

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

Fall 2022

Teaching Case Theory

Binny Miller

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Legal Education Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

TEACHING CASE THEORY

BINNY MILLER*

As the key means of framing a case, case theory is the central problem that lawyers confront in constructing a case, and many of the decisions made during the life of a case are decisions that rest on case theory. Building on the author's earlier scholarship on case theory, this essay articulates a concept of case theory called "storyline," and sets out a framework for teaching this concept. The framework for this process has three basic stages — imagining case theory, evaluating (and constructing) case theory, and choosing case theory. The material for this process is stories, which are the starting point from which storylines can be distilled. The essay discusses some of the challenges in teaching case theory in the metaphor of stories, which include overcoming the doctrinal messages of legal education, conveying the complexity of the idea of story, and devising a curriculum beyond that available in lawyering texts. The article then demonstrates how to build a case theory curriculum from the ground up, using examples from film, fictional accounts of lawyering, newspaper articles about actual cases, stories written by clinical professors and others about their cases, and simulation. These materials allow students to learn case theory in increasingly complex settings, and to begin to confront the complex strategic and ethical questions of choice of case theory, whether in a clinical course, a simulation course or a traditional classroom. The article concludes that as students move

* Professor of Law, American University, Washington College of Law. Much of this essay is the result of the hard work of the participants in the editorial process, which included many exchanges of drafts and frequent telephone calls. It was worth every minute spent — and fun at the same time. The essay also benefitted from the contributions of participants at the UCLA/IALS Fifth International Clinical Conference in Lake Arrowhead, California, and the Annual Meeting of the Law & Society Association in Budapest, Hungary, where I presented earlier versions of this essay. My research assistant, Katie M. Connors, and my administrative assistant, Cecelia Friedman, are talented editors who helped smooth out the rough edges in the text. I couldn't have finished the footnotes without Katie, who has a knack for research along with her bluebooking skills. I thank my partner, Maya Coleman, who in talking with me about case theory over the years has helped me think about how I teach it. I feel very lucky to have her love and encouragement. The administration of American University's Washington College of Law has provided generous support, financial and otherwise, for this essay and my other writing projects. And, of course, no thanks would be complete without acknowledging my clinical colleagues and students who challenge me to think in new ways every day. Although I come from a family of teachers, I didn't think about a career in teaching until my experience as a clinic student in the Mandel Legal Aid Clinic at the University of Chicago Law School transformed my idea of lawyering. From that point forward, I wanted to teach in a clinical program. I am happy to have found a home in this profession, at this law school, and to have finally written an article about teaching.

along the spectrum from imagining to finally choosing case theory, actual cases and clients become much more important in the equation.

In the aftermath of the death and destruction at the World Trade Center and the Pentagon on September 11, 2001, the *Washington Post* reported that "America struggled to retrieve meaning, salvage hope, and frame a narrative that could explain the deadly terrorist strikes."¹ The reporter quoted academics across a wide range of disciplines. According to a sociologist, "commentators began searching for explanations and metaphors even before the 110-story buildings collapsed."² A professor of psychiatry explained that emotional recovery is assisted by "find[ing] a story that explains the event."³ An anthropologist stated "people are dead . . . [but] their deaths can be inserted into a structure of meanings that make sense."⁴ These comments show the language of "narrative" and "framing" working its way from academia into the jargon of daily life, or at least the jargon of people who read the *Washington Post*.⁵

The language of legal narrative has followed a more meandering path. Long before legal academics talked about narrative, lawyers in practice understood the power of stories in advocacy.⁶ Until recently, however, even practice-oriented legal textbooks paid scant attention to narrative and storytelling. Now that legal academia has embraced narrative, lawyering theorists are grappling with its application to

¹ Shankar Vedantam, *Finding Personal Ways to Cope With National Trauma*, WASH. POST, Sept. 14, 2001, at C4.

² *Id.* (quoting Robin Wagner-Pacifici, a Swarthmore College sociologist).

³ *Id.* (quoting Robert Ursano, a psychiatrist at the Uniformed Services University School of Medicine).

⁴ *Id.* (quoting Anthony Oliver-Smith, a University of Florida anthropologist). Numerous websites are devoted to putting the attack in context or analyzing the United States' response. See <http://www.pbs.org/americaresponds> (last visited Sept. 19, 2002). Others use narrative to draw sharp distinctions between radical Arab Muslims who practice terrorism, and the Arab, Arab-American and Muslim communities. *Arab American Anti Discrimination Committee*, <http://www.adc.org> (last visited Sept. 19, 2002).

⁵ The language of "stories" is even more prevalent than the language of "narrative." Peter Jennings on ABC News talked incessantly of stories, and thanked participants for "sharing their stories." For weeks afterward, the NEW YORK TIMES penned obituaries with headings such as "He Kept Everyone Safe" or "Card Games and Cruises," see, e.g., *From Those Left Behind, Remembrances of Love, Hopes and Caring*, N.Y. TIMES, Sept. 20, 2001, at section B, and the WASHINGTON POST wrote similar profiles. See *The Lives Left Behind: For Pentagon Victims' Families, Each Day Brings Tearful Reminders of Shared Lives, Lost Dreams*, WASH. POST, Oct. 7, 2001, at A1. See also Dong-Phuong Nguyen, *An 81-Story Trek to Safety*, ST. PETERSBURG TIMES, Sept. 17, 2001, at B1 (describing a banker's harrowing escape from Tower 1 of the World Trade Center). Similar short biographies can be found on websites such as Newsday.com.

⁶ MICHAEL E. TIGAR, *PERSUASION: THE LITIGATOR'S ART* 6 (1999).

advocacy.⁷

The concept of narrative in legal advocacy is rooted in the idea of case theory. In a previous article, I defined case theory as “an explanatory statement linking the ‘case’ to the client’s experience of the world.”⁸ Other lawyering theorists addressing the substance of case theory — what case theory is — have argued that case theory is grounded in story or narrative.⁹ This articulation has meant a move away from case theory as doctrine towards a view of case theory as persuasive storytelling. For those concerned with the ethics of case theory, it has meant a greater focus on the respective rights and responsibilities of the lawyer and the client for the story that is ultimately told.¹⁰ Indeed, these questions of substance and ethics are intertwined.

Now that legal scholars are looking at case theory in story terms, law teachers need to consider how this vision of case theory affects how case theory is taught. In this essay, I suggest a framework for teaching this concept of case theory in a clinic classroom setting.¹¹

⁷ Narratives in law should be distinguished from narratives in lawyering. For an example of the former, see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989). For an example of the latter and a discussion of the disjunct between legal narratives in practice and academia, see Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994).

⁸ *Id.* at 487. This explanatory statement “serves as a lens for shaping reality, in light of the law, to explain the facts, relationships, and circumstances of the client and other parties in the way that can best achieve the client’s goals.” *Id.* Others use the term “theme” in much the same way, defining theme as “stat[ing] the central meaning of your client’s case that you want to communicate to the decision-maker,” STEFAN H. KRIEGER, RICHARD K. NEUMANN, JR., KATHLEEN H. MCMAHON, & STEVEN D. JAMAR, *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, & PERSUASIVE FACT ANALYSIS* 142 (1999), or as a “succinct, general description of your version of what happened and why” coupled with a “characterization that paints your client in a positive light and/or the adversary in a negative light.” ALBERT J. MOORE, PAUL BERGMAN & DAVID A. BINDER, *TRIAL ADVOCACY: INFERENCES, ARGUMENTS & TECHNIQUES* 95-96 (1996). See also PETER MURRAY, *BASIC TRIAL ADVOCACY* 53 (1995) (defining “fact theory of the case” as “the fact picture to be presented and the references to logic, consistency, and, above all, human experience, that support acceptance of that fact picture by the factfinders”). More has been written on the technique of case theory and the criteria for evaluating case theory than the definition of case theory.

⁹ See KRIEGER, ET AL., *supra* note 8, at 137-48 (presenting story model as one model for organizing facts). See also STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* 1-14 (2d ed. 1997); TIGAR, *PERSUASION*, *supra* note 6; Michael E. Tigar, *EXAMINING WITNESSES* 1-28 (1993); Miller, *supra* note 7.

¹⁰ See Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998); Miller, *supra* note 7; Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1994).

¹¹ To oversimplify, the material of clinical legal education falls into two broad catego-

The framework rests on the central assumption that case theory is based in story, and addresses the challenges of teaching case theory framed as narrative. The process of teaching case theory has three basic stages — imagining case theory, evaluating (and constructing) case theory, and choosing case theory. The material for this process is stories — found in film, fiction, nonfiction accounts of actual cases, and simulation. While this structure can be adapted to “pure” classroom teaching of case theory, whether in a simulation setting or a traditional classroom, these settings cannot provide the rich lessons of lawyering and client interaction that enhance students’ understanding of case theory in a live-client clinic. In particular, while the classroom is a good place to teach the process of imagining case theory, and to some extent the process of evaluating case theory, teaching case theory *choice* requires the give and take of real actors in the moment in the world.

In Part I, I map the contours of the concept of case theory that I teach, which I call “case theory as storyline,” exposing some of the difficulties inherent in the terrain.¹² In Part II, I set out some general principles for teaching case theory,¹³ and illustrate those principles with examples from my own experience teaching case theory in a clinic seminar and a non-client-based lawyering seminar. I have shared many of these experiences with my colleagues in the clinical program at American University’s Washington College of Law, so when I use the term “I” it should often be read to include “we.” The same is true of the ideas in this essay. Many of the ideas are not mine alone; I borrow shamelessly from the insights of many colleagues, for-

ries: actual client experience, and the more vicarious experience of readings and simulations. For a definition of simulation, see Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 CLINICAL L. REV. 123, 123 n.1 (2000) (defining simulation as “exercises in which students take on the role of lawyer performing one or more of the tasks performed by a lawyer”). When I use the term “classroom,” I mean a seminar setting where reading and simulation are the primary materials, although experience with actual clients informs the discussion. When I use the term “individual supervision,” I mean a setting where the students’ experiences with clients are the primary materials. While not all clinicians may share these definitions, in my approach the distinction is not so much in the size of the group but rather in the content and the materials under discussion. For an excellent discussion of the seminar, case rounds and supervision components of clinical legal education, see Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109 (1993-94).

¹² My understanding of case theory is gained from my own experiences practicing law, teaching students about theory and practice, observing my clinic students practice, and writing about case theory. My practice experience is in litigation, both my own practice representing individual clients and the United States government, and my clinical practice as a supervising attorney in a criminal defense clinic.

¹³ The framework set forth here does not present a syllabus for teaching case theory because the content of the course will vary in different clinical and nonclinical settings.

mer colleagues, and other clinical teachers.¹⁴ Through this process of teaching, writing and talking about case theory over the years, case theory has come to frame the project of clinical teaching for me.

PART I: CASE THEORY AS STORYLINE

Case theory is one of the most important “subjects” that a clinical professor teaches.¹⁵ As the key means of framing a case, case theory is *the* central problem that lawyers confront in putting a case together. Case theory drives much of the work in representing clients, from interviewing the client, to fact-gathering and investigation, and finally to negotiation, trial or some other resolution of the case.¹⁶ Many of the decisions made during the life of a case are decisions that rest on case theory, including the question of which witnesses to call at trial, the content of their testimony, and indeed, the shape of the trial itself.

A. Conceptualizing Case Theory as Storyline

There are many approaches to case theory,¹⁷ and the methodology for teaching case theory varies with the underlying conceptual approach. I teach a concept of case theory that I have developed over years of litigating, clinical teaching, and writing about case theory, in which case theory can best be described as “storyline.”¹⁸ A

¹⁴ In our collaborative clinical program, I have taught case theory in one form or another with nearly fifteen colleagues, and discussed case theory with numerous other colleagues in our weekly meetings and summer training sessions. Many years ago, David Chavkin and I collaborated on a session on teaching case theory at an AALS annual meeting, see Annual Meeting, Dilemmas for Law Teachers: Conflicting Obligations, Collegial Responsibilities and Questions of Mission (Joint Program of the Sections on Clinical Legal Education & Professional Responsibility), Teaching Theory of the Case: A Multimedia Approach, held by the Association of American Law Schools, New Orleans, LA (Jan. 6, 1995), and several colleagues and former colleagues have addressed case theory in their scholarship. See, e.g., DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS, ch. 5 (2002); Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLINICAL L. REV. 41 (1994); Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971 (1992), Shalleck, *supra* note 11.

