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What's Going On: The Psychoanalysis Metaphor for Educating Lawyer-Counselors Essay

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Essay

What's Going On? The Psychoanalysis Metaphor for Educating Lawyer-Counselors

JEFFREY M. LIPSHAW

In this Essay prepared for the Connecticut Law Review's 2012 Symposium on legal education reform, I propose an alternative to the dominant metaphor of "lawyer as warrior" for educating the many lawyers whom clients will seek out as counselors even at early stages in their careers. My preferred metaphor is "lawyer as psychoanalyst" because it invokes the need for lawyer-counselors to understand clients' idioms and meanings, or more generally "what's going on" beyond the mere analysis and application of the rules of positive law. Like lawyers, psychoanalysts learn a technical discipline (whether or not either discipline constitutes a science) but need to apply it non-technically in the process of counseling patients. I consider implications of the metaphor for lawyer-counselors and their education, concluding with some preliminary and modest suggestions about how reflection on the "repressed positivistic" and "courting surprise" might benefit our students in the "what's going on" aspect of client-centeredness.

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What's Going On? The Psychoanalysis Metaphor for Educating Lawyer-Counselors

JEFFREY M. LIPSHAW*

I. INTRODUCTION

In previous works,¹ I have laid out a theoretical basis for the contention that modern lawyers, at least those working outside of the traditional litigation fora, need to be interdisciplinary theorists, notwithstanding the au courant meme whereby critics of legal education disdain theory in favor of “skills.” I am afraid that “interdisciplinarity,”² having eight syllables, and “theory” being, well, theoretical, each get a bad rap for being highfalutin,³ when in fact I see them as central to the everyday practice of the vast bulk of the profession whose practice is more counseling and facilitation than

* Associate Professor, Suffolk University Law School. A.B., University of Michigan; J.D., Stanford University. Thanks to Rick Buckingham, Mary Karen Rogers, Betsy Armour, and Ian Menchini at Suffolk for assistance in finding data about the profession. I received insightful comments on substance and form from Bill Chin (Executive Dean for Research at the Harvard Medical School), Anna Ivey (whose business includes counseling aspiring law students and their families), A.J. Sutter (the prototype of the reflective business lawyer practitioner), Liam O’Connell (one of my contracts students), and law professors Nancy Rapoport, Andy Perlman, Pierre Schlag, Michael Madison, Patrick Shin, Stewart Macaulay, and Joan MacLeod Heminway. I have shown this to Steven Cooper to satisfy myself that I am in the ballpark regarding his thesis, but any errors in its application here are mine.

¹ Jeffrey M. Lipshaw, *Contract as Meaning: An Introduction to “Contract as Promise at 30,”* 45 SUFFOLK U. L. REV. 601, 602–03 (2012) (“[O]ur job as educators is not merely to train doctrinal technicians, but also to groom what I will refer to as lawyer-theorists.” (internal quotation marks omitted)); Jeffrey M. Lipshaw, *The Venn Diagram of Business Lawyering Judgments: Toward a Theory of Practical Metadisciplinarity*, 41 SETON HALL L. REV. 1, 27 (2011) [hereinafter Lipshaw, *Venn Diagram*] (“We need to define a new professional discipline: the field of metadisciplinarity. . . . [A] higher order skill: it means being an expert in the making of interdisciplinary judgments.” (internal quotation marks omitted)). The thesis there was that effective business lawyers need to wade into the overlap between that which is a purely legal judgment and that which is a purely business judgment. Concurrently with this Essay, I am writing an article that reflects on what a business lawyer needs to be aware of when wading into that overlap. That is, there are limits on “thinking like a lawyer,” indeed, the limits on thinking generally, when compared with the moment of decision and action based on that decision. Jeffrey M. Lipshaw, *Dissecting the Two-Handed Lawyer: Thinking Versus Action in Business Lawyering*, BERKELEY BUS. L.J. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2095357.

² Lipshaw, *Venn Diagram*, *supra* note 1, at 33.

³ Scott H. Greenfield, *Interdisciplinary, or Why We Can’t Have Nice Things*, SIMPLE JUSTICE: A NEW YORK CRIM. DEF. BLOG (Apr. 8, 2012, 4:52 AM), <http://blog.simplejustice.us/2012/04/08/interdisciplinary-or-why-we-cant-have-nice-things.aspx>.

advocacy.⁴ The implicit metaphor for a lawyer in traditional legal education is warrior. In this metaphor, the client's goal is clear, there is no obvious search for meaning, and the lawyer's job is simply to vanquish the other side.⁵

We have learned, however, that even warriors need sometimes to ask why the war is being fought, and to adapt their methods if the conventional strategies do not fit.⁶ Based on a long career as litigator, deal lawyer,

⁴ There is nothing new under the sun. Critics have been noting the practicing bar's call for more skills, the dearth of focus on counseling in legal education, and the fact that counseling has involved significant interdisciplinary skills for the better part of fifty years. See, e.g., Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 L. & CONTEMP. PROBS. 5, 5 (1995) (reacting to criticism of the interdisciplinary turn in legal education, and observing that legal education is strong in doctrine and legal analysis, but "is strikingly weak in teaching other foundational skills and knowledge that lawyers need as counselors, problem solvers, negotiators, and as architects of transactions and organizations"); Harrop A. Freeman, *The Role of Lawyers as Counselors*, 7 WM. & MARY L. REV. 203, 204 (1966) (criticizing the sterility of the Langdellian case method and noting "in recent years there has been an insistent demand on the part of alumni, practicing lawyers, that lawyer skills and the art of lawyering be taught"); Thomas L. Shaffer, *Lawyers, Counselors, and Counselors at Law*, 61 A.B.A. J. 854, 854 (1975) (discussing the intersection of lawyering and counseling).

Nor will I be offering suggestions that have not been offered, in one form or another, in comprehensive critiques of legal education like those that Roy Stuckey has offered. That volume proposes, for example, that the law school curriculum ought to be helping students acquire the attributes of self-reflection and lifelong learning. ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* 66 (2007). Stuckey also advocates as a best practice the employment of "context-based education" for, other among things, the development of practical wisdom. *Id.* at 141–57.

⁵ Here again, very little is new. Almost two decades ago, Gary Blasi offered an encyclopedic assessment of how lawyers go about solving problems, noting at the outset the prototypical lawyer in cultural context was "a litigator, very likely a trial lawyer, knowledgeable about both legal doctrine and procedure, and able to put that knowledge to use on behalf of an individual client, generally in a fairly simple dispute with another party, in order to achieve a desired result." Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 325 (1995). Thomas Shaffer has also observed:

Lawyers are counselors—some of them are good counselors; some are bad. Most of the attitudes they bring to their professional training are poor attitudes for counselors, and most of their training in law school is useless training for counselors. The lawyer in me sees myself, whether I admit it or not, as an expert in aggression. Law—I was told when I was admitted to the bar—is the difference between a debate and an alley fight. My aggression is sanctioned, licensed, and sanctified aggression, because it is better than a fist fight. Law is an alternative to chaos, and I am a specialist in this alternative.

Shaffer, *supra* note 4, at 854.

⁶ In 2009, the United States military in Afghanistan shifted to what it called a "counter-insurgency" or "COIN" strategy to deal with the reality that it was not simply fighting an enemy, but seeking to stabilize a host nation. See Kristina Wong, *10 Years of Counterinsurgency in Afghanistan—Is It Working?*, ABC NEWS (Oct. 8, 2011, 9:15 PM), <http://abcnews.go.com/blogs/politics/2011/10/10-years-of-counterinsurgency-in-afghanistan-is-it-working/> (discussing the counter-insurgency strategy in Afghanistan during an interview with Lt. Col. John Paganini, director of the United States Army's Counterinsurgency Center).

generalist, and businessperson, working both in law firms and in-house, I am willing to assert (with Marvin Gaye) that war is often (even mostly) not the answer.⁷ What clients want may not be so clear. Nevertheless, legal education and practice, at least for the non-warriors, are remarkably sparse when it comes to the theory and practice by which lawyers as counselors and facilitators figure out “what’s going on.” Hence, I question the warrior metaphor, provocatively or annoyingly or even inaccurately. I use metaphor and analogy here the way cognitive scientists suggest it occurs in the creative process generally: to upset established categories and classifications.⁸ Or in the image proffered by Steven Cooper, a psychoanalytic theorist and practitioner to whose work I turn to extensively in this Essay, I wish to “court surprise,” to take something that it is familiar and make it unfamiliar, and thereby learn from it.⁹

The metaphor I suggest here as more appropriate for much of what lawyers do in practice is psychoanalysis.¹⁰ That discipline (or at least those

⁷ For example, Marvin Gaye sings,

Mother, mother
 There’s too many of you crying
 Brother, brother, brother
 There’s far too many of you dying
 You know we’ve got to find a way
 To bring some lovin’ here today, Yeah
 Father, father
 We don’t need to escalate
 You see, war is not the answer
 For only love can conquer hate
 You know we’ve got to find a way
 To bring some lovin’ here today
 Picket lines and picket signs
 Don’t punish me with brutality
 Talk to me, so you can see
 Oh, what’s going on
 What’s going
 What’s going on
 What’s going on

RENALDO BENSON, ALFRED CLEVELAND, & MARVIN GAYE, WHAT’S GOING ON? (Tamla Records 1971), available at www.elyrics.net/inc/print.php.

⁸ Mark Turner, *Categories and Analogies*, in ANALOGICAL REASONING: PERSPECTIVES OF ARTIFICIAL INTELLIGENCE, COGNITIVE SCIENCE, AND PHILOSOPHY 3, 3 (David H. Helman ed., 1988).

⁹ STEVEN H. COOPER, OBJECTS OF HOPE: EXPLORING POSSIBILITY AND LIMIT IN PSYCHOANALYSIS 263–65 (2000).

¹⁰ Psychoanalysis is one discipline within the broader category of psychotherapy. Not all psychotherapists are psychoanalysts. I use psychoanalysis rather than psychotherapy for the metaphor simply because it happens that the thinker, Steven Cooper, whose work triggered it is a psychoanalyst, and I depend largely on his vision of the analyst-patient relationship. Within the category of psychoanalysis, there are many different schools of thought, beginning with Freud and including psychoanalysts who have rejected some or all of Freud’s theories. Cooper is an eclectic theorist, but most closely allied with the relational school. *Id.* at xii.

whose work I refer to here) is perhaps uniquely focused on *theory* in a variety of ways: theory in the descriptive sense (psychoanalysts aspire to develop coherent and accurate descriptions of the mind and its development just as lawyers aspire to develop coherent and accurate statements of the positive law); theory in a more general sense as how clients (or anyone for that matter) make sense of “what’s going on” (i.e., theory as a source of meaning); and theory of the means by which the professional assists the client in practice.¹¹

At the risk of oversimplification, here are two anecdotes, reflecting prototypes (even caricatures) at opposite ends of the metaphoric continuum of the lawyer’s professional interaction with clients.¹² At one end of this polarity resides the single-minded zealous advocate within the adversarial justice system.¹³ This evokes the metaphor of lawyer as warrior. A

Not relevant here, as far as I can see, are the ongoing challenges, since Karl Popper, to the underlying scientific validity of psychoanalysis. See KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 45–47 (Routledge Classics 2002) (1963) (“I began to feel more and more dissatisfied with these three theories—the Marxist theory of history, psycho-analysis, and individual psychology; and I began to feel dubious about their claims to scientific status.”); see also Harriete C. Johnson, *Theories of Kernberg and Kohut: Issues of Scientific Validation*, 65 SOC. SERV. REV. 403, 403–04 (1991) (evaluating the criticisms of psychoanalytic theory as being “reductionistic” and “unscientific and culturally biased”). First, my view is that whether psychoanalysis is helpful or useful does not necessarily depend on how it fits within demarcations of positivistic brain or mind science. Second, I feel the same way about law. Whether the discipline of law can be characterized as science, as Langdell wished it to be, is irrelevant to its utility.

