

WHO'S GONNA TAKE THE WEIGHT:* USING LEGAL STORYTELLING TO IGNITE A NEW GENERATION OF SOCIAL ENGINEERS

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I. INTRODUCTION

The millennials, students born between the early 1980s and the early 2000s,¹ currently enrolled in or destined for American law schools, are an often maligned group.² They have been described as lazy, narcissistic, and entitled.³ However, one crucial, but often overlooked characteristic of millennials is their affinity for public service.⁴ Millennials are projected to constitute 46% of the workforce by 2020.⁵ According to a recent survey of undergraduate students, 17% of millennials expressed a preference for government

* This title was inspired by Kevin Powell's book, *WHO'S GONNA TAKE THE WEIGHT: MANHOOD, RACE, AND POWER IN AMERICA* (New York: Three Rivers Press, 2003).

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1. See Brittany Stringfellow Otey, *Buffering Burnout: Preparing the Online Generation for the Occupational Hazards of the Legal Profession*, 24 S. CAL. INTERDISC. L.J. 147, 152 (2014) (citing NEIL HOWE & WILLIAM STRAUSS, *MILLENNIALS RISING: THE NEXT GREAT GENERATION* 10–12 (2000)).

2. See generally Jan L. Jacobowitz et al., *Cultural Evolution or Revolution? The Millennial's Growing Impact on Professionalism and the Practice of Law*, 23 PROF. LAW 20 (2016) (evaluating the millennial generation in cultural terms and making a case for cultural competence); Karla Mari McKanders, *Clinical Legal Education at A Generational Crossroads: Shades of Gray*, 17 CLINICAL L. REV. 223, 226 (2010).

3. See Douglas Main, *Who Are the Millennials?*, LIVE SCIENCE (July 9, 2013, 8:49 PM), www.livescience.com/38061-millennials-generation-y.html (defining the characteristics of millennials). See generally Jacobowitz et al., *supra* note 2, at 20 (reviewing the literature describing millennials and their projected impact on the legal profession).

4. See McKanders, *supra* note 2, at 226; Stringfellow Otey, *supra* note 1, at 175 (describing millennials as civic-minded and socially conscious).

5. Jacobowitz et al., *supra* note 2, at 23.

and public service jobs.⁶ Furthermore, when comparing millennial law students to previous generations, one commentator noted that millennials ultimately see themselves working for public and non-profit sector employers and only view employment at a large law firm as a way to shed debt and gain valuable experience.⁷

But many of the same students who begin law school with an affinity for public service ultimately embark on careers that bear little or no relationship to public service.⁸ According to Professor Jonathan Rapping, the founder of an organization devoted to training public defenders, “two-thirds of students who enter law school intending to work in government or public interest jobs do not actually end up in those roles.”⁹ Some commentators attribute the shift away from public service to the absence of social justice issues in the first-year curriculum.¹⁰ Others argue that the first-year curriculum creates a false dichotomy where the procedural and formal aspects of law practice are valued at the expense of moral concerns and compassion for clients.¹¹ Still others blame a skewed notion of the profession where clients are abstractions.¹² According to one noted scholar, “[p]erhaps the most stinging critique of modern legal education is that it teaches students to disregard, if not ignore, the client whom the lawyer is called to serve.”¹³

A curriculum that treats clients as abstractions results in a lack of instruction about how empathy deficits such as stereotypes and implicit biases can influence who a lawyer chooses to represent and creates serious access to justice issues for controversial clients; that is, those clients who have difficulty finding representation because of widely-held stereotypical beliefs rooted in their membership in historically marginalized underserved communities.¹⁴ This curricular deficiency adversely impacts the client selection process—a key aspect of the lawyer’s professional identity—and leaves millennial law students unprepared for the rigors of a career in public service. So I ask the rhetorical question:

6. Shankar Ganapathy, *10 Millennial Personality Traits That HR Managers Can't Ignore*, MINDTICKLE: SALES READINESS BLOG, www.mindtickle.com/blog/10-millennial-personality-traits-hr-managers-cant-ignore/ (last visited Jan. 19, 2016).

7. Stringfellow Otey, *supra* note 1, at 156-57.

8. Jonathan A. Rapping, *It's A Sin to Kill A Mockingbird: The Need for Idealism in the Legal Profession*, 114 MICH. L. REV. 847, 858 (2016).

9. *Id.*

10. See generally John O. Calmore, “Chasing the Wind”: Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization, 37 LOY. L.A. L. REV. 1167 (2004) (discussing the benefits of incorporating social justice issues into the first-year legal writing curriculum).

11. Ian Gallacher, *Thinking like NonLawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 LEGAL COMM. & RHETORIC: JALWD 109, 115 (2011).

12. Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering*, 87 NEB. L. REV. 1, 31 (2008).

13. *Id.*

14. See discussion *infra* n. 58 for an example of an archetypal controversial client.

“Who’s Gonna Take the Weight?” to mobilize law professors—the people responsible for shaping students’ professional identities—to use storytelling techniques to overcome the corrosive effects of stereotypes and implicit biases on controversial clients’ access to legal services and on the lawyer’s professional identity as a social engineer.¹⁵

This article precedes in two parts. Part II explores traditional client selection models and endorses a Houstonian approach to client selection, one that acknowledges the challenges of representing controversial clients within a framework that also acknowledges the social justice consequences of denying representation to controversial clients. Part III examines the power of legal storytelling and its ability to ease some of the psychological discomfort that often accompanies a decision to represent controversial clients and proposes several techniques for helping first-year students confront implicit biases and develop empathetic understanding.

