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CHALLENGES OF "SAMENESS": PITFALLS AND BENEFITS TO ASSUMED CONNECTIONS IN LAWYERING

ALEXIS ANDERSON, LYNN BARENBERG & CARWINA WENG*

"I really understand what you're going through; my father just sold his business, too. Sounds like you've both found life after the sale to be tough going."

—Student attorney to client during intake meeting

Individuals are drawn to connect with other people because of shared experiences and personal characteristics. These connections often help people establish rapport, trust, and engagement. Surely these same benefits would apply in the lawyer-client relationship where a lawyer's ability to find common links with her client would facilitate the lawyering process.

Perhaps that is true, but not necessarily and not without some potential costs. As clinical teachers, we have become increasingly wary that assumptions attributable to sameness can complicate lawyering. Untested assumptions, whatever their source, can impair lawyering judgments. In our collective experience, we have found that assumptions rooted in sameness are particularly seductive and bring unique challenges to our work.

Our aim therefore is to identify the assumptions that accompany sameness, to increase the likelihood that personal and experiential connections enhance the lawyer-client relationship and the lawyering process, and to minimize the possibility that they interfere. In addition, we explore how questions of sameness, or its complement, difference, arise in clinical supervision and provide suggestions to best address these questions with our students, our clients, and third parties within the justice system.

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Our focus is on the intersection of difference and sameness, as they are assumed or actually exist between lawyer and client, and the effect of difference and sameness together on the lawyer-client relationship and the lawyering process. In our experience, lawyers and clients build professional relationships both because of shared personal characteristics or life experiences and in spite of them. Just as other commentators have helped lawyers develop methods for bridging difference, we seek to offer tools for dealing with the consequences of assumptions rooted in sameness. It is our hope that this inquiry will assist clinic students and their supervisors to acknowledge and deal with the normal human response of making and acting on connections. Ultimately, we hope that all lawyers will interact with clients with holistic awareness of sameness and difference.

INTRODUCTION

What could possibly be wrong with "sameness"? On a national level, some observers have touted American "sameness" as a strength, and the long-lived belief in the vision of America as a melting pot testifies to the enduring desire for sameness in national identity.[1] Sameness, in this context, provides familiarity, security, and a sense of belonging.[2] Additionally, on a more personal level, individuals are

[1] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 141 (Richard D. Heffner ed., 1956) (1835) (describing Americans as "all belonging to one family, owing their origin to the same cause, and preserving the same civilization, the same language, the same religion, the same habits, the same manners, and imbued with the same opinions, propagated under the same forms"). *But see* Michael J. Glennon, *Self-Determination and Cultural Diversity*, FLETCHER F. WORLD AFF., Summer/Fall 2003, at 75, 81 (challenging the proposition that cultural homogeneity necessarily enhances democracy: "[C]ultural homogeneity and heterogeneity are not discrete categories. Rather, they are poles on a spectrum . . . . There is no such thing as 'true, pure' cultural homogeneity"); john a. powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 788–804 (2009) (cautioning against embracing claims of formal equality as a denial of difference and advocating for policies which recognize how groups and individuals are uniquely situated); Sonu Bedi & Monu Bedi, *A Politics of Sameness: The Defense of Cultural Assimilation*, Western Political Science Association Annual Meeting Paper (Apr. 1, 2010) (on file with authors) (noting conflicting views of individualized justice within criminal law due to disparate treatment of sameness and difference features in federal law).

Our reference to a vision of an American "melting pot" is offered for descriptive purposes only; we intend no normative judgment about the power dynamics inherent in assessments of political and cultural homogeneity. *See generally* Kimberly Holt Barrett & William H. George, *Judicial Colorblindness, Race Neutrality, and Modern Racism: How Psychologists Can Help the Courts Understand Race Matters*, *in* RACE, CULTURE, PSYCHOLOGY, AND LAW 31–46 (Kimberly Holt Barrett & William H. George eds., 2005).

[2] Indeed, on the opposite side, neuroscience research demonstrates links between unconscious human fear response and group difference. An experiment by Elizabeth Phelps, Mahzarin Banaji, and their collaborators in 2000 found through functional magnetic resonance imaging that White subjects exposed to unfamiliar Black faces showed greater activity in the amygdala than when exposed to unfamiliar White faces. Elizabeth A. Phelps, Kevin J. O'Connor, William A. Cunningham, E. Sumie Funayama, J. Christopher Gatenby, John C. Gore & Mahzarin R. Banaji, *Performance on Indirect Measures of Race*

drawn to connect with other people because of shared experiences and personal characteristics. These connections often help people establish rapport, trust, and engagement. Surely these same benefits would apply in the lawyer-client relationship, where a lawyer's ability to find common links with her client would facilitate the lawyering process.

Perhaps this is so, but not necessarily and not without some potential costs. Based on our combined experiences as clinical teachers,[3] we have become increasingly wary that assumptions attributable to sameness[4] can complicate lawyering. We are all acutely aware of how untested assumptions, whatever their source, can impair lawyering judgments. In our collective experience, we have found that assumptions rooted in sameness are particularly seductive and bring unique challenges to our work.

Why is sameness particularly seductive? The answer lies in our existence as social beings. Unconsciously, we categorize people into groups—in-groups whose members share characteristics with ourselves, and out-groups whose members appear different from ourselves.[5] This categorization affects how we perceive other people: automatically, we might exaggerate differences among groups and favor our in-group over any out-group. Our preference for our own in-group leads us to value, trust, and work with members of our in-group more than we do members of an out-group.[6] Hence the seduction of sameness. As human beings and lawyers, we seek sameness to

Evaluation Predicts Amygdala Activation, 12 J. COGNITIVE NEUROSCIENCE 729, 729–38 (2000). The amygdala is a subcortical structure in the brain that is involved in emotional learning and evaluation. The researchers do not conclude that race alone is sufficient to activate the fear response, noting that the subject's response reflects "social learning within a specific culture at a particular moment in the history of relations between social groups." *Id.* at 734.

[3] The authors have had the joy of working together in the in-house, live-client civil litigation clinic at Boston College Law School. At that community legal services office, Alexis Anderson is one of the faculty supervisors for students who are serving as the front-line attorneys for their clients under the state's student practice rule. Lynn Barenberg has been part of the clinic's legal team as a social work consultant for over twenty years. Recently, Anderson and Barenberg have team taught both clinic supervision and clinic seminar. Previously, Carwina Weng also served as one of that clinic's faculty supervisors.

[4] Whether sameness is actual (e.g., an attorney and a client are both women) or perceived (e.g., a seeming shared national origin based on name), assumptions can flow from the shared characteristic. As this Article focuses on the challenges that arise from assumptions around sameness, whether real or perceived, we will use the term "sameness" to encompass both actual and perceived sameness, unless the difference is necessary to the discussion.

[5] *See* AM. PSYCHOLOGICAL ASS'N, GUIDELINES ON MULTICULTURAL EDUCATION, TRAINING, RESEARCH, PRACTICE, AND ORGANIZATIONAL CHANGE FOR PSYCHOLOGISTS (2002), *available at* http://www.apa.org/pi/oema/resources/policy/multicultural-guideline.pdf, at 8 [hereinafter APA GUIDELINES].

[6] *Id.*

ease our work with clients, colleagues, and others.

At the same time, however, the comfort and security of sameness carries the risk of difference, for "sameness is always illusionary, always partial, incomplete and given to disruption. Nothing in the world is really 'the same' . . . ."[7] Because human beings are uniquely situated, members of an in-group risk disappointment and even betrayal when difference is uncovered. Indeed, as Sigmund Freud pointed out, this "narcissism of the small difference" can lead us to perceive a greater threat to our personal identity from someone who shares that identity than from someone whom we already identify as an outsider.[8] As lawyers, then, we might be tempted to ignore or gloss over difference that might rupture our connection to clients or, when the difference is too salient, to react with mistrust or a sense of betrayal that raises even greater obstacles to effective lawyering.

The challenge, then, is to help lawyers balance their innate desire for sameness and connection with their innate distrust of difference. Collectively, clinical teachers,[9] social workers, and psychologists[10] have convened conferences,[11] offered courses on multicultural compe-

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[7] Adam B. Seligman, *Living Together Differently*, 30 CARDOZO L. REV. 2881, 2889 (2009).

[8] *Id.* (quoting SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 94–99 (Joan Riviere trans., DeVinne-Hallenbeck 1930).

[9] *See generally* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 265–70 (1990); STEPHEN ELLMANN, ROBERT D. DINERSTEIN, ISABELLE R. GUNNING, KATHERINE R. KRUSE & ANN SHALLECK, LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 18–71 (2009); Susan L. Brooks, *Using Therapeutic Jurisprudence to Build Effective Relationships with Students, Clients and Communities*, 13 CLIN. L. REV. 213, 217 (2006); Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, *in* RACE, CULTURE, PSYCHOLOGY, AND LAW, *supra* note 1, at 47, 47–62; Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33 (2001); Paul Tremblay & Carwina Weng, *Multicultural Lawyering: Heuristics and Biases*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 143, 143–82 (Marjorie A. Silver ed., 2007); Mark Weisberg & Jean Koh Peters, *Experiments in Listening*, 57 J. LEGAL EDUC. 427 (2007); Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLIN. L. REV. 369 (2005); *see also infra* Part I.

[10] *See generally* Kenneth V. Hardy, *The Theoretical Myth of Sameness: A Critical Issue in Family Therapy Training and Treatment*, 6 J. PSYCHOTHERAPY & FAM. 17 (1989), *reprinted in* MINORITIES AND FAMILY THERAPY 17 (George W. Saba, Betty M. Karrer & Kenneth V. Hardy eds., 1990); Lynda D. Field, Shannon Chavez-Korell & Melanie M. Domenech Rodriguez, *No Hay Rosas sin Espinas: Conceptualizing Latina-Latina Supervision from a Multicultural Developmental Supervisory Model*, TRAINING & EDUC. PROF. PSYCHOL., Feb. 2010, at 47, 47–54; John P. Wilson & Boris Drozdek, *Are We Lost in Translations?: Unanswered Questions on Trauma, Culture and Post-Traumatic Syndromes and Recommendations for Future Research*, *in* VOICES OF TRAUMA: TREATING SURVIVORS ACROSS CULTURES 367–86 (Boris Drozdek & John P. Wilson eds., 2007).

[11] For instance, in 2009, the theme for the Association of American Law Schools Conference on Clinical Legal Education was "Emerging Lawyers: Clients, Complexity and Col-

tence, and created a rich body of literature that explores how assumptions about difference influence personal interaction. In this Article, we presume that legal training, developed from an interdisciplinary perspective, should include instruction in interpersonal skills and self-reflection.[12] We acknowledge that multicultural competence recognizes that each individual is unique,[13] and therefore that all interpersonal relationships occur across difference.[14] Constructing strong, working lawyer-client relationships across difference is critical to good lawyering.

What has received less attention is in-depth exploration of the influence of interpersonal dynamics when sameness, actual or perceived, exists between lawyer and client. In our experience, lawyers and clients build professional relationships both because of shared personal characteristics or life experiences and in spite of them. Just as other commentators have helped lawyers develop methods for bridging difference, we seek to offer tools for dealing with the consequences of assumptions rooted in sameness. Our aim therefore is to identify the assumptions that accompany sameness and to increase the likelihood that personal and experiential connections enhance the lawyer-client relationship and the lawyering process, while minimizing the possibility that they interfere. In addition, we explore how issues of sameness, or its complement, difference, arise in clinical supervision and provide suggestions to best address these issues in supervision and practice.[15]

In Part I, we survey the scholarship about sameness, drawing upon materials from the fields of counseling, social work, and psychology. Professionals in these fields have long appreciated that every counselor-patient interaction is cross-cultural, regardless of similarity

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laboration in a Cross-Disciplinary Lens." The Association of American Law Schools, Conference on Clinical Legal Education: Clients, Complexity and Collaboration in a Cross-Disciplinary Lens (May 6–9, 2009), http://www.aals.org/documents/2009clinical/clinicalbrochureforweb.pdf.

[12] ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 172 (2007) [hereinafter BEST PRACTICES]; *see also* Brooks, *supra* note 9, at 217 (noting important contributions from the social work discipline to lawyers' understanding of interpersonal dynamics).

[13] An in-depth review of the literature around identity and otherness is beyond the scope of this Article. What we do wish to explore is the critical importance of self-awareness. *See generally* BEULAH R. COMPTON, BURT GALAWAY & BARRY R. COURNOYER, SOCIAL WORK PROCESSES 328 (7th ed. 2005) (advocating counselor self-awareness); ELLMANN ET AL., *supra* note 9, at 36 (advising attorney self-reflection to guard against overidentification and loss of objectivity).

[14] APA GUIDELINES, *supra* note 5, at 7; s*ee* Bryant, *supra* note 9, at 41; Tremblay & Weng, *supra* note 9, at 151.

[15] While we have based this Article on our clinical experience, we suggest that the tools we develop will benefit supervisors and lawyers in other legal practice settings.

of cultural and personal identifiers, and that perceptions of sameness—as much as perceptions of difference—affect interpersonal relationships and professional decision making. Their teachings identify and name specific psychosocial dynamics and provide us with the professional vocabulary and tools critical to any exploration of assumptions of sameness.

Then, in Part II, we explore challenges to lawyering stemming from sameness, which our clinic students have experienced in relationships with their clients. Using case studies adapted from our clinic experiences, we apply the concepts of self-disclosure, overidentification, projection, and countertransference to identify the lawyering challenges which might flow from untested assumptions about sameness. Finally, in Part III, we propose "best practices" which lawyers and clinic supervisors can employ to maximize the likelihood that behaviors related to sameness will be intentional and reflective.

I. Existing Literature Points the Way

Within the legal academy, recent scholarship has focused on the need to educate lawyers to provide the best professional representation to a broad range of clients from different backgrounds and life experiences. We embrace this literature's insights into the powerful distinctions inherent in "difference." At the same time, a review of cultural competence scholarship in other helping professions reveals that commentators conclude that these professions have followed a path from initial blindness to difference, to efforts to acknowledge cultural, racial, ethnic, and gender diversity, followed by more recent attempts to embrace both sameness and difference. As one family counselor has noted in his provocative article entitled *The Theoretical Myth of Sameness*, "The question is not one regarding difference or sameness, but rather difference *and* sameness."[16] The focus in family counseling and elsewhere has shifted to how a professional and a client can form a relationship that allows both to maintain their own multiple, sometimes different, identities while connecting based on shared characteristics, experiences, and tasks.[17] Accordingly, our in-

[16] Hardy, *supra* note 10, at 22.

[17] When members of different cultural groups interact, they may attempt to join together cooperatively so that their interaction might be more fruitful, comfortable, and/or successful. The processes by which such joining can occur are varied and can occur simultaneously, serially, or individually. In some instances, one person will decategorize the other person, by minimizing the group identifiers in favor of individual identifiers. So, instead of seeing a Chinese person, with perhaps stereotyped images, the first person will see a man who is ethnically Chinese, comes from Michigan, loves football, and hates to eat barbeque. The man no longer is categorized as "Chinese" but takes on a three-dimensional, individual identity. In other instances, the members of the different groups cross-categorize, ei-

quiry into the scholarship, legal and non-legal, explores issues inherent in "sameness," to further develop a more nuanced approach to lawyer-client interaction.