¹¹ The most explicit connection in the literature between psychotherapy and lawyering is ANDREW S. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976). Dr. Watson was a psychiatrist and a pioneer in interdisciplinary law and psychiatry at the University of Michigan. *Andrew S. Watson—Biography*, UNIV. OF MICH. LAW SCH.: HISTORY & TRADITIONS, http://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Pages/AndrewSWatson.aspx (last visited Feb. 1, 2013). Dr. Watson’s approach is not metaphorical in the least. It is a “how-to” text, directly applying concepts developed in psychoanalytic practice, like transference, counter-transference, and resistance, to the lawyer-client interviewing and counseling process. WATSON, *supra*, at 146–56. Or to continue the theme: “Talk to me, so you can see, oh what’s going on.” BENSON, CLEVELAND & GAYE, *supra* note 7.

¹² Pierre Schlag is correct in asking me why only two metaphors. I agree that there are infinite metaphors possible. To suggest just a few from literature, theater, and film: lawyer as mouthpiece (Tom Hagen), lawyer as liberal hero (Henry Drummond), lawyer as saint (Atticus Finch), lawyer as shyster (Vinny Gambini). My two metaphors strike me as helpful in dealing with the common distinction between litigation and transactional practice, even though I recognize that real life practice categories can be far more nuanced.

¹³ See Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor’s Touchstone*, 38 FLA. ST. U. L. REV. 251, 253–54 (2011), for a thoughtful claim that the obligation to be a zealous advocate is often inappropriate in a counseling setting. To be clear, I do not believe that the rules of professional responsibility regarding zealous advocacy in an adversarial setting require that lawyers act out the warrior metaphor. The Preamble to the Model Rules states:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As

number of years ago, I participated in an interview with a candidate for a law school juvenile justice clinic. The subject turned to counseling the accused juvenile about confessions. The candidate, an experienced criminal lawyer within the juvenile justice system, said, in so many words, even if confession were good for the soul, it is not good for the body, and my only concern is the body (i.e., keeping the body free from incarceration). I translated this into the following statement of the lawyer-client relationship:

Client, I am not your therapist, I am your lawyer. I have only one mission and that is either to beat the rap or to reduce the rap to its most benign juridical consequence. As to any other physical, psychic, emotional, or life needs, please see the appropriate allied professional.

At the other pole lies the transactional lawyer-counselor. This evokes a wholly different metaphor for the professional encounter. Many years ago, I represented a client (call him Joe) in the acquisition of a business.¹⁴ The seller was not a trustworthy character in a business in which there was a distinct possibility of side deals, payoffs, commingling of personal expenses with business expenses, and so on. Joe's business judgment was that, as long as the business's revenues could be verified, he would rely on industry standards rather than on the seller's disclosures as the basis for valuation of the business. But even though we lawyered the usual panoply of contractual protections against the possibility of undisclosed liabilities—for example, structuring the deal as an asset sale rather than a stock sale, extensive representations and warranties, indemnities, escrowed purchase price holdbacks—there was still the possibility, despite best efforts at due diligence, that buying this business meant taking on some undisclosed skeleton in the closet.

Shortly before Joe signed and simultaneously closed the deal, Joe and his wife (call her Jane) visited me. She had been crying, and began crying

negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

MODEL RULES OF PROF'L CONDUCT pmb1. (2011).

Professor Schaefer accurately describes conduct I have often observed over the course of my career: lawyers do indeed confuse their obligation of advocacy in "warrior" settings with more appropriate obligations to the client in others. I have previously written about the tendency to conflate public advocacy of the client's cause with private justification or rationalization of the client's conduct. Jeffrey M. Lipshaw, *Law as Rationalization: Getting Beyond Reason to Business Ethics*, 37 U. TOL. L. REV. 959, 960 (2006). It occurs to me as a result of that the rules of professional responsibility can be a "repressed positivistic" as I discuss *infra* notes 57–94 and accompanying text. That needs to be a separate discussion.

¹⁴ I have altered the details to preserve confidentiality, but the story is accurate, to the best of my recollection, having occurred well over twenty years ago, in all material respects.

again in my office. She was afraid. Even for this wealthy family, it was a significant commitment of assets. She was not involved in the due diligence or the decision making. She might have a nice seat in first class, but Joe was still flying the plane into what might be stormy weather. “Jeff, should we be doing this deal?” I am sure I said something like the following:

I cannot answer that question for you. I can tell you that we have responsibly and professionally documented the deal to give you a reasonable amount of legal protection, but I also know that there are limits to how much the contracts can protect you. There is always some amount of good faith and trust in the seller that goes into this, and Joe and his associates have to make the call on that. I think I am more risk averse than Joe is, which is neither good nor bad, but it means we might make different decisions about whether the risk is worth taking going forward. Ultimately, you have to decide with Joe that you either trust what he is doing or not, and he has to decide what to do in light of your uneasiness. That is between you two.

In *Venn Diagram*,¹⁵ I described a set of business lawyering decisions that are truly interdisciplinary, in that they require the decision maker to weigh consequences that are wholly determined by business considerations (or any non-legal consideration) against those that are wholly legal. I argued that the ultimate interdisciplinary judgment still needs to be made in a single mind that, for better or worse, purports to incorporate knowledge from both disciplines and, more importantly, in many instances the single mind would need to be that of the business lawyer. In my experience, great lawyers as counselors seek out the interdisciplinary overlap and are comfortable operating within it. That is so even if, as in the Joe and Jane story, the ultimate decision does not fall on the lawyer. The reason is that the sources of meaning, or “what’s going on,” will almost certainly arise outside the area of the Venn diagram that is solely “law,” and we need something other than traditional metaphors of the lawyer-client relationship to plumb them.

This is not a universal view; indeed, it runs counter to the seminal (and excellent) text by David Binder and his co-authors on the “lawyer as counselor” relationship.¹⁶ The Binder text advocates a “client-centered”

¹⁵ Lipshaw, *Venn Diagram*, *supra* note 1.

¹⁶ DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 4–8 (3d ed. 2012) (explaining why lawyers should adopt the client-centered counseling approach). For additional resources on lawyer as counselor, see *supra* note 4. To be fair, Binder discusses explicitly the extent to which lawyers need to be “psychosocial” analysts. See *infra* note 43 and accompanying

approach, in that it recognizes that the client, and not the lawyer, “owns” the problem and is primarily responsible for integrating legal advice into the totality of considerations underlying a decision.¹⁷ I have no argument with that position. I suspect I am more forceful than Binder, however, in proposing the psychoanalysis metaphor for counseling practice.¹⁸

The metaphor itself is interdisciplinary, but so are most instances of counseling practice. I do not mean “interdisciplinary” as legal academics usually mean it in subjects like “law and economics” or “law and feminist theory,” even if I believe that academic and mundane interdisciplinarity invoke similar category-busting processes. Teaching skills about “what’s going on” is a matter of creating educational spaces in which young lawyers come to terms with thinking in all the idioms that clients use. At the risk of some jargon, this is a move to a higher order of thinking. It is not merely thinking in an interdisciplinary way. Instead it is thinking about how one goes about the process of interdisciplinary thinking.¹⁹ In mundane terms, it is the discipline encompassing those skills necessary in the first instance truly to understand what a client wants (to the extent possible) and only after that to figure out, either legally or otherwise, how to get it done.²⁰

text (“Your professional task is to help clients achieve their legal goals, not to provide psychological counseling. Unless you have specialized training as a psychologist or a social worker, you cannot expect to identify and remove deep psychological needs blocking clients’ full participation.”).

¹⁷ BINDER ET AL., *supra* note 16, at 4–8 (arguing that (a) “clients are autonomous ‘owners’ of their problems”; (b) “clients are generally in a better position than lawyers to . . . assess the . . . non-legal” aspects of problems; (c) “clients are . . . in a better position . . . to determine what risks are worth taking”; (d) “clients are capable of . . . participating in the counseling process and making important decisions”; and (e) “active lawyer-client collaboration promotes effective implementation of decisions”).

¹⁸ Obviously, the Binder text recognizes that lawyers should be active in helping clients identify non-legal consequences and solutions to problems. *Id.* at 9–10. The text also briefly suggests three strategies for accomplishing this, namely employing whatever industry knowledge the lawyer has, calling upon everyday experience, and explicitly considering the impact of the decision on third parties. *Id.* at 405–07.

¹⁹ The subtitle of *Venn Diagram* is “Toward a Theory of Practical Metadisciplinarity.” Lipshaw, *Venn Diagram*, *supra* note 1, at 1. I coined the term “metadisciplinarity” because I thought it described in one word exactly what I meant. I now find myself apologizing for the jargon. Anything that uses the prefix “meta-” nowadays is fair game for satire. So, at least for this essay, I am retiring it, even though I never met a “meta” I did not like.

²⁰ Joan Heminway, who teaches at Tennessee, pointed out the existence of mediation clinics like those at her law school, the University of Tennessee. See UNIV. OF TENN. COLL. OF LAW MEDIATION CLINIC, <http://www.law.utk.edu/clinic/mediation.shtml>. She asked me how these metaphors square with this kind of mediation training as at Tennessee. Her question made me realize understanding “what’s going on” applies not just to counseling, as I discuss here, but to mediation and negotiation as well. Mediators need to understand “what’s going on” from the perspective of multiple parties and then to find ways to accommodate. A negotiator needs to understand “what’s going on” from the standpoint of the negotiating counterpart, and needs to figure out a way to accommodate consistent with the client’s needs. Some of the best negotiators I have ever met (their names would not surprise you) would turn to their clients and say out loud words to the effect, “Do you understand what their

To that end, I propose that we as legal educators consider in our curriculum design and instruction, and we ask our students to consider as they begin to apply legal doctrine and skills to real-life counseling situations, the question “what does that mean?” or “what’s going on?” In the balance of this Essay, I will: (1) use the psychoanalysis metaphor to consider not only how the lawyer-counselor might approach the lawyer-client interaction, but also how the profession might go about education, training, and licensure; and (2) brainstorm some practical suggestions for enhancing our graduates’ ability to ask the question “what’s going on?” in a meaningful way.

