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Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice

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Relationship-Centered Lawyering: Social Science Theory

For Transforming Legal Practice[1]

by

Susan L. Brooks & Robert G. Madden

Introduction

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.
>
> Abraham Lincoln

These words of Abraham Lincoln conjure up the image of the "citizen lawyer," an image that is perhaps close to the idealized view that inspired many of us, and continues to inspire countless individuals to pursue the legal field. Justice Sandra Day O'Connor once stated that, at its best, the legal profession embodies three values: practical wisdom, civility, and, most importantly, good citizenship.[2] "A good lawyer understands that she is an officer of the court, a representative of organized society at its best. And a lawyer who is educated about the moral power of the profession can, in turn, be a teacher within society—passing on civic lessons to the next generation."[3]

As we embark on the 21st century, the legal profession is experiencing a deep and widespread yearning to re-capture the past images of esteemed lawyers, and at the same time, to articulate a forward-looking vision of the lawyer that mirrors the dramatic

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[1] A similar version of this article will be published as the introductory chapter to the forthcoming collection (of the same title), which is being edited by these authors.
[2] Sandra Day O'Connor, *Reflections on the Education of Lawyers*, Remarks given at event honoring Dean Kent Syverud, former law clerk to Justice O'Connor (May 4, 2005) (on file with authors).
[3] *Id.*

changes that have occurred within this profession as well as in our larger and increasingly global society. This yearning is reflected in the convergence of a number of movements that have swept across a wide swath of the legal profession—from practitioners to the judiciary to researchers/scholars to legal educators. These movements have taken on different core challenges: How can the law more consistently promote the well-being of its subjects? Is there a way to practice law preventively, similar to preventive medicine? Is there a way to make legal processes less adversarial, more humanistic, more responsive, or even transformative in a positive way for the participants? And how can legal education be reformed to contribute to bringing about desirable changes in the practice and in the profession?

This article represents an effort to compile and organize the responses to these challenges to create a unified and cohesive framework that we refer to as "Relationship-Centered Lawyering." Taken as a whole, this collection offers a model of practice that directly responds to the call for a revitalized understanding of professionalism and professional training when it comes to the practice of law.

A unique feature of this framework is its empirically tested scientific base. This relational approach is grounded in well-accepted principles and theories primarily drawn from the mental health fields of social work and psychology. Relationship-centered lawyering draws from theories of human development and social interaction, including family systems and attachment theories. They also include approaches to procedural justice, and models of practice, such as those focused on strengths, empowerment, and cultural competence.

I. Practice Reform

In this era, the legal profession must confront significant challenges to meet the demands of an expectant but pessimistic society and a shifting practice landscape. Among the challenges are the declining prestige of lawyers and the increasing dissatisfaction with practice environment. In addition, traditional legal practice with its reliance on the adversarial system is slowly being supplanted in some settings by new practice approaches to solving peoples' problems and meeting society's needs.

Judges and lawyers have extemporized novel responses to social problems being played out in their courtrooms and offices around the globe. The traditional legal approaches at times lead to frustration as recidivists clog the courts, motion battles extend family conflict in divorce, business relationships are sacrificed to the goal of winning a case, and aggressive win-at-all-costs expectations make lawyers feel uncivilized and immoral. As a result, the general public loses respect for the legal profession and the legal system.

The spontaneous emergence of multiple reform efforts and new legal models suggests a groundswell of response to a problem. It is possible to examine the reforms as emerging from a new legal realism: a response to legal procedures and tactics that were not effective being replaced by specialized courts and other approaches empirically superior in outcomes to traditional legal practices. It is also possible to view the reforms as a conscious movement away from the ineffective, unsatisfying aspects of being a lawyer or judge toward a more personally fulfilling and socially responsible professional life.

Susan Daicoff has grouped many of these reform efforts together in what she refers to as the Comprehensive Law Movement.[4] Two common features of these new approaches to dealing with legal problems are, first, the idea that the law can be an agent of positive change maximizing the emotional, psychological, and relational well being of those involved in each legal matter; and secondly, that these approaches value extra-legal concerns, beyond strict legal rights and duties. [5] The extra-legal issues include individual, family, and community interests and these approaches to practice consciously integrate these concerns into law and legal practice. Daicoff identifies the vectors as collaborative law, creative problem solving, holistic justice, preventive law, problem solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation. Many of the approaches are interdisciplinary and most employ social science research in their theoretical foundation and/or their outcome research.

Daicoff's insights into the common goals of these disparate perspectives and practice approaches have proven expedient as they have influenced scholarly study and identified those visionaries who have been at the forefront of these important reform movements. Nevertheless, we prefer the term "Relationship-Centered Lawyering" because we believe this terminology better captures and describes the essence of the revolution under way. Relationship-centered lawyering includes all approaches that focus 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. We also intentionally use the term to describe the work environment for

[4] Susan Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. DISP. RESOL. L.J. 1 (2006).
[5] *Id.* at 5.

lawyers, and the commitment to resolving issues using less adversarial and conflictual means than are currently used in many legal settings.