A. An Evolving Understanding of Difference and Sameness

An early and extensive treatment of the impact of assumptions about sameness and difference in professional relationships comes from the family therapy field and provides insights for legal practitioners. Family therapists and academics have provided both an analytical structure and specific tools to enhance counselors' awareness about their own and their clients' unique identities.

These commentators have traced the development of this analytical structure and have defined several stages in its evolution. First, they have identified a conventional or "universalist" approach to counseling which approached all families similarly regardless of difference.[18] At the risk of caricature, this counseling model supported a "one size fits all" approach to service delivery. Proponents of this counseling approach had little use for distinguishing attributes; the focus on shared characteristics made difference essentially irrelevant.[19] As one commentator noted in describing advocates of this conventional approach, "families are families."[20]

Critics soon decried this early "crude approach"[21] to sameness for inappropriately neglecting therapists' own identities and those of the families whom they sought to counsel. By the 1980s, a second therapeutic approach to treatment developed, which recognized the importance of the differences between minority and non-minority families

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ther by recategorizing—creating a new shared identity—or mutually differentiating—allowing individuals to maintain their own identities while finding common ground, including of subordinate identities. An example of recategorizing happens on successful sports teams. The 2004 Red Sox were not a collection of individual players hailing from the Dominican Republic, Arizona, and Colombia, to name a few, but rather a group of recategorized "Idiots" who won the World Series. Contemporary American society offers an example of mutual differentiation, as its members may share the identity "American" but also hold disparate ethnic, socioeconomic, gender, and sexual orientation affiliations. Marilynn B. Brewer, *Reducing Prejudice Through Cross-Categorization: Effects of Multiple Social Identities*, *in* REDUCING PREJUDICE AND DISCRIMINATION 165, 165–83 (Stuart Oskamp ed., 2000).

[18] *See* Hardy, *supra* note 10, at 19–21 (reviewing the conventional approach to family therapy); *see also* Celia Jaes Falicov, *Training to Think Culturally: A Multidimensional Comparative Framework*, 34 FAM. PROCESS 373, 373–74 (1995) (describing the universalist theory of family therapy as promoting standardized treatment and noting that its adherents proclaimed that "all families are more alike than they are different").

[19] *See* Falicov, *supra* note 18, at 374.

[20] Hardy, *supra* note 10, at 20.

[21] The authors have adapted the comparative labels of "crude" and "refined" from the work of William Simon on lawyer paternalism. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084–86 (1988).

and recommended more differentiated approaches to therapy.[22] Developing multicultural competence became a key objective for family therapists trained in this technique.[23] Variously styled as the "ethnic-focused" or contemporary view, commentators have described this counseling approach as enhancing therapists' consciousness of the significance of difference.

However, subsequent academic debate by therapists proposed a more "refined approach" to family therapy. These scholars drew from both previous schools of thought, but found fault with both the standardized treatment of the conventional approach and the overgeneralization inherent in some contemporary approaches which masked intra-group differences.[24] These therapists warned against treating all families the same or all families within a cultural group the same and urged treating professionals to counsel each uniquely situated family,

[22] *See* Falicov, *supra* note 18, at 374–75 (reviewing ethnic-focused school of family therapy); Hardy, *supra* note 10, at 20–21. These commentators have applied somewhat distinct labels to the various stages in the evolution of approaches to family therapy. *See* Falicov, *supra* note 18, at 373–76; Hardy, *supra* note 10, at 19–22. Professor Kenneth Hardy, in his seminal piece on the "Theoretical Myth of Sameness," outlines three stages. *See* Hardy, *supra* note 10, at 19–22. After describing the conventional approach (i.e., all families are the same) and the contemporary approach (i.e., all members of a cultural group are the same), Hardy proposes a third approach whereby intra-group differences would be respected. *See id.* Professor Celia Falicov posits four schools of family therapist practice: the universalist (i.e., assumed sameness), the particularist (i.e., assumed uniqueness), the ethnic-focused (i.e., giving primacy to ethnic difference and assuming intra-group sameness), and the multi-dimensional (i.e., recognizing the differences and similarities inherent in families' multiple identities). Falicov, *supra* note 18, at 373–76.

[23] *See, e.g.*, Roy A. Bean, Benjamin J. Perry & Tina M. Bedell, *Developing Culturally Competent Marriage and Family Therapists: Treatment Guidelines for Non–African-American Therapists Working with African-American Families*, 28 J. MARITAL & FAM. THERAPY 153, 153–64 (2002) (reviewing key precepts of multicultural competence within the mental health literature).

[24] *See* Falicov, *supra* note 18, at 375–76 (promoting a multidimensional approach which recognizes the reality of multiple identities and cultural connections within families); Hardy, *supra* note 10, at 22 (noting the inherent interrelationship between sameness and difference); *see also* WILLIAM J. DOHERTY & SUSAN H. MCDANIEL, FAMILY THERAPY 40 (2010). Other social scientists have also contributed to this debate. *See* JANINE M. BERNARD & RODNEY K. GOODYEAR, FUNDAMENTALS OF CLINICAL SUPERVISION 34–52 (2d ed. 1998) (analogizing the relationship between client and clinician to the interpersonal issues which arise between clinicians in training and their social work supervisors); COMPTON ET AL., *supra* note 13, at 185 (advocating that social workers acknowledge both within-group and between-group variations); HENRY A. GIROUX, BORDER CROSSINGS: CULTURAL WORKERS AND THE POLITICS OF EDUCATION 1–2, 6 (2d ed. 2005) (noting that educators should recognize the inherent fragility of identity instead of assuming sameness among cultures); RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS 26–29 (2d ed. 1993) (introducing the anthropological concept of "cultural borderlands" to denote the overlapping zones of sameness and difference within and between cultures and calling into question the applicability of cultural norms); Bean et al., *supra* note 23, at 154 (recognizing the importance of acknowledging "within-group diversity"); KAREN K. KIRST-ASHMAN & GRAFTON H. HULL, JR., UNDERSTANDING GENERALIST PRACTICE 414 (1993) (same). R

cognizant of the members' multiple identities.

B. Psychoanalytic Concepts That Inform Our Understanding of Sameness

Just as our work is informed by the family therapy literature that traces the development of a refined approach to sameness and difference, it is also enlightened by concepts rooted in psychiatry, psychology, and social work. These disciplines provide a professional vocabulary that helps us to identify, understand, and more effectively address interpersonal dynamics that impact our relationships with clients and our lawyering judgments. Several of these concepts are particularly relevant to understanding the specific dynamics that flow from sameness: identification/overidentification, projection, countertransference, self-disclosure, and professional boundaries. These concepts are both distinct and interrelated. Here we offer basic definitions:

> 1. Identification/Overidentification: When we share a personal characteristic or a life experience with another person, we often say that we "can identify" with that person. The sense of identifying with another person is a natural human response that promotes empathy and connection.[25] Overidentification occurs when the sense of identifying with the other person is excessively intense. In the context of a professional relationship, if we overidentify with a client, we run the risk of making inappropriate assumptions, and our professional judgment and professional boundaries can become clouded.
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> 2. Projection: In the psychoanalytic literature, projection is one of a number of defense mechanisms that human beings employ to lessen emotional distress and internal conflict. These mental processes are unconscious and adaptive, and, as with many mental processes, they become maladaptive when they are excessive, inflexible, or are drawn upon in inappropriate circumstances. In a strict psychoanalytic context, projection refers to the process by which a person reacts to her own unacceptable thoughts, feelings, or motives by attributing them to someone else. For example, if I feel rage toward you, I "disown" my bad/conflicted feelings; rather than

[25] *See generally* Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1352 (1993) (noting that "womens' [sic] identification with womens' [sic] rights issues such as domestic violence can fuel a strong empathy for battered women clients, conviction about their cause and strong advocacy on their behalf"). Meier goes on to make the important point that "[i]t may be counter-intuitive to realize that sharing a common experience or fear of victimization with a party may create antipathy rather than sympathy in the observer." *Id.*

seeing myself as having negative thoughts toward you, I perceive you as feeling rage toward me. In a more general context, projection simply refers to the process by which we project thoughts, feelings, or characteristics on to another person, not necessarily to "disown" a negative feeling or internal emotional conflict. When we assume sameness we may be more likely to project our own experiences, thoughts, feelings, and motives on to the other person, more likely to make premature judgments, and more likely to cut short our exploration of the other person's actual experience.[26]

3. Countertransference: Understanding this concept requires one to begin with the core concept of transference. The psychiatric literature defines transference as "the fusion of unreal attributes which the observer believes to be present in the observed, with those which in fact are present."[27] Transference is most often described in the context of the patient-therapist relationship. It refers to the process in which the patient "transfers" to his or her therapist feelings or attributes from another significant relationship in the patient's life. The patient then relates to the therapist as if those feelings and attributes belong to the patient-therapist relationship. As part of the therapeutic process, the therapist helps the patient to identify these feelings and attributes and to reflect on their actual source. Similarly, countertransference refers to the feelings and reactions that a helping professional has toward her client or patient, specifically feelings that are triggered by the professional's own relationships and internal conflicts.[28] Such reactions, in and of themselves, are not bad.[29] They are normal human responses in a range of relationships; however, in those which involve power imbalances, countertransference can be particularly significant and challenging.[30] Our response to a particular client may be fueled by our own emotional issues and projected on to the current relationship, and this response can be either positive or negative. We might find ourselves drawn to a client who is experiencing a difficult situation similar to one we have experienced ourselves, and our personal experience might inform our advocacy and strengthen the working relationship. On the other hand, we might find ourselves feeling excessively angry towards a client who is needy and dependent when we struggle

[26] Bryant, *supra* note 9, at 66–67.

[27] BASTRESS & HARBAUGH, *supra* note 9, at 190–92 (citing A. WATSON, PSYCHIATRY FOR LAWYERS 3–8 (rev. ed. 1978)).

[28] *Id.* at 296–97.

[29] *See* Meier, *supra* note 25, at 1350 (citing Allwyn J. Levine, *Transference and Countertransference: How It Affects You and Your Client*, 15 FAM. ADVOC. 14 (1992)).

[30] Marjorie A. Silver, *Emotional Competence and the Lawyer's Journey*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION, *supra* note 9, at 5, 18 [hereinafter Silver, *Emotional Competence*]; Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLIN. L. REV. 259, 264–65, 306–08 (1999) [hereinafter Silver, *Emotional Interference*].

with dependency in significant relationships in our own lives. Frequently, other people evoke feelings in us which are driven more by our early emotional experiences than by the current person or situation. These emotional reactions can undermine effectiveness, impair judgment, or cause the professional to withdraw from the relationship. They can also be a source of positive identification, empathy, and compassion.[31]

4. Self-Disclosure: This behavior is more likely to occur when sameness exists between lawyer and client. It occurs when we reveal our reaction to the present situation by providing information about the relevant past.[32] Self-disclosure can enhance understanding, empathy, and connection, model reciprocity in the relationship, and demonstrate that the lawyer will be open and willing to share in the relationship, but self-disclosure also carries risks.

5. Professional Boundaries: These parameters and norms define our working relationships with clients and allow safe and appropriate connection focused on the client's needs.[33] When boundaries in the professional relationship are either unclear or violated, at best, the client's expectations of us can become distorted, and our own sense of role can become confused. At worst, we can do harm. Factors that might contribute to an increased risk of boundary transgressions in professional relationships include the specific emotional needs of the client and the professional, the professional's sense of compassion and altruism, the professional's desire to "rescue" her client from difficult circumstances, dual or multiple relationships, the pursuit of personal benefit, self-disclosure, or shared experience.[34] Countertransference, identification, projection, and self-dis-

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[31] Meier, *supra* note 25, at 1351–52.

[32] KIRST-ASHMAN & HULL, *supra* note 24, at 61 (citing D.W. JOHNSON, REACHING OUT 18 (1986)); *see also* BASTRESS & HARBAUGH, *supra* note 9, at 265–70.

[33] Patricia Fronek, Melissa Kendall, Greg Ungerer, Julianne Malt, Ellen Eugarde & Timothy Geraghty, *Towards Healthy Professional-Client Relationships; The Value of an Interprofessional Training Course*, 23 J. INTERPROFESSIONAL CARE 16, 16–29 (2009); *see also* Susan L. Brooks, *Using Social Work Constructs in the Practice of Law, in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION, *supra* note 9, at 51, 62; Elizabeth Gaufberg, *Alarm and Altruism: Professional Boundaries and the Medical Student*, 3 CLINICAL TCHR. 206, 206–09 (2006) (writing of medical student training, Gaufberg notes, "Successful boundary development keeps students from becoming overwhelmed by intimacy and intensity, allows them to retain and channel empathy, and makes altruism the operational principle of the professional relationship. Boundaries keep the student together and the patient safe"); Catherine Holan Peterson & Candace Mathers, *Developing Personal Relationship, Impairing Attorney-Client Relationship*, 14 FAIR$HARE 26 (1994) ("Boundaries are the limits that allow for safe connection based on the client's needs. When these limits are altered, what is allowed in the relationship becomes ambiguous. Such ambiguity is often experienced as an intrusion into the sphere of safety.").

[34] FREDERIC G. REAMER, TANGLED RELATIONSHIPS: MANAGING BOUNDARY ISSUES IN THE HUMAN SERVICES 8–17 (2001) (noting five conceptual categories of boundary di-

closure, although not necessarily problematic, all carry with them the risk of boundary transgressions.

All of these dynamics can be at play in lawyer-client relationships, particularly when the lawyer experiences sameness with her client. As teachers and supervisors, our goal is to help our students identify these dynamics and understand how they might affect the students' lawyering judgments. Counseling, social work, psychiatry, and psychology provide not only a vocabulary to help us identify and name these dynamics, but also tools that help us to examine them. Through this process of naming and examining these concepts, lawyers can minimize the potential risks the concepts pose to the lawyering process.[35]

C. The Legal Academy's Integration of Insights from Other Disciplines

Lawyer training guides reflect similar trends to those seen in the family counseling literature. Initially the legal academy was slow to value instruction in personal interactions and to expand its lens to cull insights from other disciplines.[36] For example, a comparison of some

lemmas: intimate relationships, pursuit of personal benefit, how professionals respond to their own emotional and dependency needs, altruistic gestures, and responses to unanticipated circumstances).

[35] Silver, *Emotional Competence*, *supra* note 30, at 12–13 ("The goal need not be—indeed could not be—to eradicate these responses, but to recognize them, analyze how, if at all, they may affect the lawyer/client relationship, and respond appropriately.").

[36] As others have noted, even the MacCrate Report, which attempted to define the key practice skills which would help lawyers bridge the gap between school and practice, was largely silent as to the affective skills important to lawyering. *See* AMER. BAR ASSOC. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992); *see also, e.g.*, Silver, *Emotional Interference*, *supra* note 30, at 306–08.