II. THE LAWYER-COUNSELOR AS PSYCHOTHERAPIST METAPHOR

In reflecting years later on my encounter with Joe and Jane (and others like it), it occurred to me there was a powerful metaphor for lawyer-counselors as psychoanalysts. The point of the metaphor is to take the focus off of technical or scientific knowledge developed within an academic discipline, and instead to highlight what it takes in the professional encounter to hear the client in her own idiom, and to understand meanings beyond those that are of concern within the professional community of which the lawyer or analyst is a part.

A. *The Lawyer-Counselor Industry and What It Does*

The first question is: when in their careers do lawyers begin to get called upon for practical wisdom? As I believe it can occur very early, I do not think it is responsible for most law schools simply to leave “what’s going on?” education to life experience or on-the-job training.

My empirical intuitions are: (1) the smaller and less specialized the practice, the more likely it is that a lawyer will spend time working in the psychotherapist rather than the warrior metaphor; and (2) in such practices, it is more likely that lawyers will be so engaged at earlier stages of their careers. Anecdotally, even in my large firm, I can remember the young associate training meetings at which the grizzled senior lawyers told us how the “care and feeding” of clients was an art learned over many years. It seems reasonable to think a large and hierarchical law firm would have far greater luxury than, say, a five-lawyer firm to ease young lawyers into the kind of client relationship that the “care and feeding” metaphor suggests. The inference applies *a fortiori* to young lawyers hanging out a shingle. But small firms and solo offices, not mega-firms like the one in

concern is? That’s a good point. We need to figure out a way to accommodate it.” This is also fodder for a separate discussion.

which I practiced, constitute the bulk of private practice.²¹ Most small firms report themselves as doing general law, and only a small number are boutique litigation firms.²² It is also not the case that lawyers generally begin their careers in big firms and then move to smaller ones; a substantial number of young lawyers begin their careers in the small firm environment.²³ It is likely that those lawyers are quicker to take on more responsibility for care and feeding than their large firm counterparts.²⁴ Finally, the further down the law school rankings, the more likely it is that its graduates will begin their careers in small firms or in solo practice.²⁵

²¹ The ABA data on private practice firm size is consistent over time. About 45–50% of all lawyers reported themselves as solo practitioners in 1980, 1991, and 2000. Another 22% reported themselves as in firms of 2 to 5 lawyers in 1980, declining to 15% in 1991 and 2000. On the other hand, only 13–14% of lawyers reported themselves as working in firms with over 100 lawyers in 1991 and 2000. ABA MKT. RES. DEP'T, LAWYER DEMOGRAPHICS (2012), *available at* http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf.

²² A leading consulting firm's 2001 survey of 110 law firms consisting of 1 to 12 lawyers showed 68 of them reporting as "general law" or "corporate/commercial non-litigation", and only 28 as some kind of litigation firm. Similarly 453 of the 786 lawyers constituting those firms reported as "general law" or "corporate/commercial non-litigation", and only 227 reported as expressly litigators or trial lawyers. ALTMAN WEIL, INC., 2001 SMALL LAW FIRM ECONOMIC SURVEY, at xix-xx (2001).

²³ The most thorough work on young lawyer careers is RONIT DINOVIETZ ET AL., NALP FOUND. FOR L. CAREER RES. & EDUC., AFTER THE J.D.: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 27 (2004). While most young lawyers do not immediately go solo (5% in the study versus 32% of all lawyers), the number of lawyers who begin in firms of 2 to 20 lawyers is not that different from the number of lawyers in such firms generally: 25% versus 19%. *Id.* at 27; *see also infra* note 25 (discussing the Suffolk University data on small firm placement).

²⁴ Even though the numbers of young lawyers who reported themselves as "specialized" do not vary significantly from small firms to large firms, lawyers in small firms report themselves as working on far greater numbers of individual matters with far less concentration on a single subject area. DINOVIETZ ET AL., *supra* note 23, at 34–37. I infer a qualitative difference in the experience, whether or not that experience involves counseling (even though I am inclined to believe it does) from this observation by the authors:

The differences among the practice settings are further emphasized by examining the type of work that lawyers report doing within each setting. Using a statistical technique termed "factor analysis," the AJD data analyses combine these tasks into three major groupings, or factors. One factor was labeled "routine," to indicate work such as routine research or due diligence; a second, "independence," represents tasks that allow the lawyers some degree of autonomy in their performance; and a third, "trust," represents tasks for which a great deal of responsibility is vested in a lawyer.

It is not surprising that lawyers in venues where resources are stretched thin—public defenders and legal services lawyers—report relatively high trust and independence. *Lawyers in private practice generally report lower levels of trust and independence, with strikingly lower levels in the largest firms. These large firm lawyers also report correspondingly high levels of routine activity but not as much routine as for the solo practitioners.*

Id. at 34 (emphasis added).

²⁵ By way of example, compare two schools in the Boston area, Harvard and my school, Suffolk. Harvard reports that 59.3% of its 2010 graduates went to work for law firms (down from 65.1% in

These data tend to support my more casual observations that clients do not always have the luxury of turning to seasoned old veterans for wise advice. For example, I am presently acting as an informal advisory board member (not a lawyer,) to a recent graduate who is involved as a principal, and is acting as in-house lawyer (for all intents and purposes), for a small startup company. It is clear that the recent graduate is operating in the Venn overlap between business and legal advice. I get calls fairly regularly from recent graduates wanting to brainstorm similar kinds of mixed law and business issues. When I was a general counsel, I needed to staff business units with their own general counsels. The economics and career path dictated that I was often assigning lawyers to these positions who were roughly four to seven years out of school to those positions.

Whether we like it or not, lawyers get licensed to practice when they are relatively young, and will likely find themselves out there in the counseling trenches without additional supervision. It is unreasonable to expect that non-elite law schools should restrict themselves to training in the warrior metaphor with the hope and expectation that others will provide the training or life lessons that might make them better counselors.²⁶ These schools are throwing new lawyers out into

2009). In 2010, of the 349 graduates who went to work for law firms, 333, or 56.5% of its entire class, went to work for law firms of more than 100 lawyers. (48.9% of the class went to work for law firms of more than 500 lawyers.) No students started solo practices, and only 6 went to work for firms of 25 or fewer lawyers. *Additional Employment Data*, HARV. LAW SCH. OFF. OF CAREER SERV. (Nov. 29, 2012), <http://www.law.harvard.edu/current/careers/ocs/employment-statistics/additional-employment-data.html>.

Suffolk, on the other hand, has hovered in the U.S. News “third tier,” with an occasional dip into the fourth. It averaged placing 7.4% of its graduates in 100+ lawyer firms from 2001 to 2010, with a peak of 9.8% in 2007, the year before the subprime crisis precipitated the downturn in legal profession employment. On the other hand, the school has placed 20.8% of its graduates in firms of 2–10 lawyers over the same period. *Suffolk University Law School Career Development Office Graduate Employment Surveys, 2001–2010* (on file with Author). Even so, Suffolk sits in downtown Boston. *After the J.D.* reported that 8% of young lawyers in Boston were in solo practice, 19% in offices of 2 to 20 lawyers, and 20% in offices of 100+ lawyers (as a point of comparison, the latter percentage in New York City was 42%; D.C., 29%; Chicago, 26%; and Atlanta, Houston, and Minneapolis, 20%). By comparison, in Oklahoma, 10% reported as being in solo practice, with 47% in offices of 2 to 20 lawyers, and none in offices with 100+ lawyers. In Tennessee, 11% reported as being in solo practice, with 41% in offices of 2 to 20 lawyers, and 5% in offices with 100+ lawyers. DINOVITZER ET AL., *supra* note 23, at 29.

²⁶ This is all distinct from a different but somewhat related issue: the increasing perception, certainly over the course of my career, that corporate general counsel see litigation as a highly inefficient and wasteful dispute resolution device, at least in cases where the stakes are not at the “bet-the-company” level. I recall one of my law firm partners internally extolling internally the client who was willing to pay “millions for defense, but not a penny for tribute.” When I was in-house, and a business leader was inclined to litigate, I would suggest that law firms loved nothing more than a highly principled client, and that all such fees would be a charge against the leader’s profit and loss statement. See Blake D. Morant, *The Declining Prevalence of Trials as a Dispute Resolution Device: Implications for the Academy*, 38 WM. MITCHELL L. REV. 1123, 1124 (2012) (advocating for a new legal education for a “world in which full-blown trials have become anachronisms”).

environments in which it is highly likely they will be dealing with “Joe and Jane” situations early in their careers, notwithstanding the fact that they are young and inexperienced. The irony is that it has taken an unprecedented economic shock to the profession, particularly the Big Law segment, combined with increasing tuition and corresponding student debt that seems less capable of ever being repaid, to focus our attention.²⁷ But these data suggest that the reasons for educating lawyers other than “as warriors” existed long before anyone ever considered the possibility of systemic banking failure arising out of sub-prime mortgage securitization.

B. *Shifting Metaphors for Theory and Practice of Lawyer Counseling*

In prototypical “lawyer as warrior” situations, we lawyers are still the generals, and the discussion remains focused on how best to attack the target.²⁸ As soon as we move out of interaction within the discipline and talk to clients, the contrast between formal legal language and ordinary idiom is even more significant.²⁹ My thesis is that, in counseling situations like “Joe and Jane,” when it is conceivable that war is not the answer, effective lawyers become *interdisciplinary* theorists no less than effective psychoanalysts (at least in the view offered here), learning the client’s idiom whether or not the lawyers understand consciously that this is what they are doing.

It took a long time after law school for me to figure this out on my

²⁷ See, e.g., Ethan Bronner, *Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 31, 2013, at A1 (blaming the drop on law school applications to a possible “30-year low” on the “perceptions of the declining job market”); Patrice Hill, *The Mean Economy: Even Law Firms Hit Hard by Recession*, WASH. TIMES (Aug 27, 2012), www.washingtontimes.com/news/2012/aug/27/marlton-nj-terri-a-doring-used-to-take-her-comfort/ (“As corporations slashed their spending and staffs in the deepest downturn since the 1930s, they left no stone unturned. Once-plum legal jobs and prize contracts got jettisoned along with rank-and-file workers, and many American lawyers, perhaps for the first time, found out what it was like to be without a job.”).

²⁸ Here is an example of law and lore as contrasting idioms even within the disciplinary boundaries of professional technique. There is no rule in the formal canon of the law of evidence that says a lawyer should refrain, when conducting cross-examination, from asking a witness a question as to which the lawyer does not already know the answer. Refraining in that way, with limited exceptions, is, however, accepted conventional wisdom. See James W. McElhane, *Cross-Exam Surprises*, A.B.A. J. (Oct. 24, 2006, 4:46 AM), http://www.abajournal.com/magazine/article/cross_exam_surprises/ (discussing how on cross-examination, one should “[n]ever ask a question unless: you know the answer”).