II. FEELING THE WEIGHT: PROFESSIONAL IDENTITY, CLIENT SELECTION, AND THE HOUSTONIAN IDEAL

“A lawyer is either a social engineer or . . . a parasite on society. . . .”

—Charles Hamilton Houston¹⁶

Because this article champions the virtues of storytelling, I begin with the story of the teachable moment that inspired this article. For the last assignment of the first semester, my legal writing students interview a client objecting to her ex-husband’s petition to relocate their child to another state. In previous assignments, I deliver the facts through a variety of non-interactive methods such as videotaped interviews and interview transcripts. But in this capstone assignment, I wanted students to interview a “real” client.¹⁷ The client, a litigation associate at a large national law firm, works in excess of ninety hours per week. The client is ambitious. She tells the class that her goal is to become the firm’s first female managing partner. Because of her career ambitions, the client voluntarily relinquished custody in exchange for liberal

15. The social engineering ideology is the brainchild of Charles Hamilton Houston, the architect of the litigation strategy culminating in *Brown v. Board of Education*. See discussion *infra* Part II.

16. Kemit A. Mawakana, *Historically Black College and University Law Schools: Generating Multitudes of Effective Social Engineers*, 14 J. GENDER RACE & JUST. 679, 679, 679 n.2 (2011) (explaining that “the notion of a parasite speaks to the tension between a lawyer working to maximize the amount of money one can earn as opposed to working to generate justice”). See also *History*, HOW. U. SCH. L., www.law.howard.edu/19 (last updated Apr. 18, 2016).

17. The students do not know that the client is my teaching assistant until the end of the interview.

visitation on weekends and holidays. The client's ex-husband, also an attorney, works for a small law firm where he works only twenty hours per week. Although the client opposes the relocation, she is *adamant* that she is not interested in modifying the current custodial arrangements. But as the interview progresses, it is immediately apparent that the class is having difficulty adjusting to a real client with actual needs, motivations, and objectives. A few students insult the client, calling her a "disgrace," some even refer to her as "dead beat" or "scum bag." Not everyone insults the client, but almost everyone is upset that I'm "making" them represent her. Ironically, the female students, who I expected to rally to the client's defense, were the client's harshest critics. Perplexed, the students ask questions such as "Why won't she consider petitioning for custody and stopping the relocation?" "What kind of mother puts a job before her child?" "Why does she even want to become a managing partner?" I am disappointed by my students' inability to recognize their gender biases and to understand how unchecked biases impede a prospective client's access to justice. But then, disappointment morphs into empathy. I remember that first-year students stand at the precipice of two conflicting identities: their personal identities, consisting of their formative pre-law school experiences, and their nascent professional identities as lawyers.

Professional identity is "one's professional self-concept based on attributes, beliefs, values, motives, and experiences."¹⁸ Scholars emphasize the complexity of the lawyer's professional identity, describing it as a distinctive crystallization process of "self-reflection, professional education, collegial socialization, and the threat of professional discipline."¹⁹ The client selection process is an important but often overlooked aspect of professional identity.²⁰ According to one commentator, exploring the client selection process with millennial students is even more important because they are autonomous thinkers who "refuse to blindly conform to traditional standards and time-honored institutions. Instead, they boldly ask, 'Why?'"²¹ Their inquisitive nature demands a rigorous evaluation of traditional client selection models and an explanation about why a client selection model rooted in the Houstonian ideal of social

18. Holly S. Slay & Delmonize A. Smith, *Professional Identity Construction: Using Narrative to Understand the Negotiation of Professional and Stigmatized Cultural Identities*, 64:1 HUMAN RELATIONS 85 (2011), <http://journals.sagepub.com/doi/pdf/10.1177/0018726710384290>; see also Benjamin V. Madison, III & Larry O. Natt Gantt, II, *The Emperor Has No Clothes, but Does Anyone Really Care? How Law Schools Are Failing to Develop Students' Professional Identity and Practical Judgment*, 27 REGENT U. L. REV. 339, 341 (2014–2015).

19. David B. Wilkins, *The New Social Engineers in the Age of Obama: Black Corporate Lawyers and the Making of the First Black President*, 53 HOW. L.J. 557, 594 (2010) [hereinafter *The New Social Engineers*].

20. Adrienne Jennings Lockie, *Encouraging Reflection on and Involving Students in the Decision to Begin Representation*, 16 CLINICAL L. REV. 357, 358–62 (2010).

21. Jacobowitz et al., *supra* note 2, at 21 (citing Eric Chester).

engineering is the most appropriate model for preparing them to embrace the challenges of representing controversial clients.

A. *Traditional Client Selection Models*

Traditional client selection models privilege one aspect of the lawyer's identity—personal versus professional—over the other²² and originate from two sources: uncodified normative models of conduct and the Model Rules of Professional Conduct (Model Rules).²³ At one end of the spectrum is the identification principle, a normative client selection model, which privileges the lawyer's personal identity over his or her professional one.²⁴ Proponents of the identification principle argue that lawyers have the autonomy to select clients based on their affinity with the client's objectives, referred to as positional identification, or with the client's personal characteristics (i.e., race, gender, and class), referred to as personal identification.²⁵ The lawyer's demand for positional and personal identification result in what scholars describe as a thick professional identity.²⁶ Noted scholar Professor Norman Spaulding blames a shift toward thick professional identity for a whole range of problems affecting the contemporary legal community, including the maldistribution of professional services and a corresponding lack of access to legal services.²⁷

At the opposite end of the spectrum is the standard definition of lawyering (the standard definition), a normative client selection model which privileges the lawyer's professional identity over his or her personal one.²⁸ Proponents of this model argue that aspects of the lawyer's personal identity such as race, gender, religion, and

22. Michele N. Struffolino, *For Men Only: A Gap in the Rules Allows Sex Discrimination to Avoid Ethical Challenge*, 23 AM. U. J. GENDER SOC. POL'Y & L. 487, 499 (2014).