¹⁵ Case theory is a “stand alone” subject, as well as an integral part of many other lawyering subjects.

¹⁶ In litigation, case theory plays an important role at every stage of the process, including interactions with clients and opposing counsel and court appearances. I expect that there are many parallels, and some differences, to the role that case theory plays in other kinds of lawyering, including transactional and legislative lawyering.

¹⁷ For example, one clinical text offers three different approaches to teaching case theory, naming these the legal elements model, the chronology model, and the story model, and seems to favor looking at case theory from all three perspectives. KRIEGER, ET AL., *supra* note 8, at 119-151.

¹⁸ The term is not unique to case theory, or even lawyering. See *All Things Considered: Profile: How Historical Events Are Remembered* (NPR radio broadcast, Sept. 10, 2002), available at <http://search.npr.org/cf/cmn/cmnpd01fm.cfm?PrgDate=9%2F10%2F2002&Prg>

“storyline” is the short version of the lawyer’s story of the case that takes into account the context in which it will be told.¹⁹ The case theory is a snapshot, a framework, the essence of the story or what the case is about. It is not the whole story that a video camera filming the event would tell, but rather the coherent meaning that the elements create. Yet it is in stories that storylines are found.

Case theory is the most challenging concept that I teach. When students hear the term “theory,” they anticipate something grand, like Einstein’s theory of relativity. Or they expect something so abstract that it makes no difference to anyone but a handful of academics. So I must make the leap from those assumptions about theory to case theory, which is grounded in fact and the day-to-day circumstances of the clients, the lawyers and the fact-finders.²⁰ A case theory, like other kinds of high theory, is simply an explanation for why or how events happen in a particular way. Like applied theory, case theory considers the context of individuals and their surroundings.

The view of case theory as storyline places law in a narrative rather than an analytic modality. Facts do not serve law in an element-by-element categorical analysis, but rather work side-by-side with law in the story. Case theory provides an explanation for what happened, and in doing so, shapes what happened. Law plays an important role in some explanations, a lesser role in other explanations, and at times, no role at all.

For example, in a case theory that incorporates the idea of self-defense, who did what first, and with what force, matters because the law says that it does. But in some self-defense cases, the credibility of the complaining witnesses might be the key, and the legal definition of self-defense hardly matters. Context, however, always matters, even in cases that might seem to be about legal categories.

The importance of context can be illustrated by a clinic case that I once supervised, where the story of the case at trial shows the narrative concept of case theory at work side-by-side with law. My students represented an African-American client charged with assaulting a white neighbor.²¹ The alleged physical assault was minimal. The cli-

ID=2 (summarizing the view of anthropologist Geoffrey White that history is made and remembered when storylines emerge).

¹⁹ As I explain elsewhere, “[c]ase theory is a concept which describes the short version of the lawyer’s story of the case.” Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 29 (2000). Narrative is perhaps the best word for case theory, but loses many students by sounding too lofty.

²⁰ Tony Amsterdam’s speech to Canadian academics nearly twenty years ago offers the classic defense of a law school curriculum that teaches law students to *be* lawyers, not merely to *think* like lawyers. Anthony G. Amsterdam, Cambridge Lecture at the Canadian Institute for Advanced Legal Studies (July 15, 1985) (transcript on file with author).

²¹ At the time, misdemeanor assault was a common law crime. It is now a statutory

ent and the neighbor had been arguing about something, and the client shoved the neighbor. Everything had happened so quickly that the client didn't really remember the details. The client thought that they had both shoved each other, but he couldn't be sure, and the sequence of events was murky. What was known was that there was a history of tension between the client's family and the neighbor. The neighbor had made it clear that he didn't like having a black family in the neighborhood, and the client said that the neighbor had uttered some racial epithets at or near the time of the alleged assault. In terms of possible legal defenses, the racial epithets cut both ways. On the one hand, they painted a very unsympathetic picture of the complaining witness, and suggested that he might have been more involved in the confrontation than he admitted. At the same time, they gave the client a motive for instigating a physical confrontation.

The students presented a self-defense theory premised on some combination of provocation and the possibility that the neighbor had been more involved in the confrontation than he had admitted, with an underlying story that emphasized the trivial nature of the assault and the bad behavior of the neighbor. In testifying at trial, the neighbor denied making racial comments, but was not especially convincing in his denial, and did not present himself as a likeable person. Through the client's testimony, we painted a positive picture of his character; he had recently graduated from high school and had been accepted at an historically black college. He came across as a nice guy who was a bit cocky.

The problem with our case theory was that self-defense wasn't an exact fit with a story about a racist neighbor whom our client probably shoved during a verbal confrontation, yet we didn't quite have the nerve to present the story without a clear legal defense. Nonetheless, I think we were all hoping for an acquittal based on a story about the trivialness of the assault and the unpleasantness of the complaining witness. We got what we wanted when the client was acquitted, but the jury's reasoning was not what we expected.

When we talked with the jurors afterwards, they told us that they believed that the client had shoved the neighbor and that the shoving wasn't mutual, but that they nevertheless acquitted the client because they found that this "physical contact" was not "offensive" as required by the jury instruction defining assault.²² They stumbled on this lan-

crime, see MD. CODE ANN. CRIMINAL LAW § 3-203 (2002), but has retained its common law meaning, see MD. CODE ANN. CRIMINAL LAW § 3-201(b) (2002).

²² MD. CRIMINAL PATTERN JURY INSTRUCTIONS 4:01C (1999). The instruction reads: Assault is causing *offensive physical contact* to another person. In order to convict the defendant of assault, the State must prove:

guage in the instruction after trying to match the facts to the self-defense arguments of both sides, and failing to find a fit. They interpreted the word "offensive" to mean "offending," but it was not clear offending to whom (the jurors? society at large? the neighbor?) because the jurors left before we could find out more. Someone was not, or should not have been, offended.

We were surprised at the jury's attention to language in the jury instruction that neither the defense nor the prosecution had emphasized. In several years of representing clients on assault charges I hadn't thought about the meaning of this wording in the instructions. The comment to the jury instruction did not explain the word "offensive," and was largely silent on the nature of the prescribed physical force, other than to note that any amount of force constitutes an assault.²³ After hearing the jurors' explanation, I looked at the instruction again and saw an alternative to the meaning that the jurors had constructed. "Offensive" might mean taking the offensive, the opposite of "defensive." To this day, I don't know how to interpret this language in the jury instructions.

Looking back on the trial, the jurors were constructing a story and an explanation in the tradition of Bennett and Feldman's classic work.²⁴ Some might read the story of the jury deliberations as one about the primacy of legal doctrine, a story in which the jury rejected one legal framework (self-defense) in favor of another legal framework (nonoffensive physical contact). I see it differently. To me, the jury rejected one *story* in favor of a different *story* which better fit the facts. Taking the analysis one step further, the underlying story about the client, the neighbor, their relationship, and the incident has meaning apart from doctrine. All stories told in advocacy are stories in search of a legal meaning, and often the story shapes the legal meaning as much as the legal meaning shapes the story.

While not all the jurors could agree on all the facts, they pieced

(1) *that the defendant caused [offensive physical contact with][physical harm to] (victim);*

(2) *that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and*

(3) *that the contact was not consented to by (victim) [or not legally justified]*

Id. (emphasis added). The prosecutor's legal theory of the assault was that it was a battery. Two other legal theories of assault are an attempt to frighten and an attempted battery. See *id.* (Comment).

²³ As the comment stated:

There is no requirement that the defendant intend to cause a specific injury or that the victim suffer any physical injury. The mere placing of one's hands upon the body of another without consent is sufficient.

Id.

²⁴ W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGEMENT IN AMERICAN CULTURE* (1981).

together a story that relied heavily on the context of the neighbor's hostility to the client and his family, the shouting match, and the shove that caused no physical harm. Like most stories, however, the meaning is ambiguous, or at least subject to different interpretations. Because the jurors left before we could ask all of the questions that we wanted to ask, the contours of the story are even less clear. Did the story they constructed, complete with a legal element, apply a subjective or objective standard of reasonableness? Did the jurors think that the neighbor wasn't offended by the shove, or if he was, that he shouldn't have been? Why not? Was the shove not offensive because of its lack of resulting harm, or because it was fair play in light of the neighbor's racist attitude? What would the jury have concluded if it hadn't found the language in the instructions that provided an out? Was the jury's decision just jury nullification in a more subtle form?²⁵ Perhaps the jurors only agreed on one thing — that the case was based on an incident that never should have been prosecuted.

B. *Difficulties in Teaching Case Theory as Storyline*

It is one thing to tell a story about a clinic case. All clinical teachers do that.²⁶ It is yet another thing to construct a course that translates the underlying idea of story and storyline to the clinic classroom. Before I address the specifics of my approach in the next section, I want to make some observations about the difficulties that the teacher-translator faces in teaching case theory. These difficulties are rooted in the underlying messages of legal education, the complexity of the idea of story, and the inherent limitations of lawyering texts in conveying this complexity.

A story-based view of case theory confounds an overarching message of traditional legal education, whether implicit or explicit. There, doctrine is the starting point for lawyering; legal argument is in some sense "given" rather than created. Students learn to think of lawyering as the application of abstract rules to particular factual situations. These abstract rules are located in law, either statutes or judicial opinions. Like facts, these abstract rules are to be found, and later manipulated, but not shaped into something entirely new.

²⁵ A *Frontline* episode films a Milwaukee jury deliberating in a nullification case, which they resolve by focusing on the meaning of the intent element of "knowing." *Frontline: Inside the Jury Room* (PBS television broadcast, Apr. 8, 1996). For a powerful defense of jury nullification in the context of race, see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995) (arguing that in some cases "racial considerations by African-American jurors are legally and morally right").

²⁶ For a discussion of the ethics of writing about cases and clients, see Miller, *supra* note 19.

An anecdote from the end of my first year of law school demonstrates that law students may not understand that lawyering requires shaping of facts and law, not just manipulating or categorizing facts and law, even in conventional legal analysis. In researching a brief for my legal writing class, I understood that I was looking for doctrine that helped my assigned role, and I had some rudimentary skill at distinguishing helpful from unhelpful doctrine. I also understood that the “best” cases were cases where the facts were similar to the facts of the assigned problem, and where the court supported my position. This was before I had heard of case theory, and long before I had a grasp of case theory as storytelling. But even at the more rudimentary level of pure doctrine and canned facts, I misunderstood legal analysis as a hunt for the perfect case, or at least the better case. I did not understand that legal analysis requires a kind of abstraction from the holdings of particular judges and the facts of particular cases. So I spent hours looking for more cases, when my time would have been better spent creating a legal theory with the facts and law that I already had in hand. In looking back on my experience as a law student, I now realize that studying law as doctrine left me with the impression of legal analysis as a fairly static endeavor.

Instead, the process of creating a legal argument is like reading a map, in the old fashioned way, without the benefit of Mapquest or similar tools. You need to notice what is around you, rather than going in a straight linear path from point A to point B. While Mapquest allows you to zoom out, maps present you with the bigger picture. Using a map, without the aid of technology, makes it more likely that you’ll remember the names of streets, the neighborhoods that you drive through, the people in those neighborhoods. You have to think, and pay attention to details. In a world that relies increasingly on technology, despite its many benefits, lawyers will become less adept at seeing the big picture, or alternative theories.²⁷

If the idea of constructed legal argument, in the traditional sense of doctrine, is hard to grasp, then the idea of constructed stories is even further out of reach. The structure of law “on the books” is analytical, an effort to organize the world into categories. The idea of storytelling seems freer and more creative than the law allows. Understanding case theory as storyline presupposes a deep understanding of stories. It requires deconstructing stories to find storylines, and reconstructing stories to support storylines. It is fundamentally a process of construction (and deconstruction), a process which is at once

²⁷ The same is true of computer-assisted legal research tools, like LEXIS and Westlaw, where word searches and Boolean logic sometimes provide less information than the table of contents of a legal hornbook.

deceptively simple and multilayered.

