

2002

# Emotional Competence, Multicultural Lawyering and Race

Marjorie A. Silver

*Touro Law Center*, [marjories@tourlaw.edu](mailto:marjories@tourlaw.edu)Follow this and additional works at: <http://digitalcommons.tourolaw.edu/scholarlyworks>Part of the [Jurisprudence Commons](#)

## Recommended Citation

3 Fla. Coastal L.J. 219 (2001-2002).

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [ASchwartz@tourolaw.edu](mailto:ASchwartz@tourolaw.edu).

# HEINONLINE

Citation: 3 Fla. Coastal L.J. 219 2001-2002

Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Sun Dec 19 12:26:16 2010

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=1528-056X](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1528-056X)

# Emotional Competence, Multicultural Lawyering and Race

Marjorie A. Silver\*

This is difficult work, and it is difficult for white people to discuss. It hurts emotionally for us white folks to be personally challenged on issues of race . . . and in this work, one gets challenged a lot – but that hurt cannot be even a fraction of the psychic pain of those who must face racism, sexism, and homophobia on a daily basis. So I appeal to future lawyers: challenge yourself and allow yourself to be challenged. The rewards are well worth it. We have to take every opportunity to fight racism, sexism, and homophobia, even if it, uncomfortably, means confronting that racism, sexism, and homophobia in ourselves.<sup>1</sup>

Racism is like being in the Mississippi river; if you are not actively struggling against the current, you are drifting along with it.<sup>2</sup>

## *Lawyering in a Multicultural World*

Discourse on race, racism, and racial difference is ubiquitous in American social and legal culture. In the few weeks preceding this Conference, the media was filled with news of the police shooting of an unarmed black man and ensuing race riots in Cincinnati.<sup>3</sup> Racial profiling erupted again as an issue in New Jersey.<sup>4</sup> At the same time, the United States Supreme Court restricted

---

\* Professor of Law, Touro College Law Center. I acknowledge all of those who have helped me with this work, including my research assistants Lisa Ross and Diane Balos, and the professional staff at the Touro Law Library. I thank Dr. Samuel Johnson of Baruch College for introducing me to the Teachers College Winter Roundtable on Multicultural Counseling and Education and the vast and vibrant social science literature in this area. I thank Professor Stephen Ellman for affording me the opportunity to present a precursor to this paper at the December 1, 2000 New York Law School Clinical Theory Workshop. I wish, too, to thank those who attended the presentation of this paper at the May, 2001 Second International Conference on Therapeutic Jurisprudence for their contributions. Professors Sue Bryant, Shin Imai, Michele Jacobs, and Deborah Post offered important feedback on earlier drafts. Touro Law Center Faculty Research Grants enabled my work on this paper.

<sup>1</sup> Luke Cole, *The Crisis and Opportunity in Public Interest Law: A Challenge to Law Students to be Rebellious Lawyers in the 90's*, 4 B.U. PUB. INT. L. J. 1, 6 (1994).

<sup>2</sup> William P. Quigley, *Ten Ideas for Social Justice Organizing After September 11th*, LV BLUEPRINT FOR SOCIAL JUSTICE 1 (Nov. 2001).

<sup>3</sup> See, e.g., Bob Herbert, *In America: Riots, Then and Now*, N.Y. TIMES, Apr. 19, 2001, at A25; Francis X. Clines, *Blacks in Cincinnati Hear Echoes Amid the Violence*, N. Y. TIMES, Apr. 14, 2001, at A1; Susan Vela, *Arrest Mostly of Young Males*, THE CINCINNATI ENQUIRER, Apr. 12, 2001.

<sup>4</sup> See, e.g., Laura Mansnerus, *Testimony Points to Continuing Bias on the Turnpike*, N.Y.

private rights of action under Title VI of the 1964 Civil Rights Act,<sup>5</sup> and lower federal courts in Michigan clashed on the legality of taking race into account in university admissions.<sup>6</sup>

But most American lawyers are oblivious to the impact of race on the *practice* of law. Most lawyers are white, and most white people tend not to think about race<sup>7</sup> unless it arises in the context of discrimination claims or other explicit race-related conflicts. Most lawyers are unlikely to perceive the relevance of race to *lawyering*. Lawyers approach interactions with clients with unexamined, often unconscious, assumptions that our clients do, or at least should, share our worldview. We seldom pause to think about what our own racial and cultural assumptions are, let alone whether they are generally shared.<sup>8</sup> Like birds to air and fish to water, we are unaware of the culture in

---

TIMES, Apr. 10, 2001, at B5; Iver Peterson, *Attorney General Says Better Data Led to Admission That Racial Profiling Continued*, N.Y. TIMES Apr. 5, 2001, at B5; Matthew Purdy, *Our Towns; Ignoring, and Then Embracing, the Truth About Racial Profiling*, N.Y. TIMES, Mar. 11, 2001, at 37.

<sup>5</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>6</sup> Compare *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (holding that achieving a diverse undergraduate student body was a compelling state interest) with *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (holding that achieving diversity was not a compelling state interest in law school admissions).

<sup>7</sup> See *infra* note 69. While most white people never think about their race, my conversations with people of color – or more particularly African Americans – confirm that race maintains a virtually omnipresent hold on their consciousness.

<sup>8</sup> Throughout this article I refer to both race and culture, sometimes interchangeably. Yet my focus is on cross-cultural lawyering generally and cross-racial lawyering in particular, for reasons I explain *infra* notes 47-51.

I use the term culture, to incorporate distinctions and similarities among persons that affect communication, and that make a difference in how one perceives or is perceived by others. See, e.g., Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLIN. L. REV. 65 (1997). Thus I use the term differently than do anthropologists, who have a multiplicity of definitions for the word. See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 4-5 (1973) (noting multiple definitions in CLYDE KLUCKHOHN, *MIRROR FOR MAN*, a general introduction to anthropology).

*Race*, an aspect of culture, is a social construct to which, in this country, profound consequences of historical inequality attach. See Samuel D. Johnson, Jr., *Toward Clarifying Culture, Race and Ethnicity in the Context of Multicultural Counseling*, 18 J. Multicultural Counseling and Development 41, 47 (1990) ("[W]hat people now refer to as 'race' is really a product of the culture that determines the social value of skin color in specific social contexts."). The realities of power and privilege that attach to whiteness and the realities of oppression and disadvantage that attach to color—and specifically blackness—are qualitatively and quantitatively salient.

which we function until we are transported out of that culture by travel, experience, or education.<sup>9</sup>

*Recognizing Barriers to Cross-Cultural Communication: An Illustration*

Occasionally, we are forced to face our cultural solipsism. Professor Clark Cunningham presented one such example in a 1993 article.<sup>10</sup> This incident occurred at a time when Cunningham was teaching in the criminal defense clinic at the University of Michigan. Cunningham, who is white, supervised two white male clinic students appointed to represent a black man, Dujon Johnson.<sup>11</sup> State troopers had stopped Johnson at a gas station, accusing him of having run a red light. Johnson denied the charge and questioned the reason he was detained and the authority of the officers to pat him down. Subsequently, he was given a citation for disorderly conduct.<sup>12</sup> Originally, based only on the information provided in the police incident report, Cunningham concluded that this was a routine Fourth Amendment case, an improper *Terry-stop*<sup>13</sup> that escalated into a disorderly conduct arrest. He thus formulated a theory of the case and defense strategy premised on this conclusion<sup>14</sup>

---

<sup>9</sup> Many life experiences have forced me to confront my own cultural and racial blind spots. Writing this paper has been yet another such experience. I thank especially Sue Bryant and Shin Imai. Both offered helpful feedback on an earlier draft that helped me see my difficulty in separating out the “we” that is lawyers generally, or, even more particularly, American lawyers—thus including all races and cultures—from the “we” that includes me, a white woman law professor who moves, lives, and writes within the dominant (legal) culture, and excludes those who do not. Sue and Shin deserve credit for pointing out instances in which I have lapsed, and I take full responsibility for still not getting it all right. Recognizing our own cultural encapsulation is a continuous, lifelong journey.