23. See Liwen Mah, *The Legal Profession Faces New Faces: How Lawyers' Professional Norms Should Change to Serve a Changing American Population*, 93 CALIF. L. REV. 1721, 1725–26 (2005) (arguing that the legal profession must adapt to the cultural shifts in the population to better serve clients).

24. See Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 6, 11–12 (2003) [hereinafter *Reinterpreting Professional Identity*] (discussing the general characteristics of the identification principle). See also Struffolino, *supra* note 22, at 493–94 (acknowledging the existence of the identification principle and the extensive debate regarding its legitimacy in the legal ethics community); see also David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1527 (1998) [hereinafter *Identities and Roles*] (coining the phrase “personal morality lawyering” to describe a variant of the identification principle that encourages lawyers to “to look to their own personal moral values as a source of guidance for resolving the ethical problems that they encounter as lawyers”).

25. *Reinterpreting Professional Identity*, *supra* note 24, at 6–7, 11–12.

26. *Id.* at 7; Struffolino, *supra* note 22, at 498.

27. *Reinterpreting Professional Identity*, *supra* note 24, at 38–51.

28. *Id.* at 8–9.

any other sincerely-held beliefs are inappropriate client selection considerations.²⁹ According to prominent scholar Professor David Wilkins, the primary justification for the standard definition is accessibility to legal services for unpopular clients.³⁰ Consequently, under the standard definition, the client is a consumer who is entitled to unfettered access to all that the law has to offer.³¹ And protecting the rights of legal consumers requires subordination of the lawyer's personal identity.³² Although the standard definition is the dominant client selection model,³³ contemporary scholars increasingly question its assumption that lawyers can compartmentalize their personal and professional identities.³⁴ They argue that these artificial lines of demarcation between the lawyer's personal and professional identities distort "human psychology by encouraging lawyers to ignore, or at the very least, suppress . . . the moral consequences of actions taken in their professional role."³⁵

The other dominant client selection model is the one endorsed by the Model Rules of Professional Conduct. In those states adopting the Model Rules,³⁶ it is the definitive framework governing the lawyer's client selection obligations.³⁷ Rule 1.2(b) provides that "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."³⁸ Although implicitly endorsing a client selection model premised on client accessibility consistent with the standard definition, Rule 1.2(b), according to one commentator, "is not really even a rule . . . but rather more of an unenforceable pronouncement."³⁹ But despite the aspirational language of Rule 1.2(b), the Model Rules do not require that lawyers represent controversial clients.⁴⁰ For example, even when appointed by the court to represent a client, Rule 6.2 permits

29. *The New Social Engineers*, *supra* note 19, at 595.

30. *Identities and Roles*, *supra* note 24, at 1505–06, 1571.

31. *Id.* at 1505.

32. *Id.* at 1545.

33. See *The New Social Engineers*, *supra* note 19, at 595 (discussing how the teaching of excluding non-professional identities is a tradition and is central to American legal profession).

34. See *Identities and Roles*, *supra* note 24, at 1527 (demonstrating philosophers' suspicions on whether the created professional obligation to lawyers can legitimately supersede their moral duties as human beings).

35. *Id.*

36. American Bar Association, *State Adoption of the ABA Model Rules of Professional Conduct*, AMERICANBAR.ORG, www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited June 29, 2017).

37. Mah, *supra* note 23, at 1726.

38. MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (AM. BAR ASS'N 2015).

39. Lonnie T. Brown, Jr., *In Defense of the Devil's Advocate*, 44 HOFSTRA L. REV. 1037, 1059 (2016).

40. MODEL RULES OF PROF'L CONDUCT r. 6.2 (AM. BAR ASS'N 2015); *Identities and Roles*, *supra* note 24, at 1572.

the lawyer to refuse representation if it “is so repugnant to the lawyer as to . . . likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”⁴¹ Consequently, a lawyer could plausibly argue that a lack of positional or personal identification with a client constitutes good cause to decline the representation. However, the comment to Rule 6.2 contains non-binding aspirational language⁴² endorsing a client selection approach that, similar to the standard definition, is designed to make legal services available to clients with unpopular views:

All lawyers have a responsibility to assist in providing pro bono public service . . . [a]n individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.⁴³

When considered in their totality, the Model Rule’s client selection provisions send conflicting messages; some of its language supports a client selection model rooted in identification while other non-binding provisions support a client selection model consistent with the standard definition’s consumer protection approach. These kinds of interpretational conflicts have generally lead commentators to agree that the Model Rules leave lawyers with an extraordinary amount of autonomy in client selection.⁴⁴

B. The Houstonian Client Selection Model

I return to the story of my students and their gender stereotypes about motherhood to support my theory that a client selection model rooted in the Houstonian ideal of social engineering is the most appropriate model for preparing millennial law students to embrace the challenges of representing controversial clients. What should I say to the students like the ones in my story who want to only represent clients who look like them, act like them, or who share similar social and political ideologies? I automatically default to the standard definition of lawyering – the one that I learned as a law student, that informed my professional identity as a practicing lawyer, and that is most consistent with my social justice pedagogy.⁴⁵ But my students are unpersuaded by the

41. MODEL RULES OF PROF’L CONDUCT r. 6.2 (AM. BAR ASS’N 2015).

42. The Model Rules are written in a quasi-statutory style and are the only provisions that bind the lawyer. However, the comments that immediately follow each rule provide valuable interpretive guidance about the norm underlying the rules and suggest how to practically apply its provisions. Mah, *supra* note 23, at 1726.