Case theory as storyline is a complex idea for students — and for that matter, lawyers — to grasp. All of us have been told stories since childhood, so we know what a story is. Describing the contours of a story, however, is difficult. The essence of a story cannot be captured by stating the obvious: that a story must have plot, structure, and character. Nor can the essence of case theory be captured by a list of characteristics and qualities: facts, contested and uncontested, the nature of the audience, the unifying theme and its persuasive images.²⁸ The idea of a story is familiar to most students, but law school rarely taps into students' intuitive sense of a meaningful story.

If case theories are constructed and not found, then the possibilities are endless. There are as many case theories as there are cases;²⁹ indeed, more, if every case presents multiple case theory possibilities. In the open-ended universe of case theory, choosing a theory is a daunting task.

It is made more so because of its ethical implications. Considering case theory as a *choice* of which story to tell from among a variety of possible stories means that some stories are never told. This seems dishonest. Perspective, after all, is not truth, it is just a way of looking at things. Worse yet, it seems as if case theories are “made up” or make believe, either pulled out of thin air, or fictions conceived by lawyers.

The linear structure of conventional legal analysis is easier to explain than the structure of a story or storyline because it is less open-ended. Students read the statutes and case law and from that extract doctrine, and in turn, legal elements. These elements then form the framework for the case theory, to which facts are added. Some facts fit under one element, some under more than one, and some fit nowhere. The structure is neat, organized and very linear. It is made-to-order for detail-oriented lawyers.

The lawyering texts that adopt a nonstory based conventional view of case theory can piggyback on this linear structure, which lends itself to teaching by chart or outline. In one variation, facts are located on a parallel path from doctrine; sometimes the paths cross, at other times they diverge. In another pattern, facts and doctrine appear in outline form; doctrine forms the subject headings, with facts listed below. Here, doctrine is the roman numeral “I,” facts are the letters that follow. In another variation, facts and law coexist on a chart or table, arranged in boxes that reflect relevant categories.³⁰

²⁸ For an example of such lists, see KRIEGER, ET AL., *supra* note 8, at 138-47.

²⁹ Miller, *supra* note 7, at 555.

³⁰ KRIEGER, ET AL., *supra* note 8, at 122-25 (showing various case theory charts).

Again, the relationship is linear, facts and law are side by side rather than integrated.

In teaching a storyline idea of case theory, a clinical teacher must look outside these boxes to actual stories — our own stories and those of others. The process of distilling narrative and story from the large world of the client's case and the seemingly larger world of legal research is too messy for step-by-step instruction. This effort requires building a curriculum from the ground up, and utilizing a diverse array of media, materials and techniques.³¹ Case theory figures prominently in many stories about lawyering, which can be found in film, fictional accounts, newspaper articles and stories written by lawyers about their cases. In addition, stories about narrative as it functions in every day life are helpful—narratives about politics, news events, the law school. Other kinds of stories take the form of more immediate experience, such as stories contained in simulation. All of these “stories” fall somewhere along the wide spectrum of vicarious and direct experience.

However, even the clinic classroom is too confined an environment for dealing with the messiness of facts, and the surprises of clients and cases. Life is almost always more disorderly than stories and film, or even simulation. So while this article is about teaching case theory in a classroom through the use of clinical methodology, I do not want to lose sight of the importance of actual clients in the equation.

Once I have gotten past the teaching hurdle of “law as doctrine” and students have gotten comfortable with the idea of story and storyline, I have encountered two recurring problems that go to the heart of what case theory *is*. These are the problems of pure storytelling and mere semantics. In one variation of the problem of pure storytelling, legal doctrine disappears. When case theory is taught as storyline, doctrine no longer occupies center stage. The risk is that doctrine may fade from the scene, and that students will overlook the doctrinal intricacies in their cases. Once freed from the limitations of doctrine, they may forget that case theory involves a melding of law and story, not just pure storytelling.

I also encounter the related problem of the disappearing storyline, in which case theory becomes pure story, and simply reiterates “what happened,” detail by detail. A case theory frames the

³¹ While many lawyering texts teach case theory development from a perspective that subordinates facts to legal doctrine, even those that recognize narrative offer only the bare basics for teaching case theory. KRIEGER, ET AL., *supra* note 8; LUBET, *supra* note 9. Only a few texts are designed to incorporate a wide range of outside materials. See CHAVKIN, *supra* note 14.

story; it is not the story itself. In students' case theories, storylines can become lost in the larger story.³²

I see both of these problems in students' draft closing arguments, where the story sometimes overtakes the case that will be presented at trial through the client or other witnesses. The closings often tell the larger story revealed in conversations with the client and other individuals, even when the client does not want to tell her story in a legal forum. While it's possible that students don't understand the "rule" that closing argument must be based on evidence elicited during the trial, and are confused about what is evidence and what is not evidence, the issue goes deeper than that. A "bigger" closing argument story is the story that the students would most like to tell, freed from the constraints of doctrine, the rules governing courtroom advocacy, and even the structure of case theory.

Case theory also can be misunderstood as a matter of mere semantics and clever language. Words, of course, convey powerful images, and word choice does matter. In the hours and days following the devastation at the World Trade Center and the Pentagon, the descriptions of what happened began with "accident," and then moved to "incident," "attack" and finally "war."³³ These words carry different meanings, and call for different responses. In lawyering, however, words alone, however eloquent, are not enough.

Talking of case theory in storytelling terms may imply that simply saying something is enough, and that it is not necessary to undertake a slow, careful building of a story. Storytellers, after all, don't need to build a structure for facts; facts are simply out there to be chosen at will. While storytellers can draw from a larger factual landscape than can lawyers, even storytellers need to construct stories, fact after fact, small detail upon small detail. In a good story, it is not enough to characterize a person as evil, or dishonest or nasty. This characterization must be built through descriptions of incidents and interactions, developed over time.

The language we use to talk about case theory may also contribute to the difficulty students have in understanding the concept. The term "case theory" is something of a misnomer because the term implies a single overarching theory for every case that offers a coherent framework for the events that occurred. But actually, many cases

³² One way to address this problem is to give students a concrete sense of the length of a case theory. When we ask students to submit written case theories, we limit them to one or two sentences, or a specific number of words, ranging from thirty to fifty words. This helps convey the idea of storyline, although sometimes students get too caught up in the rule, by omitting two or three critical words when those words would exceed the maximum, or focusing on whether words such as "a" or "the" count towards the maximum.

³³ Vedantam, *supra* note 1.

have more than one case theory, which are constructed to serve different purposes at different stages of the case. In a criminal case, there is often a motions theory, a negotiation theory, a trial theory, and a sentencing theory. These are not the same theories; indeed, they may contradict one another. In a juvenile case, a case theory for negotiation might focus on the client's lack of prior involvement in the juvenile justice system, rather than the merits of the case, while at trial the case theory might point the finger at someone else. Finally, at disposition, the client might admit involvement in order to receive a more lenient ruling from the judge, an admission which flatly contradicts the trial theory.³⁴ The motions argued before trial might focus on constitutional or procedural issues, which typically would have little to do with the issues raised at trial.

In this mishmash of theory, students are understandably confused. Authors of advocacy textbooks point to the risks of alternative case theories, a warning that is meant to dissuade advocates from telling two different stories at the same time.³⁵ It should not be read to ignore the reality that different settings call for different stories, both legally and as a matter of good advocacy. This deceptively simple point is surprisingly difficult to explain in class. Often, case theory becomes a kind of synonym for *trial* theory, and other storylines are reduced to mere argument. There are motions arguments and negotiation arguments in civil and criminal cases, and sentencing arguments in criminal cases. Case theories are reserved for arguments on the merits, whether in trials or administrative settings. This conveys the false message that the "*real*" case theory is the one for trial, when that may be the least important setting for advocacy.

So we need a new, more precise vocabulary for case theory that captures the connection between storytelling and advocacy.³⁶ We

³⁴ If at trial the client testified and denied involvement, and admitted guilt at sentencing, the testimony in one of these settings would be false. As such, it would constitute perjury, although it would rarely be prosecuted. But a trial theory that points the finger at a different perpetrator without utilizing the client's testimony is quite a different matter. Indeed, criminal cases offer some of the most striking examples of contradictory theories. For strategic and other reasons, many criminal defendants exercise their constitutional right not to testify. As a consequence, the defendant is often not a central character in case theories offered by the defense. Yet most effective stories offered at sentencing paint a detailed picture of the defendant. For examples of these, see Maureen O'Hagan, *Hired Killer Gets Life Sentence in Murder Plot*, WASH. POST, July 12, 2000, at B7 (noting that at "yesterday's sentencing hearing, a more complicated picture of [the defendant]—and the killing—emerged").

³⁵ See ROGER S. HAYDOCK, DAVID F. HERR, & JEFFREY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* 14 (5th ed. 2001).

³⁶ Others have pointed out flaws in our existing case theory vocabulary, most notably David Chavkin, who created the term "theory of the client" to recognize the "sum of the legal and non-legal strategies that can be created to achieve the goals of the unique individ-

should continue to use the term “case theory” as a general term encompassing the whole range of possible advocacy settings for storytelling, but when the storylines in these settings differ, specify the particular setting in naming the theory (motions case theory, trial case theory, and so on). Naming those settings is important, both for clarity in distinguishing the applicable theory, and for recognizing that stories take different shapes in different settings. At the same time, the word “case” reflects the fact that lawyers think broadly about the stories that they tell on behalf of clients, and later refine those stories to fit different situations. While a good advocate cannot ignore the impact of the setting on the story she tells, the story belongs to the case as much as it belongs to the setting. If we abandoned the language of case theory altogether, and replaced it with language that is setting specific (motions theory, trial theory, and so on), we would lose the sense that advocacy is connected to something larger than the procedural setting in which it takes place. And perhaps just as importantly, case theory is by now so entrenched in the language of lawyering that to banish it from our lawyering theory vocabulary seems like sacrilege.

Given these issues, how then can we go about teaching a concept of case theory rooted in constructed stories rather than doctrine, and also address the ethical dimensions of the incredibly open-ended nature of story constructions?

PART II: HOW TO TEACH CASE THEORY

It’s good to begin at the beginning.³⁷ Many lawyering process seminars that accompany clinics begin with interviewing, and teach case theory three or four weeks into the semester. In my experience, this is too late. Case theory must be taught at the beginning of the semester, not simply because teaching lawyer skills without teaching the bedrock of case theory leaves those skills in a vacuum, but because case theory is a concept that cannot be learned quickly. Case theory is

ual [the lawyer] represent[s],” CHAVKIN, *supra* note 14, at 39, and to deal with some of the potential shortcomings of the term “case theory.” I share his concern that clients are not “cases,” *id.* at 40, but interpret the language of “case” as broad enough to include lawyers, clients and a variety of advocacy settings.

³⁷ I want to provide some sense of where the various teaching methodologies fit in the one-semester clinic seminar that I teach, where my teaching goals are more modest than would be the case in a year-long clinic. Most of the specific teaching examples in the essay are from a 1 and ½ hour class that I teach during a two-day clinic orientation, and a two-hour class (often entitled “Case Theory and Strategic Planning”) that I teach in the fourth week of the semester. This material often carries over to the next class. The placement of these two classes is similar to the structure outlined in David Chavkin’s clinical text, *see* CHAVKIN, *supra* note 14. These labels are misleading, however, because I teach case theory in virtually every seminar class.

best learned through a method that I will call “pervasive teaching” — the process of teaching case theory throughout the clinic curriculum. After introducing the basic idea of case theory as storyline, I teach case theory ideas in most clinic seminar classes, even where the titles for classes might not indicate that they are about case theory. Early in the semester, the details of how to implement case theory in the context of a particular client interaction or courtroom performance cannot be taught, but the concept of case theory can be introduced. The classes that follow can then look at case theory in the context of a particular subject or skill.