²⁹ The warrior metaphor has another implication for the lawyer as counselor. Being a general, whether in war or litigation, means being in a particular spot in the command-and-control hierarchy. Not surprisingly, those who have given thought to how we go about training lawyers outside the warrior metaphor have criticized the “generalship” that tends to go along with it. For example, Dr. Watson rejected the model whereby “a great many lawyer-counselors are inclined to dictate or at least tell their clients what they should do in a given situation.” WATSON, *supra* note 11, at 142. Binder calls the alternative “client-centered” counseling. BINDER ET AL., *supra* note 16, at 3. Watson (taking a cue from D.E. Rosenthal), calls it the “participatory” model of the lawyer-client relationship. WATSON, *supra* note 11, at 142–43.

own. Though the opportunities for material advancement may have changed in the thirty-seven years since I began the process of applying to law school, I suspect that other motivations for going to law school have not changed significantly. In other words, my recent conversations with parents and undergraduates suggest that present-day law school aspirants have no more conception about what lawyers do than I did, but if they have any image, it is “lawyer as warrior” for all that is good. I was a liberal arts major—settling in history after dalliances with mathematics, English, and political science—with strong verbal, written, and oral skill sets, and I liked what I had seen or read about real and theatrical lawyering. My metaphor for a lawyer then was “hero,” with the prototype being Henry Drummond, the fictional Clarence Darrow defending the Darwin-teaching Tennessean in *Inherit the Wind*.³⁰ I had no idea that lawyers did the “Joe and Jane” kind of work, and probably would not have considered myself to have aptitude for it in any event. My only defense is that I did not know what I did not know.³¹ Perhaps if I had been more curious in law school, I would have found someone who could have informed me more completely, but I doubt it.

Paul Brest, who never had the burden of teaching me and who became the dean of my law school alma mater well after I graduated, was exposing the interdisciplinary counseling and problem-solving failure of the curriculum in 2000, the year after my twentieth reunion.³² At that point, when I was in my second iteration as the general counsel of a large industrial business, Dean Brest’s observation, worth quoting in full here, would have struck me as patently obvious.

A client with a problem consults a lawyer rather than, say, a psychologist, investment counselor or business advisor because he perceives the problem to have a significant legal dimension. But few real world problems conform to the boundaries that define and separate different professional disciplines. It is therefore a rare client who really wants his lawyer to confine herself strictly to “the law.” Rather, most clients expect their lawyers to integrate legal considerations

³⁰ ROBERT EDWIN LEE, *INHERIT THE WIND* (1955). My impression was also that lawyers had better employment prospects and were more likely to make a decent living than history professors.

³¹ I was already a litigation partner, almost ten years out of law school, in a large Detroit-based law firm, and I *still* had no clue what transactional lawyers did. We had retained a Big Six accounting firm partner as an expert witness. One day he called with some new business. What I thought I heard him say was, “Do you have an MNA department?” I thought “MNA” must be some kind of bank. Of course, he was looking for a mergers and acquisitions or “M&A” lawyer. Ironically, within a couple years, having gone through my first of several mid-life crises, this one in which I came to terms with the fact that I hated being a litigator, I had become an M&A lawyer.

³² Paul Brest, *Skeptical Thoughts: Integrating Problem-Solving Into Legal Curriculum Faces Uphill Climb*, *DISP. RESOL. MAG.*, Summer 2000, at 20, 22.

with other aspects of their problems. Solutions are often constrained or facilitated by the law, but finding the best solution—a solution that addresses all of the client's concerns—usually requires more than technical legal skill.³³

At the same time Dean Brest was writing this, I was coaching young lawyers I had hired to be general counsel of large business units within our company. I would tell them:

When you are sitting in your executive team's meetings discussing important issues of the business, practice being a businessperson by putting yourself mentally in the place of the CEO. Think about the business decision *you* would make, and then compare it to what the CEO or the team ultimately decides. *Then* go ahead and consider whether there is legal input you need to make.

For all the highfalutin reputation of theory and interdisciplinarity, this is the mundane practical implication I have been advocating.³⁴

Theory in this context is about derivation of meaning from circumstance, and it is a part of life, not just law or science.³⁵ Lawyers of all stripes, from Main Street solo practitioners to Wall Street mega-merger specialists, work with their clients to understand separately the *legal* meanings appropriately derivable from factual circumstances in the context of all the *other* non-legal meanings. Rarely, however, is the meaning so clear that all non-legal consequences fall away, and the only recourse is the equivalent of war. What Dean Brest and I were saying, if I may be so bold, was that it is not simply the lawyer's job to throw the law over the transom to the client and let the client deal with it. Rather, the effective counseling lawyer wades into the Venn diagram overlap between law and non-law where clear boundaries fall away.³⁶

Effective counseling lawyers usually pick this up on their own, but that

³³ *Id.* at 20. For a detailed description of a clinical education approach to this kind of interdisciplinary interaction, see Dina Schlossberg, *An Examination of Transaction Law Clinics and Interdisciplinary Education*, 11 WASH. U. J.L. & POL'Y 195, 202 (2003).

³⁴ Roy Stuckey discusses a similar theme. STUCKEY ET AL., *supra* note 4, at 143 (“[A] person with an engaged, active stance and the perspective of a problem-solver inside the problem situation acquires an understanding quite different from that of a person with a passive stance and the perspective of an observer.” (quoting Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 359 (1995))).

³⁵ For an extended treatment of this theme, see Jeffrey M. Lipshaw, *Models and Games: The Difference Between Explanation and Understanding for Lawyers and Ethicists*, 56 CLEV. ST. L. REV. 613, 615 (2008).

³⁶ That is not to deny some clients want it that way or that many lawyers practice that way. I just believe it is sub-optimal. Watson and Binder are each saying that lawyers need to be aware of the overlap. See *supra* notes 17, 29 and accompanying text. My contribution to the discussion is a further exposition of the state of mind it takes for a lawyer truly to be effective.

does not excuse the lack of meta-thinking³⁷ about the process among legal educators, or the legal curriculum's shortcomings on these almost theoretical skills.³⁸ Stuckey's volume on best practices in legal education, *sponsored by legal clinicians*, makes it clear that if we are trying to educate a lawyer to be conscious of the context of a legal problem (another way of saying "what's going on?"), then mere experience in solving problems is not enough. Indeed, even mere practice is not enough; students getting better at understanding "what's going on" involves "practice accompanied by informative feedback and reflection on their own performance."³⁹ If the psychoanalyst is the metaphor of a lawyer as counselor (as in the Joe and Jane story), then it is fair to ask what some psychoanalysts do to be effective in their practices.

C. *Meaning in the Professional Relationship*

Not surprisingly, there seems to be deeper professional introspection about the relationship between the counselor's subjective views and experiences, on one hand, and those of the client, on the other, in psychoanalysis versus law. Andrew Watson's observation about lawyers and clients strikes me as beyond dispute: if we assume that the psychological phenomena of transference, counter-transference, and resistance exist between human beings, they will exist in the lawyer-client counseling relationship.⁴⁰ Commentators are not of one mind about the extent of reflection that lawyers ought to undertake regarding the psychological aspects inherent in their counseling relationships. Watson, a psychiatrist, said, "[W]hile lawyers may not often arrive at the depth of understanding about clients which the psychologist or psychiatrist might, at the very least they can have a human awareness about the complex and relatively invisible motives that drive their clients into conflict."⁴¹ Binder, explicitly taking note of Watson, is more reserved. While lawyers ought to

³⁷ There I go again. *See supra* note 20.

³⁸ *See* STUCKEY ET AL., *supra* note 4, at 143 ("Simply providing opportunities to engage in problem-solving activities is not enough. The development of problem-solving expertise is enhanced by studying theories related to problem-solving and by receiving assistance from teachers.").

³⁹ *Id.*

⁴⁰ WATSON, *supra* note 11, at 23. "In the legal . . . setting, [*transference*] includes all of the reactions stimulated by the reality of the lawyer's involvement as well as some unreal and distorted impressions derived from prior experiences and their resultant patternings of the client's psychic life." *Id.* at 24. "[C]ounter-transference . . . is the same kind of dynamic transactional information taken from the perspective of the client to the lawyer. These responses are stimulated by the client in the lawyer, have the same components as those of the transference, and are to be understood in the same way." *Id.* at 25. Resistances are barriers to the expression of ideas "related to unconscious attitudes whose purpose is to *not* express the idea which is being obscured." *Id.* at 8 n.3. Suffice to say that I could supply myriad anecdotal evidence of these phenomena in my own relationships with law firm clients and CEOs to whom I have reported as the general counsel.

⁴¹ *Id.* at 11.

“[t]ak[e] advantage of elementary psychological principles,” particularly in active listening and empathetic understanding, lawyers are not psychologists.⁴² Binder observes: “Your professional task is to help clients achieve their legal goals, not to provide psychological counseling. Unless you have specialized training as a psychologist or a social worker, you cannot expect to identify and remove deep psychological needs blocking clients’ full participation.”⁴³ I agree with Binder that lawyers cannot treat their clients’ psychological problems. I do not, however, see that as a reason why lawyers should not try to understand how their own psychology aids or impairs the counseling process, just as some psychoanalysts seem to do. Or why law schools should not provide nascent lawyers some means for doing so.

When I say “understand their own psychology,” what I mean is dealing with the possibility that lawyers’ resistances and counter-transferences get in the way of understanding clients’ meanings or “what’s going on,” and vice versa.⁴⁴ What the analyst would call the patient’s hopes for psychic health through the clinical experience, a lawyer would call the clients’ aims and desires to be satisfied through the legal process. Nevertheless, like their psychoanalytic counterparts, lawyers and clients are capable of uncomfortable mutual exploration of “what’s going on” in connection with a particular problem. The client can offer resistance to the lawyer. The CEO wants to get a deal done, and the lawyer insists there must be a special committee of the board with its own law firm. To the CEO, this is nothing more than bureaucracy or, worse, insubordination. Alternatively, the lawyer can offer resistance to the client. The sales manager shows in-house counsel a term sheet, and asks her to write a contract “but skip the legalese.” The lawyer in turn wonders how anybody could run a business with the level of sloppiness and imprecision in his “handshake” deal making.

I think that we lawyers as counselors are better off engaging in explicit reflection about our resistances and counter-transferences, just as some psychotherapists think about their own. Hence, I want to work the metaphor just a bit more and draw on two observations about psychoanalytic practice: one regarding the form of the counseling

⁴² BINDER ET AL., *supra* note 16, at 19.

⁴³ *Id.* Others have expressed views on the lawyer-client relationship. See Robert J. Condlin, “What’s Love Got to Do with It?”—“It’s Not Like They’re Your Friends for Christ’s Sake”: *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 306–11 (2003) (explaining that lawyer-client relationships are socially complex and involve lawyers serving as both fiduciaries and agents); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 793–96 (1999) (defining what it means to be a lawyer and stressing the lawyer’s role as problem solver).