<sup>10</sup> Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992). I was introduced to this work through its excellent discussion in Michele Jacobs, *People from the Footnotes: the Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997), a critique of extant client-centered clinical education models from a critical race perspective.

<sup>11</sup> Cunningham notes that Johnson was “poised, articulate and likeable,” that he was “finishing his undergraduate degree at the University of Michigan and planning on getting a Master’s degree in Chinese Studies.” Cunningham, *supra* note 10, at 1311.

<sup>12</sup> *Id.* at 1303.

<sup>13</sup> *Terry v. Ohio*, 392 U.S. 1 (1968) (holding police stop-and-frisks require more than mere suspicion or hunch).

<sup>14</sup> Cunningham, *supra* at note 10, at 1308-10. “This translation appealed to my desire for a sense of moral outrage to fuel my advocacy and seemed to promise a winning strategy. Of course it had nothing to do with our client’s story—which I had not yet heard—but at the time developing a theory of the case based entirely on the police report seemed perfectly normal.”

The state troopers' report stated that Johnson had accused them of being bigots and of having made up the charges to harass him.<sup>15</sup> Ypsilanti District Court Judge John Collins, who presided at the suppression hearing, apparently concluded that Johnson was alleging racism as a defense, and, by way of demonstrating that racism could not have been a factor, observed on the record that one of the troopers was a Native American.<sup>16</sup> Judge Collins denied the defense's motion immediately after the conclusion of the testimony, and stated that the problem was Johnson's attitude:

Well, there's no doubt in my mind, this is definitely an attitude arrest and had the person not exhibited the attitude he exhibited he never would have been arrested, I think that's pretty obvious, and I don't think there's anything wrong with that. I think that officers out on the street are human subject to the same human responses that other people have, and that they react as humans react.<sup>17</sup>

It was only at this point that Cunningham realized that this was no run-of-the-mill Fourth Amendment case.<sup>18</sup> Johnson told the students that he kept asking the troopers why they had stopped him, what had he done wrong, why they were doing this, and they persistently refused to answer his

---

*Id.* at 1362.

<sup>15</sup> *Id.* at 1306. Johnson denied that he had made some of the statements contained in the police report. Although he confirmed to his student/lawyers that he had said, "I have no respect for you people," he was vague about whether he had called them bigots. "I may have said that. I don't think I said, 'you are bigots.'" *Id.* at 1311.

<sup>16</sup> *Id.* at 1313-14. "Once having stopped him, he was the author of his own problems[.] [H]e started getting, acting strange and unusual, . . . raising his hands, howling [sic] at the officers, causing a disturbance of his own making, howling [sic] racism because they stopped him for running a red light[.] I'm sure that these two officers had no clue when they saw this person run the red light, whether he was black or white or brown or red or green or any other color[.] [T]hey just didn't know and so the person was walking around with a chip on his shoulder and these officers were the object of that behavior." *Id.* at 1320. Only much later did Cunningham notice that the judge's conclusion that the officers had probably not even noticed Johnson's race was belied by one of the trooper's statements that he had observed the driver of the vehicle look over at the patrol unit. *Id.* at 1375.

<sup>17</sup> *Id.* at 1320.

<sup>18</sup> *Id.* at 1322. In fact, it was only in discussing this case as part of a symposium presentation, with coaching from academics such as Derrick Bell, that Cunningham was really able to focus on the "real" story. *Id.* at 1322, 1325-26. Bell said that this case, as well as two others Cunningham discussed, was really about clients trying to retain their identity and their dignity. *Id.* at 1326. Bell "was sure that the 'problem' was a very familiar one: our client got in trouble simply because he was viewed as 'an uppity nigger.'" *Id.* at 1368. Thus, for a black man, this perhaps was a run-of-the-mill Fourth Amendment case.

questions.<sup>19</sup> Cunningham began to appreciate how the incident had been an assault on Johnson's dignity, how the officers had failed to show respect for Johnson as a human being. So Cunningham and his students endeavored to translate their client's story into a compelling legal narrative that would convey that the attitude problem was that of the police, not their client.<sup>20</sup>

Cunningham perceived that the (white) judge's racial attitudes affected what transpired in his courtroom, just as the troopers' racial attitudes had affected what transpired during the stop and arrest. What Cunningham remained oblivious to, however, was how his own racial attitudes and those of the student/lawyers affected their perceptions of what occurred.<sup>21</sup>

At some point during the period between the two hearings on the suppression motion, Cunningham learned that during Johnson's arraignment (before Cunningham and the students had been appointed to the case), the prosecutor had offered him a deal. The state would dismiss the complaint if Johnson would agree to pay court costs of fifty dollars. Johnson refused.<sup>22</sup> Cunningham, however, had not focused on the implications of this until after the judge's denial of their suppression motion.<sup>23</sup> Only then did he seem to understand that Johnson obviously wanted something more than having the misdemeanor charge disappear; he wanted his name cleared, his reputation restored.<sup>24</sup> So with his client's agreement, Cunningham planned to have

---

<sup>19</sup> *Id.* at 1322-24.

<sup>20</sup> *Id.* at 1324-25.

When I reviewed the videotape of Johnson's interview before the trial date, the judge's key phrase 'attitude ticket' alerted me to a correlative key word in Johnson's narrative: respect. He referred to himself as a 'respectable person' and made a careful distinction between respecting authority and not respecting the abuse of authority. I thus interpreted his narrative as being about the troopers' failure to give him the respect he deserved and his appropriate refusal to accord them the respect they wrongfully demanded: a problem of attitudes. *Id.* at 1366.

<sup>21</sup> "As best as I can recall, I had from the outset a common-sense impression that what happened that night was a 'racial incident,' but as a lawyer I did not talk about 'the case' that way, and therefore I ceased to think in terms of racial issues as our various translations shaped and limited our shifting understanding of what was legally relevant." *Id.* at 1370-71.

<sup>22</sup> *Id.* at 1326.

<sup>23</sup> Cunningham reports the rejected deal in his narrative after his description of what transpired at the symposium in conversation with Derrick Bell and others. *Id.*

<sup>24</sup> *Id.* "I would like to have my reputation restored, and my dignity. The inconvenience can't be corrected . . . It's my honor, my name. I feel violated. They tarnished my name." *Id.*

Johnson cross-examine the offending officer at trial. Cunningham was hoping thereby to in some measure replicate for the jury the experience of the encounter as it had occurred for Johnson on the night of the arrest, “hoping that the trial itself could potentially provide the relief Johnson sought: the restoration of his dignity.”<sup>25</sup>

On the first day of trial, however, the prosecutor moved to dismiss—over the protest of the arresting troopers—informing the court that he did not deem it worth the taxpayers’ money to proceed with such a minor case.<sup>26</sup> The judge responded:

We give a man a badge and a gun and a bunch of training and put him out on the street, we have to assume that they have some discretion and give them some discretion to operate. I think this was an attitude ticket. We see a lot of attitude tickets and um, no question about it. If the person had behaved in a different manner the ticket would never have happened and I don’t find fault with the Prosecutor in bringing it, I don’t find fault with the Prosecutor in dismissing it.<sup>27</sup>

The judge then turned to the students:

As a practical matter there are very few people that would have spent the kind of time and effort and legal talent to fight, as the Prosecutor has pointed out, a fifty-dollar attitude ticket. Very few people would have gone through the effort you did. But it’s a great experience for you.<sup>28</sup>

---

<sup>25</sup> *Id.* at 1327.

Cunningham hoped it would occur for the jury somewhat as follows: Observe Dujon Johnson as he asks the trooper to explain his actions; he was doing the same thing that night. Today he stands behind a podium with the force of this court behind him as he asks his questions; therefore, he receives answers. That night he stood with only his own courage behind him; therefore, he received no answers, only orders to submit to arbitrary authority. Today he receives the respect to which all free citizens in a democracy are entitled; he deserved no less that night. *Id.*

<sup>26</sup> *Id.* at 1328.