Pressure from outside the legal academy, combined with leadership from clinical quarters, has increased attention to the importance of training in interpersonal skills in legal education. The Carnegie Foundation for the Advancement of Teaching released its report on legal education in 2007. This report identified three dimensions of personal growth critical to the formation of new lawyers: legal analysis, practical skills, and professional identity. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW 13–14 (2007). The authors noted that, within the skills apprenticeship, teaching budding lawyers to work effectively with clients requires training beyond legal analysis and recommended that faculty should "draw insight from the social sciences and the humanistic disciplines." *Id.* at 14. The authors critique existing models of legal education which put a premium on "analysis and technical competence at the expense of human connection, social context, and social consequences . . . ." *Id.* at 139.

That same year, the Clinical Legal Education Association released its compilation of best practices for legal education, which showcased the importance of multicultural competence in legal training. BEST PRACTICES, *supra* note 12. Interestingly, the thrust of that study's recommendations involved issues of difference rather than sameness, i.e., how law

of the most popular texts on training law students in interviewing and counseling reveals that early editions are virtually devoid of tools directed at training lawyers for working with clients from diverse backgrounds.[37]

Change came quickly at least in law school clinical circles, where the influence of social work and psychology training is strong. Robert Bastress and Joseph Harbaugh drew extensively upon psychological and psychiatric concepts to understand the psychodynamics at work in our lawyering relationships.[38] More recently, Sue Bryant and Jean Koh Peters, drawing on counseling scholarship, have urged us to recognize that "all lawyering is cross-cultural."[39] Accordingly, much clinical scholarship has focused on the importance of helping law students to bridge perceived and actual divides.[40] Now, clinicians are developing a unified model for lawyering which identifies both challenges and benefits which flow from issues of sameness as well as of difference.[41]

The unified model trains students to recognize both connection and separation from their clients and the effects of both on their lawyering. Thus, Bryant and Koh Peters counsel teaching students to explore systematically and explicitly identifiers, traits, and experiences that connect and separate themselves from their clients. Students then use these explorations to reflect upon their lawyering, specifically professional distance, fact gathering, and case theorizing.[42] Stephen Ellmann and his coauthors demonstrate techniques to create connection in interviewing and counseling. At the same time, they provide examples of some of the pitfalls of connection that can arise when a

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students could learn to "deal sensitively and effectively with clients, colleagues, and others from a range of social, economic, and ethnic backgrounds, identifying and responding positively and appropriately to issues of culture and disability that might affect communication techniques and influence a client's objectives." *Id.* at 79; *see also id.* at 88–89 (citing Bryant, *supra* note 9).These two surveys of legal education confirmed the importance of training lawyers in interpersonal dynamics.

[37] *See* ROBERT F. COCHRAN, JR., JOHN M.A. DIPIPPA & MARTHA M. PETERS, THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 205–23 (2d ed. 2006) (including a chapter devoted to client-lawyer difference; an earlier version of this chapter also was included in the first edition of this textbook, published in 1999); ELLMANN ET AL., *supra* note 9, at 18 (tracing the increased attention on issues of multicultural competence in part to the changing face of the legal profession).

[38] *See generally* BASTRESS & HARBAUGH, *supra* note 9, at 175–96; *see also* COCHRAN ET AL., *supra* note 37, at 205–23; ELLMANN ET AL., *supra* note 9, at 18–71. R

[39] Bryant, *supra* note 9, at 49.

[40] *See supra* note 9 and accompanying text.

[41] ELLMANN ET AL., *supra* note 9, at 18 (offering an entire chapter on the "challenges and possibilities of connection across difference, as well as the pitfalls and positives of similarity") (footnotes deleted); *see also* Bryant & Koh Peters, *supra* note 9, at 48–51.

[42] Bryant, *supra* note 9, at 64–68 (describing Habit One, Degrees of Separation and Connection).

lawyer overidentifies with the client and loses professional objectivity.[43]

As any review of this literature demonstrates, clients, supervisors, and clinic students experience both sameness and difference in their work together.[44] Instead of advocating that lawyers approach client relationships around either sameness or difference, we submit that respecting both perspectives, and indeed integrating both perspectives into an awareness of the client as unique, is critical to good lawyering. Consequently, we hope to build on tools provided in the existing literature that are designed to help lawyers acknowledge their own and their clients' multiple identities and to forge strong lawyer-client relationships which account for both connection and divide.

II. Case Scenarios

We turn now to some case examples taken from our clinical work with law students. In this Part, we offer four vignettes,[45] showcasing the benefits and challenges of sameness as experienced between student lawyers and their clients. We also discuss specific tools that lawyers can use to maximize the benefits and overcome the challenges inherent in client connections. While we focus on the assumptions inherent in sameness and difference, we remain mindful that this lens is but one through which to analyze the complex dynamics in lawyer-client relationships. Our reactions to clients are drawn from multiple sources, and we recognize that dynamics related to sameness were not the only factors at work in these case scenarios. We offer the scenarios to help supervisors become more conscious of the range of interpersonal factors that affect student lawyering and we focus on sameness as lawyers have generally not been trained to recognize how sameness affects their reactions to clients and their lawyering judgments.

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[43] Ellmann et al., *supra* note 9, at 18–71. The techniques include active listening (reflection, validation), empathy and sympathy (assertions of personal reactions, apology, recovery, sharing), nonresentfulness, and self-reflection. *Id.*

[44] Given the perceived benefits of connection, it is perhaps not surprising that clinicians have frequently focused on ways to enhance sameness. *See* Ellmann et al., *supra* note 9, at 67 (stressing that connection is the key to building trust in an attorney-client relationship). *But see* William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 Md. L. Rev. 213, 222 (1991) (recognizing that a lawyer who is "socially closer" to his client may be "less conscious of the distance that remain[s] and more ready to attribute his own values to her").

[45] While the case narratives offered in this Article are built on real events, we have sanitized the vignettes to protect student and client confidentiality.

A. "We're Having a Baby!" Self-Disclosure and Assumptions of Sameness

Samantha and her husband had just learned that they were expecting their first child when she enrolled in clinic during her last semester of law school. Though she wanted to be a litigator, she had had little prior experience with lawyering, other than legal research and writing assignments doled out during her first and second year summer placements at law firms. Therefore she was eager to meet her client and to assist her with her affirmative housing suit against her former landlord.

First, the demographics: Samantha was white, female, in her late twenties, Catholic, married, well-educated, and within six months of starting work at a major New York City firm. Myrtle was African-American, in her early thirties, non-observant, an unmarried mother of four, a high school graduate, unemployed, and a recipient of TANF benefits, child support, and free legal services through the law school clinic.

Samantha had just scheduled—or actually rescheduled—her second meeting with her client. Early in the semester, Samantha had finally met with her client after several missed appointments to review the case's status. Samantha had asked Myrtle to come into the office to review the complaint Samantha was preparing to file on Myrtle's behalf and to discuss the need to retain an expert to assist with case development. Myrtle had missed the first meeting time without explanation; later, when Samantha reached her by phone, she agreed to a rescheduled time.

In planning discussions with her supervisor, Samantha had tried hard to practice parallel universe thinking[46] to understand what could be affecting Myrtle's ability to engage more fully in her case and in their lawyer-client relationship. Samantha had understood that Myrtle

[46] Bryant, *supra* note 9, at 70–72 (describing parallel universe thinking as one habit of cross-cultural lawyering); *see also* Brooks, *supra* note 9, at 222 (noting the importance of helping clinic students understand the process involved in obtaining client engagement and assessing a client's readiness for change).

Professors Bryant and Koh Peters have written extensively about the effect of interpersonal dynamics in lawyer-client relationships. Together they have identified five habits designed to enhance a lawyer's cross-cultural competence. Habit One asks lawyers to identify the differences and similarities they perceive with their clients. Bryant, *supra* note 9, at 64–67. Habit Two helps lawyers analyze the effect that those commonalities and distinctions may have on the client, the decision maker, and the lawyer. *Id.* at 68–70. Habit Three outlines how "parallel universes" thinking can free attorneys to consider alternate explanations for others' behaviors. *Id.* at 70–72. Habit Four helps attorneys be conscious of "red flags" in the lawyer-client relationship and offers remedies. *Id.* at 72–76. Lastly, Habit Five encourages attorneys to be alert to situations where bias and stereotype are most likely to be prevalent and to be reflective about ways to help eliminate bias. *Id.* at 76–78.

had a very busy life caring for her four small children and that this case was not her first life priority. Still, Samantha had searched for ways to connect.

Now, Myrtle was late for the rescheduled meeting. Once Myrtle finally arrived and after some small talk, they made decent progress through Samantha's agenda of reviewing the complaint. Then Samantha came to the issue of retaining the expert. She described the litigation benefits that would likely flow from having testimony that could establish the potential link between Myrtle's children's illnesses and the sewage which had flowed into the basement when a sewer line was not adequately repaired by the landlord. Next she reviewed the cost of retaining such expert testimony, a cost she asked if Myrtle could bear. Myrtle answered equivocally; while she supported any measures that would strengthen her case, finances were very tight. Without mentioning particulars, Samantha responded that she would be willing to see if there were other ways to pay for the expert, but Myrtle said she'd made up her mind. Myrtle would find some way to pay the fee if she could spread it out over three months.

Rather than accept Myrtle's choice at face value, Samantha decided to probe a bit more lest Myrtle commit to something she couldn't do. Samantha knew that Myrtle had very recently had her fourth child. Seeing grounds for connection, Samantha announced to Myrtle that she was pregnant: "Listen, I'm a student and on top of it, my husband and I are going to have our first baby." Myrtle was visibly moved and congratulated her profusely. They talked about how the pregnancy was going and Myrtle wished them well. Then Samantha said, "We're definitely struggling with all the new costs. There are obvious differences, but I realize that three hundred dollars is a lot. Still I know you want to pay your way." Myrtle's affect changed as the subject of conversation moved from family to money. She looked down and nodded in agreement to Samantha's acknowledgement that money was tight. But Myrtle stayed resolute and committed to making the payments.

Sure enough Myrtle brought in a money order for the initial installment on time, and Samantha hired the expert. However, the next month brought a different result. By this time, the semester had concluded, and Samantha's supervisor took over the case. She spoke with Myrtle as payment of the second installment became due. Myrtle said she was "working on it"; that she had already collected about eighty percent of the total needed; that she'd do her best to have the balance by the due date. At that point, the supervisor, a white, gray-haired clinician who was herself a mother, explained to Myrtle that there were other options to continuing the installment payments—an option

about which Samantha had earlier only intimated. Myrtle inquired about details. Ultimately the two agreed that the clinic would advance the balance of the money with the understanding that Myrtle would reimburse the clinic upon recovery.

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Samantha's supervisor first learned of the parenting connection that Samantha had made with her client when watching the video recording of their meeting. Though Samantha had vetted her meeting agenda with her supervisor and they had spoken at some length about her frustrations with Myrtle's missed appointment, Samantha had never voiced an intention to share her own pregnancy with her client. While surprised by the revelation, the supervisor recognized—and even supported—Samantha's efforts to connect with her client.[47]

During the exchange, it appeared that both lawyer and client felt a positive connection over newborns and parental roles which had not been present in their first meeting. Value added.[48] Early in the term, Samantha's supervisor had asked her clinic students to identify personal attributes which they perceived as either connecting them to their clients or distancing them from their clients.[49] She did not remember Samantha listing family status as a connector and appreciated that Samantha had remained open to finding additional attributes which she had in common with her client.

This case scenario raises the issue of self-disclosure[50] in professional relationships. Attorney-client relationships often become deeply personal; even the most sterile ones depend on trust and a modicum of rapport. Building that working relationship invites exchanges over common interests and experiences.[51] Here Samantha found a link with her client over parenting that clearly deepened their connection.[52]

Social work and counseling literature confirms professional relationships can be enhanced when the helping professionals share some

[47] ELLMANN ET AL., *supra* note 9, at 34 (listing "personal connection or sharing" by a lawyer as a viable technique for communicating empathy to clients).

[48] In concluding that Samantha's sharing had positive consequences, we should remain mindful of the pitfalls related to overidentification. *See supra* notes 25 and 32 and accompanying text; *see also* ELLMANN ET AL., *supra* note 9, at 34.

[49] For a description of this exercise, see Bryant, *supra* note 9, at 64–67.

[50] For a definition of self-disclosure, see *supra* note 32 and accompanying text.

[51] *See* ELLMANN ET AL., *supra* note 9, at 34 (noting that lawyer efforts to make personal connection or sharing can be an effective tool in showing empathy to a client but should be used judiciously).

[52] These types of self-disclosures are relatively common. For another version of this practice, see the clinic student's comments which preface this Article.

aspect of their lives.[53] Disclosure tends to encourage client sharing which could improve rapport and fact gathering. Where self-disclosure principally involves communication over the nature of the professional-client relationship, such as comments about professional role and feedback on the client and the relationship, it can be used advantageously.

But what pitfalls might be embedded in self-disclosures? Depending on the nature, extent, and appropriateness of the personal exchange, disclosure might run the risk of shifting the focus from the client's unique experience to the lawyer's experience.[54] If this shift occurs, it could cause role confusion by distorting professional boundaries and, as a result, the client's expectations of the relationship. The line between personal and professional could become blurred, and the client's expectations of the relationship could be distorted.[55]

How might lawyers recognize when this shift occurs? First, simply by naming and understanding these dynamics, by having them in our professional vocabulary, we become more conscious of when they occur. Second, we can train ourselves to be attentive to shifts in the nature of our relationship with a particular client. For example, are we sharing more personal information with this client than with other clients? Is that sharing a source of concern or discomfort? After self-disclosure, have we related to the client differently in a way that interferes with our lawyering? Has the client's response to us changed or have the client's expectations of us changed in a way that interferes with our work together?

We recognize that self-disclosure is not necessarily problematic. It can be a neutral event or it can enhance connection, as it did in Samantha's case. To maximize the benefits and minimize the risks of personal disclosure, professionals can train themselves to make deliberate decisions about whether to disclose, what to disclose, when to disclose, and how to disclose. The potential benefits and risks of disclosure must be assessed based on a particular client's emotional strengths and weaknesses, needs, circumstances, and style of relating, as well as the specific interpersonal dynamics at play in the lawyer-

[53] BASTRESS & HARBAUGH, *supra* note 9, at 267 (noting that a counselor's self-disclosure can be advantageous by "providing clients with a disclosing and coping model and by positively affecting the clients' perception of themselves, of [the lawyer], and of the lawyer-client relationship"); KIRST-ASHMAN & HULL, *supra* note 24, at 60–62.

[54] BASTRESS & HARBAUGH, *supra* note 9, at 269–73; ELLMANN ET AL., *supra* note 9, at 18–71.

