on the same page emotionally, intellectually, and physically. Raithby suggests breathing slower, with deep circular breaths, and responding with curiosity when the client goes in an unexpected direction. The goal is to connect with the client so that you can get the sense of the brain before you. The facts of the offense or the family law situation are important; one cannot ignore the facts. Heartfelt interest will give you clues as to how the brain before you is different from yours--assuming you tune in.

Many criminal law interviews prohibit touch, the simple handshake, because there is often a glass barrier. This is a bad thing, although it may be insurmountable in a

⁸⁸ In the article referred to above (*What Legal Professionals Need to Know About FASD and the Law*) David Boulding discusses this point in greater detail: the short story is other professionals can be relational: let us learn how they do it. See www.davidboulding.com (last visited on April 15, 2010).

particular situation. It is worth trying a handshake because the handshake is the first contact that counts, followed by sustained eye contact.⁸⁹

Assuming you are able to shake the client's hand, seek permission to continue the gentle handshake. My work requires interviews with clients' mothers just outside of busy courtrooms, as their sons are about to go to jail. And I have to ask them difficult questions about possible maternal drinking when they were pregnant. A prolonged handshake is both professional and a welcome lifeline to a woman who is participating in the process which will put her son in jail. I have had clients hang on to my hand for 45 minutes, only letting go when they had to leave the room. Some of my clients, it seems, have never had someone hold onto them in a comforting way, and a handshake does the job.⁹⁰ Set clear boundaries and expectations with respect to time: "we have a few minutes now before we go back to court and I need to know about...."

Encourage and model slow, deep breathing. The breathing is the way into relationship. Slowing respiration is calming and comforting when another does likewise. This slow, deep breathing can create contact and connection, and thus trust.

Be attuned to your own responses. What are you experiencing? Your client is highly attuned to your body signals. He is looking for guidance. He is looking at you for second-by-second reports. How are we doing? This constant feedback is the most reassuring single behavior a lawyer can undertake.

These are all relational skills, and all are within our professional boundaries, and will go far to creating a relational interview.

⁸⁹ Most of these clients have had a lifetime of failure and exclusion. They have had little positive contact with other persons. This explains the close bond they often develop with jail staff --people that sometimes touch them with care and respect.

⁹⁰ David M. Boulding, *Interviewing as Relationship* (on file with authors).

Sometimes you will need to intuit, or guess. For example,” I notice you are shuffling your feet and have stopped looking at me. Is there something I need to know about you right now? Might it be about the court case?” Or “right here, right now, what’s going on for you?” Use gentle touch with permission and eye contact.

Additionally, I use a “**ten question**” **checklist** if I think the client fits any of the patterns I have seen with previous fetal alcohol clients. I have created this checklist by combining guidance from mental health experts such as David Raithby with that of fetal alcohol assessment specialists. The tie in with the relational framework outlined in Part I should be evident. It is of course, no accident, as David Raithby and most of these specialists have had formal training in the theories, principles, and practice models that are essential to relationship-centered lawyering.

Asking these questions does not make me an expert in fetal alcohol assessment: they do, nevertheless, give me enough information to suggest that an expert be called in if the answers suggest that there may be a need for a multi-disciplinary team to conduct an assessment.⁹¹

Question one is about birth information: adopted? foster homes? And were there visits when you were young to special doctors? This then leads to **question two**, the difficult and crucial question about maternal drinking. It may be as simple as: did your parents ever spend a night in jail? Sensitivity is required. You may need collateral information from relatives and you may get vague and defensive answers. Be informative, not judgmental; model openness.

⁹¹ For more details, see David M. Boulding, *What Legal Professionals Need to Know About FASD and the Law*, found at: www.davidboulding.com (last visited on April 15, 2010). The web site also provides basic information about FASD in *The Lawyers’ Brief on FASD* and other publications.