<sup>27</sup> *Id.* at 1329.

<sup>28</sup> *Id.*



Cunningham and the students may have been pleased to have the case dismissed, but their client wasn't. Rather than feeling any kind of relief, Johnson was furious. He had never had the opportunity to tell his story in court. The judge had never accorded him the respect and affability that he accorded other participants in the case.<sup>29</sup>

Although Cunningham was not surprised at Johnson's response, he was taken aback by the anger Johnson directed at Cunningham and the students. Johnson was seemingly as angry about the representation they provided him as he was about his treatment at the hands of the state troopers. He leveled the same complaint at all the players in this legal controversy: none of them had treated him as an equal, as a human being entitled to the same measure of respect accorded other, white, human beings. Johnson had experienced his lawyers as patronizing, as the "adults" treating him like the "child."<sup>30</sup> Johnson's greatest anger, however, was reserved for Cunningham:

You're the kind of person who usually does the most harm. You have a guardian mentality, assume that you know the answer. You presume you know the needs and the answers. Oversensitivity. Patronizing. All the power is vested in you. I think you may go too far, assuming that you would know the answer.<sup>31</sup>

---

<sup>29</sup> *Id.* at 1387. What struck me most about the judge is that he seemed so compassionate [to the other parties in other cases I observed] in the 10 months or so that I came to the courthouse waiting for hearing after hearing to be rescheduled. I never saw this compassion, I never received the "I have been there before, I can relate" talks that he frequently gave to those who came before him. *See id.* Cunningham formed a similar impression that the judge had a folksy manner with most of the litigants who appeared before him, and seemed to have a personal acquaintance with many of the parties. *Id.* at 1313. However, during much of Johnson's testimony at the suppression hearing, Judge Collins had his chair turned away from Johnson, and the judge seemed to be paying little attention to Johnson's testimony. *Id.*

<sup>30</sup> *Id.* at 1329-30. Cunningham later writes that "[a]t the time and for months thereafter I did not think about those comments, perhaps because I did not understand them, perhaps because it was too painful to try and understand them. *Id.* at 1381.

<sup>31</sup> *Id.* at 1330. Only when Johnson later contacted him did Cunningham come to appreciate what was patronizing about the representation. In the draft of his article that Cunningham sent Johnson to read, he had changed Johnson's name and other potentially identifying information. He asked Johnson whether he wished it to remain so, or whether he would prefer that Cunningham use his real name. Johnson called to say that not only did Cunningham have permission to use his real name, he insisted that he do so. "If my name is not used I would be a non-person again. [During the case] I was talked over, I was talked through. [In the version of the Article sent to him] I still don't exist. I want to be identified. This anonymity has to end somewhere; I was anonymous in the courtroom'. . . . [Cunningham writes] it had never occurred to me (nor do I think it would occur to most attorneys) that my

The rage that Johnson, the black client directed at Cunningham, his white lawyer, engendered serious introspection and self-questioning. Cunningham presented Johnson's case to many audiences in the months and years that followed, and eventually wrote about it in the article that has precipitated my own rather lengthy discussion of the matter.

Seventy pages into his ninety-page article, Cunningham introduces a detail from Johnson's account of what happened that he had previously overlooked. In his initial interview with the students, Johnson had told them how he had been having problems with the clutch on his car. The only way he could shift gears was by turning the car off. He had just picked up some hydraulic oil and was planning on putting it in when he next got gas. He was headed to the gas station the night of the incident. "And there was a flashing red light. I turned the car off . . . . Came to a complete stop." It was because of the clutch problems that Johnson was so certain that he had stopped at the light, the light the troopers accused him of running. And since in his view it had to be apparent to the troopers that he had come to a full stop, Johnson understandably believed that they must have had some other reason for stopping him.<sup>32</sup>

One of the troopers had claimed that the night of the arrest, Johnson had said that "the only reason we stopped him was because he was black."

Yet at no point during the entire 50 minute initial interview, nor later during our representation, did Dujon Johnson tell us that he thought the trooper stopped him because he was black or otherwise claim that their actions were motivated by racism. Indeed, he did not even volunteer the information that the troopers were white; the students asked that question on their own initiative. I believe that Judge Collins introduced the actual word 'racism' first into the language of the case when he described our client as 'hollering racism' in his exchange with the troopers. I find it telling that the two-page statement of facts written by the students after the initial interview not only did not mention a possible issue of racism, but also did not even indicate that our client was black.<sup>33</sup>

---

client might be upset by this removal of his identity from a recounting of 'his' case—a striking example of apparent paternalism operating below the threshold of awareness." *Id.* at 1383-84.

<sup>32</sup> *Id.* at 1368-70.

<sup>33</sup> *Id.* at 1370. When Cunningham asked Johnson about this later on, Johnson responded: I did not tell you it was a racial issue, although I knew from the very beginning that it was (my arrest) racially motivated. I would have confided this, but who would

In no small measure thanks to Johnson writing to him two years later, Cunningham attained a greater understanding of the difficulty of communication across the racial divide that separated him (and the students) from Johnson, and separated all of them from the police and the judge:

Because I did not realize the force of the language describing what happened as a "routine traffic stop," I also failed to appreciate the significance of the word "ticket" when I seized upon Judge Collins's phrase "attitude ticket." Instead, I just focused on the word "attitude." But the "ticket" aspect of his translation set us up for the devastating day of trial by trivializing what had happened. What we viewed as criminal prosecution, and what Johnson viewed as a serious assault on his dignity, the troopers, the prosecutor, and the judge viewed as a ticket.<sup>34</sup>

Cunningham uses Johnson's story as a model to explore the complexity of the task lawyers face in translating their stories into a legal framework.<sup>35</sup> What comes across forcefully in Cunningham's account is how

---

have believed me anyway. I felt that on the basis of law itself that I did not have to interject the aspect of racial bias. I knew, legally, that [the state trooper's] actions were wrong. And I felt I had taken the higher moral and legal ground. *Id.* at 1385.

<sup>34</sup> *Id.* at 1372.

<sup>35</sup> Informed by the work of Peggy Davis, an African-American law professor, and others, Cunningham remarked on the inadequacy of our language in capturing the indignities, big and small, that assault people of color and impede cross-racial communication:

When a white person hears a black person use a word like "racist," the response is often a strong defensive reaction that implicitly says to the black person, "prove it!" And the standards of proof are those white people are comfortable with: evidence of conscious racial animus, intent to harm and degrade.

The possibility of such narrow meaning for the word "racist" has caused some scholars to introduce a new word, "racialist," to describe judgments and actions controlled by racial stereotypes without adopting an accusatory tone. Peggy Davis explains how racial stereotypes produce countless acts of "microaggression" by whites against blacks under circumstances where whites will vigorously deny the influence of race.

"[Microaggressions] are subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders." Psychiatrists who have studied black populations view them as "incessant and cumulative" assaults on black self-esteem . . . . Management of these assaults is a preoccupying activity, simultaneously necessary

difficult it is to communicate across the cultural divides of race and privilege. Despite the best of intentions, despite all of his professional training and experience, Cunningham was oblivious to the scope and depth of his client's racial experience, of what it was for Dujon Johnson to be represented by three white men and to be caught up in a process in which all of the white participants possessed power over his fate; to be a strong, intelligent, astute black man, and yet experience powerlessness. It is the rare lawyer who would have spent the time Cunningham spent, subjecting himself to the discomfort – pain perhaps – of analyzing what went wrong. Most lawyers—at least most white lawyers—would never have had an honest conversation with their clients about what it felt like to be represented by someone of a different race, a different social and economic class, a different culture. Yet as the story of Clark Cunningham and Dujon Johnson reveals, it is critically important that lawyers learn to communicate openly and effectively across cultural and racial divides.<sup>36</sup> The failure to effectively navigate these divides risks obfuscation of the client's interests and impairment of the representation. Understanding

---

to and disruptive of black adaptation . . . . The microaggressive acts that characterize interracial encounters are carried out in “automatic, preconscious, or unconscious fashion” and “stem from the mental attitude of presumed superiority. *Id.* at 1378. (citing Peggy C. Davis, *Law as Microaggression*, 98 YALE L. J. 1559, 1565-6 (1989) (citations omitted)).