Environmental changes force natural systems to adapt as a means of survival. In response to the new settings and methods in legal practice, the legal profession must embark on a course we have identified as *sustainable development*. This concept, originally coined with reference to environmentally friendly development, has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[6] It is focused on renewable resources and stewardship of assets needed for optimal development. The shortcomings of the traditional adversarial approach to lawyering are increasingly evident in today's changing practice environment. Today's lawyers are well prepared for the analysis and management of legal issues but under prepared for the complex social situations in the practice of law. Many find themselves operating as one-dimensional lawyers in a multidimensional world.

In arguing for change, we are conscious of the importance of maintaining the fundamental strengths of the legal profession. The addition of social science theory into the toolbox of legal professionals prepares lawyers and judges to practice in changing environments but does not sacrifice the essential and enduring elements of effective lawyering: professionalism, strong skills in advocacy including analytic thinking and persuasive communication, and a trustworthy character. Improvement of the reputation and effectiveness of lawyers in contemporary practice settings can become the

[6] United Nations. 1987."Report of the World Commission on Environment and Development." General Assembly Resolution 42/187, 11 December 1987. Retrieved: 2008-05-20.

sustainable aspect of developing an expanded repertoire of knowledge to support legal practice.

II. Social Reform

The environmental changes requiring adaptive legal system responses go beyond the actual practice of law to include more general societal changes. The emergence of women in professional roles has changed the identity of the consumers of legal services. To a greater extent, women are now in decision-making roles and many demand a different form of legal representation. Women's preferred styles of interaction traditionally are more relational and less competitive than men's. Research suggests that females are more attuned to issues of care in moral conflicts and males more attuned to issues of justice.[7] The relationship-centered lawyering approach is responsive to the needs of this changing demographic of legal clients.

In addition, since 1992, women have made up nearly half of the students in ABA-accredited law schools.[8] It is still an open question how the increase in the number of women in the profession has changed the practice of law, particularly where women have not found a welcoming setting in law firms. Feminist scholars have argued that the rigid, detached, hierarchical, and adversarial character of traditional notions about lawyer professionalism reflect a distinctly "male" identity. Some of these scholars suggest that women lawyers are likely to adopt different normative and structural approaches to legal practice than their male peers.[9] Gilligan asserted that women are more likely to analyze

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[8] American Bar Association, Section on Legal Education Statistics, *First Year and Total J.D. Enrollment by Gender, 1947-2007*, available at http://www.abanet.org/legaled/statistics/charts/stats%20-%206.pdf. (last visited July 23, 2008).

[9] David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1518 (1998).

moral dilemmas with reference to a sense of responsibility for others.[10] While subsequent research has affirmed this tendency, the growing interest in prioritizing relational aspects of a situation is not explained by gender alone.[11]

In addition to the increasing number of women in the legal profession, other underrepresented groups, including ethnic and racial minorities, have increased the overall diversity of the profession. The diverse experiences and cultural styles contributed by these traditional outsiders provide the legal profession with a less homogeneous profile that challenges the assumption that there is a common normative culture followed by all lawyers.[12] It can be argued that white male identity shaped traditional legal norms, reinforced by legal education and standards of professional ethics. Conceivably, the new work force, while following basic legal tenets, offers fresh perspectives in terms of analyzing discretionary social, ethical and relationship aspects of legal practice.[13]

One other social development of significant influence to the integration of social science in the law is the growing acceptance of psychology and psychotherapy in popular culture as well as within the legal profession. For example, Mojtabai has found a modest improvement in Americans' attitudes toward mental health treatment seeking over a period of more than a decade.[14] Kessler and colleagues reported that approximately 20

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[10] *See generally*, CAROL GILLIGAN, IN A DIFFERENT VOICE (Harvard University Press 1982) (1993).
[11] Maureen Rose Ford & Carol Rotter Lowery, *Gender Differences in Moral Reasoning: A Comparison of the Use of Justice and Care Orientations*, 50(4) J. PERSONALITY & SOC. PSYCHOL. Apr. 1986, 777-783.
[12] *See* Wilkins, *supra* note 9, at 1542.
[13] *See* Wilkins, *supra* note 9, at 1548-1549.
[14] Ramin Mojtabai, *Americans' Attitudes Toward Mental Health Treatment Seeking: 1990–2003***,** 58 PSYCHIATRIC SERV, May 2007, 642, 650. Mojtabai found that the improvement was more pronounced among the younger generation. Coupled with the growing perception of psychological distress in the general public, these trends in attitudes toward mental health treatment seeking portend an increased demand for mental health treatment in coming years.

percent of the population in the 2001–2003 period received mental health treatments, compared with just over 12 percent in 1990–1992; which represents an increase of about 65%.[15] As for legal profession acceptance of mental health treatment, one measure of acceptance (in addition to being a measure of lawyer angst), is the demand for mental health services among legal professionals. In Chicago, the demand has been so high that a mental health practice group has been formed specifically to treat lawyers from the city that suffer with anxiety, depression, and life adjustment issues.[16]

III. Educational Reform

In order to transform the professional culture, we need to re-think the training of legal professionals. It is therefore critical to address inadequacies within the realm of legal education. Two high profile reports on the state of legal education have recently been published, the Carnegie Report on Legal Education ("Carnegie" or "The Report") and the Clinical Legal Education Association's Best Practices Report ("Best Practices"). These studies, which call for pervasive changes in legal education, are beginning to generate significant discussion and activity at numerous law schools across the country. This article is particularly responsive to the issues raised in these reports.

