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Creating My Client's Image: Is Case Theory Value Neutral in Public Benefits Cases?

Spencer Rand*

As students learn client-centered counseling,¹ it is important for them to learn that self-image is a significant factor in how clients weigh options. Clients care about how they perceive themselves and how others perceive them. When a clients' vision of herself conflicts with how she is asked to portray herself in a legal matter, that client may reject certain legal options that would compromise her image. Students fail to counsel clients appropriately if they do not acknowledge this potential conflict to their clients. Using public benefits as an example, this Article looks at teaching students how to include self-image when counseling clients and suggests ways to help students and clients address these conflicts together.

Many times, self-image becomes a major factor in legal decision-making when the law comes with a master narrative that clients have incorporated. As defined by Papke, master narratives are descriptions

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1. For the purpose of this Article, "client-centered" is used in its conventional sense among clinical educators. Client-centered practice involves more than merely allowing clients to define ultimate goals and approve legal strategies; it requires inviting clients into the process by encouraging them to define those goals and strategies after being competently advised and counseled. For a definition of client-centered practice that emphasizes the client's predominance in the decision-making process and the student's role as facilitator, see DAVID F. CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* ch. 11 (2002). See also DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 *CLINICAL L. REV.* 369 (2006) (describing client-centered lawyering and its variations).

in the law that characterize people whom the law affects and describe the options that the law should allow those people.² Master narratives can influence individuals significantly and cause strong reactions from them. For example, clients charged with crimes are often familiar with general negative stereotypes of criminals. Many have strong ideas about who criminals are and how the legal system is supposed to deal with criminals. They may not want to think of themselves as criminals by nature and may not want to be publicly identified that way. Therefore, when we ask a client who is newly encountering the criminal system to waive a preliminary hearing for a first indictment, or to plead to a lesser-included offense to minimize jail time, we are asking her to redefine herself as a convicted criminal. If advised correctly, she will learn that the consequences of the plea place her firmly into the master narrative of the typical criminal. She will fail criminal background checks and have to explain herself to every new employer she encounters, and she may never escape the label.³ She may have to explain this choice to her family or dread it coming up later in life. Some crimes, like some sex offenses, would require this client to register her “label” and thereby

2. See David Ray Papke, *Discharge as Dénouement: Appreciating the Storytelling of Appellate Opinions*, 40 J. LEGAL EDUC. 145 (1990). Using the bankruptcy context, Papke describes the master narrative from case law, which suggests that debtors are saved through bankruptcy, able to “maneuver through the maze” of the bankruptcy law and emerge “[f]reed of the shackles of debt,” “begin[ning] anew” with “a veritable ‘fresh start’ on life.” *Id.* at 149. He compares this to the story that is often behind the bankruptcy, of hard choices, reaffirmations of debt, bad credit ratings, and embarrassment. *Id.* at 153. See also Eric K. Yamamoto, Moses Haia & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians’ Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 21–22 (1994) (defining master narrative as “a principal lense [sic] through which groupings of people in a community see and interpret events and actions. It provides a set of basic assumptions for evaluating social-political controversies and the relationships of the groups involved.”) (citations omitted).

3. Although the point here is that a person will be forever reminded of their criminal past and that others will know about it, there are clearly other problems with this labeling in the criminal context, since people convicted of crimes are often limited in their options to obtain employment, public benefits, public housing, and professional licensing. See Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 586–87 (2006). See also Eve Brenkike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (not considering effects of labeling on people convicted of crimes should be grounds for claims of ineffective assistance of counsel).

publicize that she has been convicted.⁴ She may feel differently about her prospects and self-worth in general.⁵

Similarly, when we ask someone in a domestic violence case to file an order of protection or to accept that such an order be placed on her, that person must begin to define herself in the context of the abuse system. She becomes an “abuser” or a “victim.” She is perceived as capable of doing such horrible things to her partners that the state must monitor her, or as incapable of attracting and selecting unabusive partners. She must publicly declare her domestic problems and lack of temper control or that of the person she once loved or still loves. If she is a mother, she must consider this role in deciding what steps she is willing to take and how the system will affect this role.⁶ Each judge, caseworker, or police officer whose services this client seeks will maintain her own narrative about what it means to be part of a domestic violence problem, and will seem to judge this client without regard to her particular circumstances. This client may begin to see herself not as a capable human being but as a victim who chronically makes poor or unfortunate choices.⁷

4. Many states have “Megan’s Laws,” which require convicted child sex offenders to notify neighbors of their crime. For a discussion on the narratives involved in creating these laws, which can factor into people’s reaction to having the law apply to them or their neighbor, see Daniel M. Filler, *Making a Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001).

5. See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 501–04 (1994) (suggesting reasons to follow a client-centered, rather than a traditional lawyering, theory in criminal cases, as it would allow defendants to consider whether things like vindicating themselves or fighting the label of criminal are as important to them as more tangible outcomes like reduced sentences).

6. See Merle H. Weiner, Symposium, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U.J. GENDER SOC. POL’Y & L. 749 (2003) (discussing how women factor their roles as mothers into their decisions in domestic violence cases).

7. See Nina Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL’Y 157 (2003).

Once labeled a “battered woman,” . . . society assumes that a woman automatically fits into the helpless construct that is associated with the “battered woman syndrome.” If she is not seriously hurt or not helpless enough, then society finds that she is not a battered woman and should not be allowed to take advantage of the beneficence to which “deserving” helpless women are entitled; that is, she does not adequately portray society’s idea of the damsel in distress. Yet, if she is a helpless creature who is worthy of special treatment, then she forfeits the respect afforded to other adults who are allowed by our legal system to make autonomous choices.

Clients may have adopted the master narrative found in the law or their own narrative inconsistent with the law's. Although Papke suggests using case decisions and not legal doctrine to describe them, master narratives are described in both.⁸ The law is drafted, executed, and interpreted by people in power to conform with their narrative of the way they think things should be.⁹ The disenfranchised, who are a large portion of our clients in clinical settings,¹⁰ by definition lack influence on the way the law is written.¹¹ Despite this, the law may still reflect the beliefs of our clients. In this case, self-image issues are invoked by a client who simultaneously agrees with the law's constructs and wishes not to be seen as conforming to the narrative it describes. For example, an alleged criminal does not want to be seen as the deviant she believes all criminals to be. Alternatively, a client may not believe the stereotype but may fear that others do and will characterize her accordingly. For example, an alleged criminal who believes that she is the victim of racist prosecution may still suffer from the stigma of criminality. Still other clients may have their own narratives to which they are reacting and which affect their self-images. For example, an alleged criminal who believes that all criminals have low IQs may worry that others will see her as deficient if she is labeled a criminal.

Id. at 157–58. See also Weiner, *supra* note 6, at 749.

8. See Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 142–43 (1997) (suggesting that not only cases but legal doctrine itself can restrict how people describe their situations).

9. See Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 872 (1992) (citing Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1645 (1990)), in which Gilkerson argues that master narratives do not reflect the beliefs of the disenfranchised.

10.

Although it is not universally true that clinical programs focus on serving the poor, many do, in large part because of state practice rules that allow students to represent clients in court only if the client is a state actor or an impoverished individual. For a history of student practice rules in clinical legal settings, see Peter Joy, *Prosecution Clinics: Dealing with Professional Role*, 74 MISS. L.J. 955 (2005), which discusses states adopting student practice rules to conform with PROP. MODEL RULES RELATIVE TO LEGAL ASSISTANCE BY L. STUDENTS, 94 REP. OF THE ABA 290, 290 (1969).

Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach*, 13 CLINICAL L. REV. 459, 459 n.1 (2006).

11. Gilkerson, *supra* note 9.

No matter its source, the narrative may be so deeply ingrained in clients that it figures prominently when making choices in their legal cases. Thorough legal counseling involves discovering those narratives and working with clients to help them recognize a label's influence on self-image and its relevance to decision-making, apart from any legal strategy.

This Article suggests the following model for helping students learn how to achieve these goals. First, learn the master narrative of the law. Knowing that narrative will help students listen for reflections of that narrative in a client's retelling of her story. Second, identify counter-narratives that are prevalent in the community.¹² Communities develop alternative narratives¹³ that can affect clients' perspectives together with the master narrative. Third, listen for clients' personal narratives in their descriptions of people already in the category by which society would label the client.

Fourth, if it seems appropriate, gauge the way that clients feel about how they are being asked to portray themselves in the law through different case theories. As clients react to different narratives, the way they evaluate case theories will change. They may or may not be willing to accept some damage to their self-image in order to secure the ends that a particular case theory can provide. Some clients might be more radical, wanting to present a case theory against a master narrative in hopes of altering that narrative.¹⁴ Others

12. See Yamamoto, Haia & Kalama, *supra* note 2, at 22 (citing Lynn Mather & Barbara Ygnvesson, *Language, Audience and the Transformation of Disputes*, 15 L. & SOC'Y REV. 775, 780 (1980-81)), where the authors describe a counter-narrative as challenging master narratives "and the vantage point from which they are made. By offering a 'framework not previously accepted,' the counter-narrative challenges 'established categories for classifying events and relationships by linking subjects or issues that are typically separated' or by elevating previously suppressed voices" in a way that provides a competing perspective. *Id.*

13. See Karen Tokarz et al., *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Education*, 28 WASH. U. J.L. & POL'Y 359 (2008), for a discussion of how communities can have common perspectives and legal needs that can permeate the way that clients and their attorneys should address legal problems, whether those communities are defined by geographic boundaries, common experience, or other factors.

14. See Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 778 (1992) (encouraging arguing against the master narrative that people with disabilities have no ability, in favor of case theories that emphasize abilities, in part to work toward changing that narrative). See also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1987) (suggesting that "outgroups," defined as disenfranchised people whose narratives are not in the norm, tell oppositional stories that are

more interested in self-preservation may refuse to portray themselves in a way that conflicts with their own concept of the world.

Students must consider all of this, even as they have their own difficulties with this process as they learn about the law and develop their own narratives. Students must be trained not only to listen for their clients' narratives but also to recognize how their own narratives may limit their understanding of the case and the options that they offer their clients.¹⁵

This Article uses the task of teaching students to counsel clients in public benefits matters as an example of how to teach them to consider self-image in client counseling. In the public benefits realm, many clients have strong beliefs about the public benefits system and how they fit into it. The master narrative is a complex one. People who accept welfare are often presumed to be derelicts or welfare queens. They may even feel this way themselves. Many take actions in their cases based on, or to alter, this presumption. They may apply for benefits like disability benefits, which they think are acceptable, and refuse to apply for benefits paid to parents who cannot support themselves or their children, which they think of as less acceptable. They may prefer social insurance, under which they or their employer paid into a dedicated fund to create their eligibility for benefits, like Social Security and Unemployment Compensation, but balk at applying for public assistance benefits, even when public assistance would cover the same contingencies, in part to avoid the "welfare" label.¹⁶

heard by "ingroups," which hopefully listen and incorporate them into the mainstream narrative).