43. MODEL RULES OF PROF’L CONDUCT r. 6.2 cmt. (AM. BAR ASS’N 2015).

44. See, e.g., *Identities and Roles*, *supra* note 24, at 1572; Struffolino, *supra* note 22, at 503 (“The Model Rules provide little regulation of attorney autonomy in the client selection process.”)

45. See Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through*

aphorisms of the standard definition of lawyering or of the Model Rules. Instead, their responses reflect one central theme—their preference for a thick professional identity, one dependent on positional and personal identification. As the previous discussion revealed, resolving client selection issues is a complex balancing act between a lawyer’s personal and professional self, a task further complicated by a lack of consensus among legal ethics scholars about the appropriate balance.⁴⁶ In this section, I argue that the Houstonian ideal of the lawyer as a social engineer is a more appropriate alternative to traditional client selection models because it takes a more balanced approach to resolving conflicts between a lawyer’s personal and professional identities while appealing to millennial law students’ desire to make an impact and to find meaning in their work. The discussion that follows summarizes Charles Hamilton Houston’s social engineering ideology, outlines the primary considerations in a Houstonian client selection model, and explains why that model will appeal to millennial law students.

Charles Hamilton Houston was the legendary teacher, lawyer, and activist who designed the litigation strategy that resulted in *Brown v. Board of Education*, one of the most influential Supreme Court cases of the Twentieth Century.⁴⁷ Houston described a social engineer as “a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of local communities and in bettering conditions of the [*sic*] underprivileged citizens.”⁴⁸ And consequently, Houston trained elite African-American lawyers—including Justice Thurgood Marshall—to become social engineers as a redistributive measure for providing marginalized, underserved African-American communities with access to high-quality legal services.⁴⁹ Although some social engineers attacked systematic denials of their client’s civil rights, the typical social engineer represented clients in a wide variety of cases.⁵⁰ Houston’s ideology transcended race,⁵¹ and according to one

Legal Writing, 7 LEGAL WRITING: J. LEGAL WRITING INST. 63, 64 (2001) (defining the term as making intentional curricular choice that explore problems related to class conflict, gender distinctions, and religious differences).

46. See discussion *supra* Part II.A.

47. Leland Ware, *The Story of Brown v. Board of Education: The Long Road to Racial Equality*, in EDUCATION LAW STORIES 19, 20, 22, 24, 36–40 (Michael A. Olivas & Ronna Greff Schneider, eds., 2008).

48. H. Timothy Lovelace, Jr., *Revisiting “The Need for Negro Lawyers”: Are Today’s Black Corporate Lawyers Houstonian Social Engineers?* 9 J. GENDER RACE & JUST. 637, 642 (2006).

49. See Lovelace, *supra* note 48, at 653 (generally discussing the attributes of Houstonian social engineers). See generally Jose Felipe Anderson, *The Criminal Justice Principles of Charles Hamilton Houston: Lessons in Innovation*, 35 U. BALT. L. REV., 313 (2006).

50. *Id.* at 644.

51. *Id.* at 646 (discussing Houston’s alliances with poor whites and other socio-

commentator, “[T]he true heirs to Houston’s legacy are legal advocates whose work redistributes legal resources along race and class lines . . . [and those who make] personal and professional sacrifices for often unpopular, dangerous, and unprofitable causes.”⁵²

While Houston did not codify his social engineering ideology,⁵³ some central tenets endure and are universally accepted in the modern legal community, including a commitment to serving clients in marginalized, underserved communities and correcting the maldistribution of legal services.⁵⁴ The Houstonian client selection model takes its shape from these central tenets. Under this client selection model, representation turns on whether the client is a member of a community that has been historically marginalized and underserved. Consequently, the Houstonian model is a remedial, redistributive social justice tool that is more nuanced than the client selection ideology endorsed by the standard definition or by the Model Rules. The commoditized client selection approach reflected in these traditional client selection models undoubtedly serve laudable redistributive goals that *may* benefit clients who are members of historically marginalized underserved communities, but they are not social justice tools *created* to remedy a systemic and historic denial of access to legal services. A social justice model created to remedy a historic denial of access to legal services instead of one that may do so only incidentally will appeal to the millennial worldview. Millennials bring with them a more tolerant world-view that is typically more supportive of gay rights and equal rights for minorities than previous generations.⁵⁵ Accordingly, a social justice approach to client selection—one that is remedial *and* redistributive—might appeal to millennial law students’ propensity for public service while advancing a more psychologically palatable reason for representing clients whose personal affinities or social and political ideologies are inconsistent with those of mainstream society.

The Houstonian model is also a less restrictive approach to client selection that does not create artificial lines of demarcation between a lawyer’s personal and professional identities. The *only* relevant client selection criterion is the client’s membership in a marginalized and historically underserved community. Consequently, a lawyer could decline representation based on any sincerely-held personal or positional affinities that do not perpetuate the negative social justice consequences that result from

economically marginalized groups).