When I added a class about case theory to the first morning of the first day of orientation, it improved the quality of the classroom conversation and the performances during orientation. Our orientation program is organized around a series of advocacy exercises designed to teach students a few basic trial skills and a bit of local criminal procedure, and to introduce them to the give and take of a simulated courtroom.³⁸ Before I added a case theory component to orientation, the students faced a hodgepodge of evidentiary exercises, motions arguments and sentencing hearings. They stared at us blankly when we alluded to case theory, or themes and arguments. The exercises were either theory-less, and suffered as a consequence, or the theory was implicit, but could not be discussed as case theory in any meaningful way. Not only has the discussion of case theory enhanced orientation, but it has also conveyed the message that case theory is the framework for lawyering, and also for the classroom component of clinic. Just as importantly, this simple change has widened the time frame for teaching case theory.

While there may be no single optimal sequence for conveying the idea of case theory, I have found that working in the order of movies, written stories and simulation is a good approach. This sequence allows the teaching of case theory in increasingly complex contexts, and recognizes the strengths of each of these materials in the three-stage process of imagining, evaluating (and constructing) and choosing case theory. Stories are the bedrock of teaching the idea of case theory as storyline. This idea of case theory can be learned through the long, slow process of reading and talking about lawyer and client stories which include case theory themes, and constructing case theories from simulated and actual stories. Movies and fiction are especially good at helping students imagine case theory, and begin the process of evalu-

³⁸ We also include a group court observation of a local courtroom, a class debriefing that observation as well as earlier individual observations of jury trials, a written assignment analyzing the local rules of criminal procedure, and a class on the role of prosecutors and defense attorneys.

ating case theory. Actual stories about lawyering show students how lawyers identified case theories in their cases, worked with those theories, evaluated them against other theories and made choices about case theory. However, this experience for students is inherently vicarious, until the simulation stage brings all these elements together in a setting where students begin to see how complex and shifting facts really are, and the pros and cons of various case theory choices. And finally, there is real life lawyering.

A. Movies

Movies are an entertaining way to grab students' attention. As an aspect of popular culture, movies are easily familiar and immediately relevant. While movies are not a new pedagogical tool,³⁹ even in traditional classrooms, there are several aspects of movies that make them especially effective in teaching case theory. I tell my students that every case theory should have an accompanying video that makes the themes, plots, people and other facts real. They should imagine other videos for alternative storylines, and play those videos in their heads until one storyline emerges. Movies do that; they make concepts visible in a way that language alone cannot. Because they are explicitly visual, they assist students in gaining a sensory understanding of case theory.

In addition, by providing clean examples of case theory, movies help students begin to imagine case theories, and to a lesser extent, begin to evaluate case theories in concrete situations. Movies have theme, plot and character, and while "theme" is not synonymous with case theory, it's close. Real life accounts and incidents have storylines, but they are not always immediately discernible. Whatever the limitations of movies (and for that matter television) in conveying a real sense of the actual business of lawyering, the cases portrayed in movies have obvious storylines. Indeed, it is the tendency of movies about lawyering to simplify antagonists' competing versions of a story that makes case theory stand out so clearly. Detailed, legalistic accounts of real life drama is not what sells movies. Colorful accounts of interesting characters do. It is the relative factual richness of movie portrayals of cases, and the rather limited role of law, that makes case theory so vivid. In a medium that "dumbs down" law, story elements become much more powerful.

This is not to say that law does not matter to case theory, only that there is more to case theory than law. For example, in the movie

³⁹ See MICHAEL ASIMOW & PAUL BERGMAN, *REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES* (1996).

Philadelphia,⁴⁰ legal research reveals a theory of liability and a remedy for workplace discrimination against a person with AIDS. Yet section 504 of the Rehabilitation Act of 1974⁴¹ is not the sum total of the case theory that the lawyer, Joe Miller (played by Denzel Washington) offers on behalf of Andrew Beckett (played by Tom Hanks), an associate at a large, profit-hungry law firm who was fired. Miller needs to convince the jury that the law firm knew that Beckett had AIDS, and that they fired him for this reason, and not for his workplace performance. For the first prong of his case theory, Miller offers evidence that a partner at the firm saw lesions on Beckett's forehead, and that that partner had worked at another law firm at which a paralegal had similar lesions, where it was common knowledge that she had AIDS. For the second prong, Miller, in his opening statement, chooses to portray Beckett not just as a competent lawyer, but as a "brilliant lawyer, a great lawyer." At the same time, Miller chooses not to demonize the law firm, telling the jury that when the law firm discovered that Beckett had AIDS, "they panicked. And in their panic they did what most of us would like to do with AIDS, which is just get it and everybody who has it as far away from the rest of us as possible." These are matters of case theory that law does not encompass. Miller goes on to tell the jury what the law does encompass: "no matter how you come to judge [the law firm] partners, in ethical, moral and in human terms, the fact of the matter is when they fired Andrew Beckett because he had AIDS, they broke the law."

Case theory is the picture of a case reduced to its simplest elements, its basic storyline, so it is not surprising that movies like *Philadelphia* can excel at conveying the idea of case theory. The movie demonstrates that there are many different ways to tell a legal story. Indeed, the job of an advocate is to sift through potential case theories and their accompanying factual scenarios, and following the client's lead, find an account that fits. Sometimes there is more than one path to the same storyline, as the jury deliberations demonstrate. One male juror uses an analogy from his own life experience in evaluating Miller's characterization of Beckett as a "brilliant lawyer." The juror asks, somewhat rhetorically,

say I gotta send a pilot into enemy territory and he's gonna be flying a plane that cost \$350 million, who am I gonna put in that plane, some rookie who can't cut the grade [],⁴² or my best pilot, my

⁴⁰ *PHILADELPHIA* (Columbia Tri-Star 1993).

⁴¹ 29 U.S.C. § 794 (2002).

⁴² By making this comment, the juror also disparages the firm's contention that Beckett had been assigned to an important case as a test of his ability, and then failed the test by misplacing the complaint in the case.

sharpest, my most experienced, my top gun, the very best I got?

The story of *Philadelphia* is a realistic although fictionalized account of a case, a client, a lawyer and a trial.⁴³ The moviemakers are attempting to portray events as they might really occur in a courtroom, although the events are dramatized and reduced to a barebones portrayal of a trial. Movies, as a medium, even those that tend towards the real, offer a lot of room for imagination. In contrast, there are movies that do not offer a “real” account of courtroom dramas, but instead offer fanciful, funny or outrageous accounts of cases. These crazy or goofy scenarios can even better encourage students to imagine case theory, and are often brilliant vehicles for classroom discussions of case theory because students aren’t as concerned about getting the law right.

For example, after watching segments of *Miracle on 34th Street*,⁴⁴ students are able to generate story-based case theories. The movie tells the story of Kris Kringle, the white-bearded elderly gentleman hired by Macy’s department store as the store Santa Claus at Christmas. When the store manager discovers that Kris thinks that he *is* Santa Claus, a series of events unfold in which the store psychologist seeks to have Kris committed to a mental institution. In a scene that takes place at a mental hospital to which Kris has been sent for examination pending a commitment hearing, Kris meets with a lawyer (who also happens to be a friend) to plot strategy. From this interaction, students quickly identify a number of theories, from the solidly basic to the sublime. These include theories that Kringle is joking or pretending to be Santa Claus, that although he believes himself to be Santa Claus, he’s not dangerous to himself or others, that he doesn’t really believe that he’s Santa Claus, but that he comes to so closely resemble the role that he identifies as Santa Claus. This last theory has two variations, the first is that helping others is so much a matter of principle to Kris that he is a Santa-like character, the second is that in playing the role at Macy’s he has become the fictional character that he cares so much about. Embedded in this last theory is the idea that if someone knows a character is fictional, that person can’t really believe himself to be that character. Kris is sincere in telling the world that he’s Santa Claus, while at the same time he doesn’t believe in

⁴³ Documentaries such as *A THIN BLUE LINE* (Anchor Bay Entertainment 1988) are one step closer to real cases.

⁴⁴ *MIRACLE ON 34TH STREET* (Twentieth-Century Fox 1947). For an excellent case theory discussion of this film, as well as other movies, see CHAVKIN, *supra* note 14. David Chavkin’s book chapter on case theory and my article both have their roots in a teaching demonstration on case theory that David and I jointly conducted using *MIRACLE ON 34TH STREET* at a small group session at an AALS annual meeting. See AALS Annual Meeting, *supra* note 14.

reindeer coming down the chimney on Christmas Eve. The claim that "I am Santa Claus" can also be seen as a metaphor representing goodness, generosity, and love of children. And finally, those students who have seen the movie (usually quite a number), or those thinking way outside the box, come up with the theory that Kris Kringle actually is Santa Claus.

Some of these theories depend more on law than do other theories. A theory that relies on a showing that Kris Kringle is not dangerous to himself or others is explicitly legal; we need to know what these words mean and what the legal standard entails. On the other hand, a theory that Kris Kringle is Santa Claus depends on facts, and law has very little to do with it. The same is true for theories that depend on more metaphysical questions about the nature of fact and fiction and what it means to believe something. These are good lessons for students in beginning to understand case theory and how it works, which takes them in the direction of evaluating case theory.

Miracle on 34th Street is also a good vehicle for teaching case theory because it encourages students to think about the role of lawyers and clients in choosing case theory, an ethical issue that is intertwined with the "substance" of case theory, and is part of the process of evaluating case theory. In our clinical program, we teach advocacy in the context of client centeredness. Client centeredness is a lawyering theory that argues for clients serving as decisionmakers in cases, with lawyers aiding clients in sorting through the options and weighing the tradeoffs and likely consequences of various decisions.⁴⁵ The question then becomes what role should clients have in constructing and choosing case theories?

In *Miracle*, from Kris Kringle's encounter with the store manager, to the lawyer-client interview at the mental hospital, Kris asserts that he *is* Santa Claus. He is passionate about this belief, telling the lawyer that "even if we can't win we can go down swinging." Kris is distraught that the store manager doesn't believe in him as Santa Claus but is instead sorry for him as "a nice kind old man" who has been institutionalized. He tells the lawyer that "if you'd been dragged off here instead of me, she wouldn't have been sorry, she'd have been furious." He goes on to say that the store psychologist is "contemptible, dishonest, selfish, deceitful, vicious, yet he's out there and I'm in here. He's called normal and I'm not. If that's normal, I don't want it." A theory that focuses on his lack of dangerousness, and argues that he's just a harmless old man who should be left alone in his crazy thoughts, would fly in the face of the client's conception of himself.

⁴⁵ DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

At the trial, the lawyer offers the unadulterated theory that Kris Kringle *is* Santa Claus, and wins, a result that is a clear victory for client-centeredness. Looking backwards, though, this theory was not guaranteed to win. If the lawyer believed that a different theory would have been more successful, what tradeoffs would the client have been willing to make in how that theory portrayed him? Would he have been willing to go with the more nuanced version of the theory, one that argued that Kris was a Santa-like character who had come to believe in himself as the symbol he cared so much about? Apart from what the client would see as being in his interests, what are the ethics of telling a story that is not true to the client's version of events? The case of Kris Kringle may not pose this question in the most pointed fashion because the client's case theory that he *is* Santa Claus may be less "true" than some alternative theories. But even this variation on truth is a good topic for class discussion.