15. An example of this problem from my personal experience was a student who was assigned to help a client obtain SSI benefits based on her disabling cancer. The student did not understand the disability program or why people should get benefits because of a disability. The client would have been found disabled based on a disabling radiation burn, which was as severe as if it resulted from a fire. The student reviewed the case and could find no theory that would help the woman to be found disabled, although a person can be found eligible who has an impairment similar to impairments that qualify, and having severe, untreatable burns from a fire qualifies. When the theory of the radiation burn was posed to the student, the student could only say "the client was not burned." As the student could not accept the validity of disability benefits, the student could not conceive of case theories helpful to the client.

16. For a description of several differences between social insurance and public assistance programs, see Herbert S. Denenberg, *The Right to Income: Social Insurance Versus Public Assistance*, 29 J. INS. 87 (1962). For the purpose of this Article, social insurance programs are

This Article examines the process of teaching students about categorical eligibility for welfare benefits in a clinical setting and the students' role in developing case theories with their clients. It goes through the process detailed above to explore methods for students to design effective case theories that comport with their clients' self-images. Part I describes a way to think about the public benefits master narrative generally. It suggests a helpful way to teach that narrative to students so that they understand it relatively quickly. As it is cumbersome to look at all states' systems, and as I practice in Pennsylvania, it uses Pennsylvania's system as an example. However, as all state plans for distributing welfare are based on federal regulations, what is said about Pennsylvania's program can be generalized to what happens under other states' systems. I provide a chart that helps describe the system that I use to teach students how to think about categorical eligibility systematically to see the patterns therein, including the aspects of discrimination favoring the "deserving" poor.

The next step is listening to clients for signs that they are reacting to the master narrative or other narratives in a way that implicates their self-image. Part II uses a case example described in Part I to suggest some things that people may nonverbally or implicitly communicate when they feel that their self-image figures into the process. It suggests strategies students can use to incorporate self-image into their counseling in a way to ensure that matters of self-image are part of the decision-making process.

I. PUBLIC BENEFITS: YOU GET WHAT YOU DESERVE

Clients applying for welfare benefits do so despite their demonization by several hundred years of thinkers who have dehumanized both people seeking these benefits and the process of applying for and retaining the benefits. We in the United States provide money and access to medical care only to those who have

defined as welfare programs that are separately funded through taxes on individuals or their employers in order to provide benefits for eligible recipients. Public assistance programs are defined as welfare programs that are funded by taxing the general public to provide people with help if they become categorically eligible for it and demonstrate financial need.

met specific criteria that show they are worthy of obtaining them. People with no real explanation of why they need help are generally either not eligible for benefits or eligible only for extremely limited ones.¹⁷ People with children may be eligible for a very low level of temporary benefits.¹⁸ People with little work history who have a disability are more strongly supported, although still at levels considerably below the poverty level.¹⁹ Clients gain from being fit into “higher” categories that provide them not only with more benefits but also with better administrative systems from which to get those benefits, usually through federal agencies that more readily assist clients than their state counterparts, which manage the lower-category programs.

For the novice law student, self-image may not appear to be relevant to the choices clients make at first. Clients need money or other assistance. Students learning this system often expect that all clients will pick the option of placing themselves in the highest possible category. However, self-image can be a key factor in choosing programs and whether clients feel able to endure the process of obtaining benefits at all. Putting clients in the categorical eligibility boxes of the public benefits applications upsets many of them, as does living under the welfare official’s microscope. In many

17. In many states in the past, General Assistance was a catch-all category, giving money to people who needed it, no matter what the reason. In the past few years, this has changed, making it more likely that even the catch-all category requires a person to be somehow categorically eligible to receive those benefits. In Pennsylvania, for example, people can only get General Assistance if they are under eighteen (twenty-one if they are students), living in two-parent households and happen not to qualify for Temporary Assistance for Needy Families (“TANF”), dealing with disabilities without having proven themselves eligible for Supplemental Security Income yet, caring for children or people with disabilities, participating in drug treatment programs, carrying a child (if they can “medically verif[y]” their pregnancy), or recovering from domestic violence. 62 PA. STAT. ANN. § 432(3) (West 2007).

18. Under federal law, TANF cannot be given to people for more than five years of their lives. 42 U.S.C. § 608(7) (2000). The average TANF grant in a state can be as little as \$164 per month (as in Alabama in 2002) and as high as \$631 (as in Alaska in 2002). See H. COMM. ON WAYS AND MEANS, 108th Cong., 2004 GREEN BOOK 7–36, available at <http://www.gpoaccess.gov/wmprints/green/2004.html> [hereinafter GREEN BOOK].

19. In 2007, people received \$623 per month on Supplemental Security Income. 71 Fed. Reg. 62,636 (Oct. 26, 2006). To this, states added an average of \$31 per month. See GREEN BOOK, *supra* note 18, at tbl.3-5, pp. 3-28–3-29. The federal poverty guideline is \$850 per month. 72 Fed. Reg. 3, 147 (Jan. 24, 2007). This means that the average person who qualified for SSI lived at almost two hundred dollars below the poverty level.

cases, applying for benefits goes against a traditional master narrative that they may have accepted—they balk at being seen as helpless or as people who have failed.²⁰ In others, applying for benefits goes against their personal narrative: for example, a mother with a disability may need help but may refuse to portray that her disability overwhelms her in a way to maximize her eligibility for benefits. Put otherwise, clients do not want to live by a disempowering narrative that has been assigned by the welfare official, who must pigeonhole them in order to distribute benefits.²¹

For clients who come to accept being categorized, there are still very difficult actions required by the terms of their help: they must describe themselves in disagreeable ways and live in the ways that the master narrative requires, in order to receive and retain benefits. They must bare intimate details of their lives to welfare officials they do not know. In Supplemental Security Income (“SSI”) and Social Security Disability cases, clients must testify to their own failings and their lack of hope of ever overcoming those failings to show that they are not just trying to beat the system. Further, they must live by the rules of the box created for them. They must not work more than small amounts, depriving themselves of the community of labor, from which so many derive their friends, support, and sense of identity and meaning, and preventing themselves from relieving their own poverty through otherwise lawful income.²² They can be told whether they can marry,²³ where they can live,²⁴ and with which

20. See Alfieri, *supra* note 14, for a discussion of narratives as they relate to people on welfare. Alfieri’s thoughts on counter-narratives in this area are discussed in Part II, *infra*.

21. Ideas about self-definition as a way to control one’s own life and image come in part from the empowering literature of Paolo Friere, who describes them in part in FRIERE, PEDAGOGY OF THE OPPRESSED (30th anniv. ed. 2003). His work and others’ have inspired many lawyers to help clients develop their own narratives. For examples of using Friere’s ideas to help empower clients, see Daniel G. Solorzano & Tara J. Yosso, *Maintaining Social Justice Hopes Within Academic Realities: A Freirean Approach to Critical Race/LatCrit Pedagogy*, 78 DENV. U. L. REV. 595 (2001).

22. For a summary of these rules, see MARK GREENBERG & SHARON PARROTT, SUMMARY OF TANF WORK PARTICIPATION PROVISIONS IN THE BUDGET RECONCILIATION BILL (2006), available at http://www.clasp.org/publications/tanf_workprovisions_06.pdf.

23. People lose benefits under many programs if they marry. People getting SSI have their spouse’s income and resources deemed against them in ways that can preclude them from keeping SSI. For example, if the spouse has three thousand dollars in assets, the client becomes ineligible for SSI. 20 C.F.R. § 416.1205 (2007). If the client’s spouse earns more than about thirteen hundred dollars per month, the client’s SSI check begins to be reduced. 20 C.F.R.

family members they can live,²⁵ and they can be forced to reveal their medical conditions²⁶ and financial situations to their family and the community.²⁷

For our students, exploration of these issues can be both a time of confusion and a time of growth, in part as it may expose their own, perhaps undeveloped, narratives about poverty. For some, it is their first practical look at poverty beyond theoretical frameworks that they may have previously explored. Some are surprised that money is not given based on individual need and that rarely are actual expenses considered in determining the amount of benefits people get.²⁸ Some never knew that although our most generous social insurance program provides welfare benefits to some in amounts above the poverty level, all of our public assistance programs including our most generous one, SSI, provide benefits far below the poverty level. They wonder both what they are accomplishing for their clients by “winning” an SSI case and if the compromises their clients make are worth the money. They begin to develop their own public benefits narrative that intertwines with their clients’ and must be acknowledged to ensure that the students are not letting their own narrative get in the way of representation.

§ 416.1163 (2007). Similarly, people on TANF or Social Security for widows, or who receive attendant care, may see their benefits reduced or eliminated if they marry, even when their spouse’s income and resources do not lift them out of poverty.

24. For example, a person on TANF cannot effectively move from Alaska to Alabama if their monthly benefits will decrease from \$631 to \$146. See GREEN BOOK, *supra* note 18, at 7–36.

25. Besides the deeming of spousal income cited in note 23, *supra*, laws can prohibit people who are trying to get on their feet from living with others who provide support. For example, if a person lives in another’s home while trying to save enough money to rent her own home, her SSI can be reduced by one-third if more than half of her living expenses are met by another. 20 C.F.R. § 416.1131 (2007).

26. An example of this would be a Medical Assistance case in which the person’s reason for needing medical help may allow her a better chance to get benefits. Another example is how schizophrenic and HIV-positive Pennsylvanians are required to reveal their ailments in order to obtain pharmaceutical benefits with higher income and resource limits. See MEDICAID ELIGIBILITY HANDBOOK § 338.64, available at http://www.dpw.state.pa.us/oimpolicymanuals/manuals/bop/ma/338/338-05.htm#P2422_59883.

27. For many welfare programs, people can have in-kind payments made for them, like rent, and not have it count against a welfare grant. For a Pennsylvania example, see 55 PA. CODE § 183-81(11) (1999).