Question three is about developmental delays. This is easier than it seems and gives you lots of other valuable information. Draw a grid, with grade 6, grade 7, etc. Give the client a pen and ask him to fill in his age for each grade. If you think you can get it, ask for the name of a teacher or the school name. If you have more than three schools in three years, ask “could you say more about all these different schools?” Did a special person at school ever test him because his grades were not what others expected? Was he a “social pass” because of age, school transfer, or because he was in jail? If you have created a relationship, you may ask about developmental milestones: shoe tying, riding a bike, forming friendships, getting invited to birthday parties, obtaining a driver’s license. Develop your sense of chronological age versus adaptive or cognitive age.

Question four requires you to tune into vocabulary. Is he speaking rote, above his learning or awareness of words? Can he define the words he uses? Often, these clients are experts at mimicry. They can parrot ‘legalese’ and not know what they are saying. Investigate. Ask: “what does that word mean?”

Here Dr. Conry has a helpful tool called ALARM. The first A stands for adaptive behaviors. L stands for learning. The second A stands for attention. R stands for reasoning. M stands for memory

Go through each category and be open. All you are doing is exploring. No one expects you to be the neuro-educational psychologist that Dr. Conry is, and you may surprise yourself and get information that will change the case. If nothing else happens other than you think the client needs a psychological work-up for fetal alcohol, you have done your job.

Question five is about the kinds of things that have sensory impact, such as: clothing choices, high tolerance for pain (wearing a tee shirt and it is minus 40 degrees outside), poor dental hygiene, and tactile, auditory or postural defensiveness. Ask about hospital visits. These can be clues to risky behaviors and his inability to predict outcomes. Consider how he is not like you.

Question six requires your client to write something. It could be a family tree, a map of the offense, a diagram, or a simple description of what happened. Notice what is missing. Notice his grip on the pen. Does he write and grimace, like a first grade student? That says a lot.

Question seven is easy. Conduct a brief mental health quiz. Ask the following: have you ever taken Ritalin, Prozac or special pills to feel better? Have you ever seen special doctors that only talk? Were there problematic behaviors in school, expulsions, or arrests before 12 years old? Were there suicide attempts? Did his teachers call him lazy, disruptive, violent, or un-teachable?

For **question eight**, ask about his family. Try to ascertain the size, shape and health of siblings, birth defects, and how is his weight to height ratio compared to that of the rest of his family. Does something not sound right?

Question nine requires you to be curious and non-judgmentally observant. Is there a “victim” quality here? Does he like repetition, structure, and a stable environment? Here, jail staff will often tell you what you need. Does he understand consequences? Can he generalize from experience? Is he literal-minded? Does he understand your questions? Is he eager to please?

The last question, **question ten** is for you. What questions have you not asked because you thought it unnecessary? What middle-class, overeducated assumptions might you secretly be relying on? What do you not like about him? Ask yourself how are you different?

You may not need these questions, if you have learned about FA/NB and how brains work. You are not expected to be a forensic psychologist. You are expected to be a professional interviewer, and if brain issues seem to be coming up-- investigate--using head and heart in a curious, non-judgmental way. Being non-judgmental is tremendously difficult for lawyers because we are paid to make snap judgments. Good lawyers make good snap judgments; the best lawyers make informed snap judgments. Always be asking yourself, “hmmm, that is interesting...my brain would not do that--what is going on in my client’s brain?”

The aim here is to get an answer to the question: “What were you thinking?” Armed with this answer you can begin to create an external brain you can sell to prosecutor or opposing counsel, and later to the Court.

Try using “soft eyes”, not the “laser eyes” of a lawyer. Relational interviewing is a gentle process, a soft process.⁹²

This relational process takes time to learn, as it is counter to how the hundreds-of-dollars-an-hour-world works. If you see yourself as a participant in your client’s world, not just a visitor, you may see your relationship differently.

⁹² Jan Frison, R.N., Dip.C., who spent years at Riverview Hospital (British Columbia’s warehouse for the mentally ill), has offered this specific advice on numerous occasions.