The movie also demonstrates that showing that Kris is Santa Claus requires proof of two facts — Santa Claus exists, and Kris is Santa Claus. In proving that there is a Santa Claus, the lawyer offers the testimony of the prosecutor's son, who says he is sure that there is a Santa Claus "because my daddy told me so." In proving that Kris is Santa Claus, the lawyer offers bagfuls of letters written and addressed to Santa Claus and delivered by the post office to Kris. An anecdote from this year's class discussion of the movie sheds additional light on the meaning of letters to Santa Claus. One of my students explained that when her son Christopher sent a letter to Santa Claus asking for a roller coaster K'NEX and the Star Wars Millenium Falcon (from Episode II Attack of the Clones Action Fleet), among other things, he got a form letter in response.⁴⁶ The letter is full of lawyerly caveats and bureaucratic hedging. Santa Claus tells Christopher:

Each year I get more and more letters. . . . Many children have asked for the same toys as you have. So if you don't get what you ask for, please understand and don't get mad. My big toy bag is filled with many other toys too.

In the movie, when the prosecutor's son asks for a "real official football helmet," Kris replies without any hesitation, "Don't worry, Tommy, you'll get it." Times have changed since the movie was produced more than fifty years ago.

Missing from the movie is any sense of what the conversation between Kris and the lawyer about case theory choice would look like. The movie, after all, was made for a popular audience, not a law student or lawyer audience trying to figure out client centeredness and

⁴⁶ She gave me copies of both, and permission to include them in this article.

case theory. But the contours of such a conversation is one of the most important for class discussion. It is possible that Kris did not actually believe that he was Santa Claus, but instead believed something closer to one of the "Santa as metaphor" theories. Only a conversation focused on this issue could sort out the difference.

B. Fiction

I like to supplement movies with a fictional account of lawyering. Like movie screenwriters, writers of fiction are not bound by conventions of facts, or by "what really happened," and are free to tell a good story. Case theory in the hands of a talented writer, even a writer who is not a lawyer, comes alive. Fiction writers understand storylines, and for those who understand advocacy, the distance from storyline to case theory is short.

But written fiction adds a dimension that film does not. In fiction, storylines are palpable in a different way from film. In film, visuals, action, plot and dialogue predominate. In literature, language and character are often as important as plot. Words really do matter, and it's possible to find stories that elegantly portray the case theory choices that lawyers face and the costs those choices impose on clients. I use a short excerpt from Ernest Gaines' novel *A Lesson Before Dying*,⁴⁷ a story about a young African-American teacher's relationship with Jefferson, an African-American defendant convicted of capital murder and sentenced to death. In the first chapter, Gaines describes the crime from the perspective of Jefferson, a young man in his early twenties. Jefferson finds himself in the middle of a robbery gone bad at a local store. He is with some acquaintances who ask the storekeeper for credit to purchase some wine, and when the storekeeper refuses, an argument ensues. The storekeeper pulls out a gun and shoots, one of Jefferson's acquaintances shoots back, and everyone except Jefferson is killed. Jefferson stands in the store, dazed and befuddled. He takes some whisky and some money, and is still standing in the store when two white men walk into the store. For him, that is the beginning of the end.

This scene is contrasted with the next, where in his closing argument, Jefferson's defense attorney characterizes his client as a "hog" who was incapable of planning a crime, describing him as "a thing to hold the handle of a plow, a thing to load your bales of cotton, [a] thing to dig your ditches, to chop your wood, to pull your corn."⁴⁸ The speech is a classic racist argument, where the client is portrayed as

⁴⁷ ERNEST J. GAINES, *A LESSON BEFORE DYING* (1993).

⁴⁸ *Id.* at 7-8.

a servant at best, a slave at worst, too stupid, too subhuman to have formed the capacity to commit the crime alleged. This portion of the argument is also an excellent example of a case theory shorn of legalisms, where character and criminal intent go hand in hand. It is not possible to tell from the story whether the lawyer believes in the characterization, or is making a strategic call that a racist argument is most likely to win over the jury.

This chapter is one of the most painful and poignant in a beautifully written piece of fiction. In seven pages, students learn the story of a crime and see a snapshot of the argument a lawyer makes to encapsulate the story. The chapter is a springboard for discussing much of what is important about case theory. It gets students to think about the idea that case theory involves choice, in a context where that choice exacted a huge toll on the client and others in the courtroom, and where there were facts that might have enabled the lawyer to choose a better theory. It starkly and concisely poses the question of the ethics of choice of case theory by demonstrating a choice by the lawyer that was so clearly disrespectful of the client's humanity. What is the cost of an argument that fails to capture a client's experience of an event? Even worse, what is the cost of a case theory that so demeans a client that nothing remains of his dignity? In making arguments like this one, are lawyers willing to make arguments that clients would reject because lawyers want to win at any cost, and don't have to live with the consequences of the portrayal? Is the case theory even more offensive because it didn't work? Not only was the client dehumanized in public, but he was also sentenced to death. Although it's obvious from the story that the lawyer did not craft the theory with the client's participation or permission, are there circumstances in which a client would ever approve such an argument? What are the pros and cons? Even in the 1940's in Louisiana, is this an argument that would have swayed an all-white jury? Does seeing Jefferson as a "hog" make it less likely that they will convict him of capital murder?

Would the argument have been a better one if the language were toned down and made less overtly racist? Jefferson was, after all, a little slow, passive, not hot headed or angry, with no prior history of violence. Under the circumstances, which of these traits are the most important to a good case theory? Was it even possible in that place and time to make an argument about lack of capacity that wouldn't have been viewed through a racist lens?

Getting back to the facts of the case, does the theory fit? Is this a crime that only an intelligent perpetrator could have committed? The crime on its face appears to be violent, hasty, spur of the moment, not exactly planned in advance. Intelligence seems to have had very little

to do with this crime. What is needed is an explanation of why the client was at the scene, apparently caught red-handed. Did the lawyer even talk to his client about what happened, or did he just make up an argument that he thought would work? If he did talk to his client, why did the lawyer decide not to tell the story as it actually happened?

Finally, are there some case theories that are so offensive that they ought not to be told, even if they might make the difference between life and death? Of course, the racist case theory didn't save Jefferson's life, but the lawyer couldn't have known that with certainty in advance. Does it make any difference that this was Louisiana, and the case theory offered by the lawyer was not outrageous (at least to whites) in that time and place? Would any case theory have saved Jefferson's life? As Gaines tells us, Jefferson's godmother "knew, as we all knew, what the outcome would be. A white man had been killed during a robbery, and though two of the robbers had been killed on the spot, one had been captured, and he, too, would have to die."⁴⁹ Because the verdict was a foregone conclusion, Jefferson's godmother "became as immobile as a great stone or as one of our oak or cypress stumps."⁵⁰ She had stopped listening, but "she did hear one word — one word, for sure: 'hog.'"⁵¹

C. *Nonfiction*

The story in Gaines' book is so palpable and true to life that it is as real as stories about lawyering that "actually" happened. Indeed, to the extent that much fiction is based on actual experience and all nonfiction is dependent on the perspective of the writer, the line between fiction and nonfiction is fuzzy. The advantage of real stories, however, is that they allow students to see how case theory works in the struggles of day-to-day lawyering. If the author is true to the events as they actually unfolded, it is easier to see the choices that lawyers faced. Moreover, although fictional stories have much to offer, students more readily accept "true" stories as more relevant.

In teaching the skill of imagining case theory, real life examples of courtroom advocacy abound, and can be easily incorporated into a clinic curriculum. For example, Michael Tigar's closing argument in the Oklahoma City bombing trial demonstrates that some of the most powerful themes in case theory are the oldest ones.⁵² He tells the story of Joseph, both the Old Testament version and the MTV version

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 3.

⁵¹ *Id.* at 4.

⁵² Michael E. Tigar, *The Power of Myth: Justice, Signs, and Symbols in the Criminal Trial*, LRTIG., Fall 1999, at 25.

in the *Technicolor Dream Coat*, in order to persuade the jury not to sentence Terry Nichols to death.⁵³ Case theory also figures prominently in newspaper accounts of trials, where journalists, even more than lawyers, appreciate the role of case theory in courtroom advocacy. Often, case theory is not labeled as such, instead referred to as “narrative,” or “argument,” or some other term, but the concept is the same.

I am an avid reader of the *Washington Post*, and hardly a week goes by without an article with a good example of case theory. In a recent series of articles, the *Post* reported on the trial of Larry “Bill” Elliott, a former Army intelligence officer who committed murder after he became obsessed with Rebecca Gragg, a woman he had met on the Internet.⁵⁴ Gragg accepted \$450,000 from Elliott but then rebuffed his attempt to have a sexual relationship with her. According to the prosecution, Elliott then killed Gragg’s ex-boyfriend, Robert Finch, and Finch’s girlfriend, because he perceived Finch to be an obstacle to having a relationship with Gragg. In countering the prosecution theory, the defense needed to explain much damning evidence, including the fact that witnesses had seen Elliott near Finch’s home shortly before the slayings, that his truck was spotted nearby, that some of his blood was found on a back gate to the property, and that he had made a cryptic remark to Gragg about cleaning up a mess. The defense explained Elliott’s presence near the scene not as stalking, but as surveillance conducted at Gragg’s request.⁵⁵ The defense pointed to Gragg’s custody dispute with Finch as giving her a motive for the murder, and argued that she could have arranged the murder through a third person and pinned the murder on Elliott, who was a convenient target. The jury convicted Elliott, and recommended a death sentence.⁵⁶

In addition to journalism, there are analogs to case theory in

⁵³ *Id.* at 30, 70.

⁵⁴ See Josh White, *Man Convicted of Killing Va. Couple In Jealous Attempt to Win Girlfriend*, WASH. POST, July 26, 2002, at B2; Josh White, *Murder Suspect Was Jealous, Woman Testifies*, WASH. POST, July 19, 2002, at B3; Josh White, *Obsession Blamed for Double Killing; Internet Created Odd Relationship, Police Say*, WASH. POST, May 21, 2001, at B1; Josh White, *Obsession Led to Slayings, Pr. William Jury Told: Defense Says Woman, in Custody Fight, Manipulated Man to Kill Woodbridge Pair*, WASH. POST, July 17, 2002, at B2 [hereinafter White, *Obsession Led to Slayings*]; Josh White, *Pr. William Jury Urges Death for Murderer: Couple Were Slain in Gambit for Love*, WASH. POST, Aug. 1, 2002, at B7.

⁵⁵ White, *Obsession Led to Slayings*, *supra* note 54, at B2. Elliott became an expert at surveillance through his work with the Army, where he was director of the Army’s counterintelligence school and had top-secret security clearance. *Id.*

⁵⁶ That sentence was overturned after Elliott’s defense lawyers learned that a juror had talked about the case with her husband and with a stranger in the courthouse cafeteria. Josh White, *Conviction in Couple’s Slayings Tossed Out, Judge Learns Juror Talked About Case*, WASH. POST, Sept. 25, 2002, at B2.

other professions, and stories from those professions can help students better understand the role of theory in law.⁵⁷ In *The Call of Stories*,⁵⁸ Robert Coles' describes his experiences as a young resident in a psychiatric hospital. His account is a story about the nature of teaching and learning, the limits of "expertise," and the relationships of professionals with the people they serve. The story can be read at any or all of these levels, but from the perspective of case theory, the chapter is a brilliant account of the limitations of theory removed from human experience. Coles observes that every psychiatric patient has a story to tell, and that psychiatrists are often too quick to label the "problem," rather than listening to the story. The same can be said of lawyers, who are often too quick to try to squeeze their clients' stories into standard legal "diagnoses."

Law review articles, written by clinical law professors and lawyers about their cases, are a wonderful source of stories about lawyering. These stories are often buried in longer, more "theoretical articles," and thus the shorter "story" portion can be assigned to students in unredacted form, or can be redacted to a manageable quantity of reading.⁵⁹ While these articles may not have been written with case theory in mind as the main theme, many contain excellent examples of lawyers or law students working through the process of identifying, evaluating and choosing case theories. More often than not, lessons about the nature of case theory and the ethics of case theory are intertwined.