28. See *infra* text accompanying notes 57–61.

In order to help explain the narrative method, I will elaborate on it within the particular context of public benefits. This requires an overview of the public benefits categorical eligibility system generally. Students' first inquiries into the categorical eligibility system come when they face their first clients seeking help. Although some clients have already identified the program from which they are seeking benefits, many have not or may have picked a program that would not be most financially beneficial. The students' first job is to know the system and determine if the client has considered all available options.

Consider the following case example: *Ms. L wants no charity. A fifty-one-year-old Latina woman, Ms. L has worked hard all her life and always supported herself. Now, faced with the residual effects of cancer, a disease she needs to believe she has beaten, she finds she can no longer provide for herself and her children.*

Ms. L was an office cleaner for fifteen years until she was diagnosed with and treated for breast cancer two years ago. She does not have enough money for household expenses for herself and her twelve- and fourteen-year-old boys. When she was receiving her treatment, which lasted nine months and included chemotherapy, radiation, and surgery, Ms. L felt quite disabled by it. Now, however, she feels much better. Although she has the troubling residual effect of lymphedema in her dominant right arm that limits her use of that arm, she no longer feels that her physical condition keeps her from working.

Ms. L has tried several ways to support herself and her family. She has sought work but can no longer be an office cleaner, as the lymphedema makes continually moving her arm impossible. Although Spanish is her first language, she is very competent in English, is a high school graduate, and believes there are many other things she can do. However, when she looks for work, she finds nothing but part time and minimum wage jobs with no benefits that each would leave her and her children significantly below the poverty level. She thinks that there are other jobs she could do in offices but is frustrated that she is never hired for them—she believes that Latina women, particularly ones as old as she is, are only hired to be office cleaners. Though she no longer feels disabled by her medical condition, she does feel pressure to stay home to supervise her children, who have

been in increasing trouble at school. She believes women's roles in the home should be valued and there are times that they should be supported to take care of their children when the children need the help.

When Ms. L was first diagnosed, the hospital that treated her cancer helped her get Medical Assistance ("MA") for her treatment by sending her to the welfare office. Ms. L also received Temporary Assistance for Needy Families ("TANF") benefits in the amount of \$421 per month, which she still receives. Though she was required by her welfare worker to apply for SSI and Social Security, her application was denied. She was bitter at the time that she was turned down, as she felt that her cancer kept her from working. Now, however, she does not want disability benefits based on her cancer. In fact, the doctors and social workers with whom she works have convinced her that she should try to move on and neither to worry about recurrence nor think of herself as disabled.

Along with money for basic needs, Ms. L also seeks help obtaining better medical care. Although she receives MA, which pays for her medication, she feels that it limits her choice of doctors such that she is getting substandard care.

Upon listening to Ms. L, students will note that she is a mother with children and see that she is getting a benefit for that. She has been found to be free of medical disability and she does not want to be found to have one—however, a student might note that a disability might still be proven and could provide improved benefits for her. The student might note that she feels discriminated against and might wonder whether workforce discrimination improves benefit eligibility.

To evaluate Ms. L's claim, the student should take the following steps. First, the student should know what the law is that allows one to seek support. In Ms. L's case, one would likely look to see what programs exist for families, for people with disabilities, and for people against whom there is employment discrimination. Second, the student should see whether any of these programs are viable for Ms. L. Does Ms. L qualify for better family benefits than she is getting? Do Ms. L's functional limitations allow her to pursue disability benefits? Can Ms. L's discrimination claim be effectively pursued? Third, the student should consider how she would address

these options with Ms. L. The student should lay out which programs are most likely to be successfully pursued and which benefits packages or other legal outcomes are objectively better than others. The student should also consider how Ms. L is likely to feel about these options. Is there a master narrative that would suggest that Ms. L may not want to pursue any of the options? Are there hints from Ms. L that suggest that she would be happier pursuing one claim over another?

A. Teaching About Public Benefits

To help the student with this analysis, it makes sense to begin with the types of problems Ms. L describes and what narratives are likely to come with those benefits. Public benefits can be described by looking at several overarching values that describe how we have come to distribute public benefits. Born of outdated theories stemming from Elizabethan Poor Law and New Deal ideas of how to alleviate poverty, welfare benefit distribution follows a Deserving Poor model.²⁹ The rationalization for this model may stem from the belief that some forms of poverty are more blameworthy than others, depending on the level of control the individual has to alleviate the condition.³⁰ Some others believe that this model is useful as a way to encourage work, on the premise that work-ready individuals will be more likely to rejoin the workforce if benefits are reduced or withheld.³¹ The United States has developed its categorical eligibility system to follow a discernable pattern, which is described in Chart 1.

29. For a history of poverty law in the United States and ways that it stems from English systems, see MICHAEL KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (10th anniv. ed. 1996).

30. See Roger A. Freeman, *Does America Neglect Its Poor?*, 56 *VITAL SPEECHES OF THE DAY* 514, 516 (1990): "That is why we must distinguish between what we used to call the 'deserving poor' and what we now call the 'behaviorally poor'—persons who are poor because of their own actions or inaction."

31. See Anthony B. Atkinson, *Income Maintenance and Social Insurance*, in *HANDBOOK OF PUBLIC ECONOMICS* 779, 833–80 (Alan J. Auerbach & Martin Feldstein eds., 1987), in which Atkinson looks at old age pensions, disability pensions, unemployment, and public benefits to determine whether giving any of these benefits is too strong a work disincentive. He concludes his work with a concept he attributes to Arthur Young in 1771 that "everyone but an idiot knows that the poor must be kept poor, or they would not work." *Id.* at 889.

CHART 1: WELFARE BENEFITS: WHO GETS MORE?[†]

	Social Insurance (Previously paid a tax for a possible support payment)	Public Assistance (Public benefit not correlated to specific previous tax)	Social Insurance Related Health Insurance	Public Assistance Related Health Insurance	Federal to State; Highest to Lowest
Aged	\$\$\$ (most money)	\$(some money but less than Federal Poverty Level (\$650 in PA))	\$\$\$ (best insurance)	\$\$ MA (full benefits not as readily accepted by MDs)	Federal and most*
Blind	\$\$\$	\$\$	\$\$\$	\$\$	Federal and most*
Disabled and Unable to Work for 12 Months	\$\$\$	\$\$ (\$650 in PA)	\$(same insurance as above but waiting period of 24 months)	\$\$	Federal and most*
Children of Single Parents	None	\$(Perhaps less than 1/3 FPL) (\$403-421 for family of 3 in PA)	None	\$\$	State and middle
Unemployed—Connected to Workforce	\$(Similar amount but time limited benefit (UC))	None	\$ (Various laws allowing you to keep employment related insurance or buy it at a high rate)	None in most cases unless diseases found worthy of treatment (HIV, schizophrenia)	State and less
Unemployed—Not Connected to Workforce	None	None	None	Same as above	None

* Exception of MA, which is a state-administered program.³²

[†] This Chart does not conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

32. In class, we do better than this and add amounts as below:

CHART 1(A): WELFARE BENEFITS—WHO GETS MORE?

	Income, Paid FICA or Just Worked	Income—No Significant Connection to Workforce	Health Insurance—Paid	Health Insurance—No Connection to Workforce	Federal to State; Highest to Lowest
Aged	Social Security Disability ("SSD")	SSI \$650/mth	Medicare ("MC")	Medical Assistance ("MA")	Federal and most
Blind	SSD	SSI \$650/mth	MC	MA	Federal and most

As described in Chart 1, welfare benefits are allocated to people on the basis of the reason to which their poverty is attributed rather than by absolute need. Sometimes, the reason considered is a personal trait or condition that is determined to be so overwhelming that benefits are distributed at a higher level. For example, individuals over sixty-five³³ and blind people are assumed to have enough impediments to self-support that they readily get help. People with disabilities receive benefits as well, assuming that they can prove that their disability is so severe that it precludes most work for which they are qualified.³⁴ Other times, instead of looking at traits or conditions, welfare is given to people due to their difficult circumstance. People who lose their jobs involuntarily for reasons other than gross misconduct on the job get benefits.³⁵ Children get

	Income, paid FICA or just worked	Income—no significant connection to workforce	Health insurance—paid in	Health insurance—no connection to workforce	Federal to state; highest to lowest
Disabled and Unable to Work for 12 Months	SSD	SSI \$650/mth	MC after 24 months	MA	Federal and most
Children of Single Parents	None	TANF—\$403/mth for family of 3 and 5 year limit	None	MA	State and middle
Unemployed—Connected to Workforce	UC—26 weeks	N/A	COBRA	N/A	State and less
Unemployed—Not Connected to Workforce	N/A	None	N/A	None or weird categories based on deserving illnesses	None

(This Chart does not conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005)). In class, I often include a line above even those who are aged to talk about the welfare benefits that we get, usually discussing benefits that are particularly hot in the news. This has included the subsidy we get to buy our commuter train tickets (which may exceed what a single mother gets in cash), pre-tax health care and dependent care credits, mortgage deductions on income tax, corporate welfare, and state-supported infrastructure altered to support our businesses. We also talk with students about other categories we could add—corporate tax benefits, subsidies for suburban commuters—both easy subsidies to calculate (like what it costs to ride the train) to the more difficult to calculate yet higher subsidies (student loans).

33. The age is increasing to sixty-seven for the Social Security program. 20 C.F.R. § 404.409 (2007).

34. Obtaining SSI or Social Security benefits based on disability requires having an impairment that is expected to affect basic work activities for at least a year, or result in death, and be so functionally limiting as to preclude previously held employment and most other work. For rules explaining this program, see 20 C.F.R. §§ 404.1520–404.1580 (2007), and 20 C.F.R. §§ 404.920–404.922 (2007).

35. Although it is administered by states, the federal government imposes general rules for Unemployment Compensation. See 20 C.F.R. §§ 601.1–671.170 (2007) (based on the

benefits for finding themselves tied to parents who cannot support them, at least for a short period.³⁶

Self-image might play only a small role in public benefits if the labels used by the system were meaningless to clients or if clients had no ability to select among benefits. However, in order to get help from the government, people must be willing to define their poverty according to one of the traits or situations on which welfare is based and are often required to select one over others. For example, after losing her job, a person with a disability can seek the greater, but quite time-limited, benefits of Unemployment Compensation.³⁷ Doing so would mean declaring that she is able to work and looking for a job.³⁸ Alternatively, the same person can seek the perhaps lesser, but long-term, benefits of SSI or Social Security Disability. This would involve declaring that her disability has so overcome her that she can no longer work.³⁹ Sometimes, but not always, benefits are mutually exclusive.⁴⁰

People often choose a benefit category not by looking at which program best describes their condition but by determining which program offers the best benefits. Programs that are financially better for people follow a distinctive pattern that can be described as follows:

First, people who have a connection to the workforce are able to collect higher welfare benefits than those who do not have the same connection. This plays out most clearly in the two-tiered welfare

unemployment section of the Social Security Act, 42 U.S.C. § 501 (2000), and the Federal Unemployment Tax Act, 26 U.S.C. § 3301 (1994)).