IV. WHY RELATIONSHIP-CENTERED LAWYERING MAKES A DIFFERENCE AND WILL LEAD TO BETTER OUTCOMES

There is a way forward. And there is much published and taught about the way forward--just not in law schools. Sadly, we train people to be lawyers, and we fail to train lawyers to be people. This does not mean lawyers are bad people, or that law schools or their faculty are evil or derelict. Law schools simply do not teach students that, first and foremost, their clients are people just like us.

Everyone knows law is a business. And everyone knows that the lesson of 1929 and our recent global meltdown is an indictment of unhindered capitalism. Saul Alinsky offers the correct analysis. We lawyers, and later judges, are in a class he calls the “have a little want mores.” We work hard and we work for the money. Law school is mostly about other people’s money. This is not a bad thing. This is not about being right or wrong. It is about finding what works.

The rub of it is that we are out of balance. The Hopi word “Koyaanisqatsi” applies here. It refers to a life in turmoil and out of balance, a state of life that calls for another way of living. To restore balance there is much lawyers can learn from other disciplines. The law silo needs light and air.

We need to keep up with science, philosophy and mostly ethics. A way forward is offered by the senior philosopher Joanna Macy, who says” there is work that reconnects.”⁹³ The point she makes is that we need to respond personally, not institutionally to regain our balance. Our institutions of law, medicine, education, and

⁹³ See.e.g., Joanna R. Macy & Molly Young Brown, COMING BACK TO LIFE: PRACTICES TO RECONNECT OUR LIVES OUR WORLD 1 (1998).

social work are infected with a rule of false equality: we are *not* all treated equally before the law.

Nevertheless, we can imagine certain questions arising: Will it really make a difference if I do all this stuff with my clients? And, if so, how? Will it actually help me *win* more cases?

We are convinced by our own experiences, both in terms of successes and failures, that these approaches DO make a difference on many levels. So, here is a short list of positive outcomes that result from relationship-centeredness:

- improved professional relationships with clients
- improved client well-being
- improved relationships with legal decision makers
- improved relationships with other interested parties and witnesses
- improved well-being for the helping professional

Taken together, all of these outcomes lead to better client outcomes. These outcomes also add up to more successes in and out of the courtroom.

Conclusion

There are three “take-aways” we hope every reader will get from this article. First, relational approaches and techniques are *not new*. Mr. Boulding, who used these approaches long before he ever heard of relationship-centered lawyering, is living proof of that point. It is also no accident and no coincidence that his approach and techniques have largely been imparted by people with extensive professional training in the same relational theories and practices that inform this model. **Relationship-centered lawyering** nevertheless offers an innovative and highly meaningful contribution. It

presents this accumulated *scientific* wisdom in a *clear and organized manner*, which makes it use-able and also teachable.

The second message is that these approaches and techniques *can be taught* and *can (and should) be practiced*. We know that some people, and therefore some lawyers, have come to these understandings through their life experiences and/or just do this relational stuff well, without ever having the theory or the professional training to back it up. We also know that it is only very recently that legal education is beginning to pay attention to these critical dimensions of our work--so most lawyers and most law students have not been exposed to these ideas; nor have they had the opportunity to put them into practice. And *practice* is integral to relationship-centered lawyering. Law students and lawyers can be taught the science and can be given the tools and techniques—the rest will be a lifelong enterprise of *practicing*. We must be humble enough to realize that being relational is a dynamic and ongoing process and we are never done learning.

Finally, relationship-centered lawyering makes a difference. It makes a difference to our clients, and it can make a healthy difference in our own lives. It is undoubtedly useful in working with all clients, and it is critically important in working with individuals with cognitive challenges, many if not most of whom we now know are individuals with FA/NB.

Our effectiveness, and our success, rests entirely on whether we embrace our connectedness to our clients: WE ARE IN A RELATIONSHIP WITH THEM, AND WE ARE A PART OF THEIR CONTEXT. The bottom line is that we must accept that to the extent we ignore these truths, we risk becoming complicit in our clients' transgressions.

Relationship is the key to reclaiming our authenticity, as much as it is the key to achieving better results and success in our chosen profession.