Some of the most thought-provoking stories about lawyers, clients and case theory are Clark Cunningham's piece about representing a reluctant prisoner,⁶⁰ Nancy Cook's story within a story about a woman who yelled rape and was instead arrested,⁶¹ Lucie White's story of Mrs. G. and the Sunday shoes,⁶² and Robert Dinerstein's essay about a West African immigrant who stood by her story.⁶³ These four stories were written by law professors about their experiences as

⁵⁷ My favorite example is not from the WASHINGTON POST, but from NEWSDAY, which quoted from Lorena Bobbitt's lawyer's opening statement. There, her lawyer told the jury that the case was about whether "a life is more valuable than a penis." Martin Kasindorf, *Bobbitt Denies Assault on Wife*, NEWSDAY, Jan. 11, 1994, at 6.

⁵⁸ ROBERT COLES, *THE CALL OF STORIES: TEACHING AND THE MORAL IMAGINATION*, ch. 1 (1989).

⁵⁹ My rule of thumb is fifty pages or less of narrative, non-case type reading for each two-hour seminar.

⁶⁰ Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989).

⁶¹ Cook, *supra* note 14.

⁶² Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

⁶³ Dinerstein, *supra* note 14.

lawyers, their students' experiences, or both. All of the authors have taught as clinical teachers; three of the authors recount stories from their teaching experiences. The authors are white and presumably middle class (at least). The clients are either poor or working class; most are people of color.

In the Cunningham essay, the client, who is not named, is represented by Cunningham and his clinic students (from the University of Michigan law school) in a federal civil rights case in which he is challenging his administrative punishment in state prison. The lawyers have great difficulty reconciling the client's belief that the entire prison disciplinary system is invalid with the more straightforward due process claim that he did not receive adequate notice of the nature of the prison's claim. Ultimately, the client fires Cunningham and his students, and goes on to represent himself *pro se*.

This essay highlights the inherent dangers in developing a case theory,⁶⁴ even a legally viable case theory supported by facts, in the absence of the client. Here, after the lawyers were appointed counsel for the prisoner by a federal magistrate, they did not meet with the client before filing a supplemental brief on a pending motion for summary judgment, but instead framed their argument by relying on the judge's previous opinions in the case. The client became very angry when he read his lawyers' due process notice argument, writing the words "Wrong" in the margin next to the language in the brief articulating the lack of notice case theory. Throughout the case, the client continued to insist that he wasn't being heard, and there was some truth to this belief, in view of his lawyers' failure to consult with the client about major decisions in the case.⁶⁵

In contrast, the other three essays recount stories in which lawyers (or law students) consulted with their clients about case theory, but these consultations did not always bridge the gap between how the lawyers saw the case and the client saw it. In the Cook essay, the author weaves together a fictional story of rape with the story of the case that inspired it, together with the client's story ("Debra"), the clinic student's story ("Rachel"), the author's story (as clinic supervisor), as well as some "untold" stories. In the case story, Debra, a black woman, is arrested for disturbing the peace at a motel known as a location for prostitution and drug dealing. The police reported that

⁶⁴ The term "case theory" is something of a misnomer here; these theories are closer to legal theories, see CHAVKIN, *supra* note 14, at 44, rather than what I mean by "case theory."

⁶⁵ In a curious aside, the author notes that the judge ultimately cited a state supreme court decision supporting the prisoner's sweeping attack on the prison disciplinary system, but ruled that it should not be given retroactive effect. Cunningham, *supra* note 60, at 2468-69.

the client screamed and created a loud disturbance when she saw the police interviewing a man who had “advised them that ‘a crazy woman’ had come to his [motel] room and wouldn’t leave.”⁶⁶ In the interview with Rachel, a student in the University of New Mexico Law School’s clinical program, the client tells a story of date rape after she met the man at a bar.

The essay also provides students with examples of storyline-like case theories. Cook describes the class that she taught on case planning and investigation, using Debra’s case as the material for class discussion. The students assigned to the prosecution role offered this theory:

[Debra’s] a prostitute on the run, possibly a drug addict, she didn’t get paid for her services, so she cried rape to get back at the john who stiffed her; she had been ‘violent, abusive . . . , unreasonably loud’ and ‘otherwise disorderly’ in the motel parking lot, drawing a crowd and disturbing the other residents at the motel.⁶⁷

Students working as defense attorneys gave this theory:

two racist, sexist, white cops saw a poor black woman and immediately thought junkie whore and couldn’t be bothered to listen to her; under the circumstances (she had just been raped), any disturbance she caused was more than justifiable.⁶⁸

When Rachel presented some version of this defense theory to Debra, Debra “balked” at ascribing motives and macro class, race and gender explanations to the police officers’ behavior. Instead she saw: “Her own innocence. A rapist’s guilt. Simple injustice.”⁶⁹ Rachel struggled with the tension between her theory of racism and sexism, and her client’s opposition to a theory based on these motives, as well as her increasing awareness of the limits of individual representation in combating discrimination. In “her” story, she also becomes aware of the interplay of fact investigation and case theory, and how sometimes more facts make the case more complicated, rather than less so. When Rachel conducted an investigation, she learned that the fight had been reported by the motel manager as a possible rape, and that some witnesses at the scene reported that one of the officers was disrespectful and condescending. On the other hand, Debra’s story had some factual weaknesses. Some witnesses reported that the man’s motel room door had been open the entire time, and that at some point he had tried to make Debra leave. Rachel didn’t get to see how these different scenarios would play out at trial because Debra fired

⁶⁶ Cook, *supra* note 14, at 48.

⁶⁷ *Id.* at 49.

⁶⁸ *Id.* at 49-50.

⁶⁹ *Id.* at 50.

the clinic.⁷⁰

In the author's story, Cook explores these tensions of case theory and the limits of advocacy, and in "the untold stories" makes some observations about what we can learn from stories, both in the classroom and outside of it. She tells us that "[m]any of us already know how to create a story. Theories of the case are stories, and we can learn much about *storytelling* from our own examples."⁷¹ But we need to go beyond our own stories to the untold stories of others, which can be found in many petty details of life — "what these people watch on television, where they do their shopping, to whom they send birthday cards."⁷² Cook speculates that if she were to teach her case theory class in this way, students would "be equipped to approach the question of legal case theory with a more expansive outlook on what is possible."⁷³

Mrs. G. is the only one of the four essays that does not involve a clinic case. White, then a legal services lawyer in rural North Carolina, represented *Mrs. G.* in a case in which the county was seeking to recover the \$592 settlement that she had received in an auto accident case as an offset to her welfare benefits. In their first meeting, *Mrs. G.* told White that she spent the money on school shoes and dresses for her daughters, sanitary napkins, frozen food and furniture payments, after she received permission from her welfare caseworker for these purchases. White presented *Mrs. G.* with the option of two different stories, one an estoppel story based on her conversation with her caseworker and one a life necessities story based on the nature of the goods that *Mrs. G.* purchased. *Mrs. G.* surprised White by asking to tell both stories, and White agreed, only to be surprised again at the hearing when *Mrs. G.* refused to implicate the caseworker in her decision to spend the settlement, and testified that the shoes she bought were Sunday shoes, not school shoes. White saw the estoppel argument vanish, and the life necessities argument seemingly weaken when school shoes became Sunday shoes. White lost the hearing, but to her surprise, the county withdrew its claim for reimbursement, and *Mrs. G.* won her case.

The White essay captures a fear that many students share — that the best laid plans will go astray when clients stray from their scripts. The meaning of this departure, however, is far from clear. Although

⁷⁰ *Id.* at 53. Several days after the clinic was fired, Rachel received a notice of dismissal from the prosecutor, whom she had contacted several days earlier to "take a serious look" at the case. *Id.*

⁷¹ *Id.* at 60 (emphasis in original).

⁷² *Id.* at 61.

⁷³ *Id.*

White was an overworked legal services lawyer, she took great care to prepare her client for the hearing, and, in typical client-centered fashion, Mrs. G. exercised her choice of which story to tell. It's possible, though, that she recognized the risks inherent in an estoppel story that would cast in a bad light the very person—her caseworker—on whom she depended for her livelihood. Telling this story would be made even more difficult in the presence of her caseworker, who would be attending the hearing. Understanding the meaning of Sunday shoes is even more difficult. Are the Sunday shoes real? Were they ever real? Or are Sunday shoes a metaphor for something else? Pride? The primacy of religion? Does the fact that Mrs. G. was victorious in the long run mean that she was a better legal strategist than her lawyer? In this case, the county official didn't state his reasons for the reversal, but can lawyers ever know why bureaucrats act as they do? At bottom, *Mrs. G.* is a wonderful story about the importance of context in evaluating case theory, and the important role that clients can play in shaping case theory, even when lawyers least expect it.

In the Dinerstein essay, Mrs. Smith (a pseudonym) was on trial for battery against two sisters. She was represented by two clinic students from American University's Washington College of Law, supervised by the author of the essay. Mrs. Smith admitted striking one sister with a tennis racket and scuffling with the other, but felt she was justified because one of the sisters had waved at her with an outstretched hand, a sign of disrespect in her West African culture. Mrs. Smith wanted to tell her story at a trial, and told the clinic students who represented her that she was willing to pay any price to do it.⁷⁴ More disturbing was her insistence on the fact that the sisters had interfered with her thought processes, and harassed her by reading her mail and wiretapping her telephone. True to client-centeredness,⁷⁵ the clinic students who represented Mrs. Smith told her story about cultural differences in notions of disrespect at trial, despite misgivings about her psychiatric state and presenting an inculpatory case theory. She also testified about her delusions of mind control by the victims of the assault, and the jury convicted Mrs. Smith of one count of battery (against the first sister).

As the author describes it, "all hell broke loose" after the ver-

⁷⁴ As the author notes, "[i]t was as if Mrs. Smith was a simulated client whose 'client instructions' had directed her to state this as her goal." Dinerstein, *supra* note 14, at 972-73.

⁷⁵ The article offers a pithy and accessible definition of client-centeredness:

[i]f client-centeredness means anything, it means that, so long as we counsel the client thoroughly about her options and predict the legal consequences of her choice as accurately as we can, the decision ultimately is for the client to make.

Id. at 974.

dict.⁷⁶ Mrs. Smith began yelling and burst out of control, and the judge ordered the sheriff to take her for an emergency psychiatric evaluation, no doubt influenced by her testimony about the sisters' spying on her. In an effort to stave off this turn of events, one of the students told the judge that if Mrs. Smith were committed, her three young children would have no one to care for them. The judge then learned that Mrs. Smith had left her children home alone, and told the clerk to call child protective services. The students later learned that Mrs. Smith was committed for observation, and then spent more than two weeks at a mental institution. Her children were not removed from her custody and care, and she seemed calm and pleased with the students' representation when they visited her near the end of her stay at the hospital. After the case was scheduled for sentencing, the students were unable to reach Mrs. Smith. Her telephone had been disconnected, and the apartment complex manager said that Mrs. Smith had moved out of her apartment.

The students never saw Mrs. Smith again, nor found out what happened to her. At the sentencing hearing, the judge reluctantly issued a bench warrant, after ruminating that he hoped that he had not made things worse for Mrs. Smith by committing her, when he had only been trying to help her. In issuing the warrant, the judge told the court officials not to look too hard for Mrs. Smith.

When we recently discussed this essay in class, the students immediately embraced the notion that Mrs. Smith needed to "tell her story" about disrespect, culturally embedded though it was, and despite the fact that her story had no obvious legal handle. I found this a bit surprising because my students are not always so quick to embrace client storytelling in their own cases when those stories will likely not be successful in the courtroom. As we talked about it, though, what seemed to matter most was that the story was "true," as much as we could know such a thing, and, as one student commented, "What else could Mrs. Smith say?" by way of explanation. The students had less sympathy for her story about thought control.