An interesting facet of this regulation is that it precludes people who leave the job market voluntarily from getting benefits, suggesting that one should not get help unless one can show that she is trying to participate in the job market but has lost her job for reasons beyond her control. *See, e.g.*, 20 C.F.R. § 602 app. A (2007).

36. TANF welfare benefits are available to families for a maximum of five years. 42 U.S.C. § 608(a)(7) (2000).

37. These benefits are short-term, usually twenty-six weeks long unless there is a particularly bad job market. 20 C.F.R. § 615 (2007).

38. 20 C.F.R. § 604 (2007).

39. *See* 20 C.F.R. §§ 404.920–404.922, 404.1520–404.1580 (2007). *See also supra* note 34.

40. For example, a mother with a disability may stop working when a disability overwhelms her, but may qualify for both TANF as a mother of children who should not be left in poverty and for SSI as a person with a disability. The mother cannot be on both grants at the same time, but she can be on SSI and get a child's portion of a TANF grant.

distribution scheme which provides benefits differently by giving greater benefits to people who qualify for our social insurance programs than to those who qualify our public assistance programs, even when those programs have the same categories of eligibility to help people facing the same problems. There are several distinguishing features between social insurance and public benefits programs, not the least of which is the entitlement some people feel to social insurance programs that are marketed to the public as benefits of right or as pensions, while public assistance programs have the stigma of being on the dole.⁴¹ This is done in part through the nature of social insurance programs being funded by a distinctive tax stream to which the recipients or their employers contributed while the recipients were members of the workforce. This feeling of entitlement can come from knowing that the person paid into the system, even though these payments do not create a specific fund from which the person's benefits are paid. The fact that people have paid into general public coffers that fund public assistance benefits often does not lead to a similar sense of entitlement to those benefits.

Although there are several distinguishing features between social insurance and public assistance programs,⁴² key features are that social insurance programs pay higher benefits and that they are more easily administered, since need does not have to be determined in each case. For example, in 2005, a sixty-five-year-old who paid Federal Insurance Contributions Act ("FICA")⁴³ taxes into our Social Security system could receive up to \$1,939 per month⁴⁴ without any consideration of savings, other assets, or often earnings.⁴⁵ Further, we

41. See Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361 (1996).

42. See Denenberg, *supra* note 16. Among the attitudes regarding social insurance versus public assistance, Denenberg describes those who believe they are more entitled to social insurance benefits because taxes to fund those programs have been automatically withdrawn from participants' labor income, even in cases like Social Security, where the taxes are pooled and accounts are not attributable to specific participants. *Id.*

43. Federal Insurance Contributions Act, 26 I.R.C. § 21 (1999).

44. See Social Security Administration, Press Office Fact Sheet, <http://www.ssa.gov/pressoffice/factsheets/colafacts2005.htm> (last visited Sept. 22, 2008). The formula for setting the amount that a person receives is relatively complex and is explained by the Social Security Administration, <http://www.socialsecurity.gov/pubs/10070.html> (last visited Sept. 22, 2008).

45. There are some exceptions to this, including disability pensions and worker's compensation awards, which can reduce people's Social Security income. These are exceptions

have structured social insurance benefits to include subsidiary benefits on the recognition that people in need want to and must support their dependents. An example of this is Social Security's eligibility categories for spouses, widows, and dependent children of insured former workers who qualify for Social Security.⁴⁶

Although our public assistance program also has categorical eligibility benefits for older people, namely SSI, a sixty-five-year-old who qualified only under that system in 2005 received a maximum of \$579 per month, less than a third of the maximum monthly benefit of the social insurance program.⁴⁷ Further, the amount of that person's income and resources would count against her in most cases, disqualifying her entirely if she owned more than \$2,000 in liquid assets.⁴⁸ Unlike the Social Security program, one dollar is deducted from a recipient's check for any unearned income she receives, like bank interest or an annuity,⁴⁹ and another dollar is deducted from her check for every two she earns by labor.⁵⁰

Although people are to some extent protecting themselves by working to qualify for social insurance programs, our social insurance programs do not recognize a full range of categories for eligibility. For example, a mother who must stop working due to childcare needs does not benefit at all from having paid FICA taxes unless she qualifies as old, blind, or disabled. Thus, it is more difficult for one to feel a sense of entitlement for benefits that support mothers and children, because there are no social insurance FICA benefits based on family need. People who are unemployed are

to the rule, and most income is not counted against Social Security. *See* 20 C.F.R. §§ 404.407–404.408 (2007).

46. *See* 42 U.S.C. § 402 (2000) (describing benefits to spouses, widows and widowers, children, and dependent parents).

47. *See supra* note 44. Note that this can be higher if particular states decide to provide extra support to their residents. Not all states do this, and these amounts are generally low. For example, Pennsylvania gives twenty-seven dollars per month. In 2002, the average state supplement of SSI was thirty-one dollars per month, which in real dollars was a 68 percent decrease in the average state supplement since 1975. *See GREEN BOOK, supra* note 18, at tbl.3-5, pp. 3-28–3-29.

48. 42 U.S.C. §§ 1382(a)(3)(B), (b) (2000).

49. *Id.* at § 1382(a). The first twenty dollars of unearned income is not deducted, but the rest is. *Id.*

50. *Id.* The first eighty-five dollars of earned income does not affect benefits, after which one dollar is subtracted for every two earned. 20 C.F.R. § 416.1112(4), (5), (7) (2007).

permitted twenty-six weeks of an entitlement under Unemployment Compensation.⁵¹ If the mother in this instance fails to reconnect to the workforce, not only will she be excluded from social insurance but possibly from any benefits at all.

Second, people receive better benefits under both our social insurance and public assistance programs based on the cause of their poverty in a hierarchical fashion. Deserving poor models are a very old way to think about distributing welfare to the poor. Welfare theorists on the left and right have expanded beyond deserving poor models to some extent. Conservative theorists have proposed that poverty can be reduced by placing responsibility on the poor for their poverty, in theories such as those described in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.⁵² This has absolutely changed the shape of our welfare programs, by creating the often unreliable TANF program for children and their parents⁵³ and all but destroying General Assistance programs.⁵⁴

51. Although it may appear that social insurance is different because people can feel that they paid into the system, another version of social insurance is funded by payments by employers to support benefits for their workers. An example of this is benefits for the unemployed. The Unemployment Compensation benefit is a version of social insurance that is not funded by employees directly but by employers who pay a specific tax for this purpose. Except in cases of gross misconduct resulting in firings or where people quit work voluntarily, people qualify if they can show a recent connection to the workforce and are looking for work. People who are looking for work but cannot show this connection, or who are on Unemployment Compensation beyond the twenty-six or thirty-nine weeks deemed to be a reasonable amount of time to find other work, get the much lower benefits of General Assistance, a public assistance program which often pays the lowest amounts possible or in some cases no benefits at all. *See* 29 U.S.C. § 3301 (2000). People may feel more entitled to Unemployment Compensation, due to their employer paying a tax easily traceable to the employer-employee relationship.

52. Much of the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193 (1996), is codified at 42 U.S.C. §§ 601-619 (2000). As described in the Act's purpose, personal responsibility means putting the onus on parents to support themselves and their children by rewarding things that are thought to promote self-sufficiency, like job preparation, work, and marriage. Impliedly, the Act blames single parents for their own poverty and seeks to end poverty by reducing single parenting and the help available to single parents.

53. TANF differs from the old AFDC program in many ways, but one of which is that AFDC had no time limits while TANF will not support one indefinitely.

54. For a description of these cuts and the reasons for them, see Katz, *supra* note 29, at 292-95. As to why he would get rid of General Assistance, Katz quoted Governor Thornburgh of Pennsylvania as stating, "We have no choice but to choose, and I choose to help the helpless first, to encourage self-reliance in the able-bodied second, and to do what we can with any real problems after that." *Id.* at 293.

Scholars on the left have written much about race and gender's role in poverty⁵⁵ and noted power imbalances that should be addressed to resolve poverty.⁵⁶ These theories have changed perceptions of poverty and have suggested ways that poverty could be addressed very differently from our welfare distribution schemes.

However, as Chart 1 shows, none of these models describes the current distribution of welfare benefits any better than Deserving Poor models. Welfare programs continue to distribute benefits by giving less money to people who seem more to blame for their problems⁵⁷ and to people who are closer to being able to join the workforce as an incentive for them to do so.⁵⁸

Following this reasoning, older people and those with disabilities receive significantly higher benefits than poor children and their families. Elderly, blind, and disabled people typically qualify for SSI benefits, receiving up to the \$579 per month described above with an average state supplement of \$31 per month. Parents supporting children get significantly lower benefits. For example, a parent with two children in Pennsylvania gets a total TANF grant of \$421 per month for all three people. This three-person family gets less than the one person seeking SSI in forty of the fifty states.⁵⁹ Elderly people and people with disabilities also receive more permanent benefits—people on SSI disability benefits may have their eligibility reviewed every few years but are able to remain on benefits as long as they remain disabled; children and parents needing assistance can remain on benefits for a maximum of five years, less in some states.⁶⁰

55. See, e.g., John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927 (1999); RACE AND THE POLITICS OF WELFARE REFORM (Sanford F. Schram, Joe Soss & Richard C. Fording eds., 2003); MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* (1999).

56. For lawyers who have suggested using empowerment models to address legal and other needs of the poor, see Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 *CAL. L. REV.* 1879 (2007); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 *HARV. C.R.-C.L. L. REV.* 415 (1996); Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 *CLINICAL L. REV.* 541 (2006); and Rand, *supra* note 10.