<sup>36</sup> Once again I am painfully aware that my white privileged perspective colors my interpretation of Cunningham's experience.

[I]n the final analysis, don't we have to acknowledge that many African-Americans and other persons of color, admittedly not all, would have heard resonances in Johnson's story that were lost to Cunningham and even more likely lost to other, less multiculturally competent, White persons?

\* \* \*

Cunningham has failed, in my opinion, to account for the situatedness of the Outsider lawyer. His analysis essentializes not only the client, through his own admission, but also the potential readers of his article. My [that is, Professor Montoya's] relation to the undertaking of translation is considerably different from that of the white male who fully participates in, and is privileged by, the majoritarian culture. See Melissa Harrison & Margaret E. Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 420-21 (1996).

Whatever Professor Cunningham may have failed in doing, he has certainly succeeded in provoking extensive contemplation of the complexities of multicultural understanding.

unconscious racism and the dynamics of privilege, learning how to recognize it in ourselves and others, is an important step in the successful crossing.

### *Shifting Demographics and Multicultural Competence: The Potency of Race*

Until relatively recently many, perhaps most, American lawyers could easily survive professionally and personally without multicultural consciousness. Many, if not most, functioned in a predominantly white legal culture. Most law firms were inhabited overwhelmingly by white male attorneys, as were their client bases. But the demographics of this country have been changing dramatically. According to 1999 Census Bureau figures, forty percent of New York City residents are foreign-born.<sup>37</sup> Nearly half of the nation's 100 largest cities are home to more minorities than whites.<sup>38</sup> It is expected that in 2001, California will become the first major state in which whites will be in the minority.<sup>39</sup> In the not too distant future, a majority of this nation may well consist of people of color.<sup>40</sup> For lawyers—as for other professionals<sup>41</sup>—achieving multicultural competence is no longer optional. It is increasingly a business as well as a professional and moral imperative.<sup>42</sup> In

<sup>37</sup> Bruce Lambert, *40 Percent in New York Born Abroad*, N. Y. TIMES, July 24, 2000 at B1.

<sup>38</sup> Eric Schmitt, *Whites in Minority in Largest Cities, the Census Shows*, N. Y. TIMES, Apr. 30, 2001 at A1.

<sup>39</sup> Todd S. Purdum, *Soon to Become the Newest U.S. Minority – Whites in California*, INT'L HERALD, July 5, 2000, at 1.

<sup>40</sup> See, e.g., Burnele V. Powell, *Somewhere Farther Down the Line: MacCrate on Multiculturalism and the Information Age*, 69 WASH. L. REV. 637, 640 (1994) (citing census projections predicting majority of U.S. workers by 2010 to be persons of color); SYMPOSIUM: *Session 3: Mobilizing Creative Problem Solvers*, 37 CAL. W. L. REV. 83, 94 (noting that population to reach close to 40 % persons of color in next 30 to 50 years).

<sup>41</sup> The American Psychological Association recognized this imperative over a quarter of a century ago. See ANTHONY J. MARSELLA & PAUL B. PEDERSEN, *CROSS-CULTURAL COUNSELING AND PSYCHOTHERAPY* 16 (1981) (describing the recommendations of the APA's 1973 Vail Conference on Clinical Psychology).

[K]nowledge of the cultures of one's clientele has been elevated to an ethical imperative. Henceforth, doing therapy or counseling without cultural sensitivity, knowledge, or awareness is not just problematic, it has been declared unethical. The implication of these recommendations is that the knowledge on therapy and culture has ceased being an esoteric field; instead, it has become a matter of direct and practical concern for the vast majority of clinical—and by implication, counseling—psychologists in the pluralistic culture of the United States. *Id.*

<sup>42</sup> See, e.g., Patricia McKeown, *Diversity in the Workplace: What Does It Mean for Your Bottom Line?*, 67 WIS. LAW. 10 (1994); SYMPOSIUM, *Creative Problem Solving Conference*

this new millennium, multicultural competence is an essential component of good legal practice. But acquiring multicultural competence requires facing discomforting truths about ourselves and our society, especially for those of us who enjoy the privileges of the dominant culture.<sup>43</sup>

Learning about another culture's customs is only one component of multicultural competence. Acquiring such competence also requires a deliberate exploration of the deeply rooted cultural assumptions that claim us. This, in turn, requires an exploration of our own biases and stereotypes about individuals and groups different from ourselves. Such intrapersonal exploration is often extremely uncomfortable.

In the broad use of the term,<sup>44</sup> all lawyering is cross-cultural,<sup>45</sup> yet few lawyers perceive it as such. Moreover, culture exists at various levels of experience. While the cultural differences between an American and a Japanese businessman may be rather obvious, cultural differences between others are less so. The culture of an Orthodox Jew differs from the culture of a Reform Jew.

---

*Transcript Excerpt: Session 3: Mobilizing Creative Problem Solvers*, 37 CAL. W. L. REV. 83, 93 (2000). Most companies, many businesses are international. We have a globally connected economy, and if you don't prepare them for a world where there are tremendous amounts of diversity out there, lots of different ways of doing things, many different approaches, again, you are not giving them a competitive advantage that will be useful to them, and I think that's important for law schools, as academically inclined as they are, to be aware of. *Id.* See also Jacob H. Herring, *Diversity in the Workplace*, SAN FRANCISCO ATTORNEY (Oct./Nov. 1992) (describing advances made by Fortune 100 companies in achieving diversity among workforce as compared to law firms). Cf. David Cole, *Rainbow School Colors*, THE NATION, Apr. 16, 2001, at 23. One thing is certain: The argument for diversity finds virtually universal acceptance in academe. More than 360 higher education institutions signed on to briefs defending the University of Michigan's affirmative action program. *And for good reason: In our increasingly diverse society, the ability to communicate and understand across racial lines is an essential part of citizenship, and teaching that skill requires a diverse setting* (emphasis added). *Id.*

<sup>43</sup> See Harrison & Montoya, *supra* note 36, at 417 (Cunningham "neglects to consider that the reactions and tasks for the Insider lawyer may be different than those for the Outsider lawyer.").

<sup>44</sup> See *supra* note 8.

<sup>45</sup> See Paul Pedersen, *Ten Frequent Assumptions of Cultural Bias in Counseling*, 15 JOURNAL OF MULTICULTURAL COUNSELING AND DEVELOPMENT 16, 23 (1987) ("All counseling is, to a greater or lesser extent, cross-cultural."). See also SUE BRYANT & JEAN KOH PETERS, *FIVE HABITS FOR CROSS-CULTURAL LAWYERING: A WORK IN PROGRESS 1* ("Practicing law is often a cross-cultural experience."). Cf. DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 42 (1990) ("[C]ommunication between men and women can be like cross-cultural communication, prey to a clash of conversational styles.").

The culture of a Muslim male differs from that of a Muslim female. The culture of a Catholic gay man is not the same as that of a Catholic heterosexual male. That of a sixty-year-old gay man is not the same as that of a twenty-year-old gay man. And so on. Any differences that exist between the lawyer and her client may exacerbate the power imbalance inherent in the relationship.<sup>46</sup> These differences threaten to create barriers to effective communication and may impair the attorney/client relationship.

But no aspect of diversity creates challenges as intractable as that of race. Race in America is the most salient, the most toxic of all areas of difference. The equalization of legal rights among races has done little to eradicate the social and psychological stigma that has long saturated our collective unconscious.<sup>47</sup> Regardless of our race, unexamined, frequently unconscious, biases affect our reactions to skin color.<sup>48</sup> Race insidiously infects individual and organizational decision-making.<sup>49</sup> Stereotypes that those of us in the dominant culture often dare not even admit to ourselves find validation in idiosyncratic experiences.<sup>50</sup> Stereotype threat undermines academic performance by black men and women.<sup>51</sup>

---

<sup>46</sup> See Marjorie A. Silver, *Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLIN. L. REV. 259, 260-61 (hereinafter "Love & Hate").