⁴⁴ See *supra* note 40 and accompanying text (agreeing with Watson’s observations regarding transference, counter-transference, and resistance within the lawyer-client relationship).

relationship, and the other regarding the substance of what the lawyer considers when engaged in that relationship.

1. *Neutrality and Influence*

Take, for example, the idea of professional neutrality or distance, which Binder advocates as the standard approach to a lawyer as counselor.⁴⁵ My experience is that rigid neutrality in counseling (versus advocacy) is impossible.⁴⁶ In psychoanalytic practice, the analog to the neutral lawyer-counselor is the “monolith of the analyst as blank screen.”⁴⁷ Just as my conception of lawyers wading into the Venn overlap contends with other conceptions of the appropriate level of engagement between lawyer and client, so too there is debate among psychoanalysts about the extent to which the analyst interjects his or her own subjective experience into the analytic situation. While classical technique shuns the practice, so-called “relational” technique does not reject it out of hand.⁴⁸ Rather, the question for sophisticated relational analysts is how and when do we spice the analytic relationship with what is called “self-disclosure” or “analyst disclosure?”⁴⁹ As an outsider to such practice, what I find persuasive about the relational approach is the acknowledgment that maintaining complete distance and objectivity in the professional encounter is difficult, if not impossible. Psychologist Steven Cooper observes that, for analysts, “we are disclosing whether we are aware of it or not—or whether we like it or not.”⁵⁰

The Binder text, probably the gold standard of pedagogical work on lawyer as counselor, makes it clear that offering one’s personal view in connection with a final decision is firmly within the client-centered philosophy when the client requests it,⁵¹ and sometimes even when the client does not.⁵² The text is replete with examples of how to go about offering those opinions.⁵³ What it does not do is help the lawyer sort through his own conscious or unconscious subjectivity in the counseling process. For example, I do not like litigation, despite or perhaps because I

⁴⁵ BINDER ET AL., *supra* note 16, at 346–47.

⁴⁶ *See id.* at 416–20 (discussing in detail a lawyer’s involvement in final decision making and acknowledging that lawyers may need to give advice in certain situations).

⁴⁷ Steven H. Cooper, *Analyst Subjectivity, Analyst Disclosure, and the Aims of Psychoanalysis*, 67 PSYCHOANALYTIC QTRLY. 379, 385 (1998).

⁴⁸ *See id.* at 380–82 (“Relational theorists observed the centrality of the analyst’s subjectivity and sought a way to get this subjectivity into the theoretical equation.”).

⁴⁹ *Id.* at 382.

⁵⁰ *Id.* at 381.

⁵¹ BINDER ET AL., *supra* note 16, at 417–20.

⁵² *Id.* at 427–28.

⁵³ *See, e.g., id.* at 428 (presenting a hypothetical situation in which an attorney offers a client unsolicited advice).

spent the first ten years of my career as a litigator.⁵⁴ I can recall at least two instances in which I was skeptical about the merits of proposed litigation on what I thought were the merits of each case. Nevertheless, I deferred to the judgment of lawyers on my staff that these were good claims. Both matters went to trial and resulted in significant monetary recoveries. I have wondered since then about my luck or good judgment in deferring, because on my own I likely would not have allowed the cases to go forward. Certainly, my attitude would have affected how I communicated with the client.

Compare this to Cooper's assessment of the psychoanalyst's desire to influence: there is usually more focus on the content of the theory of influence (analogous in my example to the substance of my advice as lawyer-counselor on whether or not to sue) than on the analyst's own "affective experience that pushes and motivates" the influence.⁵⁵ Clients *will* ask me what they should do. I *will* have a subjective view that influences my view of the merits. Rather than merely mouthing a standard of neutrality, we are better off thinking about our own subjectivity in the counseling interaction, and dealing with it explicitly, whether to control it or to use it as a means of making progress.⁵⁶

2. Theories and Influence

And what are we thinking? As lawyer-counselor, apart from the affective source (if any) of my theories, I certainly bring my pre-existing theories of the "Deal" or the "Problem" to the client's hopes and aims for the transaction or dispute, just as the psychoanalyst brings her pre-existing theories of human psychic development to the therapeutic interaction.⁵⁷ In each case, our success depends on our ability to employ our own professional theories against the reality that confronts us with the clients, the adversaries, and the interested third parties.

Formulae, algorithms, and heuristics of lawyer-counselor technique are all well and good.⁵⁸ I want to delve a little deeper, however. The

⁵⁴ See *supra* note 31 and accompanying text (expressing the lack of awareness that law students and lawyers have of interdisciplinary counseling skills).

⁵⁵ COOPER, *supra* note 9, at 266.

⁵⁶ Cooper, *supra* note 47, at 381 ("What does distinguish our subjectivity in disclosure is our conscious or deliberate attempt to reveal to the patient a construction of the self—either an aspect of our subjectivity or a 'fact' about ourselves—so that something new can be explored or understood. This means that at times, disclosure can appear to have fewer secondary process properties than interpretation.").

⁵⁷ See COOPER, *supra* note 9, at 280 (discussing how a psychoanalyst's "choice of where to begin to formulate and what to interpret, as well as the goals of analysis, is the most obvious expression of the analyst's subjectivity").

⁵⁸ There is a plethora of writing on the topic. See, e.g., Michael T. Colatrella Jr., *A "Lawyer for All Seasons": The Lawyer as Conflict-Manager*, 49 SAN DIEGO L. REV. 93, 94–97 (2012) (discussing the role of lawyers as counselors and how they may be capable of more efficiently preventing and

metaphor of psychoanalytic practice strikes me as helpful in dealing with the relationship of technical disciplinary competence and the application of that learning in the counseling environment. The psychoanalyst learns theories of the mind itself and applies them not merely to solve a transient problem, but to assist the patient in living a better life.⁵⁹ Reflecting on the possibilities offered by therapy, Steven Cooper observed, “psychoanalysis has taught us that we are indoctrinating our patients while we are trying to help. Indoctrination goes both ways in the analytic encounter. The analyst attempts to learn the patient’s idiom, often through elucidating the patient’s hopes.”⁶⁰ Cooper’s crucial insight is the relationship, for better or worse, among the following: (1) theory in the sense of putatively scientific descriptions and explanations to which the academic or research side of the professional discipline aspires; (2) theory in the more general sense of the way ordinary people make sense of “what’s going on” (i.e., theory as a source of meaning); and (3) theory of the means by which the professional assists the client in practice. If a patient’s idealizations—her mental constructs—can be a means of avoiding reality, so too the therapist’s theory of the mind can be a limiting idealization.⁶¹ Cooper calls this the “return of the repressed positivistic.”⁶² I read it to mean that, as

handling conflict); John M.A. DiPippa, *How Prospect Theory Can Improve Legal Counseling*, 24 U. ARK. LITTLE ROCK L. REV. 81, 81–83 (2001) (discussing the implications of research casting down on the current predominate model in law, the rational choice model); Gay Gellhorn et al., *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 CLINICAL L. REV. 245, 246–51 (1994) (discussing the need for linguistic and ethnographic research to inform relationships between clients and their attorneys); Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 162–64 (2002) (discussing the non-legal influences of lawyers’ practical judgment).

⁵⁹ See COOPER, *supra* note 9, at xi (noting that psychoanalysts indoctrinate while they try to help).

⁶⁰ *Id.*

⁶¹ See *id.* at xiv–xv (noting that there is pressure to explain observations according to theory beyond an analyst’s capabilities).

⁶² *Id.* (internal quotation marks omitted). The variations on law and economics are a barely repressed positivistic in academic law. The inimitable Pierre Schlag has recently commented on the tensions that arise between the ideal objectivity of four applications of economic theory to law (those of Frank Knight, Ronald Coase, Richard Posner, and Cass Sunstein) and the inability of any such theory to predict legal or political outcomes. Pierre Schlag, *Four Conceptualizations of the Relations of Law to Economics (Tribulations of a Positivistic Social Science)*, 33 CARDOZO L. REV. 2357, 2357–58 (2012). Professor Schlag believes a positivistic social science of law is subject to the demand that it “encounter, address, and resolve” the tension so as to be entitled to the “epistemic mantle of knowledge.”

Because this demand is nothing more than a modest request that a positivist social science specify its domain (its boundaries, depth, objects of inquiry, etc.) and that it offer some reason to believe that its claimed intellectual dominion over this domain does not turn upon extraneous considerations that escape its control. That’s one of the requirements of the project. Pretty hard to achieve. Probably not going to happen soon.

Id. at 2371. In a variation on the old joke, if we are searching for truth on only one side of the street because that’s where the social science streetlight happens to be, we need to say so.

professionals, we want to be able to fit what we are observing in the professional encounter within the idealizations—the theories, constructs, and models—we have learned during our professional training. As Cooper says, it “relates to how analysts often feel the pressure or mandate to explain, sometimes beyond our capacity to do so.”⁶³ In other words, to what extent does the psychoanalyst’s aspiration for knowledge within the academic discipline impede the process of helping the client?⁶⁴ The point is that every theory is reductive in the sense of being less than all of life (or one’s life). Practice, as opposed to academic speculation, necessarily involves some aspect of theoretical promiscuity, even at the cost of disdain from disciplinary theorists.⁶⁵

What is true in the application of disciplinary theory to practice for psychoanalysis is true *a fortiori* to the relationship between lawyer as counselor, on one hand, and client on the other. Non-lawyers generally do not express their aims and desires in terms of legal theory any more than analysts express their hopes and fears in psychoanalytic theory. Yet despite the current tension between the practicing and academic sides of the profession, there is striking commonality in the powerful models academics teach as the essence of legal reasoning, and what law students take from that teaching to practice as their disciplinary idealization. As the Carnegie Report observed, “[A]t a deep, largely uncritical level, the students come to understand the law as a formal and rational system, however much its doctrines and rules may diverge from the commonsense understandings of the layperson.”⁶⁶ What Cooper says about psychoanalysis lies at the heart of lawyer-centeredness that the Carnegie Report criticized and which Binder wants to eliminate: theory tends to trump therapy. As a result of our professional training and experience, “[w]e begin with a particular view of therapeutic action and define our focus or points of observation in order to detect the process we are hoping to achieve or, at least, observe.”⁶⁷ Within the profession, we dispute

⁶³ COOPER, *supra* note 9, at xv.

⁶⁴ Cooper describes it this way:

I believe that one of the most problematic aspects of clinical analysis is the way that we conflate analytic technique with our profound interest in the unconscious. Confusion of these two sectors can lead to a stiffness in technique and a minimization of the spontaneity in interaction that can illuminate unconscious process.

Id. at xv.

⁶⁵ *See id.* at 262 (noting that theory is informed by observation). Cooper thus describes himself as “a kind of theory junkie, finding value and interest in most psychoanalytic theories yet never feeling entirely satisfied with any single theory.” *Id.* at x.