57. Freeman, *supra* note 30.

58. See Atkinson, *supra* note 31 and accompanying text.

59. See GREEN BOOK, *supra* note 18, at 38.

60. See *id.*

Although parents and children may seem to get the short end of the stick, people who are just not working and have no recent connection to the workforce are treated worse yet, receiving little or no benefits.⁶¹

Beyond giving higher benefits for some categories of benefits, administrative hassles are built into the application process for people who seek benefits in lower categories. This plays out most dramatically in choosing to have benefits distributed through state and local bureaucracies instead of federal ones. Unlike the federal system, when a person seeks a state benefit, she will often face pressure to find other means of assistance. This can take the form of “procedural diversion”⁶² programs, which make it so difficult to apply or comply with requirements that people often do not apply or leave the welfare system entirely. It can also be more substantive diversion, like asking caseworkers and their clients to consider alternatives to welfare, including the proverbial ticket for the bus out of town or emergency grants for food or shelter, in place of finding the client eligible for benefits.⁶³

Third, patterns of welfare distribution run across many different types of welfare, including health insurance benefits. Just as income benefits are distributed differently by category rather than by need, health insurance benefits have similar distribution systems. People who fit into our FICA social insurance programs qualify for Medicare, a comprehensive healthcare program. Although Medicare has co-pays and premiums that can be expensive for many, Medicare does pay reasonable enough rates to doctors and hospitals to be an effective health insurance program for its beneficiaries. Medicare is a virtually automatic benefit for those who are elderly and have paid sufficient FICA taxes. As it may be somewhat more questionable whether people with disabilities are able to work, the Medicare

61. As of 1996, when welfare reform was passed, forty-two states had General Assistance programs, and the benefits were very low. See CORI E. UCCELLO, HEATHER R. MCCALLUM & L. JEROME GALLAGHER, 1996 GENERAL ASSISTANCE RATES (1996), available at <http://www.urban.org/uploadedPDF/sgap96.pdf>.

62. See Frank Ridzi & Andrew S. London, “It’s Great When People Don’t Even Have Their Welfare Cases Opened”: TANF Diversion as Process and Lesson, 23 REV. POL’Y RES. 725, 735 (2006) (describing procedural diversion in TANF programs in New York State).

63. *Id.* at 732.

program is somewhat worse for them, since they cannot qualify for the program until they have been disabled for twenty-nine months.⁶⁴ However, being able to qualify for this program even after the waiting period is a valuable benefit for those with disabilities.

An additional benefit of work history is the option to purchase health insurance through specific programs even after employment has ended at rates the former employees could not get on their own. The Family and Medical Leave Act allows people who leave the workforce temporarily to buy health insurance from their employer's insurer by paying the employee's share of the health insurance premium while the employer continues to pay its share.⁶⁵ The Health Insurance Portability and Accountability Act ("HIPAA") allows for people to buy health insurance from new employers when changing jobs, even when they might not have been able to get health insurance through their employment otherwise due to a preexisting condition.⁶⁶ The Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") allows people to buy insurance from the employer's insurance company at the employer's rates even when they might have preexisting conditions that would preclude their ability to get other insurance.⁶⁷ Although these programs can be prohibitively expensive and none offers government benefits,⁶⁸ they all offer a way to obtain otherwise unavailable coverage.

Under our public assistance programs, health insurance is often paid through the MA program. MA is state-administered, and thus causes problems similar to those associated with the state administered income support programs reserved for people on the lower end of the deserving scale. Although the benefits seem to be

64. 42 U.S.C. § 426 (2000). A law abolishing this waiting period is regularly introduced in Congress. The latest versions are H.R. 154, 110th Cong. (2007), and S. 2102, 110th Cong. (2007). Although large support for elimination of this provision is often reported, sometimes as much as 90 percent of each house, the bill has failed in each of the last three sessions of Congress.

65. 29 U.S.C. § 2614(c) (2000).

66. *See* 29 U.S.C. § 1181 (2000) (restricting preexisting condition requirements for group health plans if individuals had insurance coverage before they began working for their new employer).

67. 29 U.S.C. § 1162 (2000).

68. Under COBRA, for example, people must pay up to 102 percent of what their employer pays. *Id.* Clients have reported that this can be seven or eight hundred dollars for family benefits when they have lost their job and have no money to pay those premiums.

the same up and down the chart, there are similar preferences for specific categories perhaps based on the strength of effective lobbying of political groups. For example, people with disabilities can get MA if their income and assets are higher than others if they do small amounts of work⁶⁹ or if they have politically important conditions like HIV and schizophrenia.⁷⁰ Children with disabilities and people approaching sixty-five qualify for benefits more easily than others.⁷¹

Fourth, no matter what public benefits people apply for, they are likely to be supported only at low levels that represent the belief that we need not support people in a way that they can sustain themselves. A primary learning experience for students studying the categorical eligibility system for cases is the understanding that public benefits are so low that even some of the best-developed case theories cannot alleviate their clients' poverty. Certainly, moving people up the categorical eligibility chart is going to help them get more money. However, in most cases it will not resolve their poverty in any way. Therefore, one of the first things students need to consider when contemplating options to help their clients is whether positioning people within the categorical eligibility system is a necessary or sufficient undertaking.

If students begin work on these issues believing that there is a safety net for all and that their needs will be met, working to get people welfare benefits strips them of this notion. In most cases, getting clients welfare benefits does not meet that goal. Our most generous public assistance program, SSI, paid people only \$623 per month in 2007, although it was supplemented by the states by an average of \$31 more. This does not come close to meeting SSI beneficiaries' needs. The federal government's guidelines, developed

69. 42 U.S.C. § 1396(a) (2000). For an example of this program, see MEDICAID ELIGIBILITY HANDBOOK, *supra* note 26, § 316.1.

70. MEDICAID ELIGIBILITY HANDBOOK, *supra* note 26, § 338.64.

71. There is an extraordinary array of MA benefits, showing the strength of master narrative in politics—who gets what depends heavily on the strength of their lobby. For a list of the many separate programs in Pennsylvania for which people are covered, see PENNSYLVANIA HEALTH LAW PROJECT, DETERMINING YOUR ELIGIBILITY FOR HEALTH CARE COVERAGE THROUGH MEDICAL ASSISTANCE (MA) AND OTHER RELATED PUBLIC HEALTH INSURANCE PROGRAMS (2006), available at <http://www.phlp.org/Website/education.asp#maeligibility> (follow the hyperlink to “MA Eligibility Manual”).

in the 1960s on the theory that food was one-third of the family budget and that a person could meet expenses by having three times that amount,⁷² is considered by many to underestimate the poverty line in practice.⁷³ Still, people who receive SSI fall below even that level. At present, the federal poverty level is set at \$850 per month, significantly greater than the \$654 per month people receive on SSI.

Many believe that the poverty line should be raised.⁷⁴ One such group, Wider Opportunities for Women, has begun to set what many believe to be a more reasonable approximation of living expenses by state through its Six Strategies for Family Economic Self Sufficiency project.⁷⁵ In Philadelphia, Pennsylvania, it worked with PathwaysPA to calculate a self sufficiency standard in 2006 of \$1,257 per month to live, or approximately twice the SSI amount.⁷⁶ In many cases, like that of Ms. L, people come to us on behalf of themselves and their families. For them, we cannot provide sufficient money to sustain a family. The \$850 per month that Ms. L could get if she received both SSI and TANF comes nowhere close to the \$1,430 federal poverty level for a family of three or the \$2,522 per month self sufficiency guideline for Philadelphia.⁷⁷ Chart 2 helps illustrate the definition of poverty.

72. See Mollie Orshansky, *Counting the Poor: Another Look at the Poverty Profile*, 28 SOC. SECURITY BULL. 3 (1965). See also MEASURING POVERTY: A NEW APPROACH 101 (Constantine F. Citro & Robert T. Michael eds., 1995) (Chart: "Types of Poverty Thresholds"), available at <http://www.census.gov/hhes/www/img/povmeas/poverty.pdf>.

73. See, e.g., WILLIAM QUIGLEY, ENDING POVERTY AS WE KNOW IT (2003).

74. Many suggest setting a relative poverty line based on place of residence and considering the many expenses for necessities one must pay. See, e.g., MEASURING POVERTY, *supra* note 72.

75. Information about Wider Opportunities for Women is available at its homepage, <http://www.sixstrategies.org/> (last visited Sept. 22, 2008).

76. Information about PathwaysPA is available at its homepage, <http://www.pathwayspa.org/> (last visited Sept. 22, 2008). See also Diana Pearce, THE SELF-SUFFICIENCY STANDARD FOR PENNSYLVANIA (2006), available at http://pathwayspa.org/policy/final_PA-2006_full%report5-15-06.pdf.

77. For a different view, see Michael D. Tanner, Stephen Moore & David Hartman, *The Work Versus Welfare Trade Off: An Analysis of the Total Level of Welfare Benefits by State*, CATO INST., Sept. 19, 1995, available at http://cato.org/pub_display.php?pub_id=1099&print=Y&full=1, which argues that, if a person accesses every possible public benefit, she would likely have more income than the typical minimum-wage worker. The paper assumes things like ready availability of public housing, energy assistance, and a high value for medical assistance.

CHART 2: WHAT IS POVERTY?[†]

	Family of 1	Family of 3
Federal Poverty Level (2007) ⁷⁸	\$850.83/mth	\$1,430.83/mth
Self Sufficiency Standard (2006) for Philadelphia PA from PathwaysPA ⁷⁹	\$1,257/mth	\$2,522/mth
TANF Standard ⁸⁰	\$215/mth	\$421/mth
SSI	\$623/mth	\$623/mth (supports only the one with the disability), with perhaps \$200 more in TANF

Learning how low welfare benefits are, when compared to what a person needs in order to live, clears up for some students the false assumption that welfare benefits are high enough to meet people's needs. This is true even for people with disabilities, who must prove that they are unable to work and therefore cannot supplement their incomes. Therefore, a student's best efforts can get the client one-quarter or one-half of the self-sufficiency income level, leaving clients destitute. Students learn from this exercise how deficiently we support indigent people in the United States and that developing other resources is a key part of lawyering for the poor.