Looking back on the class, another explanation for the lack of dissent to a client-centered case theory for Mrs. Smith is that the essay sets forth how the choice was made after much deliberation. The students met with their client and their faculty supervisor several times in the two weeks following their interview of Mrs. Smith, where they discussed the pros and cons of the story that the client wanted to tell. The students discussed with their supervisor whether Mrs. Smith could testify at a sentencing hearing (if one were held) instead of trial, and

⁷⁶ *Id.* at 978.

whether the trial theory could or should raise some sort of mental capacity argument. The students raised the capacity issue with the client in a round-about-way by inquiring whether she would be willing to attend counseling as part of a negotiation, and her resounding refusal suggested that a case theory along the lines of a psychiatric disability would not suit her. The students researched long and hard to incorporate Mrs. Smith's story into an existing legal context, but were unable to articulate a theory of legitimate provocation, even when thinking creatively in terms of political and social theory justifications. Finally, they told Mrs. Smith that if she told her story she would lose on one or both counts of the charging document, but she still decided to go forward and tell her story.

In some respects, the story of Mrs. Smith is similar to that of Mrs. G. Like Lucie White, the students do all they can to try to be client-centered, but in their case, the challenge is greater because one part of the client's story (the part about her delusions of mind control) has obvious dangers, dangers even greater than those that could have been foreseen in advance of trial. Like Mrs. G., Mrs. Smith departs from her script, telling both the more acceptable story about cultural difference and the story about mind control, which was interpreted by everyone, including the students, as a story evincing mental illness and delusional thinking. But unlike Mrs. G., her story about mind control does not make her a "superior strategist," but instead sets the stage for a conviction on one charge (although perhaps a foregone conclusion under the best of circumstances) and an involuntary commitment to a mental institution, and risks her children being taken from her. The essay generates a good discussion about the limits of allowing clients to direct case theory: is it worth it despite the consequences? The fact that the story has a sad ending, softened only by the judge's ruminations at the aborted sentencing hearing, puts the question in sharper relief than a story like Mrs. G, where the client speaks out and is victorious. And the ending in Mrs. Smith may be truer to life.⁷⁷

These essays can give students a good sense of how lawyers construct and evaluate case theory, and the consequences of some of those choices. They also help students gain confidence that they can translate what they are learning in the classroom into action. At the same time, the discussion of consequences benefits from hindsight, but suffers from the fact that the students don't know as many of the variables as they would if they were living the situations described in the

⁷⁷ Of the other three essays, only Cunningham's has a less than happy ending for the client, who loses his lawsuit. See Cunningham, *supra* note 60, at 2469. For a discussion of the problems with happy endings and idealized clients in critical lawyering stories, see Miller, *supra* note 7, at 525-26.

essays. Such are the limitations of vicarious experience.

D. Simulations

Simulations add a dimension to learning case theory that reading and film do not provide. As a learning experience, simulation is a more direct experience than watching video clips or reading, especially with simulations based on actual cases where the underlying materials are more real. To say that simulation and roleplaying foster learning by putting students in active roles, engaging them in the messiness of facts, and requiring them to make decisions, in problems or case files that have been carefully constructed to create particular dilemmas and learning opportunities, that can be shared by everyone in the classroom, is to repeat what many others have said.⁷⁸ Simulations that are carefully drafted, based on actual cases, can be quite real. As I tell my students, simulations are real, they're just not real life in the moment. They can be carefully crafted in ways that real, live pending cases cannot be, given the time constraints of an academic semester. And roleplaying can provide a sense of freedom that actual cases cannot.

In the tripartite world of constructing case theory (imagining, evaluating and choosing), simulations add a more complex dimension to the process of imagining case theory, and despite the fact that they happen within a closed, controlled universe, they help students a great deal with the actual experience of evaluating and choosing case theories.

The simulation I use is factually rich with the possibility of many stories.⁷⁹ The client is Randy Gillis, and this is the story he tells in his interview.⁸⁰ Gillis is thirty-two years old and unemployed; he volunteers for the Prince George's County, Maryland recreation department. Gillis played basketball in college, but left college without a degree. He is a former drug user, now in counseling, who spent time in prison on a robbery charge, and is now on parole. He was also convicted of theft on three separate occasions.

Now, Gillis has been arrested and charged with a first degree sex offense⁸¹ for an incident that occurred on a night that he was hanging

⁷⁸ Amsterdam, *supra* note 20, at 17-23; Maranville, *supra* note 11, at 129-30, 145.

⁷⁹ Unfortunately, readers cannot as easily translate my observations about simulations to their own classrooms as they can translate the movie, fiction or nonfiction examples, which are widely available.

⁸⁰ The simulation was written by a former colleague, Nancy Cook, based on an actual case from her clinic, and has been modified by other teachers in our clinical program over the years. As should be clear from this essay, *see infra* notes 85 & 94, attribution for purposes of clinical teaching and authorship is very difficult to pin down.

⁸¹ MD. CODE. ANN., CRIMINAL LAW § 3-305 (2002).

out at a club with his friend Warren Press. Gillis and Press are both African-American. Gillis' hand is cut when he tries to break up a fight at the club, and Press drives Gillis to Prince Georges County Hospital. In the hospital parking lot, they encounter an African-American woman named Debra Brand, who asks the men for a ride home to Landover. They agree to give her a ride, but tell her to wait until Gillis gets treated for his injury. When Gillis walks into the hospital building, Press and Brand stay in the parking lot. At the emergency room, Gillis gets stitches in his finger. When Gillis comes out of treatment, he sees Press and Brand talking together in the waiting area. Later, Press tells Gillis that Brand smoked marijuana in the parking lot while Gillis was in the emergency room.

All three of them leave the waiting area, get into Press' car, and drive off towards Brand's apartment. On the way, they talk very little; Brand is in the back seat, Press and Gillis are in the front seat, with Press behind the wheel. At some point, Press and Gillis decide not to take Brand all the way home, so they drop her off in the 7600 block of Nally Road. Press drops Gillis off at his apartment around 6:45 a.m. Gillis thinks everything is okay until several weeks later when an acquaintance of his named Hobbs, a Prince Georges County police officer, calls him and tells him that there is a warrant out for his arrest (and Press as well) on charges of forcing Debra Brand to perform fellatio on the two men in the car. Gillis tells Hobbs that he vaguely remembers the woman, but that nothing happened in the car. He suggests that Brand might be angry because Gillis and Press dropped her off before they got to her destination. He later tells his attorney that he thought Brand was "acting a little weird," but that he didn't think much of it at the time.

Gillis has a copy of the application for a statement of charges, an affidavit filed under oath by Hobbs,⁸² which summarizes Brand's statement to the police. According to the affidavit, Brand asked the men for a ride to the Landover area, but when she later changed her mind, they grabbed her by the arm and told her to get in the car. They drove her to another location, told her that they had a gun and wanted her to perform fellatio on them, and motioned towards the glove compartment as if to indicate a weapon. They then forced her to perform fellatio on both of them.

This is as much information as the students have after they interview Gillis. The students learn the facts of "the case" over a five-week period near the beginning of the semester. Half of the students are

⁸² MD. CODE ANN., MARYLAND RULES, § 4-211 (2002) (defining application as a "written application containing an affidavit showing probable cause that the defendant committed the offense charged").

assigned the role of Gillis' public defender, and half are assigned the role of the client.⁸³ They break into interview pairs and conduct the simulated interview, which we later discuss in class. Initially, the focus is on learning what happened from the client's perspective and establishing a connection with the client. We tackle case theory after students have received discovery from the prosecutor, which includes additional statements that Brand gave the police, some notes that reflect another public defender's conversation with Gillis about the discovery, and the supplemental interview notes from another public defender.

The discovery fleshes out the barebones story contained in the affidavit supporting the charging document. Brand's tone in the documents is excited and, at times, confused. Although Brand refers to Gillis as the "tall guy" and Press as the "short guy," it is often difficult to know whether she is referring to Gillis or Press because she often uses the term "he," rather than using these physical descriptions. Some of the details that she relates about the incident are inconsistent with her other statements, most of her story is inconsistent with Gillis' version of events, including details that are relatively minor. She and Gillis seem to agree on only a few facts: that they met for the first time at the hospital where Gillis was being treated for an injury to his hand, that Brand asked Gillis and Press for a ride, that she went with them in the car, and that she got out of the car at Nally Road.

The basic story that emerges from the discovery is that Brand called an ambulance early that morning to drop her off at the hospital for severe scratching and itching, and when the ambulance driver refused, she got a friend to drop her off at the hospital. Brand got some kind of shot at the hospital. She couldn't reach any of her friends to take her home at that early hour, and that's when she encountered Gillis and Press. Then, in a rambling monologue, Brand describes the events at the hospital and in the car in more detail, and explains how she managed to "escape" from the car. According to Brand, she was able to get out when Gillis "was getting in the back" seat to rape her. A man at the scene offered her a ride home.⁸⁴

Brand's story, however, differs in the details in various documents. In her verbatim statement, she stated that Gillis and Press "grabbed me by the arm and pulled me into the car," that Press "forced me in the car with kind of a flash," and that she "just went because the guy [Gillis] pushed me in my back like so I seen I did not

⁸³ The roles are reversed in a second simulation, in which the Gillis attorneys play client roles, and the Gillis clients are assigned lawyer roles.

⁸⁴ From a subsequent police report, it appears that the man who drove her home was a cabdriver.

have much of a choice so I just get in the car.” In other documents, the language “victim was permitted to enter [Press and Gillis’] vehicle” appears, or another variation, Brand entered the vehicle “with some assistance from accused.” In the affidavit, no mention is made of force until *after* the three individuals have gotten into the car and left the hospital. The time frame is similarly unclear. In the verbatim statement, Brand describes being taken to the hospital, or dropped off at the hospital, at “around 4:30, 6:30 a.m. to 5-6 a.m. in the morning.” Other documents place Brand at the hospital between 5 and 6 a.m., noting that she asked Gillis and Press for a ride between 6:30 and 7:30 a.m. and that the “time of offense” was 7 a.m.

Moreover, Gillis’ and Brand’s stories differ not only in major details — the occurrence of sex and the existence of a gun — but in smaller specifics. For example, Brand describes the car as a dark blue two-door Mustang, approximately five years old, while Gillis says that Press’ car is light blue grey. Brand mentioned that Gillis had his right three fingers bandaged; Gillis says his left index finger was bandaged. Brand described Gillis as a slim thirty-two-year-old black male, six feet tall, cleanshaven, with brown eyes and a “medium bush” haircut. Gillis says that he is 6’4”, and at the time of the incident had a moustache.

Gillis’ second interview with the public defender adds some significant details, but like Brand’s statements, has some inconsistencies. Brand told Gillis and Press that she was at the hospital for “female problems.” When Gillis and Press asked Brand why she was at the hospital so late without a ride home, she seemed “freaked out” and got “quiet.” Then she said she was meeting a guy at Lansdown Village Apartments, and asked to be let out of the car at the intersection of Village Green and Sheriff Road, about one mile from the apartments. In his first interview, Gillis said it was his and Press’ idea to drop Brand off in the 7600 block of Nally Road because driving her home was too far out of their way, and he didn’t mention that she was meeting a guy.

Gillis also tells his lawyer that he has since learned that a woman named Denise Mayhew saw Brand get out of Press’ car that morning. Gillis heard about this witness from his sister Mary Ann, whom Mayhew called after she saw Gillis that morning.

After gathering these complex and competing stories, every student, both those who played lawyers and those who played clients, submits a written case theory for Mr. Gillis prior to class. I collect these theories and circulate them in class, where the students break into small groups to discuss the theories, and then come back to the larger group, where we discuss the possibilities and the pros and cons

of the theories.⁸⁵ Which of these theories is most convincing, based on the “facts” as we understand them? What role does character, in the larger sense, not the narrow evidentiary sense, play in this determination? What about Debra Brand’s motivation? Which theory is truest to the client’s version of events? Does it matter? Is the client limited by the story he told in the interviews, or are there circumstances in which he can switch stories? Does the answer depend on whether or not the client testifies?

This is a law school class, so we don’t answer these questions, but we do begin to sort out the apparent strengths and weaknesses of the different theories. Even if this were not a law school class, there isn’t a right answer to the question of the best case theory, at least at this stage of the proceedings. But some very important lessons emerge from the discussion of these messy and often times conflicting stories.