<sup>47</sup> The New York Times series, *How Race is Live in America*, that ran in 2000 successfully captured the interpersonal complexities of our multiracial society. See, e.g., *Talking About Race*, THE N. Y. TIMES MAGAZINE, July 16, 2000.

<sup>48</sup> See, e.g., recent studies by neuroscientists confirming unconscious responses based on race. For example, in an "implicit association" study conducted by Yale University researchers, black and white subjects were exposed to images of black and white faces and asked to classify words flashing on the screen simultaneously as either "good" or "bad." The majority of white subjects and half of black subjects more frequently associated words with positive connotations (such as love, peace, joy) with white faces and negative words (such as bomb, devil, cancer) with black faces. People who consciously profess to be personally and politically opposed to racism often find the results of their tests to be extremely disturbing. David Berreby, *How, But Not Why, the Brain Distinguishes Race*, N. Y. TIMES, Sept. 5, 2000, at F3.

<sup>49</sup> See Anne C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415 (2000); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STANFORD L. REV. 1161 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STANFORD L. REV. 317 (1987).

<sup>50</sup> See, e.g., REBECCA GILMAN, SPINNING INTO BUTTER 75-76 (2000).

<sup>51</sup> See Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, ATLANTIC MONTHLY, Aug. 1999 (describing studies demonstrating that black students told that a test measures ability will perform less well than when informed that ability makes no difference); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test*

## *The Smog We Breathe*

Few of us want to admit to being racists. Although white Americans hold differing views on how much racism persists today, most of us consider ourselves, if not our neighbors, free of racism. We deny complicity in a racist society. We deny ownership of racial stereotypes. Our shame about our own racist impulses creates deep resistance to self-awareness.<sup>52</sup> Yet racism persists, insidiously, perniciously, and largely beneath our consciousness.<sup>53</sup>

---

*Performance of African Americans*, 69 J. PERS. & SOC. PSYCH. 797 (1995).

<sup>52</sup> Lawrence, *supra* note 49, at 322. (“[T]he human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right.”).

The difficulty in grappling with our internalized racism is illustrated by Professor Cunningham in writing about the Johnson case. Although Cunningham claimed an intellectual understanding of unconscious racism, he struggled in his attempts to write about it:

Was the context that made my client’s experience understandable as a “racial incident” as invisible to me, the student attorneys, and the white judge as the air we breathed? How then could I understand Johnson well enough to even attempt to translate his story to other white Americans? What in my own experience could I possibly draw upon? Many times I approached this question in writing this Article: my fingers grew still on the computer keyboard, and I eventually moved to a different part of the Article. But in reviewing my notes of that painful meeting with Johnson on the day the case was dismissed I may have found a possible bridge: my own experience of representing Dujon Johnson. Cunningham, *supra* note 10, at 1381.

<sup>53</sup> Cunningham was ultimately able to see why Johnson experienced his treatment by his lawyers as similar to his treatment by the state troopers, *see supra* text at note 34, and why, perhaps, it had been so difficult for Johnson to talk about it while the case proceeded:

Perhaps Johnson realized the risk that, like Trooper Kiser and Judge Collins, we might interpret his complaints about being treated differently as a strong accusation of being racist, “racist” as the word is understood by white Americans. Recognizing the gap, he told us, “I never said you were racist.” Instead, he urged us to admit that we were different from him and therefore were necessarily going to treat him differently. He asked that we be sensitive to the differences and adjust what we said and did accordingly . . . [He said something akin to] What’s wrong with realizing that different people have different needs? You wouldn’t say ‘Hi’ to someone you know doesn’t speak English. You wouldn’t say ‘let’s run over to the store,’ to someone who doesn’t have legs. If both parties are making an effort, there eventually will be a consensus about how to deal with the solution, about how to communicate.



If we can perceive racism as inevitable, rather than evil, we might find it less threatening to recognize the ways in which race encapsulates us. Dean Beverly Tatum addresses this in her book, *Why Are All the Black Kids Sitting Together in the Cafeteria and Other Conversations About Race*.<sup>54</sup>

I assume that we all have prejudices, not because we want them, but simply because we are so continually exposed to misinformation about others. . . . Prejudice is one of the inescapable consequences of living in a racist society . . . . None of us would introduce ourselves as 'smog breathers' (and most of us don't want to be described as prejudiced), but if we live in a smoggy place, how can we avoid breathing the air? . . . When we claim to be free of prejudice, perhaps what we are really saying is that we are not hate-mongers.<sup>55</sup>

If, however, we have never known anything other than smog, then it will be difficult to recognize it. So with racism. It is an underpinning of our culture and we are largely inured from recognizing its existence in ourselves, and in our society. Birds to air. Fish to water.

---

*Id.* at 1382.

<sup>54</sup> BEVERLY TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?" AND OTHER CONVERSATIONS ABOUT RACE (1997).

<sup>55</sup> *Id.* at 6; See Lawrence, *supra* note 49, at 321, 326:

Much of one's inability to know racial discrimination when one sees it results from a failure to recognize that racism is both a crime and a disease. The failure is compounded by a reluctance to admit that the illness of racism infects almost everyone. Acknowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure. But the diagnosis is difficult, because our own contamination with the very illness for which a cure is sought impairs our comprehension of the disorder.

\* \* \*

We cannot be individually blamed for unconsciously harboring attitudes that are inescapable in a culture permeated with racism. And without the necessity for blame, our resistance to accepting the need and responsibility for remedy will be lessened. *Id.*

As Professor Charles Lawrence wrote in his pathbreaking 1987 article on the relationship between unconscious racism and equal protection doctrine:

The theory of cognitive psychology states that the culture—including, for example, the media and an individual's parents, peers and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings. Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. *These tacit understandings, because they have never been articulated are less likely to be experienced at a conscious level.*<sup>56</sup>

Much of what affects our behavior is rooted in the unconscious. Making the unconscious conscious empowers us to act purposefully. We may have greater access, however, to uncovering some aspects of our unconscious than we do to accessing our racism, both because of the shame we experience when racist thoughts rise to consciousness,<sup>57</sup> and because racism is so ingrained in our culture.

---

<sup>56</sup> Lawrence, *supra* note 49, at 323 (emphasis added).

<sup>57</sup> I have known that shame. I had long been aware that despite my deeply held social and political commitment to fighting racism and discrimination, that, from time to time, *I experienced racist thoughts*. When these thoughts invaded my consciousness, I pushed them away with shame and repulsion. But they were there, and they were mine.

Somewhat over a decade ago, I read Chuck Lawrence's extraordinary article, *supra*, note 49, and it was as if I had opened the door and let some light into a locked, stuffy closet. I was profoundly affected by Lawrence's explanation of the unconscious basis for the disease of racism. This empowered me to experience racist thoughts as unwelcome visitors, challenges to be recognized and eviscerated, rather than as catalysts for shame and self-deprecation. I stopped berating myself for being so conscious of racial differences. Such thoughts no longer threatened my sense of personal integrity; they did not mean that I was less of a human being. I was inevitably complicit in the system, as Lawrence and Tatum suggest, but my complicity no longer limited me. *See also* Davis, *supra* note 35, at 1560 ("The work of Professor Charles Lawrence has sensitized legal scholars to basic psychological facts about race and perception.").

Most of us avoid discussions about race because such discussions are uncomfortable, feelings get hurt, and people get angry. But if we can no longer avoid the salience of race in the attorney/client relationship, what can we do to enhance the possibility of positive outcomes and to minimize the likelihood that race or other differences will create obstacles to good lawyering—or worse?

### *Lessons from the Social Scientists*

We are not without resources. Much can be learned from the social science literature on multicultural and anti-racism counseling. In their important text on the subject, *Counseling the Culturally Different*,<sup>58</sup> for example, Derald Wing Sue and his brother David Sue, document the failure of traditional counseling theory and practice to address the needs of minority populations. The book proposes concrete strategies for remedying this failure.