The Carnegie Report identifies a major challenge of the legal profession as how to link the interests of educators with the needs of practitioners and the members of the public lawyers are intended to serve—"in other words, participation in civic

[15] Ronald C. Kessler, Olga Demler, Richard G. Frank, Mark Olfson, et al., *Prevalence and treatment of mental disorders, 1990 to 2003*. 352 NEW ENG. J. MED. 2515–2523 (2005).
[16] Carol McHugh Sanders, *Psychoanalytic Services Center is Reaching Out With Own Practice Group for Stressed-Out Lawyers*, 141 CHI. DAILY L. BULL. No. 146, July 25, 1996.

professionalism."[17] In order to meet this challenge, the Report calls for greater emphasis on the formation of professional identity along with teaching theory and practice.[18] "A focus on the formation of the professional would give renewed prominence to the ideals and commitments that have historically defined the legal profession in America."[19] The Report identifies what it terms as three "apprenticeships" that are essential components of legal education: (1) **intellectual or cognitive**; (2) **practice-based/performance skills**; and (3) **identity and purpose**.[20] The Carnegie authors' main concerns are twofold. First, they find that the three apprenticeships, to the extent they are being taught, are not well integrated with each other.[21] They tie this idea of integration to the legal realist movement, and Jerome Frank, to the extent that Frank's vision of legal education advocated for an epistemology of professional learning that contemplates an intimate connection between theoretical understanding and practical experience.[22]

Second, and of equal importance, the Carnegie authors find that while legal education has developed systematic and effective pedagogical approaches focused on the intellectual/ cognitive ("first") component, such as the Socratic Method, and has done the same with respect to elements of the practical skills ("second") component, such as in the field of negotiation, it is lacking in the development of a "science" or body of theory particularly with respect to the third apprenticeship, that of identity and purpose. In other

[17] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4 (Jossey- Bass, 2007) (As part of "The Preparation for the Professions Series" from The Carnegie Foundation for the Advancement of Teaching)
[18] *See* SULLIVAN ET AL., *supra* note 17, at 13.
[19] *See* SULLIVAN ET AL., *supra* note 17, at 13.
[20] *See* SULLIVAN ET AL., *supra* note 17, at 27-29.
[21] *See, e.g.*, SULLIVAN ET AL., *supra* note 17, at 59 ("We believe legal education requires not simply more additions but a truly integrative approach in order to provide students with a broad-base yet coherent beginning for their legal careers." *See also*, p. 94 Legal education needs a broader form that includes strong interconnection among the elements of the curriculum and the full faculty. *Also*, p. 97 " How to blend the analytical and practical habits of mind that professional practice demands is, we believe, the most complex and interesting pedagogical challenge in the preparation of legal practitioners.").
[22] *See* SULLIVAN ET AL., *supra* note 17, at 88.

words, what is needed is a 'science' of professionalism. Moreover, to address the fundamental concern about integration, it is necessary that elements of the second and third apprenticeships be given the same level of credibility and respectability as the first, which involves teaching students to "think like a lawyer."

In light of the professional image and satisfaction issues discussed above, both the Carnegie and Best Practices reports examine and critique legal education's signature pedagogy as it is reflected in the case method approach used in the first-year curriculum. *Signature pedagogy* has been defined as a teaching and learning model that is distinctive to a profession and one that functions as a window into the priorities and, moreover, the very essence of a profession's work.[23] Beyond the need to prepare students for practice, the signature pedagogies of the professions serve a role as cultural markers, instilling critical ideas, language, behaviors, customs, beliefs, and values of a professional group. Culture is often referred to as the totality of ways being passed on from generation to generation.[24] The experiences of students in professional education socialize them to these subtle but influential characteristics common to the practice of their chosen field.

This professional acculturation process is embedded in the very interactions of the teaching/learning process. Marsiglia and Kulis describe acculturation as occurring in two distinct dimensions. Behavioral acculturation involves the adoption of the external aspects of the culture such as language and skills that allow the individual to assimilate.

[23] CHARLES R. FOSTER, LISA DAHILL, LARRY GOLEMON & BARBARA WANG TOLENTINO, EDUCATING CLERGY: TEACHING PRACTICES AND PASTORAL IMAGINATION 33 (2005).
[24] NATIONAL ASSOCIATION OF SOCIAL WORKERS, NASW STANDARDS FOR CULTURAL COMPETENCE IN SOCIAL WORK PRACTICE 7 (2001).

Psychological acculturation involves the adoption of the ideologies of the culture or the way the group sees the world.[25]

The Carnegie and Best Practices reports ultimately probe difficult questions about the unhappy state of the legal profession and how the law school experience brings students to their identity as lawyers. The pedagogical elements of a law school education include a focus on the intellectual through analytic thinking; a focus on competition through grading and law reviews; a focus on preparation and verbal sparring through the Socratic method; and a focus on selective listening through intellectual training to shape facts to support a legal argument. The consequences of these factors are as limiting as the benefits are positive. They fail to prepare students with the knowledge and skills to negotiate the realities of legal practice steeped in relational variables and moral/ethical dilemmas.