52. *Id.* at 640.

53. *Id.* at 642.

54. See *Identities and Roles*, *supra* note 24, at 1522 (commenting on the parallels between the Houstonian social engineering model and the general notion that a lawyer’s professional identity is linked to access to justice for all citizens).

55. Main, *supra* note 3.

a systemic lack of access to legal services for clients from marginalized underserved communities. So, under the Houstonian model, a lawyer could refuse to represent a member of the Ku Klux Klan based on his or her disdain for that organization's history of racial violence and its ideology of white supremacy because white men are not members of communities that have been historically marginalized or underserved.⁵⁶ Lawyers should be encouraged to represent unpopular, unlikeable, or infamous clients, even if they are not members of communities that have been historically marginalized or systematically denied access to legal services.⁵⁷ But I recognize the enormous personal and professional sacrifices required of lawyers who bravely accept the challenge of representing these kinds of clients⁵⁸ One of the many benefits of the Houstonian model is its acknowledgement of the enormous moral, psychological, and physical challenges posed by representing controversial clients within a framework that also recognizes the detrimental effect that denial of access to legal services has on clients who have historically been most injured by that lack of access. The Houstonian client selection model is not a panacea. Even if attracted by its remedial and redistributive characteristics, students will still have to grapple with the enormous moral, psychological, and physical challenges posed by representing controversial clients.

56. This example is modeled on the high-profile case of Anthony Griffin, an African-American lawyer, who was harshly criticized by some and praised by others because of his willingness to represent Michael Lowe, grand dragon of the Texas Knights of the Ku Klux Klan. See Brown, Jr., *supra* note 39, at 1046; *Identities and Roles*, *supra* note 24, at 1509–10, 1544–45.

57. Camille Lamar Campbell, *Attorneys for the Damned: Using Legal Storytelling to Facilitate Zealous Representation of Unpopular, Unlikeable, or Infamous Clients*, THE SECOND DRAFT 24 (Fall 2015), <http://lwionline.org/uploads/FileUpload/F2015SecondDraftMobile.pdf>.

58. See Brown, Jr., *supra* note 39, at 1038, 1048 (discussing personal and professional consequences such as physical threats, the loss of clients, and being ostracized by the public and other lawyers); see also Rapping, *supra* note 8, at 859–62.

III. TAKING THE WEIGHT: THE LINK BETWEEN SOCIAL JUSTICE, LEGAL STORYTELLING, AND EMPATHY

"Stories make us more alive, more human, more courageous, more loving."

—Madeleine L'Engle⁵⁹

"The biggest deficit that we have in our society . . . is an empathy deficit."

—Barack Obama⁶⁰

Professors can help students take the emotional weight of representing controversial clients by adopting storytelling techniques that reveal the corrosive effects of stereotypes and implicit biases on controversial clients' access to legal services. The following discussion explores the connection between social justice, legal storytelling, and empathy and supports the psychological and social justice benefits of making that connection in first-year legal writing courses. In a thoughtful article about the social justice benefits of involving clinical students in the client selection process, Professor Adrienne Jennings Lockie argues that teaching students how to manage their assumptions and biases reinforces the relationship between client selection and social justice.⁶¹

Examining social justice through the lens of client selection requires students to examine the effects of the lack of access on their clients, on the legal system, and on communities. Ideally this reflection encourages students to work for social justice in their careers. Examining the distribution of legal services and access to justice in the context of client selection shows that there are social justice consequences of taking on a particular client; deciding whom to represent is how lawyers grapple with which injustices to take on.⁶²

Professors can teach similar lessons about the corrosive effects of stereotypes and implicit biases on controversial clients' access to legal services to first-year law students. And first-year legal writing courses are the natural place to begin teaching those vital lessons. Legal writing classes are the only place in the first-year curriculum

59. Madeleine L'Engle was a prolific author storyteller best known for her Newberry-Award winning book, *A Wrinkle in Time*. Jennifer King, *10 Favorite Quotes by Madeleine L'Engle*, JENNIFER LYN KING (July 23, 2013), www.jenniferlynking.com/2013/07/23/10-favorite-quotes-by-madeleine-lengle/.

60. Mark Honigsbaum, *Barack Obama and the 'Empathy Deficit'*, THE GUARDIAN (Jan. 4, 2013, 11:30), www.theguardian.com/science/2013/jan/04/barack-obama-empathy-deficit.

61. Lockie, *supra* note 20, at 391.

62. *Id.* at 408.

where students are required to represent clients.⁶³ The compulsory nature of the representation forces students to grapple with the complex emotions often triggered by controversial clients, ones that are often based on stereotypes and implicit biases.⁶⁴ Legal writing courses are also the most natural place in the first-year curriculum to introduce students to storytelling.⁶⁵ Legal storytelling stimulates empathy which empowers students to build plausible counter-narratives that ease the psychological discomfort of representing controversial clients.⁶⁶ Legal storytelling and empathy are inextricably linked.⁶⁷ Colloquially known as “putting one’s self in another person’s shoes,” empathy is “the willingness of an observer to become part of another’s experience, [and] to share the feeling of that experience.”⁶⁸ According to noted scholar Professor Ian Gallacher, legal writing courses help “students develop their empathetic senses through a combination of course assignments that can be designed to stimulate a student’s empathetic response by contextualizing legal analysis more realistically than can be achieved in the typical doctrinal-class setting.”⁶⁹ Facilitating empathetic understanding is the key to combating stereotypes and implicit biases that prevent students from hearing controversial clients’ stories and from wanting to zealously representing them. I return to the story of my students and their unwillingness to represent a client who does not meet society’s definition of a good mother to demonstrate two techniques that I have found particularly instructive: *Mirror, Mirror, on the Wall, Who’s the Fairest Mother of Them All*, an in-class exercise that helps students confront implicit biases, and an in-class visualization exercise that helps students develop empathetic understanding.