⁶⁶ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 186 (2007).

⁶⁷ COOPER, *supra* note 9, at 262.

theory, but in practice, “[w]here is the place for unpleasant observations—things that we observe that do not fit our theories?”⁶⁸ We need to take care that our reflection on the client’s problem is not simply another return of the repressed positivistic—the fixation on objectivity and reduction—that seems to underlie our professional self-selection as lawyers.

Even within the discipline, lawyers (and even law professors) face contrasting idioms of formal law and less formal “legal lore,” occasions where the things we observe fail to fit our theories of explanation.⁶⁹ Rick Hills of the NYU Law School points out an instance of non-congruence of “street” idiom even among lawyers themselves and the formal language expected in the disciplinary ideal.⁷⁰ The first he calls “legal conventional wisdom,” consisting “of those catchphrases, habits of mind, slogans, proverbs, maxims, half-truths, and rough predictions for what courts do, usually without much explanation or justification.”⁷¹ The second is more traditional legal reasoning, which Professor Hills characterizes as “normative and justificatory: [s]ome propositions are deduced from, or invalidated by, other more basic propositions, all of which hold together as a consistent system of rules serving some general goal or set of goals (say, obedience to the text enacted by an authoritative sovereign, internal logical consistency, etc).”⁷² His thesis is that legal conventional wisdom can trump the result of more rigorous legal reasoning—the example being the prevailing view that New York City may not exact bridge or road tolls without authorization from the state.⁷³ Professor Hills’s moral from the story is that good lawyers should see when there is a gap between law and lore, and reflect on whether it is normatively good or bad. That Professor Hills sees this as an issue within the discipline itself is a reflection of the power of the disciplinary idealization.

It seems to me the answer, ironically, is to do more to educate our students in thinking about thinking inside *and* outside the disciplinary idiom. Cooper uses the term “[c]ourting [s]urprise” for the psychoanalytic clinician’s experience in applying theory to the real life patients bring to the office.⁷⁴ What he means is that life has a way of failing to adhere to our aspirations of scientific theorizing; nevertheless, “[w]e are deeply

⁶⁸ *Id.* at 262–63.

⁶⁹ Rick Hills, *Legal Conventional Wisdom Versus Legal Reasoning: The Case for New York City’s Power to Impose Congestion Fees*, PRAWFSBLAWG (July 12, 2012, 6:25 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/07/statutory-construction-the-power-of-cities-the-case-of-new-york-city-and-congestion-fees.html> (discussing the distinction between legal conventional wisdom and legal reasoning).

⁷⁰ *Id.*

⁷¹ *Id.* (internal quotation marks omitted).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See COOPER, *supra* note 9, at 264–65 (describing an experience with a patient).

attached to our theories, for they follow us around, for better and worse, like our character, our adaptation. They seduce us and force us to see things through a particular lens.⁷⁵ For the analyst, one of the problems of theory is that it is not merely an objective tool used to interpret and classify the patient's symptoms, but it is the analyst's very means of conceptualizing the patient's information and structuring how the analyst might go about influencing the patient.⁷⁶ Therein lies the conundrum. If the analyst's theory is powerful, but life has a way of not following theory, what should the analyst do? Cooper's answer is that the analyst is obliged to reflect on his "own resistance to learning from new experience in revising theory."⁷⁷ This is because objectivity in the clinical encounter is an unobtainable ideal.⁷⁸ In analysis, as elsewhere, we cannot suspend our theories, our ways of making sense,⁷⁹ rather, theory is "the guide who leads and determines the analyst's formulations and interpretive activity through shifting foci on past, present, and future threads within the patient's associations and the interaction between patient and analyst."⁸⁰

My sense is that we do a pretty good, though not perfect,⁸¹ job of inculcating law students in precisely this kind of disciplinary theory, by which I mean the tools lawyers use in the professional encounter to explain "what's going on" from the standpoint of a lawyer. But Cooper could just as well have been commenting on lawyers and clients rather than clinicians and analysts when he observed:

There is often a tension holding theory as friend and foe, self and alien, welcome and unwelcome fellow traveler, and ultimately, constructive and destructive factor in the understanding of clinical process. Theory always expresses our attachment to ideas and important others in our lives. Our body of theory is our metaphorical body—our hearts,

⁷⁵ *Id.* at 265.

⁷⁶ *See id.* at 266 (describing the interaction between the analyst's theories and his or her attempts to influence and understand the patient).

⁷⁷ *Id.* at 267.

⁷⁸ In the Freudian ideal, the analyst merely listened in the manner of a scientific investigator. Freud, in a letter to Sandor Ferenczi, said, "I consider that one should not make theories. They should arrive unexpectedly in your house, like a stranger one hasn't invited." *Id.* at 268.

⁷⁹ *Id.* at 269.

⁸⁰ *Id.* at 271.

⁸¹ Why not perfect? We teach to think like lawyers, but there are different teachers, different lawyers, and different ways to think like lawyers. My casual empiricism is that there is pretty much one way to think like a first-year law student taking a typical issue-spotting exam. I base that on the fact that most of my high-performing students seem to perform well on the exams of my colleagues, and most of the students in academic trouble are in trouble across the board. But I know from faculty exchanges, faculty meetings, hallway conversation, chat board materials, and other conversations about theory, doctrine, and practice that my approach to dealing with problems is not necessarily the same, for better or worse, than my colleagues. I will address a way to deal with this in the last section.

minds, limbs, and desires. It expresses our hopes, and herein lies the passion with which we defend our theory, the fervor with which we express it, and often the rigidity and anxiety with which we listen to new ideas and observations.⁸²

As Professor Hills suggests, there is theory—a disciplinary ideal—at the heart of our formal system.⁸³ Practitioners and theorists of that formal system of law resist conventional wisdom of lore even when it turns out that lore, more than law, reflects commonsense understandings.⁸⁴

For professionals steeped in a disciplinary ideal from the first day of law school, that is uncomfortable. Cooper says that “the only times I am very motivated to rethink theory are when I am unhappy with what I know about the theory I have.”⁸⁵ As lawyers, we spend our student years learning particular theories that offer us an integrated and coherent model of the world. As Cooper suggests, those theories, like Freudian or British object relations or American relational theory in psychoanalysis, “are like an object attachment or a self-representation that we cling to. They provide safety; they are home. Otherwise, why would so many people, without really knowing what they feel or think, offer, out of hand, blanket rejections of innovations in theory and technique?”⁸⁶ Yet being steeped in theory is a significant problem for a lawyer, who by desire or client demand, ventures into the Venn overlap. As Cooper observes in the psychoanalytic encounter, the analyst’s struggle is with the conscious or unconscious desire to influence the patient’s outcomes against a professional standard that advocates neutrality and objectivity.⁸⁷ If you believe, as Cooper does for analysts and as I do for lawyers, that we want to influence, then we are better off countering the repressed positivistic with explicit thinking about our theories and disciplinary ideals in the context of our real life counseling.⁸⁸

⁸² COOPER, *supra* note 9, at 271.

⁸³ See Hills, *supra* note 69 (suggesting that legal conventional wisdom is more controlling than legal reasoning when it comes to implementing city-imposed tolls on New York City bridges and tunnels).

⁸⁴ Within faculties, an example of this is the difference between the law and lore of tenure. Generally the law of tenure is the AAUP 1940 Statement of Principles on Academic Freedom and Tenure, as updated and as incorporated by reference into contracts or faculty handbooks. See AM. ASS’N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 4–5 (rev. ed. 1970), available at <http://www.aaup.org/file/1940-Statement-of-Principles-on-Academic-Freedom-and-Tenure.pdf> (setting out terms, probationary periods and rules for termination of tenure). I am willing to assert that the conception of the rights conferred by tenure, at least in the minds of many faculty members, go beyond those explicitly set forth.

⁸⁵ COOPER, *supra* note 9, at 271.

⁸⁶ *Id.* at 272.

⁸⁷ *Id.* at 272–73.

⁸⁸ See *id.* at 273 (theorizing that it is easier to balance goals of influence and neutrality if the analyst is aware of her own natural instinct to influence).

This is not easy stuff. But nobody promised us professional rose gardens. The challenge for any lawyer who seeks to be anything more than a blank screen or tennis ball backboard is to judge when to confine herself to abstract disciplinary models and when to seek a different metaphor. We influence our clients and they influence us. Different lawyering circumstances call for different approaches to influence. Sometimes the lawyer ought to be relatively dispassionate. That is the lesson of the Joe and Jane story. It was not my money, and I could not make the decision for Joe and Jane. I was uncomfortable telling either what to do. Nor was I prepared to say that I thought the seller was a lying scumbag for two reasons: (1) I did not know if that was right; and (2) I decided that advice would not be helpful in their decision-making process. All I could do was my best to help them overcome the gap between the non-legal risks, uncertainties, fears, and consequences on one hand, and what I knew as a lawyer on the other.

I do not believe, however, that the lawyer as counselor must always be dispassionate, any more than the psychotherapist must always be a backboard to the patient's tennis ball. If the lawyer is external, then assimilation of the decision-making process—the ultimate integration of legal and non-legal meaning—may be subtle. When I was a law firm lawyer, most of my clients still seemed to want me to say something to this effect: “It is your decision and your money, not mine, but if it were mine, this is what I would do.”⁸⁹ If the lawyer is in-house, it seems to me that it is entirely appropriate for the lawyer to put on her business hat and say to the Human Resources (“HR”) officer, “Knowing what I know about this situation, and knowing the law as I do, here is the action we should take.” Imagine that a company's human resources officer has decided a particular employee is poisoning the office environment, and curative steps must be taken. Nevertheless, the employee is within a protected classification under equal opportunity legislation. Either the HR officer has to internalize the judgments an employment lawyer is capable of making, or the lawyer has to internalize what the HR officer knows about her own discipline.