The first step in addressing the problem is the recognition that race plays a role in what both the counselor and the client bring to the relationship. In the context of the climate of racism that has historically and currently permeates American society, the culturally different client is inclined to anticipate assistance from a member of the majority culture with a significant dose of skepticism.<sup>59</sup> “What makes you, a counselor/therapist<sup>60</sup>, any different from all the others out there who have oppressed and discriminated against me?”<sup>61</sup> How do we answer?

To say that we have somehow escaped our racist upbringing, that we are not perpetrators of racism, or that the racial climate is improving is to deny reality. As mental health professionals,<sup>62</sup> we have a personal and professional responsibility to (a) confront, become aware of, and take actions in dealing with our biases, stereotypes, values, and assumptions about human behavior, (b) become aware of the culturally

---

<sup>58</sup> DERALD WING SUE & DAVID SUE, *COUNSELING THE CULTURALLY DIFFERENT: THEORY AND PRACTICE* (2d. ed. 1990).

<sup>59</sup> See *id.* at 5.

<sup>60</sup> Or counselor/lawyer.

<sup>61</sup> SUE & SUE, *supra* note 58, at 6.

<sup>62</sup> Or as lawyers.

different client's world view, values, biases, and assumptions about human behavior, and (c) develop appropriate help-giving practices, intervention strategies, and structures that take into account the historical, cultural, and environmental experiences/influences of the culturally different client.<sup>63</sup>

Sue and Sue describe numerous studies documenting minorities' underutilization of mental health services. Additionally, they note studies demonstrating that more than half of minority clients terminate counseling and therapy after just one visit, as compared to less than a 30% termination rate for white clients.<sup>64</sup> It would hardly be surprising to discover that similar patterns exist with respect to utilization of legal services. Are whites more likely than minorities to use lawyers when they are involved in disputes? Do minorities consult legal counsel for transactional or planning purposes at a similar rate to whites? I suggest this as a fertile area for empirical study.<sup>65</sup>

Are minority clients benefiting from movements such as preventive lawyering,<sup>66</sup> creative problem solving<sup>67</sup> and Therapeutic Jurisprudence<sup>68</sup> to the same or a lesser degree than whites? Are minority attorneys participating in such movements in any significant degree? I could not help but note that among the participants and presenters at the Conference, there were few non-white faces, despite attendance by a number of participants from other

---

<sup>63</sup> SUE & SUE, *supra* note 58, at 6.

<sup>64</sup> *Id.* at 7. See also Jacobs, *supra* note 10, at 384-87 (discussing results of similar studies).

<sup>65</sup> This raises as well questions about the comparative quality of representation of minority and non-minority client populations. I have been unable to find any empirical study on either quantity or quality of utilization of lawyers' services among minorities. See Jacobs, *supra* note 10, at 383 ("To date, there have been no empirical studies which seek to determine how the perceptions of white law students impact on their ability to represent clients of color . . ."). Jacobs reports, however, on empirical work in other fields supporting the conclusion that unconscious racism negatively affects interactions between white physicians and black patients and white employers and black applicants. *Id.* at 378-83. Jacobs, too, advocates for empirical study to identify difficulties in student/lawyer-client interactions. *Id.* at 406-07.

<sup>66</sup> See, e.g., Dennis P. Stolle, David B. Wexler, Bruce J. Winick, Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in DENNIS P. STOLLE, DAVID B. WEXLER, BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 5, 6-7 (2000).

<sup>67</sup> See, e.g., SYMPOSIUM, *Towards a New Architecture: Creative Problem Solving and the Evolution of Law*, 34 CAL. W. L. REV. 351 (1998).

<sup>68</sup> See, e.g., Stolle et al., *supra* note 66, at 7-9.

countries. If these movements that seem to hold such promise of transforming law into a healing profession are to make a meaningful difference in the *status quo*, we who support them must self-consciously reach out across racial divides. We must both figure out why we have so far not succeeded in doing so, and how to overcome this failing. And we must be open to the possibility that the contributions of lawyers, psychologists, social workers, and clients from a multiplicity of racial groups may transform our understanding of what it means to practice law as a profession of healing. We must be open to the possibility that by embracing diverse perspectives, our very notion of transformation may be altered.

### *Learning Multicultural Competence: The Challenges for Legal Education*

Sue and Sue argue the critical importance of an anti-racism training component for counselors:

While cognitive understanding and counseling-skill training are important, what is missing for the trainee is self-exploration of one's own racism. Without a strong antiracism training component, trainees (especially Whites<sup>69</sup>) will continue to deny responsibility for the racist

---

<sup>69</sup> See SUE & SUE, *supra* note 58, at 114 (describing conformity stage in white racial identity development).

The White person's attitudes and beliefs in this stage are very ethnocentric. *There is minimal awareness of the self as a racial being* and a belief in the universality of values and norm-governing behavior. There is limited accurate knowledge of other ethnic groups, but a great deal of adherence to social stereotypes. . . . Consciously or unconsciously, the White person believes that White culture is the most highly developed, and all others are 'primitive' or inferior. The conformity stage is marked by contradictory and oftentimes compartmentalized attitudes, beliefs, and behaviors. On the one hand a person may believe that he or she is not racist, yet believe that minority inferiority justifies discriminatory and inferior treatment; that minority persons are different and deviant, yet believe that 'people are people' and that differences are unimportant. Like their minority counterparts at this stage, the primary mechanism operating here is one of denial and compartmentalization. For example, *many Whites deny that they belong to a race.* (citations omitted) (emphasis added). *Id.*

See also JANET E. HELMS, A RACE IS A NICE THING TO HAVE: A GUIDE TO BEING A WHITE PERSON OR UNDERSTANDING THE WHITE PERSONS IN YOUR LIFE (1992) ("White people have difficulty accepting that they have a race").

system that oppresses their minority clients. Thus, White trainees may continue to view racism from an intellectual perspective that allows them to distance themselves from the true meaning of cross-cultural work.<sup>70</sup>

Virtually all lawyers are counselors. As such, Sue & Sue's prescription speaks to the needs of our profession as it does to the counseling profession.<sup>71</sup> And while it is unrealistic to expect most lawyers to train as extensively, to delve as deeply, into psychology as education and mental health counselors are required to, some degree of deliberate self-examination and cultural awareness is essential for the good lawyer to be a good counselor.

I borrow here from Sue & Sue, adapting their prescriptions for the "culturally skilled counselor" as goals for the "culturally skilled lawyer:"

1. The culturally skilled lawyer is one who has moved from being culturally unaware to being aware and sensitive to her own cultural heritage and to valuing and respecting differences.
2. The culturally skilled lawyer is aware of his own values and biases, and how they may affect minority clients.
3. Culturally skilled lawyers are comfortable with differences that exist between themselves and their clients in terms of race and beliefs.

---

<sup>70</sup> *Id.* at 15 (citations omitted). See also Juris G. Draguns, *Cross-Cultural Counseling and Psychotherapy: History, Issues, Current Status*, in ANTHONY J. MARSELLA & PAUL B. PEDERSEN, *CROSS-CULTURAL COUNSELING AND PSYCHOTHERAPY* 3, 8 (1981) (noting consensus among several recent writers as to strong countertransference reaction in therapists doing cross-cultural counseling. "Thus, therapists undertaking to treat members of minority groups should approach this task with a maximum of self-awareness and be prepared to deal with their own distortions of the therapy experience and relationship.").

<sup>71</sup> As Jacobs points out, lawyers and mental health professionals develop confidential relationships with their clients/patients. For these relationships to succeed, a level of trust must be established. Jacobs, *supra*, note 10, at 374.