Accordingly, the Carnegie authors note that on the whole legal education has essentially 'overvalued' the importance of the first apprenticeship and undervalued, and in many ways, devalued the latter two. One simple illustration of how legal education is missing the mark is the observation that law students are generally taught to focus on legal matters as "cases" rather than "clients". In part, this distancing and de-personalizing of what it means to practice law is reinforced through the schism between the first-year courses that are taught through the highly revered case method, and the upper level 'skills' and clinical courses, which have historically been viewed as 'anti-intellectual'.

Undoubtedly, the case method is often thought of as quintessential to, if not itself an embodiment of legal education's signature pedagogy.[26] At the same time, this

[25] FLAVIO FRANCISCO MARSIGLIA & STEPHEN KULIS, DIVERSITY, OPPRESSION, AND CHANGE 6 (2009).

approach has been described as "acultural" and "acontextual" to the point of forcing students to separate their sense of fairness and justice from their understanding of the requirements of legal procedure and doctrine.[27] Unfortunately, the emphasis on pure legal reasoning that is taught specifically through the case method may have alienating effects on students and ultimately, on the public. Such corrosive tendencies must be and can be countered by simulations and clinical courses, through which the student's professional self is most effectively explored and nurtured. "Critically, the[se courses] are the law school's primary means of teaching students how to connect the abstract thinking formed by legal categories and procedures with fuller human contexts."[28] Nevertheless, in contrast to the first-year courses, which are usually taught by tenured and tenure track faculty, the upper level skills and clinical courses are often taught by faculty who do not share the same status or job security as those teaching the courses focused on the first apprenticeship.[29]

The Carnegie Report takes the position that in order to gain respectability and credibility, the apprenticeships related to practice and to the ethics and values of the profession must be 'scientified'—they must be articulated in terms of theories and principles that can actually be taught and applied to different contexts.[30] The Carnegie authors use the field of negotiation to illustrate this point. According to the Carnegie authors, negotiation has attained a greater level of academic respectability than other practice-oriented subjects because negotiation can claim a body of theory to bolster its

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[26] *See, e.g.*, SULLIVAN ET AL., *supra* note 17, at 53
[27] *See*, SULLIVAN ET AL., *supra* note 17, at. 55-58, (citing ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO THINK LIKE A LAWYER 97-140 (Oxford University Press 2007)).
[28] *See*, SULLIVAN ET AL., *supra* note 17, at 58.
[29] *See*, SULLIVAN ET AL., *supra* note 17, at 94.
[30] *See*, SULLIVAN ET AL., *supra* note 17, at 104.

claims to practical importance.[31] Another example of an effort to use theory to fortify a field has been the development of clinical legal education scholarship discussing the 'theoretics of practice,' including Gary Blasi's work drawing upon the literature of cognitive theory and the learning sciences.[32]

The relationship-centered lawyering approach presented in this article represents an important first step in the development of a more holistic 'science' of legal professionalism, as captured by the components of expert practice mentioned in the Report. When viewed as a cohesive body of theory, this relational model can, in the words of the Carnegie's authors, "serv[e] to legitimate the construction of new forms of recognized competence.[33] One element of this model, which is highlighted within the report, is the role of lawyer as "cooperative problem-solver," which is described as a new normative model of professionalism for the student, but could equally be presented as a new normative model for the practice of law.[34]

Another essential element of the relational model, which is identified in the Carnegie Report, and also in Best Practices, is the notion of the "contextualization" of legal education and practice, or "context-based education" [35] as reflected in the ecological approaches presented in this article. Both publications recognize that the expert legal professional needs to comprehend fully a highly contextualized understanding of the client, case, and situation.[36] Contextualization also means the exploration of moral and

[31] *See* SULLIVAN ET AL., *supra* note 17, at 105-106.
[32] *See* SULLIVAN ET AL., *supra* note 17, at 101 (citations omitted).
[33] *See* SULLIVAN ET AL., *supra* note 17, at 13.
[34] *See* SULLIVAN ET AL., *supra* note 17, at 102.
[35] *See* SULLIVAN ET AL., *supra* note 17, at 95, (citing ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 109 (Clinical Legal Education Association, 2007)).
[36] *See* SULLIVAN ET AL., *supra* note 17, at 115.

ethical-social issues as integral elements of legal representation, including the qualities of compassion, respectfulness, and commitment.[37]

Turning to the Best Practices Report, Roy Stuckey and his colleagues advocate that a primary goal of legal education should be to develop competence—the ability to resolve legal problems effectively and responsibly.[38] Competence requires the integrative application of knowledge, skills, and values (similar to Carnegie's three apprenticeships). Moreover, competence is "context-dependent" in that it represents the interplay between the lawyer, the lawyer's task, and the legal framework in which the tasks must take place.[39] Best Practices thus advocates the need for "context-based" education in order to develop practical wisdom or practical judgment, which is identified as essential to creative problem solving. "Practical judgment …"is context-dependent, linked to intensive interplay between theory and human problem , as relevant knowledge is developed through reflection in light of surrounding circumstances and brought to fruition through action."[40]

Similar to the Carnegie Report, Best Practices makes the case for greater emphasis and intentionality connected to the teaching of what it calls "affective skills."[41] These skills include values, attitudes, and beliefs such as how students related to clients, how they respond to ethical concerns, and how their values inform their role.[42] Roy Stuckey and the other contributors to this report strongly support "supervised practice" as

[37] *See,* SULLIVAN ET AL., *supra* note 17, at 144, 146.
[38] ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 60 (Clinical Legal Education Association 2007).
[39] *See,* ROY STUCKEY ET AL., *supra* note 38, at 60.
[40] *See,* ROY STUCKEY ET AL., *supra* note 38, at 149 (citations omitted).
[41] *See,* ROY STUCKEY ET AL., *supra* note 38, at 167.
[42] *See,* ROY STUCKEY ET AL., *supra* note 38, at 167.

more effective than classroom instruction for purposes of teaching the standards and values of the legal profession and for inculcating a commitment to professionalism.