Fifth, with the possible exception of age and blindness, each category gives benefits only to people perceived to be individual failures with character flaws. This is true even in cases of disability. Alfieri has written that clients have particular problems due to the persistent use of "terms of dependence, incompetence, and deviance"

[†] This Chart does not conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

78. See *supra* note 19.

79. See *supra* text accompanying note 76.

80. See *supra* note 18.

to describe people with disabilities.⁸¹ He looks specifically at widows seeking disability benefits and how they are often viewed as victims.⁸² To obtain benefits, he states, lawyers and the state demand a paternalistic perspective that forces the welfare applicants to see the lawyers as benevolent helpers and to accept their own deviance from the norm.⁸³ Lawyers are complicit when they rely on disclaimer, which calls for acknowledging the state as benevolent and the disabled person as deviant;⁸⁴ idealization, which employs disclaimer for the purpose of expediency;⁸⁵ and concession, in which the clients are told that it is not so bad to be perceived in an unpleasant way if only for a short time.⁸⁶

B. A Public Benefits Master Narrative

What master narrative can be drawn from the public benefits distribution scheme? As in the bankruptcy doctrine that Papke described,⁸⁷ master narrative can be drawn from public benefits cases and doctrine. As in other types of cases,⁸⁸ public benefits laws are so confining that only certain viable legal arguments are consistent with the master narrative, which limits the range of case theories available to clients and makes irrelevant many of the ways in which clients see themselves. When public benefits laws are written to say that people with disabilities should get help only if their disabilities functionally impair them from being productive members of society, case theories must focus on inabilities of clients. Clients are constrained to describe themselves as incompetent people who cannot cope with

81. Alfieri, *supra* note 14, at 778–79.

82. *Id.* at 784.

83. *Id.* at 788–91, 799–812. See also Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (discussing attorneys as viewed by their clients as assuming the role of the state and perhaps actually doing so).

84. Alfieri, *supra* note 14, at 812.

85. *Id.* at 813–14.

86. *Id.* at 814.

87. See Papke, *supra* note 2.

88. See Baron & Epstein, *supra* note 8, at 143 (“Any given set of doctrinal rules might be said to dictate what stories may emerge and how they may emerge in potential cases involving those rules; the substantive law determines which facts will and which will not be deemed to bear on the problem at hand.”).

their impairments.⁸⁹ When families needing welfare can only extend their temporary benefits if they can show abuse by a parent, case theories must indicate that spousal abuse is a major cause of the family's impoverishment.⁹⁰

Looking at the distribution of public benefits, there are several parts of the master narrative that students need to understand in order to see whether their clients are reacting to or against that narrative. They include the following:

First, poverty is the fault of the individual. Because we base our welfare programs on examining the individual for traits or circumstances that cause them to need help, there is an implication that there is not a general condition that requires support. Not all people require public support—people need support only if we can point to something wrong about them that justifies trying to help them. This can be seen as “blaming the victim”⁹¹ or as supporting Horatio Alger myths.⁹² This can go as far as suggesting that people who need public benefits have moral failings.⁹³

89. See Alfieri, *supra* note 14.

90. See Tarr, *supra* note 7.

91. Social work has long recognized the inadequacy and unfairness in blaming people for conditions beyond their control. Much of this stems from work by Ryan, most notably WILLIAM RYAN, *BLAMING THE VICTIM* (1971). In the context of disability benefits, the Independent Living movement can be seen as stemming from that tradition. That movement has a mission of ensuring that a person's disability is not the sole trait that defines them and that people with disabilities are given every opportunity to live as rewardingly, independently, and sociably as possible. See Gina McDonald & Mike Oxford, *History of Independent Living*, EOCIL, Aug. 6, 2008, <http://www.eocil.org/il-history.html>.

92. See Lisa A. Crooms, *Law and Equality: An “Age of Impossibility”: Rhetoric, Welfare Reform, and Poverty*, 94 MICH. L. REV. 1953 (1996) (reviewing JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* (1995), and MARK ROBERT RANK, *LIVING ON THE EDGE: THE REALITIES OF WELFARE IN AMERICA* (1994)). Crooms discusses each author's take on the welfare reform proposals that lead to the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, see *supra* note 52, and the prevailing belief, which they both opposed, that individuals should try to overcome their perceived shortcomings, which would otherwise lead to the need for welfare.

93. Crooms, *supra* note 92, at 1959. See also Peter Edelman, *Where Race Meets Class: The 21st Century Civil Rights Agenda*, 12 GEO. J. ON POVERTY L. & POL'Y 1, 3 (2005), which describes what the author believes to be the wrong narrative, of poverty being caused by failed morality:

One is the classic American explanation—“it's their own fault.” Horatio Alger's heroes made it, why didn't they? A variation on this theme is “too much welfare.” They might have acted responsibly, but instead they got hooked on welfare, became

Second, poverty is based on people having individual defects of character that prevent them from overcoming traits or situations that overwhelm them. As with Alfieri's example of widows with disabilities, people do not receive help unless they prove that they have failed to overcome what life has thrown at them.

Third, the individual failings that lead to the need for public benefits can be ranked from best to worst. Therefore, people who need help can be considered better or worse based on the type of benefit they seek. Since clients are given different benefits based on the reason that they seek benefits, it is reasonable to assume that those who get greater benefits are thought of as better than those who get lesser ones. People with disabilities that preclude work are considered better than parents who are unable to support their children.

Fourth, having been connected to the workforce in the past is a good thing that should allow people to get more help if they need it in the future, although only if they stop working for reasons that might impair work. Because social insurance covers only some reasons why people may need to be supported in the future, it is reasonable to assume that people who leave work for those reasons are better than people who leave work for other ones. People who have worked in the past who leave their work because of their age or disability are thought of as better than those who leave to deal with needs like dependent children.⁹⁴

dependent, wouldn't bother to look for a job, and had more babies out of wedlock so they could receive more welfare.

Id. Interestingly, Edelman's attempt to deal with this damaging narrative is to ask us to adopt an alternative narrative of poverty being based not on individual failings, but on the failings of the American labor market.

There are too many jobs that do not pay enough to live on; this is a problem that hurts large numbers of people of all races, and this defect has a disproportionate impact on younger people of color who have less education and experience continuing discrimination in the labor market. Especially for low-income people of color, poor education is a direct cause of higher poverty rates, and the impact of the criminal justice system makes matters even worse.

Id. at 3.

94. For example, the coach of the Philadelphia Eagles had grown sons who habitually committed crimes and potentially needing parental guidance. There was a call for him to leave his job and take care of his family matters, both from fans and from a judge, who suggested that

Fifth, people in need should not be given sustainable support. They do not deserve to live in a sustainable way and are not entitled to help that will allow them to purchase the necessities of life. Even our most generous public assistance program, SSI, pays people less than the minimum amount that the government believes it takes to live and many other programs pay even less than that; presumably, then, people receiving such help are expected either to cheat on the welfare system or live in ways that leave them hungry, unclothed, homeless, and without other necessities of life.

II. TALES OF MIXED NARRATIVES: IS YOUR CLIENT REACTING TO THE MASTER NARRATIVE OR ANOTHER?

Students must be prepared to notice whether their clients have feelings about being placed in welfare eligibility categories. They must consider it part of their job to notice how their clients feel about the actions they are taking. Although this is to some extent just asking students to be client-centered, it emphasizes that knowing possible strategies to solve problems is not enough to help clients to make strategic decisions in their cases. It gives the student the role of determining whether identity issues affect clients' choices among the options presented to them. Armed with knowledge of the way the welfare system works and the master narrative it conjures, students can begin to do this effectively.

A first step is applying the law to the case without consideration of narrative at all. This enables students to consider the realm of available strategies and the outcomes they are likely to achieve through application of different laws. Next, students should examine the actions required for clients to obtain each outcome. Importantly, will they have to testify as to how the law applies to them, or will the law just apply to them without requiring a public declaration that they belong in one category or another? Finally, students should consider

he and his wife supervise their children better. Karen Crouse, *There Are No Easy Answers for Reid and His Family*, N.Y. TIMES, Nov. 11, 2007, available at http://www.nytimes.com/2007/11/11/sports/football/11reid.html?pagewanted=1&_r=1. It is unclear whether people understand that the demands of parenting sometimes interfere with work, and that we should afford parents more leeway in our public benefits system, so that not only people with money have the luxury to take off from work due to these issues.

how the application of the law to the particular client creates meaning for the client. By knowing the master narrative, being aware of counter-narratives or personal narratives, and listening for each of these when working with a client, the student can better counsel the client about the legal options. Together, they can discuss these options and consider their objective outcomes, their emotional effects upon the client, and their effects upon the client's self-image.

A. Analyzing Ms. L's Case

Students' first analyses of public benefits cases often start by taking the first step prescribed above: they determine the different categories of eligibility for each client and rank them based on the potential benefit packages available for that client. Realizing that recent employment entitles clients to participate in the better paying social insurance system and to better medical insurance options, they opt first for those programs. They then move directly into selecting the highest-public assistance options.

Applying straight categorical eligibility to Ms. L's case suggests that the best benefit package may not be the one she wants. From listening to Ms. L, it is clear that she believes that workplace discrimination and family pressures are the reasons she needs help—from her perspective: (1) Latina women can only get cleaning jobs; and (2) her children demand her attention, and she should be supported while she is given the opportunity to provide it. However, pursuing these paths is unlikely to help Ms. L. She may be right that Latina women suffer discrimination from employers and that their job opportunities are limited. However, outside of Unemployment Compensation benefits that provide twenty-six to thirty-nine weeks of income to those who recently left the workforce, we do not have social insurance, public assistance, or effective job training and placement for those who are trying unsuccessfully to reconnect with the workforce. We certainly have no welfare programs that allow people to show that the job market is so discriminatory that they should be supported like those who are given the opportunity to work. Short of trying to identify a discriminatory employer and suing

them (an unlikely strategy),⁹⁵ or taking some collective action (a slow strategy), this will not provide Ms. L with income assistance. She may also be right that her duties as a mother should be valued and that we should better support parents in critical times with their children. However, Ms. L has already accepted the TANF benefits, which are so low that she and her family would have to live at less than one-third of the poverty level were they to try to subsist on it.⁹⁶ She also receives MA, which she has found not to meet her entire needs.

If her only consideration were obtaining the objectively optimal benefit package, Ms. L's best bet would be to portray herself as a person whose cancer has caused her such a disability that she should be provided with support, despite the commitment she made to herself not to let her cancer define her or to blame it for her poverty. SSI would give Ms. L considerably greater benefits than TANF. Under SSI with a state supplement she would receive \$650 per month, about \$200 more than the TANF grant. Further, although her TANF check might decrease by removing her from the grant, she would likely continue to receive around \$200 per month from TANF to support her children, giving her a total of about \$850 per month, between one-half and two-thirds of the federal poverty level. She would remain on MA, which would not improve her health insurance situation.

However, based on her fifteen-year work history, Ms. L has likely earned enough to qualify for the social insurance benefits through Social Security Disability. If so, her benefits might be somewhat higher than her SSI benefits, although not much higher, because low-paying jobs trigger lower-range benefits.⁹⁷ Her medical insurance would also improve, since she qualifies for Medicare, but she has to wait for this benefit until she can prove that her disability has lasted twenty-nine months. Medicare may require her to pay for part of her

95. See Lou Rulli & Jason Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and Its Impact on the Poor*, 8 J. GENDER RACE & JUST. 595 (2005) (describing an empirical study that disability discrimination cases are on the decline and posit what this means about discrimination cases generally).