4. The culturally skilled lawyer is sensitive to circumstances (personal biases, stage of ethnic identity, sociopolitical influences, etc.) that may dictate referral of the minority client to a member of her own race/culture or to another lawyer in general.
5. The culturally skilled lawyer acknowledges and is aware of his own racist attitudes, beliefs and feelings.<sup>72</sup>

How much of this is it realistic to teach—or expect our students to learn—in law school? A proponent of multicultural training in law school can expect numerous obstacles. One is that of the already overburdened curriculum. We can anticipate the usual resistance from colleagues preoccupied with concerns over coverage.<sup>73</sup> Two, students and colleagues are likely to view such training with a hefty dose of skepticism. While multiculturalism and racial identity development may now be a central component of basic education in schools training educators and counselors, such training is foreign to the majority of law schools. I have written elsewhere about the antipathy among lawyers and law students towards crediting the unconscious.<sup>74</sup> I have argued for, while anticipating the resistance to, emotional competence training for law students.<sup>75</sup> Anti-racism training, geared towards revealing and dissipating hidden biases, is likely to invite comparable, if not greater, resistance. Multicultural training, promoted to prepare students for global practice, and that does emphasize race differences, might meet with greater acceptance.

Are the clinics the appropriate venue for this training?<sup>76</sup> Although clinical education strives to educate law students as to how to be empathetic, active listeners,<sup>77</sup> it has generally been less purposeful in exploring the cultural

---

<sup>72</sup> SUE & SUE, *supra* note 58, at 167-69.

<sup>73</sup> See *Love & Hate*, *supra* note 46, at 308.

<sup>74</sup> *Id.* at 278-83.

<sup>75</sup> *Id.* at 305-11.

<sup>76</sup> Jacobs suggests that the clinics are “uniquely situated within legal education to develop some aspirational goals for cross-cultural counseling competency.” See Jacobs, *supra* note 10, at 411.

<sup>77</sup> See, e.g., BINDER, BERGMAN & PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 46-68 (1991); KRIEGER ET AL., *ESSENTIAL LAWYERING SKILLS* 11 (1999).

obstacles that interfere with these skills.<sup>78</sup> The subject has been neglected in most clinical texts. One notable exception is the 1999 book of clinical materials by Cochran, DiPippa and Peters, *Collaborative Approach to Client Interviewing and Counseling*, which includes an entire chapter entitled "Dealing With Client-Lawyer Differences."<sup>79</sup> However, although the authors devote eighteen pages to multicultural sensitivity, they do not address unconscious and systemic racism.<sup>80</sup> Other clinical texts give little or no attention to the subject.<sup>81</sup> Despite—or perhaps because of—the relative inattention to

---

<sup>78</sup> See Michele Jacobs' excellent critique of client-based lawyering from a critical race perspective. Jacobs, *supra* note 10.

[A] major weakness of both [of the client-centered] models is that they fail to address, in any significant way, the effects of race, class and, to a lesser extent, gender on the interaction between lawyer and client.... Indeed, there are no references in the texts to how a lawyer's race or gender may affect counseling. Both models of lawyer-client relationships caution lawyers not to 'color' the process with personal feelings, biases or values. *Id.* at 346-47 (citations omitted).

Jacobs advocates adding cross-cultural competence and self-awareness training to client-centered clinical education (CCLASS). *Id.* at 349, 405.

<sup>79</sup> ROBERT F. COCHRAN, JR., JOHN M.A. DIPIPPA, MARTHA M. PETERS, *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* (1999), Ch. 11, *Dealing With Client-Lawyer Difference* 203-221.

<sup>80</sup> The authors write somewhat obliquely of "[s]ociopolitical forces [that] have affected minority races and cultures differently than majority races and cultures . . . . These differences may create incompatible interpretations of events and interactions, and when views expressed by lawyers match the views of the dominant group and conflict with the worldview of the client, there is likely to be a breakdown in rapport and trust." *Id.* at 214.

<sup>81</sup> See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING* (1990). Although this popular clinic text probably devotes more attention to the psychology of lawyer/client relationships than any of the others, it does not address cultural or racial differences between lawyer and client at all. BINDER ET. AL., *supra* note 77, another widely-used text devotes about a page to "Personality Conflicts," in its chapter on "Motivation," but nothing to cultural differences. *Id.* at 44-45.

Other clinical texts that deal with limited aspects of multicultural sensitivity include FRED E. JANDT, *EFFECTIVE INTERVIEWING* (1990), which contains a chapter entitled "Interviewing Special Clients," that discusses ways of dealing with cultural differences, including those of perception, thought patterns, nonverbal factors and values, and contains suggestions for dealing with these differences, including not assuming similarity, recognizing differences, and not evaluating others. *Id.* at 105-09; STEFAN H. KRIEGER, RICHARD K. NEUMANN, KATHLEEN H. MCMANUS & STEVEN D. JAMAR, *ESSENTIAL LAWYERING SKILLS* (1999) briefly discusses factors to be considered in cross-cultural negotiating, including language, environment, social organization and hierarchy, contexting and conceptions of time. *Id.* at 274-76. See also *id.* at 13 ("A lawyer can be effective only if the lawyer understands cultural differences and knows how to recognize and deal with them"); ALEX J. HURDER, FRANK S. BLOCK, SUSAN L. BROOKS, SUSAN



multicultural skill development in the clinical texts, a number of clinicians have begun to address the need for such education through developing materials and exercises aimed at developing multicultural sensitivity. Professors Sue Bryant and Jean Koh Peters, for example, have developed a set of materials, available on-line, based on their work on the "habits" of cross-cultural lawyering.<sup>82</sup>

---

L. KAY, CLINICAL ANTHOLOGY: READINGS FOR LIVE-CLIENT CLINICS 207-213 (1997) (chronicles clinical students as they grapple with being different from their clients.).

Several clinicians have written about methodologies that they use in their own clinical teaching to address cross-cultural lawyering. See, e.g., Jane Harris Aiken, *Striving to teach "Justice, Fairness, and Morality"*, 4 CLIN. L. REV. 1 (1997); Christine Zuni Cruz, *[On The] Road Back in: Community Lawyering in Indigenous Communities*, 5 CLIN. L. REV. 557 (1999); Shin Imai, *Thoughts on Community, Critical Race Praxis, and Clinical Pedagogy or, "What I Teach in My students,"* (paper presented at the New York Law School Clinical Theory Workshop, April 27, 2001; on file with the author); Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 Clin. L. Rev. 65 (1997).

Some non-clinicians have written about multicultural techniques and exercises for non-clinical law school courses. See, e.g., David Dominguez, *Beyond Zero-Sum Games: Multiculturalism as Enriched Training for All Students*, 44 J. LEGAL EDUC. 175 (1994); Isabelle Gunning, *An essay on Teaching Race Issues in the Required Evidence Course: More Lessons from the O.J. Simpson Case*, 28 S.W.U. L. REV. 355 (1999).

Still others have written doctrinal casebooks from a multicultural perspective. See, e.g., AMY HILSMAN KATELY, DEBORAH WAIRE POST, SHARON KANG HOM, *CONTRACTING LAW* (2d ed. 2000); Lenora Ledwon, *Storytelling and Contracts (Casebook Review Essay of CONTRACTING LAW (2d ed.))*, 13 Yale J.L. & Feminism 117, 119 (2001) ("To my delight, this collaboration resulted in a highly teachable casebook that is the most interdisciplinary and multicultural contracts casebook I have yet to see."); DONALD LIVELY, DOROTHY ROBERTS, PHOEBE HADDEN, & RUSSELL WEAVER, *CONSTITUTIONAL LAW: CASES, HISTORY AND DIALOGUES* (1996). As Sue Bryant notes, the Society of American Law Teachers (SALT) regularly holds teaching conferences aimed at integrating multicultural techniques throughout the law school curriculum. Susan Bryant, *The Five Habits: Building Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33, 36 n.5 (2001).