These reports' advocacy for professional education steeped in practice experiences brings to mind the potential parallels between the fields of medicine and law. Indeed, the Carnegie report expressly draws important lessons for legal education from the field of medical education, such as the extensive use of simulations throughout medical training.[43] Interestingly, the field of medical education has spawned a parallel movement to that which we are advocating in this volume, known, as the "Relationship-Centered Care Initiative" (RCCI).[44] The impetus for RCCI, similar to that which spurred the Carnegie Report, was a recognition that the principle mechanism for changing the culture of the profession is through the transformation of professional educational institutions. This initiative is being implemented at the Indiana University School of Medicine (IUSM) through its "informal" or "hidden" curriculum, meaning the social environment of the medical school, on the premise that these social and organizational elements have a profound influence on the students' professional identity formation. In other words, students internalize and perpetuate patterns of behavior regarding the way they see people treating each other and the way they themselves are treated. The goal of this project is to foster and develop an informal curriculum that "consistently reinforces the values of the formal curriculum," including promoting mindfulness about the values exhibited in

[43] *See,* SULLIVAN ET AL., *supra* note 17, at 108.

[44] *See* Anthony L. Suchman, et al., *Toward an Informal Curriculum that Teaches Professionalism*: *Transforming the Social Environment of a Medical School*, 19 J. GEN. INTERNAL MED. 501 (2004). To show just how parallel developments in these two fields have been, it is noteworthy that an article describing the historical context of RCCI mentions how it evolved out of the "patient-centered care" movement. In the field of legal education, one might recognize a similar evolution from the well-accepted client-centered model to what we now propose as the relationship-centered approach. *See* Binder, et al.

everyday interactions within the institution, and a commitment to continuous learning and behavior change.[45]

In order to effectuate this level of transformation, the proponents of RCCI have expressly rejected a linear model, and instead adopted a non-linear perspective referred to as " 'making ripples in a pond,' envisioning [thei]r work as introducing constructive disturbances in existing patterns of interaction that other people might then adopt, modify, and propagate."[46]

They have also expressly adopted two theories of organizational change, which bear a striking resemblance to several of the principles and approaches presented in the Relationship-Centered approach. The first, Appreciative Inquiry (AI) relies upon the social constructionist insight that reality is created in conversation, and is thus a dynamic and interactive process.[47] AI emphasizes reframing situations to focus on core perceptions of capability and hopefulness rather than deficit, and uses the modality of storytelling as a means toward community-building. These salient features of AI mirror important elements of the relational model, in terms of the focus on collaborative processes, as well as an orientation toward strengths and empowerment.

The other theory is Complex Responsive Process (CRP), which, as described in the RCCI materials, has a great deal in common with ecological or systems theory, which is a core feature of our relational model.[48] To begin with, CRP is premised on the notion that "humans beings are a thoroughly social species: we grow up and live in a medium of

[45] *See* Suchman et al., at 501.
[46] *Id.* at 501 (citations omitted).
[47] *Id.* at 503.
[48] *Id.* at 503-04.

continuous social interaction."[49] CRP describes how patterns of meaning and patterns of relating arise, propagate, and evolve spontaneously in the ongoing flow of human interaction. By focusing on how novel patterns can arise in the almost imperceptible iterative and dynamic interactions between and among individuals within a particular environment , the theory of CRP encourages organizational leaders to avoid grand schemes and to attend to what is actually happening in an immediate sense in order to explore opportunities to introduce new and potentially more desirable patterns.

RCCI has also encouraged the development and use of metaphors as part of its 'ripple effect' and dialogic approach. Two of the metaphors discussed in the RCCI literature, which relate to institutional readiness, are useful for thinking about the challenges we aim to address through our relationship-centered model. One metaphor is the "burning platform," which alludes to the amount of discomfort, pain, fear, or hope, required before a person is willing or feels the need to jump, or to escape from the fire and heat of a burning platform. The second is the "tipping point," which contemplates a mechanism or means of change, which may indeed begin as a small ripple. Dr. Dewitt Baldwin, Jr., the author of the 2006 Evaluation Report of RCCI recognizing its apparent successes, relays a quote credited to Margaret Mead: "Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has."

IV. Public Trust in the Profession: Raising the Bar

Lawyer malaise is a term heard too often over the past quarter century. It reflects both an internal crisis and an unsettling sensibility of those outside the profession that

[49] Anthony L. Suchman, *A New Theoretical Foundation for Relationship-Centered Care: Complex Responsive Processes of Relating*, 21 J. GEN. INTERNAL MED. S40-S44 (2006).

lawyers and legal practice in contemporary American society are unhealthy and morally insolvent. Like any relationship, characteristics that attract may eventually repel. The dogged advocacy of a lawyer fighting for the rights of a client has come to be viewed by some as an adversarial, hypercritical, self-interested, speculator who profits off the exacerbation of conflict. Not only do those outside the profession report negative images of lawyers, those inside the profession feel increasingly unhappy in legal practice.