Consider the following situation. A new general counsel joins a public company. Some time before, the company had completed the acquisition of a business. The company's management team is disappointed in the results of the acquisition and has a nice story to tell about why there were contractual and extra-contractual misrepresentations by the seller. I am skeptical that the lawyer can be wholly dispassionate in her assessment of the chances of prevailing in a lawsuit. If anything, she is likely to be

⁸⁹ It is possible that this was self-selecting in that clients knew I was likely to say this anyway and if they did not want to hear it, they migrated elsewhere.

subject to what Cooper calls the “fantasy” of the return of the repressed positivistic: that “the analyst is able to put aside his feelings and thoughts so as not to have them influence his view of the patient’s psychic reality.”⁹⁰

In her case, the fantasy is that she can give dispassionate objective advice about precisely what the law is and how her new business ought to use it. Although she does not like litigation, she thinks the narrative presents a colorable if not compelling legal claim. But there are certainly implications of filing the lawsuit beyond those suggested by the purely legal considerations. Filing a lawsuit is like firing a bullet that has a good chance of ricocheting unpredictably. Indeed, a subsequent lawsuit over an acquisition, regardless of its legal merits, may be perceived as public admission that something failed in the acquisition process, which reflects poorly on management. The new general counsel wants very much to help. She does not want to say “no” in connection with the first issue that her new team presents her. She can come up with five good reasons to file and five not to file. How should she distinguish, if at all, her theory of the legal case and her personal predilections? Should she express a business view for or against filing? Her formal law school education likely did little more in connection with these nuanced judgments than exactly what the Carnegie Report said: to inculcate particular *legal* theories by which, as a *lawyer*, she would make sense of the world.⁹¹

The question is whether those theories get in the way of her understanding, from the client’s standpoint, what is really going on. As Cooper observes, classical (I assume Freudian) and other psychoanalytic theories may become less vibrant and less meaningful over time and need to change.⁹² That does not mean the theories lose all utility; rather “[i]t means only that, for particular practitioners, patients, observers, or listeners, we can benefit from extending our observational field to include new metaphors.”⁹³ I interpret this insight about openness to learning in a micro as well as macro sense. Among other observations, Cooper says about our theories that “it is extremely easy for all of us to pour old wine into new bottles, just as some who are frightened of change, yet sense it, try to pour new wine into old bottles.”⁹⁴ Trying merely to suppress one’s affect while dealing with a client problem strikes me as a bad idea. But even the forward-thinking Binder’s “client-centered” approach in the Binder text incorporates an ideal stance of professional neutrality. Our hypothetical general counsel needs to reflect about her own desire to

⁹⁰ COOPER, *supra* note 9, at 278.

⁹¹ SULLIVAN ET AL., *supra* note 66, at 63.

⁹² COOPER, *supra* note 9, at 290 (stating that psychoanalyst must change and learn over time in order to continue to be effective and achieve their goal).

⁹³ *Id.* at 264.

⁹⁴ *Id.*

influence and to “court surprise”; in short, to at once be a master of her professional discipline while incorporating, in the client’s idiom, other theories of “what’s going on.”

That is never easy, but the subject of the next section is how law school education might help.

III. PRACTICAL SUGGESTIONS FOR INCORPORATING THE PSYCHOANALYSIS METAPHOR INTO LEGAL EDUCATION

In the current environment in which responsible law professors write about how law schools are failing⁹⁵ and anonymous Internet pundits predict law school closures,⁹⁶ even I wonder whether the inwardness of my focus here constitutes rearranging metaphoric deck chairs. Several colleagues I have asked to comment on this Essay have raised the issue of structural impediments to recasting legal education if we were fully to follow the implications of using analogs from health-care education and licensure. Michael Madison, for example, has recently described changes to his doctrinal classroom that go well beyond classical Langdellian case analysis and reflect the kind of client-centeredness that Binder has long been advocating.⁹⁷ Like Professor Madison, I want us to do a better job of connecting the technical aspects of traditional law school education, even in the traditional classroom, to what lawyers (particularly transactional or counseling lawyers) need to do in action.⁹⁸ I agree with Professor Madison that “the problems with the legal profession and legal education are too large and too deep to be fixed in any particular classroom.”⁹⁹ Like

⁹⁵ E.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

⁹⁶ See, e.g., Debra Cassens Weiss, *Profs Predict Law School Closings as More Grads Earn Less than Break-Even Pay*, A.B.A. J. (Oct. 19, 2010),

http://www.abajournal.com/news/article/profs_predict_law_school_closings_as_more_grads_earn_less_than_break-even_p (predicting school closures due to low graduate salaries, increased student loans, and decreased law school applications); Brian Leiter, *Predictions About Closings of ABA-Accredited Law Schools over the Next Decade*, LEITER’S L. SCHS. REP. (Oct. 3, 2012), <http://leiterlawschool.typepad.com/leiter/2012/10/predictions-about-closings-of-aba-accredited-law-schools-over-the-next-decade.html> (estimating ten law schools will close in the next decade).

⁹⁷ See Mike Madison, *(Not So) Newish Law School Teaching*, MADISONIAN.NET (July 25, 2012), <http://madisonian.net/2012/07/25/not-so-newish-law-school-teaching/> (explaining the teaching method consisting of an unconventional approach of client-centeredness applied to conventional subjects).

⁹⁸ Professor Madison’s blog post links to an essay that criticizes the Carnegie Report for failing to come to terms with action or doing like a lawyer as opposed to merely thinking like a lawyer. *Id.*; see also Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 356 (2012) (challenging the Carnegie Report’s conclusion that law schools teach students to think like lawyers). Thinking versus action in business lawyering is the subject of my recent article as well. See Lipshaw, *Venn Diagram*, *supra* note 1, at 3 (focusing on “the practical reality of lawyers making particularly difficult kinds of judgments, namely those that require blending legal judgment with knowledge from disciplines outside the law”).

⁹⁹ Madison, *supra* note 97.

Professor Madison, I will not try to eat the entire elephant in one sitting.¹⁰⁰

Nevertheless, I suspect teaching lawyer-counselors how to assess what's really going on—integrating practical wisdom or *phronesis*—would require fundamental changes in legal education, largely throwing off the legacy of Langdellian case method for some piece of the first year and modifying the traditional three-year classroom curriculum.¹⁰¹ While I intended the comparisons to be metaphoric, I could not help but think about the considerable additional commitment required for full licensure as a psychoanalyst.¹⁰² I am not suggesting that we institute licensing and educational requirements under which lawyers, like psychoanalysts, would

¹⁰⁰ Nor will I rehash the good work that has been done on educating lawyers as counselors or problem-solvers. See, e.g., Andrea L. Johnson, *Teaching Creative Problem Solving and Applied Reasoning Skills: A Modular Approach*, 34 CAL. W. L. REV. 389, 389 (1998) (providing guidance on integrating problem solving skills into curriculums); Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375, 375 (1998) (describing the authors use of a visual paradigm in the law school curriculum to teach creative problem solving); Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445, 447 (2002) (describing “a model for teaching legal problem-solving skills in the context of a clinical program” that combines various lawyering skills”); Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 260 (1999) (focusing on lawyers’ relationships with their clients); Jean R. Sternlight & Jennifer Robbenolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 440 (2008) (filling in the gaps in applying psychology to law by focusing on the psychological insights necessary for “providing initial counseling to clients in civil cases”); Clifford S. Zimmerman, *“Thinking Beyond My Own Interpretation”: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957, 970 (1999) (examining the “conflict between individual and institutional concerns in legal education”).

¹⁰¹ For an explicit reference to the development of phronesis as a best practice in legal education, see STUCKEY ET AL., *supra* note 4, at 149.

¹⁰² In most states, psychoanalysts are legally and functionally capable of counseling at roughly the same age (early to mid-thirties) that young lawyers are practicing law. In New York, for example, to be licensed as a psychoanalyst, you must be at least twenty-one years old, have passed the examination, and have satisfied the education and experience requirements. The education requirement is that one must obtain at least a master’s degree in an appropriate field and complete a registered and accredited program in psychoanalytic study. *Psychoanalysis License Requirements*, NYSED.GOV, <http://www.op.nysed.gov/prof/mhp/psyanllc.htm> (last visited Jan. 26, 2013).

In turn, such a program must comply with the American Psychoanalytic Association’s requirements. BD. ON PROF’L STANDARDS OF THE AM. PSYCHOANALYTIC ASS’N, STANDARDS FOR EDUCATION AND TRAINING IN PSYCHOANALYSIS I (2010) [hereinafter BOPS], available at <http://www.apsa.org/LinkClick.aspx?fileticket=yo5vqUk7j18=>. Even to be eligible for psychoanalytic training, one must either be: (1) a physician nearing completion of a residency in psychiatry; (2) a mental health professional with a doctoral degree from an accredited mental health program and 3,000 hours of clinical experience; or (3) a licensed mental health professional who has graduated from a masters program where such degree is the highest obtainable in the field (such as social work or psychiatric nursing) and completed *another* two years post-masters of didactic and clinical training. *Id.* at 2. The standard also requires that the applicant demonstrate the appropriate level of maturity and personal and ethical integrity. *Id.* at 3. Once admitted, the student must undergo analysis, attend seminars, and conduct analysis under supervision. *Id.* at 3–5.

not act as unsupervised counselors until they were in their mid-thirties.¹⁰³ Even under my metaphor, I suspect counseling people like Joe and Jane, or the hypothetical CEO, does not require this intensity of professional preparation. But that counseling is also not like my barber giving me advice whether my buzz cut ought to be performed with a number one or number two clipper, and whether the clipper should be metal or plastic. The point is that we have no standards of professional education, development, or licensure in phronesis, despite the fact that lawyers in their twenties and early thirties will typically be licensed to give advice more akin to psychotherapy than grooming tips, and in circumstances where they are likely to be called on for that advice.¹⁰⁴

I want to make some preliminary and far more modest suggestions, in keeping with the themes of the psychoanalysis metaphor, about how reflection on the “repressed positivistic” and “courting surprise” might benefit our students in the “what’s going on” aspect of client-centeredness.

A. *Dealing with the Repressed Positivistic*

In my experience, very few of our entering law students have ever been the *client* of a lawyer. I propose taking Binder’s concept of client-centeredness and Stuckey’s concept of context-based instruction a step further. Even if medical and dental schools do not, as Harvard does, have courses called something like “Patient-Doctor One,”¹⁰⁵ and “Patient-Doctor

¹⁰³ New York’s minimum age requirement seems laughable in view of the other requirements. By my calculation, if a physician goes straight through school and residency, he will be applying for psychoanalytic training at about age thirty, and finishing in his mid-thirties.

¹⁰⁴ Comparing time commitments more generally to medical education, as much as I deeply admire my evening students who leave their full-time jobs, miss dinner with their families, and sit in first-year classes several nights a week until close to 10:00 p.m., I also know that there are no evening or part-time medical schools. Should we extend schooling or replace some of the current curriculum with internships or residencies in “teaching firms,” equivalent to “teaching hospitals,” so that lawyers may develop counseling phronesis? What about bridge programs? Solo Practice University is an example of a for-profit enterprise that has associated itself with a number of law schools (for example, New York Law School, Chapman University School of Law, and the Bowen School of Law at Arkansas-Little Rock), and seeks to fill in the gap between traditional legal education and practice. See *Meet Solo Practice University*, SOLO PRAC. UNIV., <http://solopracticeuniversity.com/about/> (last visited Jan. 26, 2013) (discussing the idea behind Solo Practice University and its objective to serve as “a single online destination where lawyers and law students learn the basics of running a solo practice, take classes and get expert feedback from lawyers and business professionals in specialized fields”). These are all structural issues beyond the scope of this Essay.

¹⁰⁵ *Patient-Doctor I*, HARV. MED. SCH., <http://www.medcatalog.harvard.edu/coursedetails.aspx?cl=preclinical1&id=17561> (last visited Jan. 26, 2013).