[55] BASTRESS & HARBAUGH, *supra* note 9, at 269–71 (advocating that any self-disclosures be made consciously); *see also* Susan L. Brooks, *Practicing (and Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques into Clinical Legal Education*, 17 ST. THOMAS L. REV. 513, 525–27 (2005) (detailing the need to explicitly address boundary issues in lawyering and offering examples from clinical legal education).

client relationship. When disclosure of the professional's own life and problems is offered primarily for her benefit and not the client's, then it distorts the focus of the session and undermines the role relationships. Therefore, any self-disclosures should be utilized judiciously and for a targeted purpose designed to aid the client.[56]

To her credit, Samantha's personal disclosure seems to have been made to enhance her counseling about payment of the expert's fees. Samantha wanted to explore whether Myrtle might be committing to something she would be unable to do. Samantha's disclosure that she was soon to be a new parent and her acknowledgement that their situations were different appear intended to demonstrate empathy with her client's financial constraints, and to offer her client a way out while acknowledging her desire to be responsible to the payments.

But did Samantha's assumed connection with her client affect her judgment and lawyering, particularly her fact investigation and counseling? With the benefit of hindsight, we can evaluate whether Samantha had presumed too much about the similarities between herself and her client. Was the budget of a third year law student and her family really comparable to that of a single mother on public benefits? Samantha was about to embark on a law career, starting with a very well-paid firm position; Myrtle's ability to find work, when she was ready to begin the job search, was still questionable. Samantha's husband had a good paying private sector position. Myrtle did not have a stable partnership.

Myrtle's initial response to retaining an expert was equivocal—"finances were tight." Despite the fact that Samantha said she'd be willing to see if there were other ways to pay an expert, Myrtle stood firm, "if she could spread it out over three months." Then, Myrtle's affect changed when Samantha equated parenting to belt tightening. Clearly, Myrtle was sending some messages about her financial circumstances and her ability to make the payment, and these messages deserved further exploration. If there was a material difference in the financial status of the two families, then Samantha might have too readily accepted Myrtle's decision to pay the new fees. As a legal counselor, Samantha did not fully explore her client's ability to follow through on her commitment. We wonder, therefore, whether Samantha's probing of Myrtle's unique circumstances might have been cut short because of unconscious assumptions about what it

[56] KIRST-ASHMAN & HULL, *supra* note 24, at 62, 418; *see also* BASTRESS & HARBAUGH, *supra* note 9, at 270–73 (listing four factors as critical in providing appropriate self-disclosure: ability to link disclosure to a specific issue; effective timing of the disclosure; judicious use; and brevity).

means to experience financial constraints.[57]

Another attorney who remained more agnostic about Myrtle's finances might well have probed more fully (i.e., asking questions about whether she routinely had extra cash at the end of each month; how she intended to raise the money). Following that additional fact investigation, the attorney could have acknowledged Myrtle's wish to be responsible for these costs and empathized with how Myrtle's circumstances made that difficult. Samantha could then have presented a complete explanation of the other legal options available short of Myrtle having to pay the fees (i.e., determining if the court could provide funding; deciding if the firm could advance the fees). Instead, these discussions never happened, even though Samantha's preparation indicated that she was aware that other legal alternatives existed. Had she been more conscious of the shades of difference within shared experience, Samantha might have been more hesitant in making untested assumptions about Myrtle's financial situation. As a result, her fact investigation and client counseling might have been fuller and more effective.

B. "Over-Controlling Mothers": Overidentification, Projection, and Role Confusion

On the eve of eviction, Jeanne belatedly asked for legal help. Nadal, a clinic student on intake, offered to jump into action to help Jeanne avoid homelessness. Over the course of the next two weeks, Nadal, a successful third year law student, and Jeanne, a very bright and well-educated law school drop-out whose addiction had put her housing at risk, talked on numerous occasions. Jeanne often went out of her way to explain how very functional she had been, pre-addiction (i.e., sports star, academic leader in college) and indicated that she now had little sense of self-worth (recovering addict, unemployed, nearly homeless). Nadal learned that Jeanne's parents were divorced, as were Nadal's. In addition, both had had strong ties with their non-custodial fathers during their teen years. Jeanne also shared that she struggled to maintain a decent relationship with her "overbearing" mother. She had moved out of the mother's home when their relationship deteriorated; therefore, Jeanne indicated that returning to live with her mother were Jeanne to be evicted was not an option. During the initial meetings, Nadal played the role of active listener, but chose not to disclose any of his own life story.

Nadal represented Jeanne zealously and offered principled rea-

[57] *See* Bryant, *supra* note 9, at 67 ("*Assumptions of similarity that mask difference* can lead the lawyer to solutions and legal theories that may not further the client's goals." (emphasis added)).

sons why Jeanne had no viable options other than a homeless shelter were the landlord to proceed immediately to evict her. Initially, his negotiation efforts were successful as the landlord agreed to delay the eviction to allow Jeanne to pursue other housing options.

By the close of the case, Nadal was acutely aware that he and his client shared significant common ground, including their law school experiences and their family situations. But Nadal had not mentioned his parents' divorce to his client. During their final meeting to review the settlement papers, Jeanne again raised her strained relationship with her mother. She reported another difficult conversation which had occurred the night before when Jeanne had asked her mother to advance funds for moving costs. Her mother had refused, which refusal made Jeanne both furious and anxious, given her impending homelessness. Nadal commiserated and then offered this advice:

> Look, Jeanne, my mother's way too controlling, too. It took me a while, but I learned how to deal with it. You just have to fight back; don't take no for an answer. Or if you can avoid asking her, do. Go around her, but just don't let her control your life.

Jeanne listened intently. Shortly thereafter Jeanne reported that she got money to move from an acquaintance, as she had decided not to ask for another favor from her mother.

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Like our first vignette, this scenario also finds the lawyer grappling with questions of self-disclosure and assumptions about sameness. However, while the first narrative described a lawyer whose assumptions might have prompted her to narrow her lens and short circuit her fact investigation and counseling, this example highlights the risks of counseling well beyond a lawyer's professional role and expertise—counseling which could result in unintended, negative consequences for the client.

Here, Nadal and Jeanne had forged a warm, working relationship. Nadal's early efforts to empathize with Jeanne's plight coupled with the client's frequent reference to her personal travails had led to extended disclosures of Jeanne's family situation. These disclosures might have helped Nadal and Jeanne to establish connection.

At the same time, Nadal's experience reminds us that lawyers should be mindful that a strong connection can lead naturally to projecting one's own experience onto the client and making assumptions of greater similarity than actually exists. Here, the sameness between Nadal and Jeanne was experiential and deeply personal: Nadal's conflicted relationship with his own mother appeared to mirror Jeanne's

relationship with her mother.[58] The significant family information that Nadal learned from Jeanne might have fueled the connection he felt to Jeanne. But if that connection aroused a strong, emotional link to his relationship with his own mother or a strong emotional response to Jeanne, then Nadal would be well advised to investigate these reactions as red flags in his relationship with Jeanne.[59] Such a strong emotional reaction increases the likelihood that Nadal might project his experience with his mother onto Jeanne and lawyer based on inaccurate assumptions about Jeanne's relationship with her mother.

Without the benefit of exploring his emotional response to Jeanne's disclosures, Nadal decided to offer Jeanne advice about how to deal with her mother. That approach risked undermining the attorney-client relationship. While Jeanne did not react negatively to Nadal's characterization of her mother or his recommendations, one can imagine that another client might find his advice inappropriate, intrusive, or even offensive. Nor can we assume from her silence that Jeanne was receptive to Nadal's advice.

Nadal's counseling of his client raised questions about professional role and judgment. Not only did Jeanne not ask for Nadal's help on those matters, but they also fell outside the scope of Nadal's professional role and expertise. In addition, Nadal's advice did not take into account what Jeanne might want, for both her immediate financial need and her relationship with her mother, and did not recognize that he lacked sufficient information about Jeanne's history, Jeanne's mother, or Jeanne's relationship with her mother, to assess the situation fully and accurately even if he did have the training to do so.

For example, Jeanne described her mother as "overbearing" and shared the fact that her mother refused to advance funds for moving costs. We know that Jeanne is a recovering addict. What we do not know is whether Jeanne's description of her mother as overbearing is Jeanne's experience of her mother, rather than the reality of her mother's behavior. Perhaps her mother is working hard to respond to Jeanne's self-defeating behavior with "tough love" after years of efforts to support Jeanne's recovery. Perhaps it is important to Jeanne's ongoing recovery from addiction to stay in a relationship with her mother. Perhaps over time there would be a chance to rebuild the relationship as an important source of support for Jeanne.

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[58] *See* Bryant, *supra* note 9, at 72–76 (discussing Habit 4, red flags).

[59] *See* ELLMANN ET AL., *supra* note 9, at 31–32 (suggesting that offering empathy to a client is less likely to destroy critical legal objectivity than sympathizing); Simon, *supra* note 44, at 222 (recognizing the capacity of lawyers to empathize across social distance, while noting that lawyers with more connection to their clients may be more tempted to attribute their own values to their clients).

In addition, the focus on the conflicted mother-daughter relationship might have distracted from discussions of whether Jeanne's father, with whom she had had strong ties during her teen years, might be available as a source of support. Giving advice with less than full information not only risked providing bad advice regarding the direction of Jeanne's relationship with her mother ("you just have to fight back . . . "; "avoid asking her . . . "; "go around her . . . "), but also risked cutting off practical and legal options for the client. The supervisor therefore might help Nadal to identify the potential consequences of his counseling on this issue.

Our exploration of sameness, however, focuses on the challenge to help Nadal recognize what factors contributed to his responding as he did. The range of possible factors might include: a desire to help Jeanne and to help quickly to avert her eviction; a desire to avoid having a good settlement derailed by other problems; a desire to have an open and trusting relationship with his client; a sense of connection based on shared family and personal experiences; not being conscious of his personal reaction to Jeanne's disclosures about her family; and perhaps a need to validate his own choices in his relationship with his mother.

Having identified potential factors, we can then fashion tools to help Nadal become more self-reflective and intentional in his lawyering. To avoid the risks of overidentification, Nadal's supervisor must help Nadal to acknowledge and make explicit his reactions to his client, identify the source of those reactions (assumptions of sameness), and recognize the impact that those assumptions have on his relationship with his client and his lawyering judgments.

As Samantha's and Nadal's experiences illustrate, identifying with, and finding connection with, our clients can be both productive and fulfilling. The lawyer and client might find that shared culture, personal identifiers, and experiences help to nurture empathy and understanding, which in turn can enrich the lawyer's representation of the client. However, that same connection carries risks when the lawyer assumes too much. Samantha's case illustrates how self-disclosure and connection around a shared experience can mask the uniqueness of the client's experience, have us overlook important differences within that shared experience, and result in prematurely closing off fact investigation and narrowing the range of options explored in counseling. Nadal's case illustrates how overidentification and projection can inadvertently result in the lawyer's injecting personal perspectives that shift the focus from the client's reality and emotional needs to those of the lawyer. In this particular case, projection resulted in advice that might not serve his client's interests.

In the next two case examples we turn to the concepts of countertransference and professional boundaries. Our responses to clients which are based on our past experiences and relationships can be either positively or negatively charged, and can potentially result in boundary confusion. As discussed below, entangled professional boundaries, i.e., those evidencing the professional's consistent over-involvement, can complicate the professional relationship, and rigid boundaries carry their own risks in our representation of clients.[60]

C. "My Grandmother Won't Let Us Help Her": Positive Countertransference and Entangled Boundaries

Karen thought it all a great joke—her psychiatrist had diagnosed her with schizophrenia, which she knew she didn't have because she wasn't crazy and people with schizophrenia are *crazy*, but her new student attorneys, Jenna and Rachel, thought she would have a better claim at obtaining disability benefits if they could address the diagnosis at her hearing. "Sure," the sixty-year-old woman giggled, "it'll be really funny to get disability benefits for a problem I don't have."

As Jenna and Rachel debriefed their interview with their supervisor, Rachel noted, "I'm so glad that Karen is our client. My grandmother is bipolar and won't admit that anything is wrong either. She's cut herself off from us, even my father. She won't let him help her with anything, even food and rent. And she hasn't wanted to see us kids for about ten years. It's going to be great being able to help Karen. She's had such a tough time, worried that people think she's crazy and not realizing how ill she is. I don't know how she survives eating chocolate bars and drinking Ovaltine."

The supervisor thanked Rachel for sharing the information about

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[60] Jennifer C. Davidson, *Professional Relationship Boundaries: A Social Work Teaching Module*, 24 SOC. WORK EDUC. 511, 517 (2005) (offering a conceptual framework for understanding professional boundaries along a continuum from the extremes of "entangled" boundaries and "rigid" boundaries, with the mid-range on the continuum representing the range of more "balanced" boundary relationships). Davidson defines the most significant types of boundary violations as follows:

> "Entangled" professional boundaries refers to consistent over-involvement, where a worker may be investing more of their [sic] time, emotional energy or favour in this relationship than in others, in a manner that is unhelpful for the client. . . .
>
> Workers with "rigid" professional boundaries barrel ahead with their own agenda inflexibly, condescendingly, and without attending to the unique and multifaceted needs of the client.

Id. at 518–19. *See also* REAMER, *supra* note 34, at 17–18 (outlining a six-pronged risk management protocol for dealing effectively with boundary issues). Reamer's recommendations include the need for the professional to: be vigilant about possible conflicts; consult with colleagues and ethical standards regularly to identify possible conflicts; design action plans to address boundary issues; document the professional's handling of the conflict; and develop a monitoring protocol to determine the efficacy of the action plan. *Id.*

her grandmother and commended her for recognizing the connection between her strengthened desire to help Karen and her own family situation. Rachel's supervisor noted that we all have personal experiences that affect how we relate to our clients. We connect more easily with some clients and find it more difficult to connect with others. Her supervisor summed up the challenge, noting that what is important is being aware of our reactions and staying conscious of how they might be affecting our lawyering: "It will be interesting to think about this as you work with Karen."

The students learned from Karen's elder services caseworker that there was a good deal of concern about Karen's social isolation, household clutter and unhealthy conditions of her apartment, and her poor nutrition. At the students' next meeting with Karen, their client expressed some paranoid thinking and talked about the fact that she rarely left her apartment. She said the only people who cared about her were her caseworker from elder services and the students. As Karen was leaving the meeting, Rachel gave Karen a hug and whispered, "Don't worry, you're a good person. Everything will be all right."

Some weeks later, during a meeting with her supervisor, Rachel mentioned in passing that she had stopped by Karen's apartment a few times "just to see how she was doing." The last time she stopped in she had brought some basic groceries "just to let Karen know that someone cared." Karen had called Rachel earlier that morning, asking if Rachel could come by the apartment that same afternoon. Rachel was feeling both guilty that she would not be able to stop by because she had other commitments that afternoon, and troubled that Karen would make that request on such short notice.