Research in positive psychology suggests three principal causes of the demoralization prevailing among lawyers: (a) **pessimism**, which is more common among lawyers than other professionals, and can lead to increased unhappiness and depression; (b) **low decision latitude**, the number of choices an individual believes he has, combined with high pressure; [50] and (c) the **zero-sum game** nature of the job. Seligman, Verkuil, and Kang define a zero sum game as one in which for every gain by one side, there is a countervailing loss by the other side. They explain the effects of practicing in a zero sum game environment. When lawyers have too many professional experiences that are zero sum games such as litigation or other contest strategies, it can produce predictable emotional consequences for practitioners. Many such lawyers will be anxious, angry and sad much of their professional life.

What can be done to change the psychological resources of lawyers to make them less susceptible to these challenges? The answers lie both in changing the legal environment and helping lawyers develop the inner tools necessary to build a life in the law that is psychologically healthy. These tools or competencies fall into three dimensions:

[50] Martin E.P. Seligman, Paul R. Verkuil & Terry H. Kang, *Why Lawyers are Unhappy*, 23 CARDOZO L. REV., 39-43 (2001).

(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.

In the Chapters that follow, the authors have collected materials from a variety of disciplines to provide readers with the fundamentals for relationship-centered legal practice.

V. Foundational Perspectives

The Relationship-Centered Approach is grounded in four influential perspectives that have emerged within the past twenty years. Each perspective represents a movement that has captured the energy and imagination of judges as well as legal scholars and practitioners. Taken together, they constitute the foundation for a relational approach to the practice of law.

The first of these perspectives is **Therapeutic Jurisprudence** (often known as "TJ")—the study of the role of law as a therapeutic agent. TJ is truly a global, interdisciplinary movement created and inspired by its co-founders, David Wexler and Bruce Winick. Twenty years ago, Wexler and Winick, two law professors, began writing about the need to study the impact of the law on the wellbeing of those affected by it. This project began with an exploration of topics in the field of mental health law such as looking at the effects of the insanity defense and civil commitment hearings. Within the past two decades it has blossomed into an international network of scholars, judges, legal

educators and practicing lawyers, along with scholars and practitioners from a wide range of other disciplines, including experts from a range of mental health fields, criminologists and other social scientists.

The second perspective is TJ's counterpart, **Preventive Law (PL)**. Preventive Law was around long before TJ, largely as a set of risk-minimizing operations for legal practice. Then in 1999, the two fields formally came together to create a new and improved model.[51] As described by Edward Dauer, now a leading proponent of PL, the credit for the merger goes to Dennis Stolle. "Stolle saw in PL a useful system of lawyering operations without a complete theory; in TJ he saw a set of coherent theories without a complete plan of operation."[52] These preventive strategies and techniques have contributed significantly to the broader development of psychological-mindedness in legal scholarship and practice, an important forbearer of a relationship-centered model.

The third foundational perspective is **Restorative Justice**. This movement encompasses both a broad conceptual/philosophical orientation as well as a growing number of specific applications in fields including criminal and juvenile justice, child welfare and domestic violence. Restorative Justice has been described as "an umbrella term for a spectrum of practices used in association with the criminal justice system,"[53] and also "a set of principles or even a philosophical approach to life."[54] This field is still in its infancy, and to some degree eludes real definition, but the notions of participation and reparation have been identified as key principles. This movement's focuses on the

[51] *See* Edward A. Dauer, *Preventive Law Before and After Therapeutic Jurisprudence: A Forward to the Special Theme Issue*, 5 PSYCHOL. PUB. POL'Y & L. 800, 800-01 (1999).
[52] *Id*. at 801.
[53] James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Medication and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 239-240 (2004).
[54] *Id.*

healing and potentially transformative power of human interaction underscores its inclusion as a building block of a relational approach to lawyering.

The fourth and final perspective is **Mediation**. Mediation theory includes three distinct and coherent ideological frameworks: (a) the problem-solving framework, (b) the harmony framework, and (c) the transformative framework.[55] For the purposes of relationship-centeredness, the authors of this volume embrace the transformative model, which represents a "relational ideology. In addition to offering a way out of adversarial legalism, ADR allows parties to decide for themselves how they want their disputes to be solved.

VI. Competencies within Relationship-Centered Lawyering

A. Substantive Social Science Perspectives

In the relationship-centered approach, lawyers and other legal professionals must be prepared to understand clients' extra-legal issues. Frequently lawyers are asked to play a role in decision-making for clients who are in complex and sometimes vulnerable life circumstances. Most lawyers, however, lack a theoretical model from which to operate when assessing the needs and interests of their clients. Legal research and analytic skills do not help the legal professional to understand and appreciate the significance of the social and emotional dynamics in the lives of their clients. Adequate representation and effective judgments require knowledge that comes from research based theory rather than subjective or speculative responses to client situations. Three theoretical perspectives provide the most useful research-based knowledge for practice: family systems theory, developmental theory, and attachment theory.