<sup>82</sup> See Bryant & Peters, *supra* note 45. See also JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS, Chapter 10, *Representing the Child-in-Context: Five Habits of Cross-Cultural Lawyering*, 163-243 (Supp. 2000); Bryant *supra* note 81. These "habits" include: I. Degrees of Separation/Connection (inventory and note lawyer/client differences/similarities); II. The Three Rings (create an overview snapshot of the interrelation of client/lawyer and legal worlds); III. Parallel Universes (brainstorm alternative explanations for client behavior); IV. Pitfalls, Red Flags and Remedies (identify warning signals (& early responses) of faltering lawyer/client communication and understanding); V. The Camel's Back (identify and neutralize factors that tend to lead to unacceptable lawyer behavior). PETERS, *supra*, 2000 Supp. at 165 (diagram of five

Clinical faculty cannot and should not carry the entire burden of cultivating students' personal intelligences or clarifying students' racial blind spots.<sup>83</sup> It would be far better to introduce such training at the *beginning* of the educational process, no later than the first year of law school. Multicultural awareness could then serve as both a lens and a filter through which the student might experience the law and the participants in the legal system.<sup>84</sup>

Ideally, students would have had such training as part of their basic undergraduate education. Some of our students have had such training; most have not. If they had, law schools could focus on refining the application of multicultural competence skills to the practice of law. But just as we must teach basic writing to our students with deficient skills before we can effectively teach legal writing, we must teach multicultural skills before we can effectively teach legal counseling.

---

habits and three rings).

Several other clinicians have written about methodologies that they use in their own clinical teaching to address cross-cultural lawyering. See, e.g., Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality"*, 4 CLIN. L. REV. 1 (1997); Christine Zuni Cruz, *[On The] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLIN. L. REV. 557 (1999); Shin Imai, *Thoughts on Community, Critical Race Praxis, and Clinical Pedagogy* or, "What I Teach in My Students," (paper presented at the New York Law School Clinical Theory Workshop, April 27, 2001; on file with the author); Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLIN. L. REV. 65 (1997).

<sup>83</sup> Some non-clinicians have written about multicultural techniques and exercises for non-clinical law school courses. See, e.g., David Dominguez, *Beyond Zero-Sum Games: Multiculturalism as Enriched Training for All Students*, 44 J. LEGAL EDUC. 175 (1994); Isabelle Gunning, *An essay on Teaching Race Issues in the Required Evidence Course: More Lessons from the O.J. Simpson Case*, 28 S.W.U. L. REV. 355 (1999). Still others have written doctrinal casebooks from a multicultural perspective. See, e.g., AMY HILSMAN KATELY, DEBORAH WAIRE POST, SHARON KANG HOM, *CONTRACTING LAW* (2d ed. 2000); Lenora Ledwon, *Storytelling and Contracts (Casebook Review Essay of CONTRACTING LAW* (2d ed.), 13 YALE J.L. & FEMINISM 117, 119 (2001) ("To my delight, this collaboration resulted in a highly teachable casebook that is the most interdisciplinary and multicultural contracts casebook I have yet to see."); DONALD LIVELY, DOROTHY ROBERTS, PHOEBE HADDEN, & RUSSELL WEAVER, *CONSTITUTIONAL LAW: CASES, HISTORY AND DIALOGUES* (1996). As Sue Bryant notes, see Bryant, *supra* note 81 at 36, n. 5, the Society of American Law Teachers (SALT) regularly holds teaching conferences aimed at integrating multicultural techniques throughout the law school curriculum.

<sup>84</sup> This is consistent with a pedagogy that advocates teaching experiential lawyering skills throughout the curriculum and not only in the clinics. See, e.g., Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCH. PUB. POL'Y & L. 1173, 1197-1200 (1999) (describing proposed curriculum for Touro Law Center).

## Conclusion

Lawyers, judges, and legal scholars have devoted substantial energy, time, and thought to litigating, adjudicating, and writing about racism. A growing body of literature exists on the experiences of minorities in law school.<sup>85</sup> Numerous bias studies of court systems around the country have identified disparate treatment of minorities throughout the justice system.<sup>86</sup> Many have written of the obstacles faced by minorities as they enter and attempt to advance in the practice of law.<sup>87</sup> Much less has been written about how bias affects the *interactions between lawyers and clients*.<sup>88</sup> Although empirical data may be lacking, anecdotal evidence bolstered by informed intuition suggests the need for further investigation.<sup>89</sup>

---

<sup>85</sup> E.g. GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 3 (1992); LANI GUINIER, MICHELLE FINE, JANE BALIN, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997).

<sup>86</sup> See, e.g., Davis, *supra* note 35, at 1559; *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SUR. AM. L. 9 (1997); Larry M. Fehr, *Racial and Ethnic Disparities in Prosecution and Sentencing: Empirical Research of the Washington State Minority and Justice Commission*, 32 GONZ. L. REV. 577 (1996-97); Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173 (1996).

<sup>87</sup> See, e.g., RICHARD A. ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW*, Chapter 10, Problem 24: *Is There a Glass Ceiling as Lawyers Climb the Law Firm Ladder?* 510-32 (1995) excerpting Steven Keeva, *Unequal Partners*, A.B.A. J. (Feb. 1993); Jacob H. Herring, *Diversity in the Workplace*, SAN FRANCISCO ATTORNEY (Oct./Nov. 1992); Nina Burleigh, *Black Women Lawyers – Coping with Dual Discrimination*, 74 A.B.A. J. 64 (June 1988).

<sup>88</sup> Notable exceptions include the works discussed *supra* note 79. See also Earlene Baggett, *Cross-Cultural Legal Counseling*, 18 CREIGHTON L. REV. 1475 (1985); Harrison & Montoya, *supra* note 36; Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STANFORD L. REV. 1807 (1993) (mostly anthropological approach, *but see* at 1824); LOPEZ, *supra* note 85, at 80-81. Although Lopez' book focuses mostly on the socio-political rather than on the socio-psychological, his work does raise some issues concerning multicultural competence. See, for example, his story of Helen Padilla's counseling of elderly Japanese American regarding an SSI overpayment claim. *Id.* at 148-49.

<sup>89</sup> See, e.g., O'Leary, *supra* note 8, at 106-07 ("[T]hose of us who have succeeded in raising these issues in a systematic way find it well worth the trouble. After students have participated in a course that focuses on 'difference analysis,' there is marked increase in their sensitivity to a wide range of needs and options.").

We need to commit to introspection and self-awareness as an essential component of basic legal education. Law students and lawyers need to develop their intra- and inter-personal competencies,<sup>90</sup> and understanding how hidden biases affect our interpersonal reactions is an essential component in that development. And we must do so pervasively throughout the curriculum.<sup>91</sup> That will only be possible if those of us who train lawyers confront our own humanity, our own racial demons, uncomfortable and messy as that may be. And we will need help in doing that.<sup>92</sup>

But how much good can we do? In large measure because very little such training is done in law schools, empirical evidence that multicultural competence training makes a difference is virtually nonexistent.<sup>93</sup> Anecdotal evidence, however, suggests that more experiments with such training may well enhance the quality of the lawyer/client relationship. Hopefully, in the years to come, law schools will undertake experiments in multicultural competence training. Hopefully, we will be able to gather empirical data to validate our informed hunch that lawyers who are aware of the smog they breathe will be able to help their clients—and themselves—breathe easier.

---

<sup>90</sup> See Silver, *supra* note 84.

<sup>91</sup> See also Jacobs, *supra* note 10, at 407-08 (advocating pervasive values and self-awareness training throughout clinical curriculum); Bryant, *supra* note 82, at 63 (discussing importance of reinforcing cross-cultural habits pervasively throughout clinical curriculum).

<sup>92</sup> See Love & Hate, *supra* note 46, at 310, arguing for inclusion of psychiatrist, psychotherapist or social worker on law faculty.

<sup>93</sup> See Jacobs, *supra* note 10, at 392-394 (discussing effective experiments with students in values priority awareness training). Jacobs argues that by helping law students become self-aware of their own values priorities they may become more culturally sensitive towards their clients. *Id.* at 395. Jacobs discusses other studies as well that suggest fairly uncomplicated approaches may effectively increase students' multicultural awareness. *Id.* at 395-401.