****

In this scenario, the student-client sameness raises the challenges of positive countertransference and its effect on the lawyering relationship. Because Rachel made the connection between Karen's mental health issues[61] and Rachel's relationship with her grandmother early in the lawyering relationship, Rachel's supervisor was able to raise the issue of countertransference in practical, descriptive terms

[61] Although we focus here on issues related to sameness, countertransference, and professional boundaries, we note that representing clients with severe psychiatric impairments raises additional considerations with respect to the lawyering process and professional responsibility. *See* Lynn Barenberg, *Working with Clients with Emotional Impairments* (unpublished; on file with authors); Judith G. Edersheim, *Providing Quality Representation for the Mentally Ill*, 25 MASS. FAMILY L.J. 71 (2007); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515 (1987).

and introduce the idea that it might affect Rachel's lawyering of the case.[62] The supervisor's goals in raising countertransference were to help Rachel identify the potential benefits and challenges of her connection with the client and to help Rachel and Jenna monitor the lawyering relationship for interference. As the working relationship progressed, the supervisor could then help Rachel and Jenna identify indicators that countertransference might be at play: heightened emotional reactions that are not typically aroused by other clients (either positive or negative), excessive worry or sense of responsibility for a particular client, making atypical time commitments to a particular client's case, more frequent and spontaneous self-disclosure, feeling drawn to provide advice or assistance in matters outside of the legal representation, or feeling angry or disengaged. If Rachel realized, or Jenna wondered, whether any of these indicators were at play, they should explore the reaction and test it against their professional judgment.

Such exploration could help to determine whether countertransference was affecting Rachel's lawyering judgment. Rachel had experienced strong reactions to Karen's sense of isolation and to Karen's nutrition and physical well-being. These reactions resulted in Rachel's hugging and reassuring Karen, stopping by Karen's apartment, and bringing her groceries. It could simply be that Rachel's warm and compassionate personality led her to take these actions. It is also possible that unconscious countertransference was at play: Karen provided Rachel with the opportunity to connect and help, something that was denied her in her relationship with her grandmother. Exploring the dynamics of the relationship might help Rachel to become more conscious of all of the factors at play and to be more intentional and professional in how she approached the lawyer-client relationship.

Accordingly, it would be important for Rachel to test her reactions and responses to her client against standards of appropriate professional behavior. Rachel said that she had hugged Karen because she felt awful about Karen's circumstances, and she described the hug as "feeling great" because she was able to comfort Karen and because Karen had hugged her back. Rachel's enhanced compassion and empathy certainly had the potential to strengthen the lawyer-client relationship. Whether Rachel's hug and whispered reassurance risked impairing the lawyering relationship could depend on many factors: whether the hug was an isolated event or part of a pattern of minor

[62] We have found it much more helpful to avoid jargon and use practical language. Thus, instead of naming the dynamic "countertransference," Rachel's supervisor talked about the "connections" and their potential challenges.

boundary transgressions;[63] how well the two knew each other; the accuracy of Rachel's read that a hug would be welcome or at least acceptable; who initiated the hug; the motivation for the hug; and the interpretation of the hug. We recall instances when we have been hugged by grateful clients after hearings. Such hugs can be appropriate and genuine expressions of appreciation and connection, which do not alter or interfere with the professional relationship. In Rachel's case, given her early disclosure to her supervisor about her grandmother, as well as the nature of Karen's mental health diagnosis, the hug might raise concerns of a minor boundary breach. Rachel and her supervisor might now watch for patterns of behavior and events to assess whether the hug was part of a broader dynamic in the relationship that might negatively affect Rachel's effectiveness as Karen's lawyer. Indeed, the hug might look different in hindsight, given Rachel's later actions. Rachel told her supervisor that she had stopped by Karen's apartment to check on Karen and bring her groceries. Although a caring gesture, Karen's actions reveal a level of connection/intervention that raises a concern about potentially entangled professional boundaries, specifically overengagement and extension of role beyond what might be deemed appropriate. Such overengagement runs the risk of role confusion (is this my lawyer, my friend, someone I can count on to help me with non-legal problems?), the creation of expectations that cannot be sustained over time, and tensions in the working relationship.

From the supervisor's perspective, it was most important to help Rachel identify, and make conscious, what dynamics might be at play in her relationship with Karen. As we heard earlier, after Rachel had stopped by Karen's apartment a few times, Karen called Rachel one morning asking her to come by the apartment that afternoon. Rachel felt both guilty that she would not be able to stop by because she had other commitments that afternoon, and troubled that Karen would make that demand of her on such short notice. This series of events, and Rachel's mixed responses to the client, provided a supervisory

[63] Davidson, *supra* note 60, at 519. Davidson distinguishes a boundary breach from a more serious boundary violation: R

> [A] boundary breach is an action that transgresses a commonly accepted standard of behaviour for reasons that may be understandable given exceptional circumstances, and the implications of which are not harmful to the client. . . . A boundary violation, conversely, is an even more serious action in which a professional uses the relationship with the client to meet their [sic] personal need at the expense of the client, and this is never justifiable.

Id. (citing Thomas G. Gutheil & Glen O. Gabbard, *The Concept of Boundaries in Clinical Practice: Theoretical and Risk-Management Dimensions*, 150 AM. J. PSYCHIATRY 188 (1993); COLL. & ASS'N OF REGISTERED NURSES, PROFESSIONAL BOUNDARIES FOR REGISTERED NURSES: GUIDELINES FOR THE NURSE-CLIENT RELATIONSHIP (1998)).

opportunity to help Rachel reflect on what was driving her behavior and how it was affecting both her relationship with her client and her own emotional well-being. The next step would be to encourage Rachel to consider the interesting professional challenge of how to redefine the relationship ("re-contract") and how to have an explicit conversation with her client about the parameters of the relationship.[64]

D. "I'm Not Going Through That Again": Negative Countertransference and Rigid Boundaries

John, a third-year law student, was assigned to represent William in a Social Security disability case. William had a history of significant psychiatric problems and a longstanding history of alcoholism. John scheduled two appointments for the initial interview. William did not show for either appointment and did not call to cancel. Like most law

[64] With any client, whether she has a psychiatric impairment or not, that conversation will be most effective if done honestly, directly, and with empathy. Clearly, the conversation may need to be modified with clients with particular mental health issues, but not all clients with mental health issues will require a modified approach; that must be assessed on a case by case basis. In this case, despite Karen's severe impairments, the annotated conversation could look something like the following, with explanations of the suggested interventions appearing in brackets:

> "Karen—I want to talk with you about our work together. As you know, I want to do everything I can to help you with your case." [Begin with affirming your interest in helping.]
>
> "I've been thinking about our work together and realize I've been doing some things that might make it more difficult for the two of us." [Own the problem as something of our making, not the fault of the client.]
>
> "Because I am so concerned about you [Express compassion.], I've been stopping in to see you to make sure you're OK." [Be explicit about the behavior that must change.]
>
> "Then you called the other day asking me to come by, and because I had a full work day I couldn't make myself available. And that made me feel guilty and frustrated because I realized that I had led you to think that I could be available to you in ways that I may not be able to be." [Be explicit about the problem; explain what is making us rethink what we have been doing; focus on the client's perspective and interests.]
>
> "So I wanted to let you know what I've been thinking, and I wanted to be honest about what I think we need to do from here." [Express desire to be transparent and honest.]
>
> "As your lawyer, I want to be available to you—I want to be sure to make time to talk with you about your case and answer any questions you might have. I am glad to schedule meetings at my office, or talk with you by phone to discuss your case and to hear how you are doing. But I realized that I won't be able to stop in as I've been doing—not because I don't care, but because it's important that I be clear with you about our relationship. I don't want to make you think I can be available in ways that I can't be. And that's hard because I do care about you." [In a supportive way, clearly state the parameters of the professional relationship, and explain why those are the parameters—"re-contract."]

students, John had multiple other commitments and several other clients in need of his time and services.

John told his supervisor that he wanted to close William's file. "He has failed to show, failed to call, and I can't keep setting aside time for someone who won't get it together to help himself." The supervisor asked whether John had contacted William to find out what was getting in the way of his making it to the appointments. John responded that he was not going to do that. When his supervisor asked why not, John explained that his father was an alcoholic and for years the family made every effort to help him, but it became clear that he didn't want to help himself. John went on to say that he was not going to get in to all of that again. If William wanted help, he needed to be responsible to the process. The supervisor recommended that John engage in some "parallel universe" thinking[65] and suggested that William's inability to follow up with the appointments might have been a manifestation of his disability, which was the precise issue in his legal case. Indeed William's medical records indicated that he had a disabling condition that interfered with his functioning. The supervisor simply asked John to consider whether he had a different duty in his professional role as William's lawyer than he did in his family situation and left it to John to decide what to do.

Several days later, John informed his supervisor that he had called William to ask what was making it difficult for the client to attend scheduled meetings. William explained that John had scheduled the appointments for early morning, which was the toughest time of day for him, and suggested scheduling the appointments in the afternoon. William also said reminder calls might help. John rescheduled William's appointments for the afternoons and gave reminder calls before each appointment. With these two changes, William was able to make his appointments and John successfully represented him before an Administrative Law Judge, resulting in a fully favorable decision, and the award of all benefits due.

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We offer this scenario as an example of how negative countertransference might arise in our cases, although we understand that negative reactions to particular clients or particular client behaviors might arise independent of countertransference. In this case, the student's negative association initially resulted in his minimizing his engagement with the client and restricting his role, as is common where

[65] Bryant, *supra* note 9, at 70–72 (Habit Three).

professionals have established rigid professional boundaries.[66] Had the supervisor not intervened as she did, that rigidity would likely have resulted in premature case closure, thus complicating William's ability to obtain the disability benefits to which he was entitled.

We acknowledge that not all cases involving negative countertransference resolve themselves as easily as this case. Here, as in the previous case example, the student quickly made the connection between some aspect of his relationship with his client and other relationships in his life. In addition, in both scenarios, the students disclosed the connection to their supervisors, were open to reflecting, and were willing to change their thinking about their interactions with their clients. Clearly a much greater supervision challenge arises when students do not consciously make the connections, do not disclose to their work colleagues, or have difficulty reflecting upon the dynamics that might be at play.

III. Best Practices

We move now from case examples that illustrated some of the psychoanalytic concepts that can accompany sameness and assumptions of sameness to a case example[67] that illustrates how sameness and assumptions of sameness can potentially affect all phases of the lawyering process from initial case assignment to interviewing, case planning, and preparation for hearing. Following each scene, we provide analysis and propose best practices to help clinicians and lawyers begin to identify and address the psychodynamics of sameness in teaching and practice.

A. Beginnings: Initial Assignments—Cases and Pairings

We begin by considering how sameness might factor into decisions about initial assignments. Should we assign students to particular

[66] *See* Davidson, *supra* note 60, at 518–19; *see also* Brooks, *supra* note 55, at 527–28; Brooks, supra note 9, at 225–26 (discussing risks of countertransference and inappropriate boundary setting); Meier, *supra* note 25, at 1349–56 (noting lawyering challenges inherent in countertransference); *see supra* notes 25 and 27–32 and accompanying text (discussion regarding boundary issues).

[67] The authors have led two conference sessions on lawyering issues inherent in sameness. First, we presented a mini-plenary session at the 2010 AALS Clinical Conference in Baltimore, MD, together with two other clinical colleagues, Professors Maritza Karmely and Jason Eyster. Then the same clinical team reprised the issues at the New England Clinical Conference in Boston, MA, in November 2010. The case vignette upon which we build in Part III of this Article is fictional but drawn from our clinical experience. The authors are deeply indebted to their co-presenters for the insights in this Part which grew out of our collaboration on the conferences. We also note that, while our experience stems from clinical work, these issues arise in virtually all practice settings; therefore we hope that the specific tools described in this Part will be instructive beyond the clinical context.

cases, particular case responsibilities, or particular supervision pairings based on shared personal characteristics or shared life experiences?[68] How might we anticipate, and teach our students to anticipate, issues of sameness and difference early in the process?

****

Supervisor to clinic students, Marie and Bill:	*I'm really pleased that both of you are taking the clinic this semester. I'd like you to work together as a team on an asylum case for one of our new clients. Our client, Jane Barton, is from Cameroon. From the intake, it appears she has a very compelling case.*
Supervisor (to Marie):	*I understand that your family is from Cameroon?*
Marie:	*My Mom and Dad are from there. He came here for his Ph.D., and they stayed.*
Supervisor:	*Do you have any family still in Cameroon?*
Marie:	*Yes I have aunts and uncles and cousins. And, I've been there twice. It was different from what I expected, but they live pretty much the way we do here, except they have servants; having servants is more common among the middle class there.*
Supervisor:	*What do you know about the politics?*

[68] We recognize that it may not be feasible to assemble working relationships based on considerations of difference and sameness. We draw upon our own clinical experience at the Boston College Legal Assistance Bureau where clinic students are assigned to faculty supervisors at the beginning of each fall semester. The pairings are not entirely random as each supervisory and seminar group is adjusted as needed to account for various factors such as gender, access to transportation, racial and ethnic diversity, and credit load. On other occasions and in other clinics, student registration is the sole determinant of supervisor/student pairings. Clinic students are then paired. In some clinics, they share cases; in other clinics, each student has his/her own cases, but they meet jointly with their supervisor. This discussion of assignments has relevance at all levels (i.e., attorney/client, supervisor/student, student/student pairings).

Whether attorney assignments of clients can be "engineered" to account for sameness and difference may not always be feasible, much less advisable. Solo practitioners or small office settings may have only one attorney competent to handle a particular client's matter. Even in larger practice settings, there may be constraints which restrict choice in legal assignments.

Marie: *I've heard about it constantly from my parents. It's one of the reasons they left. There's a lot of corruption and the President doesn't allow any complaints or opposition.*

Supervisor: *Bill, what do you know about Cameroon?*

Bill: *I was a poli sci major, but I was interested mainly in Latin American issues. I really don't know much of anything about Africa. To be honest, I had hoped that I'd have the opportunity to work with a Spanish-speaking client.*

Supervisor: *Well, I'll keep that in mind for a second client, but I'm sure that with your background in political science you'll be able to help us all get a much better understanding of the conditions in Cameroon. We spoke in class about how we generally sort out team representation and I am wondering if you two have any thoughts about how you would like to divide up the work in this case.*

Bill: *I'll be happy to work on developing background information about the country and about the political conditions. I think that Marie should be in charge of telling the client's story. The fact that Marie's family is from Cameroon, too, will give us a lot of insight and will help the client connect with us.*

Supervisor: *Marie, what are your thoughts about that?*

Marie: *I agree with Bill. We should play to our strengths.*

Supervisor: *OK. So why don't you begin by reviewing the intake materials and thinking about how you want to introduce yourselves to Ms. Barton. Then we'll all talk more later in the week.*

Marie and Bill: *OK.*

****

Here, the supervisor made a key assumption about connection. Relying on her knowledge that Marie and the client shared a common national heritage, she presumed that common heritage to be an advantage in the clinic's representation of Jane Barton. The supervisor held these factors determinative in assigning Marie, and her partner, Bill, to work with Ms. Barton. Only after the assignment of the student lawyer team to the case did the supervisor express some openness to the student pair's division of responsibilities, posing that question for the team's consideration.