63. See Edwards & Vance, *supra* note 45, at 71–72 (describing a legal writing assignment where the hypothetical client’s legal dilemma forced students to grapple with complex social justice themes); see also Gallacher, *supra* note 11, at 146–47 (explaining that legal research and writing courses use simulated client experiences and problems that students must analyze).

64. See Edwards & Vance, *supra* note 45, at 76–77 (noting that students are often uncomfortable with issues they do not want to confront).

65. Legal storytelling is an approach to persuasive writing which recognizes that effective written advocacy uses core societal values embedded in legal rules as the foundation of powerful legal stories that explain why the client should prevail. See generally Lamar Campbell, *supra* note 57.

66. See generally *id.* (addressing the value of legal storytelling in helping students overcome reservations about representing unpopular clients).

67. Camille Lamar Campbell & Olympia R. Duhart, *Persuasive Legal Writing: A Storytelling Approach* (forthcoming Feb. 2017).

68. See Pamela Hartigan, *Empathy: The Missing Link to Solving the World’s Most Pressing Problems*, HUFFINGTON POST: THE BLOG (July 10, 2013, 3:05 PM), www.huffingtonpost.com/pamela-hartigan/empathy-the-missing-link-_b_3556404.html

69. Gallacher, *supra* note 11, at 146–47.

A. *Techniques That Help Students Confront Implicit Biases*

My students' protestations about representing the client reveal their implicit biases about motherhood: "Why won't she consider petitioning for custody and stopping the relocation?" "What kind of mother puts a job before her child?" "Why does she even want to become a managing partner?" Because they are blinded by their gender-based implicit biases, my students *automatically* assume that the client is a bad mother because she is ambitious. According to researchers at the Kirwan Institute for the Study of Race and Ethnicity at the Ohio State University, implicit biases:

Affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control . . . [these implicit associations] cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance.⁷⁰

Implicit bias, also known as unconscious bias, is no longer the lexicon of human resources professionals and civil rights advocates.⁷¹ Members of the legal community are increasingly recognizing its corrosive effects on access to justice.⁷² Federal judges are leading the crusade to educate the legal community about implicit bias.⁷³ Federal District Judge Mark W. Bennett regularly speaks to members of the bench and bar about implicit biases.⁷⁴ After taking the Implicit Association Test (IAT), a measurement tools created by Project Implicit, a research consortium of researchers from Harvard University and several other prominent universities,⁷⁵ Judge Bennett was shocked to discover that he had a high implicit bias against African-Americans.⁷⁶ Ironically, Judge

70. *Understanding Implicit Bias*, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY (2015), <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> (last visited Jan. 19, 2016).

71. Howard Ross, *Proven Strategies for Addressing Unconscious Bias in the Workplace*, CDO INSIGHTS, 1, 2 (Aug. 2008), www.cookcross.com/docs/UnconsciousBias.pdf.

72. See, e.g., Lori A. Buiteweg, *Improve Our Profession with Unconscious Bias Awareness and Correction*, MICH. B. J., Nov. 2015, at 8 (recognizing the needs to acknowledge the implicit bias that is pervasive in the legal profession); see also Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 COLO. LAW 45 (May 2016) (offering steps that can be taken to reduce the harmful impact of unconscious bias).

73. ABA Criminal Justice Section, *Judge Bennett on Implicit Bias in the Courtroom*, YOUTUBE (Mar. 22, 2016), www.youtube.com/watch?v=Ge8YzKSuibY.

74. *Id.*

75. Ross, *supra* note 71, at 1.

76. *Id.*

Bennett had these biases although he is a white man who was raised by an African-American woman and who, as a practicing lawyer, often defended African-American clients.⁷⁷ Federal District Judge Ricardo Urbina, shared his personal approach for minimizing unconscious bias in a recent *Washington Post* article: “I try to see where my biases and prejudices that day are hiding If you don’t find them, they have a tendency to come out at the most unusual of times.”⁷⁸ As these testimonials indicate, *everyone* has implicit biases. In discussing their ubiquitous nature, noted author Malcolm Gladwell explained that “The giant computer that is our unconscious silently crunches all the data it can from the experiences we’ve had, the people we’ve met, the lessons we’ve learned, the books we’ve read, the movies we’ve seen, and so on, and it forms an opinion.”⁷⁹

But not all of the news about implicit bias is bad. We are not slaves to our unconscious, and stereotypes based on race, gender, age, and ethnicity can change.⁸⁰ Professor Patricia Devine, a social psychologist and prejudice expert, explains that the first step in combating implicit bias is awareness.⁸¹ She likens implicit bias to a bad habit, explaining that “Like any habit, becoming aware of the habit and being motivated to change are necessary first steps.”⁸² According to Professor Devine, people who take the first step are more likely to take the next one because awareness of prejudice promotes self-regulation.⁸³ Colleges and universities have also joined the campaign to combat implicit bias.⁸⁴ A working group of Ball State University psychology professors and students developed a series of classroom activities to combat implicit bias in high school and college students.⁸⁵ The classroom activities are extremely comprehensive, and I have synthesized several of them⁸⁶ to create

77. *Id.*

78. Del Quentin Wilber, *Judge Who Had “No Passion for Punishment” Retires After 31 Years*, WASH. POST (June 1, 2011), www.washingtonpost.com/local/crime/judge-calls-it-quits-after-31-years-sentencing-too-much-to-bear/2012/06/01/gJQA1u3F8U_story.html?utm_term=.d4f5ccd2311e.