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[55] Dorothy J. Della Noce, et al., *Clarifying the Theoretical Underpinnings of Mediation Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. J. 39, 40 (2002).

Family systems theory is an organizing theoretical perspective to structure a lawyer's thinking about the life circumstances of clients.[56] The traditional focus on legal outcomes, the winning or losing of a case or the maximization of monetary awards misses important client goals related to family goals and values, as well as the developmental, relational, and cultural context of clients.[57] Robert Madden explores the significance of social sciences to legal practice and describes six competencies of lawyers operating from a family systems perspective: understanding context, using the skills of collaboration, practicing in ways consistent with cultural competency, maintaining effective relationships, engaging in multidisciplinary practice, and practicing with an ethic of care.[58]

Family systems theory explains basic systems concepts including family communication and transactional patterns, relationship factors, human development within the context of the family's experiences, and the adaptability of systems to stress and change.[59] For example, Froma Walsh presents a nuanced perspective on resiliency, a concept critical to help practitioners understand family response to stress.[60] While some clients are overwhelmed by minor problems, others seem to be fortified by stressful experiences, not only coping but thriving by a process of adaptation to the changed demands and environment. By studying the personal characteristics and systems supports of those who are resilient in the face of stress, legal practitioners can better anticipate the human needs of clients and help to ensure resources are in place to support resiliency.

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[56] Robert G. Madden, *From Theory to Practice: A Family Systems Approach to the Law.* 30 T. JEFFERSON L. REV. 429, 431 (2008).
[57] *Id*., at 432.
[58] *Id*., at 443- 453.
[59] Karen L. Fingerman & Eric Bermann, *Applications of Family Systems Theory to the Study of Adulthood,* 51 INT'L J. AGING & HUM. DEV. 5 (2000).
[60] Froma Walsh, *Family Resilience: A Framework for Clinical Practice,* 42 FAM. PROCESS 1 (2003).

Knowledge of **human development** across the lifespan is central to effective assessment of client behavior and emotions. Lawyers who understand the client's life context are better able to provide wise counsel, advocate for extra-legal needs, and work for outcomes that support healthy development, regardless where the client is in the life course. Developmental theory placed within family systems thinking allows the practitioner to appreciate both the stability of structure and the fluidity of change within a family system. Behaviors and patterns of response are viewed as adaptive and functional responses to the dynamics of the family system and thus change as the individuals within systems develop.[61]

The third foundational social science theory is **attachment theory**, one of the most significant developments in psychological research over the past fifty years. It is not enough for a lawyer to understand the current family system context and developmental stage of clients if they experienced early problems with attachment relationships to caregivers. Ross Thompson describes the basic principles of attachment theory highlighting the relationship of early nurturing attachments, and subsequent development within the family system.[62] Attachment problems can impact long term functioning although the effects of disrupted attachments can be overcome with a supportive environment.[63] Early attachment problems can create a powerful and enduring narrative, an internal representation about self that influences future relationships, including the lawyer client relationship.[64] Lawyers who represent clients in family/custody issues, child welfare cases, adoption, and many other matters should be

[61] *See* Fingerman & Berman, *supra* note 59, at
[62] *See* Ross A. Thompson, *The Legacy of Early Attachments*. 71 CHILD DEV. 145 (2000).
[63] *Id*., at 146.
[64] *Id*., at 147.

familiar with the research on attachment theory to inform their decision-making and recommendations to clients and courts.

B. **Process-Oriented Perspectives**

Trust is an essential feature in the public's perception of justice and fairness in the legal system. It is implicit in clients' subjective assessment of the experience. When people encounter the legal system voluntarily or not, the meeting is marked by process issues such as whether they felt respected, whether they experienced the legal professionals as fair-minded and nonjudgmental prior to the disclosure of facts, and whether they perceived that they had the opportunity to be heard. Psychologist Tom Tyler has led efforts to apply empirical research to process elements in legal and police work, a field known as **procedural justice**. Tyler's findings reinforce the therapeutic ideal that attending to client psychological factors, enhancing positive feelings and minimizing anti-therapeutic costs, is justified by the outcomes. When people's experiences leave them with a sense of being treated fairly, they are more likely to have respect for the system leading to increased compliance with decisions of the legal authority.[65] The critical element in the determination of fairness of procedure is whether people going through the process have their social identity as full-fledged members of society reinforced.[66] In effect, the process provides a barometer on the person's social status.

Finally, empiricism in legal practice cannot be relegated to an inconsequential status in the law if scholars and researchers can find ways to inform legal policy reform

[65] Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B. U. L. REV. 361 (2001).
[66] Lind, E. A., et al, *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73(4) J. PERSONALITY & SOC. PSYCH. 767 (1997).

by applying empirical knowledge and measuring the outcomes of such changes. Mark Fondacaro, a law professor, proposes a social science influenced model of legal practice he terms **ecological jurisprudence**.[67] In rejecting theories of human motivation based on myth or common beliefs, Fondacaro establishes a foundation for legal practice that is both functional and consistent with empirical understanding of human behavior. Fondacaro argues for a perspective change that begins with the individual as part of other systems. This raises the primary question of what effect social environment has on an individual's legal responsibility, but also calls into question many of the legal procedures relied on by legal authorities.