96. See *supra* note 19.

97. In Pennsylvania and some other states, Social Security is considered earned income, and she may lose her family's TANF and her own MA benefits.

medication, which MA provides at no cost, but it may give her access to better treatment for her cancer, due to higher reimbursement rates to doctors and hospitals.⁹⁸

Public benefits cases often resemble Ms. L's. Although there are many reasons that clients seek help, those reasons may not correlate to the qualification criteria for improved benefits. By learning about clients and measuring them against the eligibility requirements listed in Chart 1 above, we can identify the most objectively beneficial programs to pursue.

B. What Will Ms. L Have to Do to Obtain the Optimal Benefits?

In some cases, getting a public benefit means accepting an outcome but does not require the beneficiaries to make frequent public statements about the traits or situations that qualify them for benefits. For example, a person with an obvious disability, like deafness, may be able to apply for and receive benefits with little fanfare. This is not to say that the deaf person will be happy that she has to apply to a disability system to get help—it means that she will not continually have to describe her disability in order to receive aid. In other cases, however, beneficiaries must take active steps to prove their continued eligibility for benefits. This is true, for instance, when a disability manifests itself in less obvious ways, like through mental impairment or orthopedic pain.

In Ms. L's case, applying for help would not be easy. Were she to pursue a disability claim, she would begin with doubts about her capacity to work due to the effects of her lymphedema. She may not expect that, due to her age, the limitations of her arm movement probably qualify her for disability benefits.⁹⁹ With the government

98. For those who practice in this area, this scenario may seem somewhat too hopeful, as a person with no symptoms of cancer would not seem like a likely candidate to qualify for benefits. However, Ms. L is based on a real client who chose to apply for Social Security benefits. Despite her lack of many functional impairments, our office was able to help her prove her disability, in part by showing that her cancer was worse than it looked, although it was asymptomatic. Although she did not want to testify about functional limitations, we prepared her to do so if necessary and were fortunate enough to win the case before she had to testify.

99. Social Security disability rules make it easier for a person to qualify for benefits once they turn fifty. At that age, a person who is limited to sedentary work and has no transferable skills qualifies for benefits. 20 C.F.R. § 404, Subpt. P, App. 2, Rule 201.14 (2007).

telling her that she is disabled, and thus qualified for public assistance, and with her doctors telling her not to consider herself disabled, Ms. L would probably be confused and unhappy to be given disability benefits. Trying to convince the government that she is disabled would go directly against how she is trying to live her life.

Furthermore, the process of getting the benefits would likely require Ms. L to obtain doctors' reports stating that she has a disability and to document functional impairments. She would have to state and restate that her arm cripples her attempts to do some jobs. Although the fact that she had cancer is obvious, the fact that her arm is causing her severe trouble is not. And although it is possible she will win the benefits when she applies, she probably will have to attend a hearing before an administrative law judge and testify as to her limitations and that her cancer has beaten her and caused her to fail.

Ms. L's problems would not end when the government finds her eligible for disability benefits. Receiving disability benefits would require her to identify herself as a person with a disability to her family and friends. Her life would be limited by that definition—if she got SSI, she would fear working as she would risk losing her benefits if she did so; she would not be able to marry as her spouse's income would make her ineligible for those benefits, even if her potential spouse makes relatively little money.¹⁰⁰

Ms. L can continue to get TANF benefits for now, but since the program is limited to five years,¹⁰¹ this is only a temporary solution. Furthermore, while receiving the benefits, case workers will regularly inquire into her job status (due to the TANF work participation rules) with the implication that she is an unemployed failure.¹⁰² Though it may not compromise her self-image to receive TANF benefits, these benefits are minimal.¹⁰³

Students might talk with her about pursuing remedies for the discrimination she believes she faces in the workplace. She is unlikely to get immediate help, however, even if she and the students

100. *See supra* note 23.

101. *See supra* note 18.

102. *See Greenberg & Parrott, supra* note 22. *See also* Ridzi & London, *supra* note 62.

103. *See supra* note 18.

could target a prospective employer who directly discriminated against her. Further, no public benefit exists to offset the damage done by employment discrimination. The categorical eligibility system is thus difficult for Ms. L.

Considering how extensively clients must portray themselves as fitting into welfare categories is important in determining the impact of the application process category on self-image. Similarly, the frequency with which the client will have to deal with the ramifications of being placed in the category and the procedural difficulties of obtaining and maintaining them will be important in deciding which legal strategies to pursue.

C. How Can We Help Ms. L Pursue Goals with Which She Is Comfortable?

At this point, Ms. L can pursue either a strategy that aligns with her self-image or one that she deplores but which optimizes her benefits. We can help determine the best, most agreeable strategy by taking the following measures:

First, identify whether the client is reacting to the traditional master narrative, a counter-narrative, or a personal narrative. Ms. L seems to react both to the master narrative of disability and her own personal narrative. She also has a counter-narrative about family benefits that allows her to accept TANF benefits.

Ms. L does not want to describe herself as disabled. Her personal narrative, reaffirmed by her doctors, is that she is able to, and indeed should, work. In order to meet the eligibility requirements for public benefits, she must directly contradict her own opinion and the one that her medical team believes or wants her to project for her own sake. The alternatives available to those connected to the workforce through social insurance could help her, but only if she would describe herself as a person with a disability. There are no specific parental benefits available from paying FICA taxes.¹⁰⁴ Public assistance benefits for people with disabilities are entirely unhelpful here, because Ms. L wants to describe herself as a parent who needs help or a person discriminated against in the workforce. Recognizing

104. *See supra* note 18.

Ms. L's personal narrative in relation to the master narratives of disability, minority status, and poverty helps students consider her perspective better when they evaluate her options.

Ms. L has a counter-narrative that allows her to accept TANF benefits. Despite the stereotype of women seeking welfare as undeserving welfare queens, Ms. L has adopted a different counter-narrative that values her being home to care for her children. This counter-narrative of mothers staying home with children who need them, one that was once mainstream,¹⁰⁵ helps Ms. L accept TANF benefits with a clean conscience. It may not help her financially in the long run, since the benefits are low, but it does help her collect these benefits without the self-image problem that might have hindered her otherwise.

As with Ms. L, clients can react positively or negatively to the way that master narratives and counter-narratives in the law apply to their situations. Their personal narratives may also be implicated as they consider goals and strategies for their cases.

Second, help clients consider how their self-images are implicated through application of the law and the narratives they invoke. Once it has been decided that self-image is a factor in the case, students may employ several strategies to help clients consider and accept legal options that leave their self-images intact.

One such strategy is to help clients consider acceptable counter-narrative. As described above, Ms. L was able to accept TANF benefits because she adhered to a counter-narrative about the identity of mothers who need help from the welfare system. One strategy that helps clients maintain their self-image when they utilize a legal strategy with an unappealing narrative is to offer a more attractive counter-narrative. Using widows' disability benefits as an example,¹⁰⁶

105. In fact, the ADC program, which predated TANF, had as one of its main objectives allowing mothers to stay home with their children. See Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 *FUTURE CHILD*. 28, 30 (1997), available at http://www.futureofchildren.org/usr_doc/vol7no1ART3.pdf. See also Katz, *supra* note 29, at 132 (describing widows' pensions from 1911, which were designed to allow mothers to stay home and care for children and to keep them out of the workforce, in part as an alternative to institutionalizing children).

106. Widows and widowers can receive Social Security benefits to support themselves if their spouses had been insured for benefits. They can qualify for the benefits as early as age fifty if they can prove that they would have been dependent on their spouses because of their

Alfieri upends the traditional narrative of widows with disabilities as being dependent by creating oppositional narratives that describe the widows' independence, competence, vulnerability, and solidarity.¹⁰⁷ He suggests looking at widows who were homemakers and including in their narratives their successes at maintaining the house instead of their failures at entering the job market. He suggests focusing on their independence in the community, accomplishment of activities of daily living despite their disabilities, resourcefulness in remaining in the community on the small amounts of money they have after their breadwinner husbands have died until they can finally receive the government benefits they need.¹⁰⁸

Another counter-narrative that could be similarly attractive to clients is one that recognizes that welfare benefits should provide individuals with at least subsistence income, and that as only a few welfare programs come close to doing so, it is okay to get as much help as possible from the welfare system by accessing the best welfare package for which they legitimately qualify. Clients do not have to believe that they fit into a category for which they are determined to be categorically eligible—they have to believe that they have traits that allow them to fit into the category in the way it has been defined. This narrative is based on clients recognizing that perfect categorization is impossible and that as long as a welfare system chooses to categorize people in order for them to get support, some people will be miscategorized. Just as some will be unfairly excluded, clients can take advantage of being over-included in a category.

For example, the system for determining whether a person's disabilities impair her is necessarily imperfect—no one can know whether particular sets of impairments keep all people from working. For efficiency and due process reasons, rules have to include some people and exclude others and will do so inaccurately. Many people do not get help that should, such as those with chronic fatigue syndrome that cannot demonstrate their impairment sufficiently to

disabilities. The eligibility test is the same as the one for people seeking disability benefits under the Social Security program generally. *See* 20 C.F.R. § 404.335(c) (2007).

107. Alfieri, *supra* note 14, at 786.

108. *Id.* at 829–31.

show they cannot work. However, imperfect definitions can be taken advantage of to get better help. For instance, one could argue that a definition of disability that gives benefits to the blind is over inclusive—many blind people can work and do so, yet all who are blind qualify for benefits when they are not working and meet the non-disability criteria for the program. Taking advantage of this description in the law allows for accessing the potentially higher disability benefits that people need to survive. Whether individuals believe they are disabled due to the particular impairments they have is irrelevant as long as they feel like they have the characteristics to fit into the disability category.