79. Jacobowitz et al., *supra* note 2, at 31 (citing Malcolm Gladwell).

80. *Strategies to Address Unconscious Bias*, UCSF: OFFICE OF DIVERSITY & OUTREACH, <https://diversity.ucsf.edu/resources/strategies-address-unconscious-bias> (last visited Jan. 28, 2017).

81. Kevin Miller, *How to Fight Your Own Implicit Biases*, AM. ASS’N OF U. WOMEN: LEADERSHIP (Mar. 30, 2016), www.aauw.org/2016/03/30/fight-your-biases/.

82. *Id.*

83. Bridget Murray Law, *Retraining the Biased Brain*, MONITOR ON PSYCHOLOGY 42 (Oct. 2011), www.apa.org/monitor/2011/10/biased-brain.aspx.

84. *See, e.g., Understanding Implicit Bias*, *supra* note 70 (reporting an ongoing implicit bias research project at The Ohio State University).

85. *Group Activities*, BREAKING THE PREJUDICE HABIT, <http://breakingprejudice.org/teaching/group-activities/> (last visited May 11, 2017).

86. *See, e.g., Hannah Ballas & Austin Russell, Social Media Activity*, BREAKING THE PREJUDICE HABIT, <http://breakingprejudice.org/teaching/group-activities/social-media-activity/> (last visited June 27, 2017) (providing research instructions and questions of group activities to test prejudice habits); *see also* Seth Brianna Johnson,

an in-class exercise, *Mirror, Mirror, on the Wall, Who's the Fairest Mother of Them All?* This easy-to-implement thirty-minute group activity facilitates a “safe space” discussion about whether widely-available internet images reflect, create, or contribute to stereotypes and implicit biases about motherhood. I begin the exercise with a trigger warning.⁸⁷ Then, students Google images using the word “mother” and the phrase “working mother.” I instruct them to compare the images and synthesize any implicit messages about motherhood gleaned from those images. When each group is finished working, I project the images on the board and ask the following questions:⁸⁸

- Did you notice any characteristics about the “mothers” that differed from the characteristics of the “working mothers?”
- Were you able to identify any implicit messages or common themes about motherhood after comparing the images? If so, do those themes reflect your personal beliefs or those of your families and peers?

I allot ten or fifteen minutes for students to grapple with these questions and then segue into stereotypes about female lawyers:

Non-Verbal Communication Activity, BREAKING THE PREJUDICE HABIT, <http://breakingprejudice.org/teaching/group-activities/non-verbal-communication-activity/> (last visited June 27, 2017); Marli Diane Simpson & Bridget Ryan, *Physical Appearance Categorization Activity*, BREAKING THE PREJUDICE HABIT, <http://breakingprejudice.org/teaching/group-activities/physical-appearance-categorization-activity/> (last visited June 27, 2017) [hereinafter *Physical Appearance Categorization Activity*].

87. Trigger warnings are advance content that alert students to potentially disturbing course content. I typically give the following trigger warning in conjunction with this exercise: Lawyers have to often tackle emotionally charged issues such as racism, sexism, and homophobia when counseling clients. And our discussion of these issues may result in rigorous debate that may reveal your implicit biases or those held by society, your family, or your peers. Everyone has prejudices and biases, but our professional identities as prospective lawyers compel us to rigorously examine our thinking so that our biases don't exert undue influence in our decisions about the kind of clients we're willing to represent.

A comprehensive discussion of trigger warnings is outside the scope of this article. However, for a thoughtful discussion about trigger warnings see Kim D. Chanbonpin, *Crisis and Trigger Warnings: Reflections on Legal Education and the Social Value of Law*, 90 CHI.-KENT L. REV. 615 (2015).

88. These discussion questions were adapted from ones contained in Marli Diane Simpson & Bridget Ryan, *Physical Appearance Discussion Questions*, BREAKING THE PREJUDICE HABIT, <http://breakingprejudice.org/assets/AHAA/Activities/Physical%20Appearance%20Categorization%20Activity/Physical%20Appearance%20Discussion%20Questions.pdf> (last visited June 27, 2017) [hereinafter *Physical Appearance Discussion Questions*].

- What are some stereotypes about mothers who relinquish custody of their children or who work in professions that have been traditionally dominated by men?
- Do these stereotypes apply to working fathers? Should they? Why or why not?
- Does society have different expectations for male and female attorneys when it comes to work life balance? If so, what are they?