Granted, the supervisor had to assemble some legal team to undertake an initial interview of Ms. Barton. The supervisor seemingly wanted to assemble a team that might more easily connect with Ms. Barton but was faced with making the team assignment without full information about the personal traits or experiences that might exist between her students and the client. What the supervisor did know about Marie—her national origin—then became the principal consideration; the possibility of some shared language might also have motivated Marie's selection. Other than gender, it is unclear at this juncture whether Marie and Ms. Barton share other commonalities. Questions of class, age, religious preference, education, and political affiliation, for example, are as yet unknown, even though these other factors could potentially help a client and lawyer connect or pose a divide.

As to the supervisor's assumptions about Bill, we have even less information. Was the supervisor aware of his political science training before she assigned him to this case? Certainly, once this training was revealed, the supervisor touted it as important to Bill's assignment to this client, although it is not clear that Bill's training makes him the right person to investigate Cameroon's political situation. Otherwise the visible factors of potential connection (e.g., race, gender) are not present. Unknown at this stage is whether there are connectors which could help Bill and Ms. Barton forge an effective working relationship had Bill been assigned to be the principal client contact.

Here is the challenge: at the time of case assignment on a new intake, we cannot have sufficient information to make a fully informed assignment decision, should we choose to make assignments based on shared attributes. However, recognizing that such assignment decisions may be weighted toward what is visible and otherwise known may help us be more conscious of the connections that are being valued. Similarly, even when a decision is made to assign a client based on visible sameness, we should recognize that additional, less obvious connectors and distancers may become apparent as the

attorney-client relationship unfolds. Such recognition can help the supervisor test her own assumption about the advantage of the known connection. The supervisor can then engage the students from the inception of the relationship in discussions about sameness and difference. These discussions in turn might help supervisor and students to anticipate responses as additional similarities and differences become apparent.

In this asylum matter, we can assume that the supervisor's intent was to assemble the legal team best suited to handle Ms. Barton's case zealously and efficiently. Are assignments which attempt to foster sameness necessarily best? In addition to Marie and Ms. Barton's common nationality, perhaps Marie and Ms. Barton also spoke the same language (thus sparing the expense and inefficiency of interpreters[69]); at a minimum, they would have some common experiences that could help rapport.

Whether those factors should trump other considerations in assignments remains the hard question. Indeed, if we draw on research from clinical supervision in the counseling field, we find that there is little empirical data supporting professional assignments based on visible sameness. Family therapists who have studied cultural competency in clinical supervision have warned that the "myth of sameness" can occlude a professional's understanding of the importance of context.[70] Studies of various intra-ethnic or racial counseling dyads conclude that assigning family therapists on the basis of perceived common ethnicity with their clients does not necessarily guarantee a better working relationship. Rather, these analyses suggest that therapists need not be assigned to match their clients' ethnicity but recommend instead that therapists employ interpersonal tools to achieve an effective working relationship.[71] In addition, much work has been done on how each of us—helping professional and client alike—is "uniquely situated."[72] Understanding multiple identities, intra-group differences,

[69] At the same time, we recognize that, if Marie and Ms. Barton are sufficiently fluent in the same non-English language to avoid using an interpreter, this enhanced connection between them might have a deleterious effect on Bill's ability to connect to Ms. Barton and on his working relationship with Marie, as he presumably would not be able follow their conversations in the other language.

[70] *See* Hardy, *supra* note 10, at 19.

[71] COMPTON ET AL., *supra* note 13, at 191–92; *see generally* Bean et al., *supra* note 23, at 155–61 (suggesting tools for non-African-American therapists counseling African-American families); Insoo Kim Berg & Ajakai Jaya, *Different and Same: Family Therapy with Asian-American Families*, 19 J. MARITAL & FAM. THERAPY 31, 31–38 (1993) (offering suggestions to improve non-Asian therapists' connections with their Asian clients); *see also* Field et al., *supra* note 10, at 47 (extending the subject matter from a focus of therapist and client to supervisor and clinician-in-training).

[72] *See* COMPTON ET AL., *supra* note 13, at 330–31; KIRST-ASHMAN & HULL, *supra* note 24, at 419 (providing strategies for cultural assessment grounded in recognizing the unique-

and the fact that each of us within any one of our group affiliations is uniquely situated, is critical to understanding the complexities of connection and divide.

By analogy, clinical law supervisors might, for good reason, choose to assign a particular student attorney to a particular client based on shared language, race, gender, ethnicity, or life experience. At the same time, they should remain conscious of the student's and client's multiple identities and the potential for making overly broad assumptions of sameness. Clearly, there might be advantages to assigning lawyers to clients who speak a common language; however, apparent language similarity can mask important differences in dialect and other linguistic distinctions, and there might be other personal characteristics that are sources of difference. Therefore, those lawyers and their supervisors would benefit from taking time to identify the full range of attributes that might connect them to and divide them from their clients.[73] As illustrated in the vignettes that follow, recognizing that there can be both benefits and pitfalls to assignments based on common attributes will best ensure that the attorneys and supervisors will proceed mindful of the potential risks of sameness. Lastly, being transparent and reflective at the case assignment stage will be helpful.[74]

B. Ongoing: The Lawyering Process

The key factor that fueled our interest in this project was exploring how unrecognized assumptions about connection and distance risk adversely affecting the representation. In the next vignettes, we examine how the clinic students assigned to the asylum case approached interviewing, case planning, and advocacy.

1. Interview

We join Marie and Bill in the midst of their initial meeting with Jane Barton (Client). We offer two scenes: the first includes Marie's self-disclosure of her Cameroonian roots; the second involves the the-

ness of individuals); *see also* Falicov, *supra* note 18, at 377–78, 385 (advocating taking "culture into the mainstream" of all family therapy, paying close attention to context while remaining respectful of client's culture, and encouraging development of a "cultural road map for understanding similarities and differences"); Kenneth V. Hardy & Tracey A. Laszloffy, *Training Racially Sensitive Family Therapists: Context, Content, and Contact*, 73 FAMILIES SOC'Y 364, 367–69 (offering clinical teaching exercises to promote effective counseling across difference, including completion of cultural genograms and racial storytelling).

[73] Field et al., *supra* note 10, at 49.

[74] In an attempt to make explicit how a more nuanced conversation on sameness and difference might be handled at the point of case assignment, we offer a second cut at the initial team meeting about Ms. Barton's case in Appendix 3.

ory verification phase, where Marie is probing for more details about her client's arrest back in her home country of Cameroon. Bill is in the room and taking notes but not otherwise participating in the interview.

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Marie: *Nice to meet you, Ms. Barton.*

Bill: *Thanks for coming in today.*

Client: *I'm very happy that you've offered to take my case.*

Marie: *That's something we'll want to talk with you more about at the end of our meeting, to see if you'd like us to represent you and whether our office can offer that help. Let's begin though by talking about how we propose to proceed today. [discussion of confidentiality, student practice, division of duties between students, other preliminaries]*

Marie: *So, I understand from your file that you're asking for help with your asylum application and that you're from Cameroon. Before we hear about what happened, I want to share with you that my parents are from Cameroon.*

Client: *Really?? That's terrific to hear. Are they still there?*

Marie: *No, they came to the U.S. before I was born, but I still have aunts and uncles back there and I've visited them twice. I find the countryside very beautiful.*

Client: *It is very beautiful. I really miss how Cameroon looks. Where does your family live?*

Marie: *They live in Southern Cameroon.*

Client: *Oh, I'm from there, too. I lived in a town called Wum. Have you been there?*

Marie: *I'm afraid not. Is that inland? My family is near the coast. . . . I fear my Ewondo is really rusty, so I wonder if it's okay with you if we continue in English? That way Bill can understand, too.*

Client: *That's fine; I took English all through school, so I'll do the best I can. It just means so much to me that you're from Southern Cameroon, too. I know that you'll be able to understand what happened to me and why I can't go back home.*

****

Marie: *Now, I'd like to move on to the events that led up to you going to jail. First, can you tell me about the work you did in Cameroon?*

Client: *I had a food stall—it wasn't much, but I was really proud of it. We sold inexpensive street foods.*

Marie: *About how long had you had that business?*

Client: *We'd been in business for just a few weeks. My family helped me get started and would spell me when I needed assistance. But then they came and it was all over.*

Marie: *Can you tell me more about what happened?*

Client (indignantly): *At first it was just the stealing. At lunch, these two policeman walked by, staring at me and the stall. Then they came closer and took food. I asked for payment, but they just laughed, saying they didn't have to pay for anything from a Nelu.*[75] *The next day, I tried to stop them from taking my food, because I really needed it for people who would pay. They laughed again and told me I was lucky that they were letting a filthy Nelu stay in business.*

Marie: *They said "filthy Nelu"?*

Client: *Yes, the police, they're all Beti-Pahuin. They think they can do whatever they want because the President is too. They go to the good schools and get all the good jobs. They look down on everyone else.*

Marie: *OK, so they took food without paying for it. Did anything else happen*?

Client: *Yes, a couple of days later, I was at the market, helping some customers, and two new police came. They were laughing about being hungry and grabbed some of the food and started to eat. But then one spat it out saying it tasted awful. And then he started yelling at me, grabbing all the food and throwing everything down, smashing the table and my pots. The other one laughed and then helped his partner break everything.*

[75] For purposes of this vignette, we have created the Nelu as a fictitious, indigenous ethnic group within Cameroon. Similarly the political climate and particular events described in the narrative are not intended to be historically accurate.

Marie: *You said they were yelling. Can you tell me what the police were saying?*

Client: *They were yelling at me that I was a filthy Nelu; that I couldn't even cook right and was selling bad food; that I had no business being in the market; that they would stop me.*

Marie: *Then what happened?*

Client: *They just handcuffed me and dragged me off with them to jail.*

Marie: *Did they say why?*

Client: *I asked them, but they told me to shut up and kept repeating that I was a filthy Nelu and shouldn't be selling bad food. There was nothing wrong with my food, though. They were just looking for an excuse to ruin my business.*

Marie: *What do you mean?*

Client: *They harass all the Nelu, and anyone who isn't Beti-Pahuin has a really hard time making a living in our town.*

Marie: *So, what happened at the jail?*

Client (reluctantly): *I asked them again what I had done and to let me call my father. The first one, he said I'd tried to poison him and he'd show me what would happen to a Nelu poisoner. I tried to explain that nothing was wrong with the food, no one else had gotten sick, and he slapped me and told me not to talk back or else.*

Marie: *And then what happened?*

Client: *He started to unbutton his clothes and the other one held me down. And then they used me.*

Marie: *How awful! What did you do?*

Client (shrugging): *Nothing—what was the point?*

Marie: *Well, after they raped you, what happened?*

Client: *That was it. The policeman who claimed I'd poisoned him spat on me and warned me that I'd get worse if I went back to the market. Then they let me go.*

Marie: *Well, did you go to the hospital?*

Client: *No.*

Marie: *Did you try to file a complaint against the police?*

Client: *No.*

Marie: *Did you report the rape to anyone?*

Client: *No.*

Marie: *Not even your family*?

Client: *No. This is the first time I've talked about it*.

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Too often in our work, we learn of horrific events that our clients have experienced. For front-line attorneys, this type of client disclosure is all too frequent an event.[76] Here Ms. Barton chose to confide in Marie and Bill. Since their client indicated that this occasion was the first in which she had shared the trauma of her rape, the clinic students deserve special praise for developing a constructive attorney-client relationship that fostered the revelation. Knowledge of this assault would surely provide the lawyers additional legal theories on which to base her asylum case.

At the beginning of the meeting, Marie disclosed her family's ties to Cameroon, to the apparent comfort of Ms. Barton. Whether Ms. Barton would have surmised the connection had Marie not disclosed it is unclear; however, there can be benefit from being explicit about common ground. Rather than having to speculate, Ms. Barton knew from the beginning about Marie's shared heritage. Had she had concerns she might have been more willing to voice them, given that Marie had been forthcoming.

In this segment, Marie has asked Ms. Barton to describe the events which led to her arrest and imprisonment. After obtaining some general background about Ms. Barton's food stall, Marie asked a series of effective, open-ended questions which elicited a detailed narrative about Ms. Barton's involvement with the police and subse-

[76] I. Lisa McCann & Laurie Anne Pearlman, *Vicarious Traumatization: A Framework for Understanding the Psychological Effects of Working with Victims*, 3 J. TRAUMATIC STRESS 131, 131–33 (1990). The authors describe vicarious traumatization as "related both to the graphic and painful material trauma clients often present and to the therapist's unique cognitive schema or beliefs, expectations, and assumptions about self and others." *Id.* at 131. They proceed to recommend tools by which helping professionals can handle client histories of trauma, while protecting their own mental health. *Id.* at 144–47.

quent arrest.[77] Marie's efforts paid off as she obtained a chronological, detailed review of the events leading to Ms. Barton's assault.

If we next parse Marie's approach to the interview after Ms. Barton's disclosure of sexual assault, we find a none-too-subtle shift in her lawyering style. Marie's initial reaction to Ms. Barton's disclosure was outrage and empathy, which she followed with two key, broad questions eliciting what Ms. Barton did next. However, upon learning that Ms. Barton had not reported the assault, Marie's tone shifted and her questioning became more pointed, telegraphing her surprise and skepticism that Ms. Barton had not previously shared her trauma.[78]

Given the nature of this case, obtaining information about Ms. Barton's actions post-assault is critically important. Marie did not hesitate to explore that key subject matter, but if her questioning and tone communicated judgment, it is possible that her approach could adversely affect the lawyer-client relationship and potentially inhibit Ms. Barton from sharing her full experience. Whether the connections she shared with Ms. Barton affected Marie's specific approach to that inquiry is, at this point, unclear. We certainly recognize that an interviewer who did not share her client's nationality might also make judgments arising from issues unrelated to the connection; we suggest that the supervisor should remain open to the range of possibilities.

Here we've presented only one lawyering skill—interviewing—but one can readily envision how issues of sameness and difference could affect other lawyering skills, from counseling to research, to fact investigation, to advocacy. The source of Marie's reaction becomes more evident as the process continues.

2. *Case Planning*

Helping our students become conscious about assumptions around connection and divide is a key aspect of all stages of supervision. We rejoin Marie and Bill, this time in their post-interview meeting with their supervisor. After a general debriefing of the interview, Marie begins to share her concerns about Ms. Barton's narrative.

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[77] Examples of Marie's good questioning technique include: "Can you tell me more about what happened?"; "Did anything else happen?"; "Then what happened?"; "Did anything else happen in jail?" Often Marie coupled these open-ended inquiries with other types of active listening, including empathic statements and recapping.

[78] After hearing about the rape and Ms. Barton's inaction thereafter, Marie asked a number of closed, detailed questions about medical treatment, police reports, and disclosures. The focus of these questions is clearly critical to fact investigation in this case, and much rests on the tone of Marie's inquiry as well as her non-verbal communication (body posture, facial expression, etc). It is the tone of Marie's last inquiry, "*Not even* your family?" that bordered on cross-examination question format and conveyed a negative judgment.