C. Affective and Interpersonal Perspectives

There are four dimensions to the affective and interpersonal competencies needed for relational lawyering. These four dimensions are: (1) **cultural competence;** (2) **empowerment and** (3) **strengths perspectives; and** (4) **emotional intelligence**.

Two important points are fundamental to understanding the role of culture through a relational lens. First, the work of understanding culture is informed by a contextualist viewpoint, meaning that the individual is embedded within the family, which itself is embedded in a culturally diverse context.[68] Second, the full range of cultural contexts--including history, complexity, and diversity--must be examined within this contextualist paradigm. Historically, the study of culture has been static, based upon historical and idealized aspects of a particular culture. Rather, science must adapt to the

[67] Mark R. Fondacaro, *Toward an Ecological Jurisprudence Rooted in Concepts of Justice and Empirical Research*, 69 UMKC L. REV. 179 (2000).

[68] *See* Jose Szapocznik & William M. Kurtines, *Family Psychology and Cultural Diversity: Opportunities for Theory, Research and Application*, 48 AM. PSYCHOL. 400 (1993).

current realities, which mean that the study of any culture necessitates an understanding of multiculturalism as our society grows increasingly pluralistic and diverse.

A relatively new field for scientific research in the area of culture that takes account of both context and multiculturalism is the increasingly studied phenomenon of "racial microaggression": day-to-day verbal, behavioral, or environmental indignities, which may be intentional or unintentional, but which nonetheless communicate racial slights or insults toward people of color.[69] Although the recognition of the existence of this phenomenon is not new, social scientists have recently found innovative ways to categorize and study these seemingly invisible and innocuous interpersonal dynamics. The taxonomy includes microassaults, microinsults, and microinvalidations. This groundbreaking work on cultural difference and its impact on helping relationships as one that 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.

The next two components, the *empowerment* and *strengths* perspectives, represent two practice models that have become fundamental components of social work training and education. The **empowerment perspective** includes a value base drawn from the National Association of Social Workers' (NASW) Code of Ethics, theory drawn from a political-economic perspective focused on the significance of power in social relationships, and a practice framework in which the helping professional and client join together to evaluate data and to form an ongoing assessment of the client's issues. The common and consistent theme is one of facilitating the empowerment of clients against a socio-political and historical backdrop of understanding and critiquing oppression in all

[69] *See* Derald Wing Sue, et al., *Racial Microaggressions in Everyday Life*, 62 AM. PSYCHOL. 271, 272-73 (2007).

of its forms. Using a feminist lens, one can refine this approach by incorporating developmental and process-oriented perspectives, but retaining the foundational concept of "praxis," a "cyclical process of collective dialogue and social action that is meant to effect positive change."[70] Viewed in this manner, empowerment is an inherently interpersonal process in which individuals collectively develop strategies to gain access to knowledge and power.

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.

Lawyers who go through traditional legal training may have innate personal skills such as effective communication to allow them to be effective in the emerging forms of practice. Many lawyers have used the counseling role to guide clients to settle cases by wisely considering extra-legal issues in their analysis. But, with very few exceptions, if lawyers have the skills and perspectives necessary to practice effectively in a relational model of legal practice, they are either part of interdisciplinary training or naturally occurring tendencies.

[70] E. Summerson Carr, *Rethinking Empowerment Theory Using a Feminist Lens: The Importance of Process*, 18 AFFILIA 8 (2003)

Analytical thinking is only one subset of what is needed to make a successful lawyer.[71] Lawyer satisfaction depends on inter and intrapersonal capacities and thus argues for the cultivation of **emotional intelligence** for lawyers. High levels of emotional intelligence can lead to greater competencies in professional skills such as persuasion, communication and influencing others.[72] Emotional intelligence also allows lawyers to have increased capacity for empathy, which enables deeper understanding of a client's situation and the ability to be sensitive to and accepting of the emotional lives of others.[73]

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

Conclusion

> We have, I suggest, been living for a long time--too long a time--within the mainstream of nineteenth century thought. Our current malaise may reflect the obscure realization that the nineteenth century ended some time ago.
>
> (Grant Gilmore on the state of the legal profession, 1972)

The perceived malaise within the legal profession has been a persistent phenomenon. So, perhaps it is too soon to predict whether the movements identified here signal a profession ready to jump off the burning platform, or just early ripples in a pond. In either case, the legal profession seems ripe for the development of a language and a rubric that answers the calls for a science of

[71] Marjorie A. Silver, *Emotional Intelligence and Legal Education.* 5 PSYCHOL. PUB. POL'Y & L. 1173-1180, (1999).
[72] John Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students*, 39 TOL. L. REV. 323 (2008).
[73] *See* Silver, *supra* note 71, at 1178.

professionalism. The language of relationship-centeredness as distinct from client-centeredness captures the notion that professionalism requires more than zealous advocacy or even client self-determination. Professionalism requires that lawyers cultivate intrapersonal as well as interpersonal literacy—what some have referred to as psychological-mindedness. The competencies we have identified within this framework speak to professionals' relationships with co-workers, opponents, experts, eyewitness, and judges, as much as they do to clients. Having identified the components of relationship-centeredness, the challenge ahead is to make use of this framework to humanize the profession such that lawyers can meet Lincoln's vision of peacekeepers and good citizens.