Ms. L might understand this narrative as a way to allow the government to support her while she is caring for her children by stating that they are supporting her for her disability, as long as she gets the best support she can. Ms. L's bad arm may not be a disability in her mind, but if Social Security law assumes that a person with limited use of one arm over fifty cannot work and is therefore entitled to the benefits, she should take advantage of that. Through this narrative, she would see herself not as a disability recipient but as a welfare recipient that needs as much help as possible. Ms. L is not asked to be dishonest—in fact she must disclose all of the facts about her condition. She is asked to take advantage of a disability system that fortunately includes her within its purview and helps her more than she would be helped otherwise.¹⁰⁹

109. This narrative was suggested to me by a local legal services attorney, John Whitelaw. E-mail from John Whitelaw, Staff Attorney, Community Legal Services, Philadelphia, PA, to the author (Apr. 22, 2008, 12:19 EST) (on file with author). He explains that he tells his clients that at best the SSI disability rules are tangentially related to employment in the real world and have almost nothing to do with whether they can work. He describes a case where in medical records, a doctor wrote that a sixty-two-year-old woman who had previously done unskilled medium work was limited to light work and would benefit strongly from taking such a job. His statement that she is limited to light work qualifies her for disability benefits. Although the woman might be counseled to follow the doctor's advice and although the woman may be able to work, she meets disability requirements and can choose to take advantage of these benefits without having to believe she is unable to work due to her impairments. Whitelaw points out other areas where the federal and state government explicitly recognizes that being found to have a disability, though defined as severe impairments that preclude work, do not actually preclude work. For example, Pennsylvania's version of Medical Assistance for People with Disabilities allows for people to purchase Medical Assistance who meet the Social Security standard for disability "except for earnings" and are "employed and receiving compensation" of up to 250 percent of the federal poverty guidelines, a figure way beyond what is normally

It may be more likely that clients will accept counter-narratives if they already exist in the community. Community lawyering models that allow for learning with and from community groups make discovering these narratives more likely.¹¹⁰

The argument here is not narrative for the sake of allowing clients to tell their stories. Some have critiqued Alfieri and others for suggesting that although narrative practice can be good as it allows people to tell their stories through their cases, clients do not come to lawyers as a means for self-expression but rather to use whatever strategy will promote the best legal outcome.¹¹¹ Rather, my argument is that by understanding the clients' narratives about their cases, students can help clients decide on case strategies consistent with the clients' self-images.

Third, help clients separate problems from the master narratives. Some clients can be helped by having their problem described as one to which the master narrative does not apply or one they can ignore. If Ms. L had accepted the narrative that mothers who receive welfare benefits are welfare queens, students might have been able to convince her to remember that she is not one. Ms. L knows that she competently supported her children for many years. She knows that she will not try to live on TANF forever. She knows that she and her

presumed to be substantial gainful activity for Social Security purposes. See 42 U.S.C. § 1396a(1)(10)(A)(ii)(XIII) (2000); MEDICAID ELIGIBILITY HANDBOOK, *supra* note 26, § 316.

110. See Tokarz et al., *supra* note 13. See also Rand, *supra* note 10.

111. See Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: A Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOK. L. REV. 889 (1995), for a discussion of the problems of using narratives for their own sake at the expense of practice:

If theoretics of practice scholars have assumed correctly the purpose for which poverty lawyers are told clients' stories, then their critique of traditional poverty law practice is valid. If poverty clients enter the legal process, and engage us for the purpose of public storytelling of their struggle, then traditional poverty law practice—admittedly an ends-oriented endeavor—is likely to fail them. But if, as I believe, poverty law clients tell their stories to poverty lawyers for the same simple reason corporations tell their stories to their lawyers—so that a certain result can be obtained—then traditional practice may be not only defensible, but the only appropriate vision for poverty lawyers.

Id. at 895 (citations omitted). See also John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer To Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85 (1999) (describing problems with clients telling stories that conflict with the narrative constructs of judges and juries).

family need help and that she is not trying to game the system or take advantage of others. Helping her focus on how her case differs from the master narrative can help her accept TANF benefits, and it would be particularly important if she agreed with the master narrative and needed to feel that it did not apply to her. Clients can benefit from distinguishing themselves from others to whom they may believe the negative master narratives apply.

Fourth, discuss with clients whether they would consider their self-images damaged if they adopted a particular case theory and, if so, what alternatives they found acceptable. Case theories often challenge clients' self-images, and clients need to decide whether to allow that damage to occur or to go with another case theory.

In the case on which Ms. L's case is loosely based, the client decided to apply for disability benefits. As predicted, she lost and had to appear before an administrative law judge. Although we applied a lawyering strategy by which she would not have to testify, our client decided that she would testify as to her functional limitations if required. She also allowed us to contact her doctors, who would describe her limitations. This was not easy for our client, but her need to obtain support for herself and her family drove her final decision.

Clients may accept damage to their self-images for the sake of their cases. Clearly, disempowering clients from that decision is not the point of this Article. It is important for students to discuss self-image with their clients in order to minimize the effect of self-image on their case theory choices.

Alternatively, clients may decide that they are unwilling to employ case theories that damage their self-images. Students should anticipate this and encourage their clients to feel comfortable in making other choices. Even when the case theory may not bring the best objective results, the case theory may be the best to maintain the client's dignity.

D. Effects of Using This Method

The narrative method should have several positive effects. First, using this theory should help students' practices become more client-centered.

Client-centered lawyering is difficult for students in many ways. Students often evaluate situations and believe that their role as attorneys is to figure out the best option and carry it out on their clients' behalf. Students often want to define the best action themselves and just get the nod of approval from their client.¹¹² A good example of this is the public benefits case, where a best possible benefit package can often be defined, and students may believe they have a "right" direction in which to go for their client.

Demanding that students consider self-image issues ensures that they conduct meaningful discussions with their clients about their clients' emotional reactions to their available options. It gives students practice in the valuable skill of getting clients to reveal personal matters that are necessary for representation. Getting clients to reveal this information despite things that might inhibit their giving personal facts is a key skill.¹¹³ Practice listening for narratives and discussing these options helps develop it.

Second, these discussions, while essential to effective representation, may be therapeutic for the client as well. Lawyers and law students are not often trained in dealing with people's feelings or in considering psychological factors that lead to legal problems or that must be considered in resolving those problems. Some movements, such as therapeutic jurisprudence, suggest that lawyers should have such training. As described by one of its leading proponents, Bruce Winick, therapeutic jurisprudence uses "[a]n interdisciplinary approach" that "seeks to assess the therapeutic and counter-therapeutic consequences of law and how it is applied."¹¹⁴ He argues in the domestic violence case that judges, police officers, and attorneys on all sides "can perform their roles in ways that can help to rehabilitate offenders and bring about healing for their victims."¹¹⁵

112. See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002) (allowing an attorney to act with her client's assent without requiring the client to have any real part in the decision-making process).

113. For a discussion of factors that influence a client's willingness to disclose information, often called inhibitors, see Alexander Scherr, *Lawyers and Decisions: A Model for Practical Judgment*, 47 VILL. L. REV. 161, 190–91 (2002), which cites BINDER, BERGMAN & PRICE, *supra* note 1, at 9, 34–45.

114. Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 33 (2003) (citations omitted).

115. *Id.* at 34.

Courts dealing with criminal law, domestic violence, and other matters have been designed to do just this, with the judge and attorneys focusing on the reasons that bring people before the court and supporting the needs of alleged criminals and victims.¹¹⁶ Although therapeutic jurisprudence practitioners suggest that there is much to learn from social work and psychology about lawyering,¹¹⁷ often their work suggests that lawyers are not therapists in the traditional sense but are “change agents”¹¹⁸ that can be helpful to clients in crisis.

It is possible that dealing with how clients' self-image is affected by how the law applies to them can be therapeutic to clients. This Article is not advocating that students set themselves up to be therapists. However, it is quite possible that having their clients deal with the dissonance between case theories and their self-images will be therapeutic to the clients, as will discussing the narratives to which the clients are reacting. It is also possible that this process would be better handled by a trained therapist, when the dissonance appears great.

Third, as students learn about the public benefits system and how it affects their clients, students may refine their own opinions about the system. Whether it be due to the counter-transference that therapeutic jurisprudence advocates have observed¹¹⁹ or just because they are people with their own feelings, students will display their own narratives about public benefits. It is important to teach students to listen for the clients' narratives through their own. Students must

116. For a discussion of drug courts, see Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055 (2005). For a survey of some other criminal projects, see David Wexler, *Introduction: Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 *ST. THOMAS L. REV.* 743 (2006). For an interesting response, see Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 *B.C. L. REV.* 539 (2007).

117. See Susan L. Brooks, *Using Therapeutic Jurisprudence to Build Effective Relationships with Students, Clients and Communities*, 13 *CLINICAL L. REV.* 213 (2006) (suggesting that much is gained from social work that guides therapeutic jurisprudence). See also Marjorie Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 *CLINICAL L. REV.* 259 (1999) (describing traditional references to psychoanalysis in legal work).

118. Wexler, *supra* note 116, at 747.

119. Brooks, *supra* note 117, at 220. See generally Silver, *supra* note 117.

be taught to be self-aware enough that they recognize their own feelings and counter them if they begin to interfere with effective representation. A necessary prerequisite is the kind of emotionally developed feelings narrative legal practice uniquely provides to students.¹²⁰

III. WHAT IS AN ATTORNEY'S ROLE?

In studying narrative practice, what are students learning about an attorney's role? Among other things, students learn that, while they need to know the law and the way it applies to their clients' situations, they also need to know that case strategies that the law may suggest would be the best for the client may be inconsistent with their clients' views of themselves. An attorney must recognize the ramifications of accepting a case theory and address the potential impact of the case theory.

Certainly, some clients will just want to accept whatever case theory brings them closer to their ultimate goals. Others, however, will need to discuss the impact of case theories, which they will more likely be able to do if the students are on the lookout for the issues and raise them when appropriate. By knowing master narratives and counter-narratives and by listening for their client's personal narrative, whether common or unique, students will have a better chance at helping their clients come to terms with how their clients' self-image can affect making an appropriate case theory choice.

120. See Brooks, *supra* note 117, at 298, for strategies on doing this. See also Emily Hughes, *Taking First-Year Students to Court: Disorienting Moments as Catalysts for Change*, 28 WASH. U. J.L. & POL'Y 11 (2008). Hughes discusses having students in non-clinical classes challenge assumptions they bring to law school about criminal law by taking them to court to watch proceedings. Through this, many notice that defendants are disproportionately poor and black. They also notice how laws that seem great in the abstract, like giving constitutional rights to defendants, are so poorly understood by them that they may be of little benefit. Through citing Fran Quigley and Jane Aiken, who argue for similar teaching methods in clinical settings, Hughes argues that students often come to law school without an understanding of how power and privilege is used to create and implement laws and that one of our jobs as law teachers is to give them opportunity to learn this. *Id.* at 25 n.47.