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Marie (angry): *I can't believe that Ms. Barton is making things up about her case. Especially to us, when we're trying to help her.*

Bill: *What do you mean?*

Marie: *She says that the police persecuted her because she was a Nelu. And that the Beti-Pahuin have all the good jobs and run the country. Well, my family is Nelu, and they've never had any special problems because of their ethnicity. My relatives vote for the President's party and stay out of politics even though they hate him. What's wrong in Cameroon is the government doesn't allow opposition—of any kind, from anyone, no matter what ethnicity.*

Bill: *Well, maybe things have changed . . . maybe Ms. Barton's circumstances are different.*

Marie: *My folks talk to our extended family back in Cameroon every month. I know what things are like back there, which is one reason we all agreed I'd work on this client's direct.*

Bill: *But you're saying she's lying to us*.

Marie: *I think she isn't telling the full truth. I bet the people who smuggled her in told her what to say to have a better asylum case.*

Bill: *You don't know that. She's your client, but you're sounding more like the judge.*

Marie: *I don't think so. I'm just assessing her claims based on my experience. I think she does have a claim because she was active in the opposition, but the facts as she presents them just don't ring true.*

Supervisor: *It might help me and Bill to understand what makes you think that?*

Marie: *I'm Cameroonian. I have friends who've been smuggled in and they told me they were told how to improve their chances of being granted asylum. It is part of the service they buy. Some of them even can buy fake affidavits about persecution. And I've been to Cameroon. I know the people. The horrible things she said that happened to her because she's Nelu—Cameroonians wouldn't do that; they're really proud of their nationality, just not of the government.*

Supervisor: *You mentioned earlier that there's a lot of corruption and the President doesn't allow opposition. Is there any possibility here that the authorities might come down hard on particular individuals or ethnic groups?*

Bill: *Yeah, what about the fact that they raped her? That raises questions about persecution based on gender, too.*

Marie: *Look, I know you want to believe her, but what she said about the rape—it didn't sound true. She sounded like she'd been given a script to memorize. And she didn't tell anyone until now.*

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The candor and richness of these student lawyers' reflections are truly striking. Marie in particular deserves support for her efforts to make explicit what troubles her about the case. No attorney relishes thinking she has a lying client. Concerned about her client's veracity, Marie is able to share her skepticism with her partner and supervisor. She has relied on limited data that her client's political persecution is at odds with the experiences of her extended family, to make an assumption that the client must be fabricating the assault to attempt to strengthen her asylum case. Marie concludes: "I'm just assessing her claims based on my experience."

Her supervisor wisely asks Marie to test her assumption ("what makes you think that?"), but Marie persists, given her growing conviction that her client is lying about being raped. However, the supervisor's prompt does expose additional bases for Marie's assumption—her knowledge of general smuggling practices. Again, Marie's distrust of her client seems rooted in Marie's personal experiences rather than in specific data obtained from her client. Marie presumes that her client is lying because the client's narrative, if found to be true, would not square with Marie's existing world view.

But isn't Marie's effort to think critically about her client's story exactly what good lawyers do? Marie is trying hard to put the pieces of her client's narrative into a coherent case theory and is appropriately flagging those parts of the puzzle which are not fitting. Now that the apparently conflicting information has been exposed for further inquiry, she and Bill can better assess whether the questionable facts can be tested and/or accommodated in a revised case theory. For example, the legal team might be able to review the interview transcript more carefully to assess whether further probing of their client might

offer more data upon which Marie's fears can be tested.[79] One useful technique for testing assumptions can be determining what else would likely be true if Ms. Barton had been raped while in custody (i.e., whether there are other reports of rapes of Nelu women who had been arrested; whether there are medical reports substantiating assaults on Nelu women during interrogation).[80] Surely the lawyers would want to know well before the asylum hearing if their client is prepared to perjure herself.[81]

Bill has raised a related, but distinct, challenge to Marie's concerns. He worries that his partner has sold out their client ("you're sounding more like the judge") and that her judgments are preventing her from moving forward with case preparation. Bill has begun expanding the case theory to incorporate the new facts about the assault (i.e., gender discrimination), as he does not share Marie's disbelief. However, Bill has connected his partner's concerns to those that an immigration judge might have.[82] Bill is assuming that an immigration judge will approach Ms. Barton's asylum case with significant skepticism, perhaps even hostility.

At this juncture, the team's efforts to develop a case theory may be enhanced by inviting them to test Bill's thesis. A supervisor might urge the partners to stop and assess what assumptions each thinks the immigration judge would likely hold about Ms. Barton. By making explicit the predispositions they anticipate to be integral to the judge's approach to the evidence, the lawyers can better anticipate the judge's questions and concerns and plan to rebut them. In addition to helping refine the case theory for this particular client, this exercise also provides a lens through which the students can better assess the systemic

[79] For example, Marie asked a number of closed questions about her client's (in)action post-alleged rape. After debriefing the interview, Marie and Bill might be able to plan additional inquiries designed to explore why Ms. Barton did not report that assault and the reasons for her current decision to disclose. Had the interview been recorded, that review process could be much richer as the supervisor could direct Marie's attention not just to the substance of her questions, but also to the type of questions and her affect during the interview.

[80] *See* DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 165–66 (2d ed. 2004) (offering information-gathering techniques to help support generalizations, including topics which occur "especially when" or "except when" linked to the proposition being scrutinized).

[81] While a full ethics analysis is beyond the purview of this Article, professional duties prevent lawyers from offering testimony which they know to be false. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983). There may be limited exceptions in the criminal defense field where a defendant may have a constitutional right to testify which are not relevant to this immigration case.

[82] *See generally* Bryant & Peters, *supra* note 9, at 54–55 (Habit Two).

effects of assumptions on the justice system.[83]

Bill and the supervisor have helped Marie become more conscious of her potential assumptions about their client. Bill has taken the additional step of challenging Marie to suspend and explore her initial assumptions to allow a fuller lawyering process. Absent Bill's intervention, it seems unlikely that Marie would have moved forward to broaden her fact investigation, more fully develop her case theory, and zealously represent her client.

3. Pre-Hearing Angst

Case preparation continued, with Bill and Marie continuing to work toward the hearing date, now only three weeks away. As we know from the earlier scenes, Bill was responsible for researching country conditions and writing the brief for the hearing. Marie has been the main client contact and has been responsible for the fact investigation to establish that the client is a member of a protected class and a victim of persecution.

In this next scene, Marie requests a private meeting with her supervisor to discuss some issues that have come up for her in her representation of Ms. Barton.

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Marie: *I have something I need to talk with you about—about the Barton case—do you have some time?*

Supervisor: *Sure, come on in; what's up?*

Marie: *I'm having a hard time with this case. We have the hearing in a few weeks. I thought Bill and I were on top of things, but the past week or so I've been concerned, feeling anxious about it all.*

Supervisor: *Would it make sense to have Bill join us?*

Marie: *I'd prefer it to be just you and me for now.*

Supervisor: *OK—why don't you tell me what's going on?*

Marie: *I'm not sure how to say this, and I feel awful about it . . . but I'm not sure I can go through with putting on Ms. Barton's testimony at the hearing.*

[83] Attached as Appendix 2 are notes outlining seminar class exercises designed to help students identify and assess systemic evidence of bias. As suggested in the text, the exercises can be adapted for use in individual supervision as well. For more detailed information about relevant exercises, see Bryant & Peters, *supra* note 9, at 53–56.

Supervisor: *Why is that?*

Marie: *Well, I don't like talking about it, but things have gotten so bad that I just need to tell someone . . . [Uneasy pause, deep breath] I was raped myself a few years ago, and when I talk with Ms. Barton it brings it all back. I thought I could handle it but now I just don't think I can do it.*

Supervisor: *I'm so sorry about what happened to you and I'm sorry to hear that this case is bringing it all back. I really appreciate your telling me what's going on. Is there anything I can do to help?*

Marie: *I'm OK . . . it's just really hard. But I have a lot of support from my family and friends who know.*

Supervisor: *I'm glad to hear that. If there's anything I can do to help let me know . . . But it sounds like you're anxious to figure out where we go from here with Ms. Barton's case—are you feeling like you can talk about that now?*

Marie: *Yes, it's been weighing on my mind. I'm really anxious to sort things out.*

Supervisor: *OK. Let's figure out together where we go from here. And let me know if at any time you need to take a break. I heard you say that you don't think you can handle Ms. Barton's testimony.*

Marie: *Well, not all of it. I want to help her and I've worked so hard on her case; I want to see it through. So, I think I could handle her testimony about her family background, but I'm not sure I could handle her testimony about her arrest and the rape. So, I'd like Bill to take that part, but I'm not sure if Bill can handle it along with the brief.*

Supervisor: *It would be nice if you could still conduct part of the hearing, and I want you to take some time to think more about whether you can. At some point, we'll have to bring Bill into the planning to see what he can take on. As part of that, you'll also want to think about what you want to tell Bill about why we're adjusting assignments. Any thoughts about how we might do that?*

Marie: *Not right now.*

Supervisor: *And if we do make changes, we'll also need to consider how to tell Ms. Barton about the changes. Any thoughts about how we might discuss this with her?*

Marie: *I hadn't thought about having to explain to Ms. Barton. I don't have to tell her about my experience do I? I guess I should talk with Bill first. And see what he thinks. Hmm, as I think about it, he believed Ms. Barton all along and he's shared with her the evidence he found that other women reported sexual assault to doctors and the U.N. So maybe it won't be so bad that he's the one asking about the arrest and the rape. I'll talk to him, and then maybe the three of us could meet to talk about where we go from there.*

Supervisor: *OK. That sounds good. Let me know if there is anything I can do to help with that.*

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We often learn of our client's pain. Less frequently, we share that of our colleagues. Here the supervisor, because of Marie's disclosure, has become privy to another connection within the case: the trauma which links Marie to her client. Obviously, the supervisor could not have foreseen that shared personal experience or have anticipated how it might affect the lawyering. Clearly the supervisor's initial focus needed to be on her student's well-being and sense of control over next steps in managing this difficult disclosure. The fact that she was able to focus on the student's needs in the moment is certainly commendable.

C. Wrap-Up: Post Case Reflections

In the final vignette, we return to a meeting of the lawyering team. With the asylum hearing behind them, they have the luxury of both time and hindsight. Marie and Bill are meeting with their supervisor to review their advocacy at the hearing in particular and their work on the case more generally. Prior to the hearing, Marie had disclosed to Bill that she had been raped and, as a result, the team reallocated some of the work for the hearing. Specifically, Bill handled that portion of their client's direct testimony about her arrest, imprisonment, and rape.

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Supervisor: *Now that we've talked about how the hearing went, I thought it might be helpful for us to talk a bit about your relationship with Ms. Barton. It's something we've talked about periodically—from your disappointment, Bill, not to have a Latin American client, to your concern, Marie, that Ms. Barton wasn't being fully truthful with us. What really strikes me is how well each of you was able to connect with her as the case progressed.*

Bill: *Yeah, I was disappointed at first, though I thought it lucky that Marie had so much in common with Ms. Barton, with both of them coming from Cameroon. But, as I got to know her, I really liked her. She was pretty easy to work with. And I admired her feisty spirit.*

Supervisor: *What you said about how lucky it was that Marie had so much in common with Ms. Barton is interesting. When I think back on our first meeting about this case, I made the same assumption based on their shared country of origin. That was why I originally assigned this client to Marie. Marie—I remember how excited you were that you'd have a client who also came from Cameroon—and how we all agreed that that would help her feel comfortable with us and help us connect better. How well do you think that assumption held up?*

Marie: *Well, in some ways, I think it was correct. I was very excited. And Ms. Barton seemed happy to learn that my family was also from Cameroon. We really connected in our first meeting, finding out where our families were from, what I knew from my visits there, and about her involvement with the opposition party. But, as we got deeper into her story, I was surprised that it became harder for me to relate to her.*

Supervisor: *What do you think made it harder to connect?*

Marie: *When she blamed the arrest on her being Nelu . . . My family hadn't had problems because of our ethnicity. My parents left because of politics. My relatives in Cameroon decided to toe the line and did pretty well for themselves as a result. So I didn't believe her that she was being persecuted for being Nelu. I thought she added that in to make a better claim.*

Supervisor: *It sounds as though your and your family's experience affected your reaction to Ms. Barton's experience.*

Marie: *Yeah, I guess so, although I also knew that smugglers do tell people how to make a stronger claim for asylum.*

Bill: *But my research showed that there were intersections of ethnic, socioeconomic, and political persecution. So, we didn't have any proof that she was making up her story, and we did have proof to support it. That research also helped me connect with Ms. Barton. I totally believed what she was telling us had happened to her, and sharing the results of my research with her made her more comfortable with me. She could see I believed her and that my research would help the judge believe her too.*

Supervisor: *I realize that in our first meetings my own assumptions weren't very well thought out. Assigning Marie to be the primary client contact based on shared background was much more complicated than I had anticipated. And I underestimated what Bill could bring to developing a connection to the client. That you were both able to recognize and get past these assumptions to work with the client is impressive.*

Marie, this might be difficult to consider, but you and Ms. Barton had another shared experience. I'm wondering if you think that your own history of trauma might have influenced your assessment of her circumstances?

Marie: *I hadn't considered that. When she recounted the attack it didn't ring true. She was so unemotional about it, and her story sounded canned. I remember every detail of what happened to me. It stays with me. And anytime I talk about it I get panicky. I didn't consider how someone else might react differently. I was so angry, thinking that she'd made up a story of being raped.*

Supervisor: *That's certainly understandable. Any of us might naturally assume that others would react to trauma or other significant events like we would. Our own experiences might make it particularly hard to hear our client's experience. And when we respond in the moment we may not have the luxury of being conscious of how all of that is playing out. I wonder whether your response to her account of the assault also led you to disbelieve what she said about ethnic persecution.*

Marie: *You're right. At the time, I wasn't thinking about how my own experiences colored my judgments about a lot of things, not just the attack.*

Supervisor: *It sounds like you've really gained some insight into how experiences that on first blush seemed similar are in many ways quite distinct. What's important and admirable is that you've come to recognize that assumptions about sameness carry some risk and can directly affect our lawyering judgments*.

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We recognize that we have captured the dialogue of a particularly insightful lawyering team. However, we believe that the crux of their conversation contains important takeaway messages for all student lawyers and clinicians. Not only did the group show remarkable candor, but also they risked challenging each other and their own conduct. The process by which they arrived at those insights is the primary focus of our inquiry. What did the supervisor do in this meeting that facilitated the students' learning about their assumptions and the impact of those assumptions on their lawyering?

The supervisor artfully led her students through a debriefing of their overall work on the case. Her techniques are noteworthy. First, she explicitly prompted her students to reflect on issues of sameness and difference and acknowledged the positive connections both students had made with their client. Before asking the students to be self-critical, she modeled the process by offering a self-appraisal of her own assumptions and their effect on her actions.