The in-class discussions are robust and reflect different opinions about how the images depict motherhood. But most students agree that the mother images are more aesthetically pleasing than the images of the working mother. The mothers were almost universally portrayed as serene, contented, and angelic. And some even bore a striking resemblance to the Virgin Mary. Women of color and women with disabilities were also notably absent in the mother images. The majority of students also agree that images of the working mothers were less aesthetically pleasing. In stark comparison to their angelic counterparts, the working mothers were portrayed as frazzled, frustrated, or distracted. Furthermore, the children in the working mother images were often portrayed as competing for their mothers' attention. When the conversation shifts to stereotypes about female lawyers, I mention the results of a 2015 Florida Bar Survey on Women in the Legal Profession which revealed that, of the 400 young female lawyers who responded to the survey, 43% reported experiencing gender bias and 42% reported difficulty balancing work and life responsibilities.⁸⁹ I solicit the students' reactions to the statistics, and several students acknowledge the pervasiveness of gender stereotypes about female lawyers. A female student who worked as paralegal before entering law school shared a story about a female lawyer in her firm who was told that she "didn't have to worry about making money and moving ahead because she would get married one day and would not have to worry about money." The student who had previously demanded to know why I was "making her" represent the client acknowledged the unfairness of trivializing the client's career aspirations simply because she is a female lawyer with a child. Another student remarked that television shows perpetuate physical and emotional stereotypes such as female attorneys wearing tight, short suits or female lawyers who, although financially successful, have strained or non-existent relationships with their children. These discussions shocked some students and resonated with others. But the exercise successfully introduced students to the universality of gender-based

89. See Staci Zaretsky, *Female Attorneys Continue to be Held Back by Gender Stereotypes*, ABOVE THE LAW (Feb. 26, 2016), <http://abovethelaw.com/2016/02/female-attorneys-continue-to-be-held-back-by-gender-stereotypes/?rf=1> (highlighting the results of a survey of female attorneys who shared their experiences with gender bias in the profession).

implicit biases about motherhood while providing them with a “safe space” to explore how implicit biases might negatively impact their client’s ability to obtain representation.

B. Visualization Techniques That Develop Empathetic Understanding

Visualization is another effective technique for stimulating empathetic understanding.⁹⁰ Visualization exercises help students move beyond their prejudices and build plausible counter-stories about why the client is entitled to relief. Clinical psychologists define visualization as “a cognitive tool accessing imagination to realize all aspects of an object, action or outcome.”⁹¹ I begin the exercise by highlighting areas of commonality. In the custodial relocation example, the most obvious commonality is the client’s profession: the students are aspiring lawyers, and the client is a lawyer. Another subtler commonality is that most first-year students have experienced the same sort of familial tensions that the client is experiencing. After exploring these commonalities in a modified Socratic dialogue, I ask questions that invite students to use their law school experiences as a scaffold for understanding the client’s dilemma:

- Are there any limits to what you would do to achieve success as a lawyer? If so, what are they?
- If you were faced with the client’s legal dilemma, how would you handle it? Assume that the client was a loved one or close friend, would that change your answer?
- What would you have to know about the client to help you understand why she voluntarily relinquished custody or why she’s not interested in petitioning the court for full custody, even if full custody would prevent a battle over the child’s relocation?

To answer these questions, students must rigorously question their assumptions that good mothers must *always* be custodial parents and that ambitious women can *never* be good mothers. More importantly, these questions, ones that emphasize what the class has in common with the client, develop empathetic understanding. Several students mention the emotional and financial sacrifices that they are making to pursue their dreams of becoming lawyers.

90. This visualization exercise is adapted from one discussed in a previous article. See Lamar Campbell, *supra* note 57.

91. Jennifer Baumgartner, *Visualize it*, PSYCHOLOGY TODAY (Nov. 8, 2011), www.psychologytoday.com/blog/the-psychology-dress/201111/visualize-it.

Another student recognized that other lawyers might judge the client in the same way that he had and that the collective weight of these judgments might negatively impact the client's ability to find a lawyer. As these vignettes demonstrate, once students make an emotional connection with the client via common interests, they are ready to "see" her story. They no longer question her ambition or condemn her decision to voluntarily relinquishing custody. Once freed from the emotional baggage of their stereotypes and implicit biases, they can see a powerful counter-story: The client is the embodiment of a good mother, a woman who decided that it was in the child's best interest for her to shoulder the financial responsibilities of parenting although that decision defies stereotypic beliefs about motherhood and subjects her to ridicule.

This visualization exercise and facilitated discussion are tailored to the custodial relocation example, but the main objective of any visualization exercise is to help students understand that, if they look hard enough, they can always find something in common with virtually anyone, even controversial clients. And common ground leads to the kind of empathetic understanding that allows students to combat stereotypes and implicit biases that prevent them from willingly representing controversial clients.

IV. CONCLUSION

"It is up to us to live up to the legacy that was left for us, and to leave a legacy that is worthy of our children and of future generations."

—Christine Gregoire⁹²

The lawyer's identity as a social engineer is Charles Hamilton Houston's legacy and the crown jewel of a profession that has historically been publicly maligned.⁹³ Given the profession's reverence for social engineering, law professors have a vested interest in equipping millennial law students—a generation with an unparalleled affinity for public service—to take the emotional weight of representing clients who have difficulty finding representation because of widely-held stereotypes rooted in their membership in historically marginalized underserved communities. Introducing first-year law students to the power of storytelling facilitates empathy, empowers them to recognize and correct their implicit biases, and increases the likelihood that they will embrace their role as social engineers.

92. *Quote from Christine Gregoire*, BRAINYQUOTE, www.brainyquote.com/quotes/quotes/c/christineg167885.html (last visited June 27, 2017).

93. *See generally* Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?* 29 SETON HALL L.R. 1405 (1999) (exhaustively describing the origins of the public's negative perceptions about lawyers).