Students will learn to take a medical history with excellent communication skills and to develop relationships with patients. Understanding the patient’s experience of illness and various aspects of the patient-doctor relationship will be important themes of the course. Students and faculty will meet in small groups for 2

Two,”¹⁰⁶ every aspiring doctor or dentist has at one time been a patient.¹⁰⁷ Nevertheless, under our current system, law students show up for the first day of the first year and get bombarded thereafter with case analysis, a soupçon of statutory construction, and an intense introduction to legal research and brief and memo writing. Less than three years later, they are fully licensed to hold themselves out as lawyers and counselors to real clients, whether or not they are prepared to be the latter. Unless they have gone out of their way to participate in clinics, the result of the traditional approach is to repress the positivistic view of law and lawyering that is likely to impede effective counseling. They learn to be technically proficient lawyers without ever having a supervised educational experience of what it is like to be on the other side of the desk. In the passionate words of Professor Madison:

I can only note that I don't have a difficult time keeping a client-centered perspective well, front and center. I've been a client. (Lots of lawyers and law professors say: to get a great perspective on the legal system, be a juror. I say: That's fine, but to really understand the legal system—and how dehumanizing and alienating it can be—be a client. Want to know why lawyers are unhappy? Ask a client. *They're*[sic] unhappy. Find happy clients, and you will often find happy lawyers. . . .)¹⁰⁸

With the innovations he developed and contributed to the “Educational

hours/week for patient interviews and tutorial discussions. Satisfactory completion of Patient Doctor I is a prerequisite for Patient Doctor II.

Id.

¹⁰⁶ *Patient-Doctor II*, HARV. MED. SCH., <http://www.medcatalog.harvard.edu/coursedetails.aspx?cl=preclinical2&id=17577> (last visited Jan. 26, 2013).

Patient-Doctor II is a prerequisite for all core clerkships. It extends instruction in the techniques of interviewing begun in *Patient-Doctor I*. The emphasis in *Patient-Doctor II* is on the development of clinical skills and professional behavior appropriate for the beginning of clerkships, with special focus on learning the physical examination. The patient-physician relationship receives continued attention. Teaching in lectures, demonstrations, small groups and at the bedside are the primary methods of instruction.

Id.

¹⁰⁷ See *HMS Night of Fun Clip 2002—Patient/Doctor I*, YOUTUBE (June 8, 2008), <http://www.youtube.com/watch?v=jS8S3BOeZFQ> (last visited Feb. 2, 2013) for a hilarious send-up of the course. I liked the tagline to the YouTube video: “PD1 is the course that tries to turn medical students into humans.” *Id.*

¹⁰⁸ Madison, *supra* note 97. When I advised that I wanted to quote this, Professor Madison told me he thought it sounded like he was being flippant. I do not think it sounds flippant at all, but he adds an addendum to the blog post by saying that “to say that happy clients and happy lawyers go together may be appropriately flip for a blog but too brief for a real analysis.” *Id.*

Tomorrow's Lawyers" portfolio,¹⁰⁹ Professor Madison is already ahead of the curve in dealing with the return of the repressed positivistic in his classrooms. I offer the following additional suggestions.

1. *"Law Student as Client" Interaction*

Once admitted, the psychoanalyst-in-training must undergo her own psychoanalysis "with a training analyst usually conducted with the analyst on the couch at a frequency of at least four sessions per week on separate days."¹¹⁰ Might there be an analog to the analyst's own analysis in having law students bring their own problems as client to student-lawyer teams? The teams would not actually practice law outside the school, but the real problems would be the source of a simulation/clinical exercise in which students have skin in the game as clients. The point is to develop the affective experience of being a client for purposes of understanding, from the other side of the desk, what it means to hear one's problem addressed in the legal idiom. As the chief legal officer of a company dealing with outside lawyers, I was as often the client as the lawyer. I know from my own experience that once you care about an outcome, you are quite capable of seeing what the lawyer is telling you as wholly divorced from reality or common sense, even if it may be the right legal answer.

2. *Teaching Metacognition*

This is the explicitly cognitive counterpart of the affective "law student as client" experience: the student's thinking about her own thinking as part of the learning process.¹¹¹ More concretely, it roughly describes that aspect of knowledge a learner invokes in developing strategies to use other knowledge effectively; for example, how to marshal what one knows for the purpose of an examination. At Suffolk University Law School, Sandra Yauncey McGuire, the Assistant Vice Chancellor for Learning, Teaching, and Retention at Louisiana State University, and a chemistry

¹⁰⁹ *About ETL*, EDUCATING TOMORROW'S LAWYERS: PUTTING KNOWLEDGE INTO PRACTICE, <http://educatingtomorrowlawyers.du.edu/about-etl/> (last visited Feb. 2, 2013). For Professor Madison's Copyright course materials, see *Copyright Law*, EDUCATING TOMORROW'S LAWYERS: PUTTING KNOWLEDGE INTO PRACTICE, <http://educatingtomorrowlawyers.du.edu/course-portfolios/detail/copyright-law> (last visited Feb. 2, 2013).

¹¹⁰ BOPS, *supra* note 102.

¹¹¹ See Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1, 13-14, 17 (2003) (advancing the notion that metacognition now should be comprised of law students actively engaging with the materials instead of just passively reading them); Jennifer A. Livingston, *Metacognition: An Overview* (1997), <http://gse.buffalo.edu/fas/shuell/cep564/metacog.htm> (describing metacognition as a "higher order thinking which involves active control over the cognitive processes engaged in learning"). Stuckey does not use the phrase "metacognition," but it is implicit in the self-reflection required for effective context-based instruction. See STUCKEY ET AL., *supra* note 4, at 141-43 (advocating for schools to employ context-based education).

professor recently talked to us about the use of metacognitive insights to improve law student academic performance.¹¹² What struck me was the unusual (for law school) focus on teaching techniques of self-reflection. If it is possible to teach students to think about how they think about legal doctrine, then it seems equally likely we can teach them about how they think about their relationship with a client.¹¹³

B. “*Courting Surprise*”

Two of my favorite doctrinal teaching exercises involve shocking students into realizing that there are sometimes significant limits on their ability to solve legal problems by using the very materials they are learning in law school. The first is familiar to anybody who teaches the “battle of the forms” under the Uniform Commercial Code. Notwithstanding a couple cases of infamous judicial misunderstanding,¹¹⁴ it is well understood that a seller of goods dealing with a knowledgeable buyer in the typical exchange of purchase orders and invoices will not be able to eliminate the buyer-oriented implied warranties under Article Two.¹¹⁵ I usually conclude the discussion by asking students to act as the seller’s lawyer to come up with a foolproof way of writing the document so as to incorporate an effective disclaimer of the implied warranty of merchantability. What they discover is that it is like playing tic-tac-toe. As long as the buyer makes the right moves, the seller cannot win the game. So, to their surprise, any modification or disclaimer requires a

¹¹² Sandra Yancy McGuire, *Teach Law Students HOW to Learn: Metacognition Is the Key!*, Presentation to Suffolk Univ. Law Sch. Faculty, May 10, 2012 (on file with Author).

¹¹³ When I teach contracts, I do my own variant on what Stewart Macaulay has championed for fifty years: placing legal doctrine in the context of action by clients, their lawyers, and judges both “before-the-fact” in a transactional sense, and “after-the-fact” in a litigative sense. See Jeffrey M. Lipshaw, *Metaphors, Models, and Meaning in Contract Law*, 116 PENN ST. L. REV. 987, 994 (2012) (defending the notion that contract law should be taught as a metaphor to increase student understanding by providing them with the perspective of the contract participants). The jury is still out on whether it works or not, but this was part of a touching note I received from a student after grades got distributed this past year: “[R]easonable minds can differ’ is your token (in my mind) and this is something I will never forget in my law career. As we 1L’s attempted to hang in to any black and white we could find, we did so in a grey world.” E-mail from Liam T. O’Connell to Author, (June 17, 2012) (on file with Author)

¹¹⁴ See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997) (ruling that an arbitration clause is valid even if the buyer does not receive notice of the clause aside from the terms and conditions included in the box and that an allegation that an arbitration clause is meant to defraud does not make it unenforceable); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (explaining that a two-party contract is not the same as the exclusive rights present within copyright law, thus the contract between the CD company and the shrinkwrap company is enforceable because additional terms were presented with the goods, and the goods were not returned).

¹¹⁵ U.C.C. §§ 2-104(1), 2-314(1) (1995) (explaining the definition of a merchant as one that has “knowledge or skill peculiar to the practices or goods involved in the transaction” and that a warranty is often implied from the contract).

negotiation and agreement that is outside the default rules.

The second arises in the law of agency. The idea of apparent authority or inherent agency power is that the agent's authority to bind the principal to a third party arises solely from the appearance that either the principal or the agent creates from the standpoint of the third party.¹¹⁶ Whether there was actual express or implied authority between the principal and agent is irrelevant.¹¹⁷ Indeed, the standard teaching cases on apparent authority deal with the dilemma that arises when the agent expressly lacks actual authority, but the appearance of authority nevertheless exists.¹¹⁸ I conclude the discussion by asking students to act as the principal's lawyer and to come up with a way of restricting the agent so that the problem of apparent authority never arises. Invariably, students suggest a number of methods, none of which can ever keep the agent from ignoring the restriction and creating apparent authority anyway. Again, to their surprise, the lesson is that there are some legal problems for which the law has no answer; the principal's best solution is to hire trustworthy and conscientious agents.

In the big scheme of education, these are trivial examples, but we could do more to court surprise in our students. For example, I have in mind something my colleague, Jessica Silbey, suggests which is co-teaching within law school doctrinal courses. Professor Silbey and I teach in different substantive areas. I teach business law and contracts; she teaches constitutional law and intellectual property. It is also clear from dozens of delightful arguments on all sorts of subjects that we do not always see the world in the same way. I would love to co-teach with her a course dealing with the overlap of business and intellectual property. We would let law students encounter law professors who may have different organizing principles, or reflect different concerns or techniques or outcomes for complex problems. Even more dramatically, we could be co-teaching across the schools in the university, and thus courting surprise in our students by didactic exposure to non-legal frames of reference.¹¹⁹

IV. CONCLUSION

This Essay focuses on just one segment of law practice and education, namely the counseling work that many or most lawyers undertake even from the early stages of their careers, which I contend the legal curriculum insufficiently addresses. I have suggested shifting our metaphor from the

¹¹⁶ LARRY E. RIBSTEIN & JEFFREY M. LIPSHAW, UNINCORPORATED BUSINESS ENTITIES § 2.03 (4th ed. 2009).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ For an example of the upper-level program at Stanford Law School, see Larry Kramer, *JD Program: Letter from the Dean*, <http://www.law.stanford.edu/degrees/jd/letter-from-the-dean> (last visited Feb. 3, 2013).

“lawyer as warrior” to the “lawyer as psychoanalyst,” and considered some of the implications of doing so. I do not have answers to these questions, but I am willing to reflect and court surprise. I hope the rest of the legal academy is willing as well.