As she turned to the students for their contributions, the supervisor first elicited their comments on sameness, before challenging them to assess their assumptions of difference and explore the impact that those assumptions might have had on their lawyering. She acknowledged the power of assumptions by regularizing their existence.

Marie's supervisor reflected on her initial assignment of this case.

The women's subsequent revelations about being rape victims became another shared, but unknown, connection as the lawyer-client relationship unfolded. The supervisory challenge became finding ways to help Marie assess whether her previously undisclosed rape experience might have affected her assessment of the case and her client's credibility. Then the difficult questions follow: how and when to raise these issues with Marie.

As painful as reliving the trauma had been for Marie, it also offered a rich teaching moment. With a minimal prompt from her supervisor, Marie began reflecting on her lawyering. She identified a possible assumption she made—that her client had been lying about the rape. In this case, Marie's personal experience as a rape survivor seemed to intensify her judgment and skepticism of the client because she felt that the client's experience did not "ring true." That same shared experience could have affected her lawyering judgments in a very different way. It could have enhanced Marie's empathy for, and identification with, her client. That enhanced empathy could have made her the most effective of advocates; alternatively, intense empathy could have compromised her ability to make necessary critical judgments in the case (e.g., ability to acknowledge possible inconsistencies in her client's version of events).

After exploring Marie's reflections, the supervisor closed the session with further positive reinforcement and appreciation of the clinic students' efforts. In Appendix 1, we catalogue some practical tools that clinical supervisors can use to help students identify and explore assumptions of sameness and difference. Then, in Appendix 2, we offer some teaching exercises designed to help clinic students recognize issues related to sameness and difference. Finally, in Appendix 3, we offer a more nuanced case assignment dialogue for comparative purposes. It is our hope that these tools, drawn from social work and psychology concepts, will prove useful in accomplishing our mutual interests of training our students and better serving our clients. Making our assumptions explicit and being sensitive to their potential impact on our lawyering is a hallmark of effective practice important for students to appreciate.

Conclusion

Shared personal characteristics and shared life experiences can be powerful connectors in our working relationships with clients. They can also help us to understand and appreciate more fully a particular client's legal problem and to be more effective advocates. In addition to these possible benefits, there are also potential risks inherent in sameness and assumptions of sameness—risks frequently related to

overidentification, projection, countertransference, or self-disclosure of sameness. Identifying and addressing those potential risks—role confusion, boundary issues, the narrowing of our focus, and impaired judgment—are critical to effective lawyering.

To meet the challenges inherent in sameness, we must first acknowledge that we, and our clients, have multiple identities, some of which will raise issues of sameness and some, issues of difference. It is also important to acknowledge that we, and our clients, may have reactions to one another that are drawn from our unique backgrounds and life experiences. These factors are sometimes obvious or articulated, sometimes not. They might be disclosed during the lawyering process, or they might be triggered by a particular event during the course of representation. Only if we train ourselves and our students to recognize that these dynamics are present in our work, can we move on to identify how they might affect our relationships with clients and the lawyering process—from fact investigation, to client counseling, to case planning and advocacy. Developing self-awareness and interpersonal competence can and should be included among the essential lawyering skills we need to teach.

Appendix 1: Practice Tools for Supervisors[84]

Here, we offer tools that supervisors might use to encourage intentional exploration of sameness between a lawyer and a client. While our emphasis is on identifying sameness, we recognize that sameness and difference are complementary and exist simultaneously in each lawyering relationship.

- Encourage students to identify ways they see themselves as similar to their clients as well as ways they see themselves as different from their clients
- Raise potential sources of sameness or difference that have not been raised by the student
- Begin by acknowledging the student's positive connections to her client and the case
- Offer explicit prompts re: reflection on assumed difference, finding connection
- Offer explicit prompts re: reflection on assumed sameness, finding difference
- Offer explicit prompts re: reflection on how systems (judges, agencies, opposing parties, etc.) might approach sameness/difference and how such approaches might inform the student's advocacy
- Identify how the student's responses to a particular client might inform her about potential systemic bias and, as a result, inform her advocacy
- Model self-reflection re: assumptions of sameness
- Beware of overstating the advantages of sameness
- Acknowledge the student's experience while noting the uniqueness of the client's experience
- Make explicit connections re: how assumptions of sameness drawn from personal characteristics/personal experiences might affect lawyering judgment
    - Lawyer-client relationship
    - Fact investigation
    - Case assessment
    - Theory development
    - Strategy decisions
    - Zeal

[84] These practice tools are the result of the collaboration of the authors and Professors Eyster and Karmely at the 2010 AALS Clinical Conference in Baltimore, *supra* note 67. They draw heavily on the social work insights of Lynn Barenberg, L.I.C.S.W., but reflect the group's collective thinking.

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Appendix 2: Exercises for Seminar or Individual Supervision

Here, we focus our attention on specific exercises that can be used before actual issues of sameness or difference arise, or as they arise, with our students. These exercises allow the supervisor and students to explore such issues on a micro level, as has been the primary focus of this Article, and on a macro level, as students consider the effect of sameness or difference in the legal systems in which they work.

A. From Micro to Macro: The Systemic Impact of Assumptions of Sameness

As either a seminar assignment or in individual supervision, consider asking students to engage in the following planning exercise.

Goals

- To help student lawyers make their assumptions about sameness and difference conscious;
- To identify assumptions other players in the justice system might make in a particular case (e.g., opposing counsel, judges, mediators, service providers, etc.); and
- To plan how these untested assumptions can best be countered or neutralized.

Implementation

Have students choose one of their cases. Ask them to put themselves in the role of the judge (or jury, opposing attorney, or other player in the particular system in which their client is involved). In that role, have them identify the assumptions that they think the player whose role they have undertaken might make about their client. In particular, they should review carefully any adverse evidence and/or facts in the case. Having identified possible assumptions which the judge (or other significant player) may make, have them consider what inferences that person might make about the client, the legal issues in the case, and the likely disposition.

Now, ask the students to return to their role as counsel for the client. In that role as zealous advocate, have them engage in more case planning and identify what fact investigation or case theory development should be undertaken to address those assumptions. The supervisor can then help the students debrief both their reflections on the process of identifying assumptions while in another role and on the case planning process that followed as they

attempted to rebut those assumptions.

Questions and prompts to guide that debriefing include:

- What assumptions did the students identify?
- Which of the identified assumptions are rooted in sameness? In difference?
- How, if at all, might those assumptions affect their lawyering?
- What, if any, risks exist if the assumptions are not addressed?
- What does the fact that the "systems" (i.e., judges/juries/opposing attorneys/service providers) make assumptions mean for our lawyering?
  For the delivery of justice generally?
- Who else, if anyone, within the lawyering process may be making assumptions (i.e., clients, lawyers, supervisors)?
- How, if at all, is the lawyer-client relationship affected by assumptions of sameness? Of difference?

B. Normalizing, Identifying, and Working with Assumptions Related to Sameness

1. Teaching Concepts from Social and Cognitive Psychology

Implementation

Assign readings that address social science research on cognitive schema, assumptions, stereotyping, implicit bias, and prejudice.[85]

Have students take the implicit associations test, available at Project Implicit: https://implicit.harvard.edu/implicit/ (click on Demonstration).

2. Normalizing Assumptions

Implementation[86]

As a seminar exercise early in the semester, have each student and the supervisor prepare three statements about themselves—two of which are true and one of which is false. Each

[85] *See generally* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); WANDA M.L. LEE, AN INTRODUCTION TO MULTICULTURAL COUNSELING 10–14 (1999); Weng, *supra* note 9.

[86] The authors thank Professor William Berman, Clinical Professor at Suffolk Law School, for sharing this exercise.

person's goal should be to try to mislead his or her peers, thus making it difficult for the class to divine the false statement.

Others in the group must then guess which statement is false.

Have the students identify the assumptions that were evident in their choices and explore the source of those assumptions.

Have the students consider any assumptions they might have made that were specifically related to sameness.

Not only do students and supervisors learn about one another, but they also develop a heightened appreciation for (1) how ubiquitous assumption making is; and (2) the particularities of assumptions rooted in sameness.

3. Identifying and Working with Assumptions

a. Refinement of Cross-Cultural Habit 4: Red Flags[87]

Goals

- To help students understand when overidentification, projection or countertransference might be at play;
- More specifically, to help students recognize when they might be responding to a client based on assumptions of sameness.

Implementation

If a student's reaction to a particular client is more intense than, or distinctly different from, her/his reaction to other clients (whether positive or negative), have the student identify the specific reaction and the possible source of that reaction (make it conscious).

If the student's reactions to the client are interfering with the lawyer-client relationship and/or the lawyering of the case, identify those specific interferences and have the student consider ways s/he might work to repair the situation.

b. Clinical Debriefing

Goals

- To provide students the direct data by which they can critically assess their work;

[87] *See* Bryant, *supra* note 9, at 72–76.

- To determine if and how "sameness" is affecting the lawyering.

Implementation

For a case in which shared characteristics or experiences might be at play, focus on a specific dialogue between the student attorney and the client. With that data available to both supervisor and student, consider the following:

  - When you said X, what did you think the client was thinking/hearing?
  - When the client said Y, what were you hearing/thinking?
  - What does this tell you about how you are perceived by the client?
  - What does it tell you about how you perceive the client?
  - How might these dynamics affect the lawyer-client relationship?
  - How might these dynamics affect the lawyering?
  - How might the conversation have looked different if you were more conscious and intentional about the effects of sameness/difference?

c. Exploration of Student Self-Disclosure with Clients

Goals
- To help students be more conscious of self-disclosures;
- To assist students in analyzing the impact of self-disclosure.

Implementation

If the student has disclosed to the supervisor a connection (shared characteristic or shared experience) with the client, have conversations about whether to disclose and if so, what, how, and when to disclose.

If the student elects to disclose to the client, have the student reflect on what draws her or him to want to disclose.

Together with the student, help her or him identify possible benefits of self-disclosure, including enhancing the lawyer-client relationship and enhancing the student's zeal.

Have the student consider the potential risks of self-disclosure,

including:

- Premature narrowing of fact investigation if the student attorney assumes that her or his experience is the same as the client's experience;
- Undermining the uniqueness of client's experience;
- Blurring of professional role and boundaries; and
- Distortion of client expectations of the working relationship.

Appendix 3: Case Assignment Meeting

Here, we offer a more nuanced conversation about sameness and difference at the case assignment stage of our asylum client hypothetical (*see supra* Part III.A.). In this conversation, the supervisor guides the student attorneys to consider explicitly the benefits and potential pitfalls of Marie's ethnic similarity to Ms. Barton, while modeling her own exploration of this issue in making the initial case assignment to Marie. Tools from Appendix 1 and other supervision techniques are noted.

DIALOGUE	TOOLS
Supervisor to clinic students: *I'm really pleased that both of you are taking the clinic this semester. I'd like to talk with you about working together on an asylum case for one of our new clients, Jane Barton. Ms. Barton is from Cameroon and she's applying for asylum based on ethnic persecution, as a member of a minority group and of a political opposition party. I put a copy of the intake file in your mailboxes and asked you to review it. Any initial thoughts?*	Present preliminary case assignment neutrally. Invite student discussion of the assignment.
Bill: *I was a poli sci major, but I was interested mainly in Latin American issues. I really don't know much of anything about Africa. To be honest, I had hoped that I'd have the opportunity to work with a Spanish-speaking client.*	
Supervisor: *It sounds like working with a Spanish-speaking client would be of interest to you. That's important for me to know as we plan your work for the semester and make additional case assignments. How about you, Marie?*	
Marie: *Well, my Mom and Dad are from Cameroon and we still have aunts and uncles and cousins there. And I've been there twice and speak the main dialect. Visiting was different from what I expected, but they live*	

pretty much the way we do here, except they have servants; having servants is more common among the middle class there.	
Supervisor: *An interesting connection. We'll want to think about what your background and experience might bring to the representation. Are you or Bill familiar at all with the political situation there?*	Offer explicit prompt to consider how sameness might affect lawyering. Invite students to explore other aspects of client's experience.
Marie: *I've heard about it constantly from my parents. It's one of the reasons they left. There's a lot of corruption and the President doesn't allow any complaints or opposition.* Bill: *While I've never studied African politics, it could be interesting to see if there's any comparison with some of the South American regimes*.	
Supervisor: *It sounds as though, with Marie's familiarity with Cameroon and Bill's political science training, we should be able to bring some good resources to bear on Ms. Barton's asylum case. Indeed, Marie's connection to Cameroon, which I knew about, is a primary reason for my preliminary assignment of you to this case. However, we should keep in mind that Marie's shared connection to Cameroon, although it might provide us with some helpful insights and connections to the client, doesn't necessarily mean we can know the client's unique experiences. And it can't guarantee a positive working relationship with Ms. Barton. I'm curious to hear your thoughts about what this might mean for how we proceed with the case.*	Model assumptions of sameness. Note limitations of sameness. Encourage students to reflect on how these issues affect assignment of lawyering tasks and case planning.
Marie: *It does seem like it makes sense for me to take her case. She might feel more comfortable with me both because I'm from Cameroon and*	

because I'm a woman. We might also be able to talk in Ewondo if she speaks that dialect, too. That could really help with rapport. Bill: *I agree.*	
Supervisor: *Those are certainly some possible advantages. I wonder whether there might also be some differences in your experiences that might affect our work with Ms. Barton?*	Acknowledge connections based on sameness. Prompt reflection on potential difference.
Marie: *I can't think of any.* Bill: *Well, what about politics? Marie, you said that your family left because of the corruption in the government, but were they involved in politics? Or the opposition? We don't know if there are multiple opposition parties or anything specific about the political situation there. What if your family and Ms. Barton are in different political camps?*	
Marie: *Hmm. I hadn't thought of that. My parents don't talk much about specifics in the political scene. I just know they don't like the government, but I don't know how many parties there are or what party my family might belong to.*	
Supervisor: *Let's assume that there is a political difference between your family and Ms. Barton. How do you think that might affect your relationship?*	Prompt reflection on difference and its potential impact on the lawyer-client relationship.
Marie: *Hmm, she might see me as part of the political problem.* Bill: *Yeah, and then she might not be so willing to work with us.*	
Supervisor: *So, even though Marie and Ms. Barton share some personal characteristics, there might be differ-*	Invoke Habit 1, Degrees of Separation and Connection,[88] to systemati-

[88] *See* Bryant, *supra* note 9, at 64–67.

ences like political affiliations that could impede the representation. I'd like us to consider ways in which Marie and Ms. Barton might be differently situated despite the characteristics they share, as well as to consider ways that Bill and Ms. Barton might make connections despite some apparent differences. *Here's what I propose. I'd like each of you to list some personal characteristics or personal experiences you bring to the table and think about how Ms. Barton's experience might be the same or different. Then I'd like you to consider how those connections and differences might either enhance or challenge our relationship with her. And finally, I'd like you to think about how we might build on the connections and minimize the challenges. Once we've had a chance to discuss it, we'll make some decisions about how we want to proceed.*	cally consider similarities and differences between members of the legal team and the client.