First, students see that while there are many possible storylines, they fall into a few, broad general categories. One category contains the nub of the theory articulated by Gillis: “nothing happened in the car, we were just giving her a ride home from the hospital.” There are many explanations for why this might be so, but the starting point is the same. Another type of case theory is a story that Debra Brand consented to having sex with Gillis and Press. This, of course, is very far from the story that Gillis tells, but it is always a possibility. And like the “it never happened” theory, there are many ways that consensual sex might have occurred. Another possibility is that Press was the instigator, or perhaps the lone actor in any sexual activity that took place. Yet another possibility is that Press and Gillis were not the individuals who had forced sex with Debra Brand in the car. This seems highly unlikely, given Debra Brand’s identification of Gillis, his admission that they gave her a ride from the hospital that morning, and the observations of the witness at the point when Brand got out of the car. But this train of thought leads in other directions. Did some-

⁸⁵ Others have used similar techniques in teaching case theory. See Cook, *supra* note 14, at 49-50. Following the lead of my former colleague Nancy Cook, I have another method, where I divided students into teams, and each team is assigned to “tell the story” from the viewpoint of other professions, such as novelists, journalists, psychologists, politicians and talk show hosts. This method conveys the notion of case theory as perspective and encourages imagination unrestrained by doctrine. Several of our clinics have used this approach with a simulation in which a woman named Margaret Barnes is charged with criminal child abuse, and civil abuse and neglect, for allegedly poisoning her children with PCP. Besides Margaret Barnes and her two children, the characters include a horde of other family members, the emergency room doctor who treated the children, the psychologist who examined the children during their hospital stay, the psychiatrist who treated Ms. Barnes prior to the incident, and the social worker assigned to the case. The content of the case file, and the prevalence of mothers-who-kill stories in popular culture, make this an ideal case for storytelling in a wide variety of voices. This simulation was adapted by my colleague Ann Shalleck from materials based on actual cases.

body force Debra Brand to have sex against her will, not in the car that morning, but at some other time, and somehow the blame got transferred to Gillis?

Another category of case theory relies more on legal definitions. If Gillis had nonconsensual sex with Debra Brand, did that act amount to a first degree sex offense?⁸⁶ If it didn't, is Gillis guilty of a lesser-included offense? And looking beyond the merits of the case, is there some constitutional or evidentiary reason why the State can't prove a case against Gillis? Can Brand's identification of Gillis in the photo array be suppressed, and would that make a difference? What about the statement that Gillis made to Hobbs in which he denied committing the offense but admitted to picking Brand up at the hospital?

Most students submit a theory that holds true to the client interview — "nothing happened in the car, we were just giving her a ride home from the hospital." By this point in the semester, students understand that client-centeredness means respecting a client's wishes, and quite possibly, his story. And the theory is not implausible; the events could have unfolded the way Gillis says they did. But if nothing happened in the car, why did Debra Brand say something did happen? This question leads to the most interesting part of the class discussion. Students come to see that in this type of theory, it is absolutely essential to paint a picture of Debra Brand. Debra Brand is either a liar, or she's mistaken. These are very different pictures of Brand, but both require either a reason or a motive. Why would a woman lie about a sex crime, and endure the difficulties of testifying at trial? How could someone be so confused that she would think she had been forced to perform fellatio, when in fact nothing had happened?

Two important things come out of this discussion. First, what at first seems like a one motive case theory — "she's mad because we didn't take her all the way home" — now appears to be a multiple motive case theory, with the actual motive to be sorted out later. The case theory, as annotated during the class discussion, can take up most of a whiteboard. Here is an example from a class that I taught:

Nothing happened in the car; Debra Brand says she was sexually assaulted because Debra is SPITEFUL because [*the men didn't take her all the way home; the men rejected her sexual advances; Press*

⁸⁶ For example, "fellatio" is a term defined by Maryland law, *see* *Thomas v. State*, 301 Md. 294, 320-22, 483 A.2d 6, 19-20 (1984), *cert. denied*, 470 U.S. 1088 (1985), and lack of an accomplice or weapon can bring the same sexual act down from first to second degree sex offense. Compare MD. CODE ANN, CRIMINAL LAW § 3-305 (2002) (stating additional aggravating factors for first degree sex offense) with § 3-306 (stating elements of second degree sex offense).

didn't give her all the marijuana she wanted; something happened earlier that evening while Gillis was getting his hand stitched up] AND/OR Debra is AFRAID because [the man she was going to visit is jealous; the man she was going to visit is vengeful] AND/OR Debra is CONFUSED from [smoking marijuana; the side effects of her shot at the hospital; some combination of both; a preexisting mental condition] AND/OR Debra is DELUSIONAL from [some extreme combination of the factors listed under confusion].

Second, none of these motives can simply be asserted; they must be proved, through a process some call inference,⁸⁷ but which has imagination as a major component. Suddenly, Debra's confused and conflicting statements about seemingly minor details have meaning beyond simple inconsistency. They may add up to confusion or delusion. Similarly, the process of showing that Debra was vengeful or angry is a creative process. What would make Debra so angry that she would lie about being sexually assaulted? Her anger might depend on how far from home she was dropped off,⁸⁸ how much of a rush she was in to arrive at her destination, the neighborhood where she was dropped off, the weather, her attire, her personality, her life experiences and the gap between what Gillis and Press promised her when they offered her a ride and what they delivered.

The threads of case theory stretch even further. Now, geography starts to have a bearing on Gillis' explanation that he and Press offered a complete stranger a ride home from the hospital with no expectation of compensation. All this after a long night of drinking, carousing, and a visit to the emergency room. Why would the men do this? They're good Samaritans? Or they expected something in return? Brand didn't live far from the hospital? Brand's apartment was on the way from the hospital to Gillis' apartment? Now, the geography of Prince George's County matters. Where is Landover? Glenarden? Prince George's County Hospital? How would you drive from one place to the other? More specifically, where is Nally Road, Village Green or Sheriff Road?

And finally, the threads of confusion, delusion, fear and anger come together. In a state of heightened confusion and fear, for whatever reason, Debra Brand might become very angry. Angry enough to falsely accuse two men of sexually assaulting her.

At this point, students are already well into the process of assessing and evaluating the theories. Some sorting has already occurred

⁸⁷ BINDER, ET AL., supra note 45, at 122-23, 162.

⁸⁸ Brand says that she was dropped off on Nally Road in Landover, a few blocks from her house; Gillis first says they dropped Brand off in the 7600 block of Nally Road, then later says this happened at the intersection of Village Green and Sheriff Road, about "one mile from Lansdown village" where she was meeting a guy.

that is relevant to process of evaluating the theories. At least at first glance, some version of the “it didn’t happen” theory is truer to Gillis’ story, which is one of the factors in considering client centeredness. And Gillis insists that neither he nor Press had sex with Debra Brand, which puts the consent theory at some distance from client centeredness, but who’s to say that Gillis’ story is true, or that he would stick to it if pressed to the wall? What if DNA evidence revealed that Gillis had had sex with Debra Brand?⁸⁹ The “legal” case theories don’t look especially promising, but that could change based on additional fact gathering. Even if the photo array were somehow tainted, even tainted enough to preclude Brand’s incourt identification, Gillis has admitted to the police that he was in the car with Brand that morning, and it would be difficult to suppress the content of Gillis’ telephone conversation with Hobbs. And if Gillis is guilty of *some* sex offense, it would be hard to convince a factfinder that his crime is something less than a first-degree sex offense, since the presence of a weapon *or* an accomplice are the elements that distinguish a first-degree sex offense from its lesser included offenses.⁹⁰

Returning to the “it didn’t happen theories,” would a theory even half as complicated as the massive, annotated case theory be effective? There’s too much going on, too many variations, too many suggestions being offered by way of explanation. This massive theory is really a number of alternative theories, with Debra Brand mad, afraid, confused and perhaps delusional, with a variety of reasons supporting all of these states of mind. If there are facts to support more than of these theories, though, can the lawyer tell more than one story about Debra Brand’s state of mind? Of course, the facts as we dig for them may preclude any of these theories. Gillis’ defense is compromised by the fact that he has several prior convictions that the State may be able to bring out if testifies at his trial,⁹¹ so defense counsel’s ability to tell his story will be hampered by this fact.

One of the most interesting things about teaching case theory as imagining stories is that the students bring their own experiences, perspectives and biases to the simulation, creating yet another level of stories. A gay male student has played the role of Gillis as a gay man, telling his lawyer that he and Press went to a “big leather bar that night,” and that he was wearing Gap blue jeans and a white t-shirt, and Press was wearing blue jeans and a Polo shirt with “polka dots.” When his lawyer asks, “Are you dating anyone right now?” he re-

⁸⁹ The simulation was written before the infamous blue dress and the Bill Clinton-Monica Lewinsky affair.

⁹⁰ See *supra* note 86.

⁹¹ See LYNN MCLAIN, MARYLAND EVIDENCE § 609 (2d ed. 2001).

plies, "No, that's why we were at the bar, Warren and I." Another student has played the role as a heterosexual guy on the make. In the bar, he was trying to put the moves on a woman he met there, whom he describes as "bad," when he cut his hand, "which blew his whole night" when he had to go to the hospital. This Gillis also teases his lawyer with the possibility that Brand is a prostitute and the sex was consensual. He says that in the parking lot, "She looks like she's trying to flag down people, you know, you know, I don't know if you're familiar with the streets but on the streets some of the girls do stuff like that for drugs and whatever." Later he adds, "she looked like one of those streetwalker types."

True to my overall strategy of teaching case theory pervasively, we continue the discussion of case theory in the fact investigation class, where the students interview Denise Mayhew, the witness who saw Debra Brand get out of the car. In the class on counseling, we include choice of case theory as a topic for client counseling. In a class on sentencing advocacy, students develop case theories for Gillis' sentencing hearing. The case theory message is enhanced because I use one primary simulation throughout the course of the semester-long clinic seminar, supplemented with other materials.

In the spring semester, when students have already had some exposure to trial advocacy concepts,⁹² we wrap up our teaching of case theory with an intensive trial advocacy simulation at the end of the semester. While case theory cannot be learned quickly, it can be learned better through intensive examination over a short period of time, once the initial groundwork has been laid. Although the format varies from year to year, the simulation is usually taught in twelve to fourteen hours of class time over a period ranging from two days to one week.⁹³ The simulation involves an assault case, which stems from an altercation between a security guard at an apartment complex and a visitor to the complex. Our clinical program has used both a civil and criminal version of the simulation.⁹⁴ Self-defense is the only

⁹² Although the portion of the clinic that I teach is a one-semester clinic, with a one-semester seminar, in a different semester many students also enroll in the one-semester prosecution portion of our program, where the seminar focus is trial advocacy. Thus, by the end of the spring semester, many students have received training in these skills.

⁹³ For this to happen, we need to rely extensively on Fridays, when few students take classes, and weekend time. The regularly scheduled clinic seminar meets once a week for two hours, and finding large chunks of time that students share in common the remaining weekdays is an impossible task. In order to prevent a mutiny, we concentrate the class time on a Friday and some part of the following weekend, and sometimes utilize regularly scheduled class time during the week.

⁹⁴ The simulation was adapted from J. ALEXANDER TANFORD, *TRIAL PRACTICE PROBLEMS AND CASE FILES* (1986) by my colleagues Robert Dinerstein, Elliott Milstein and Ann Shalleck, who also wrote a teaching manual for the simulation, and the simulation

viable legal defense, but the possible case theory constructions involve subtle and not so subtle variations based on the character of the two men, their prior interaction and relationship with a woman at the apartment complex, factual questions involving who initiated the altercation, word choice (“fight” versus “altercation”) and the relevance of the defendant’s status as a security guard.

The students work in small groups, ranging in size from eight to twelve students. Each group is divided into two teams, one team is assigned to represent the plaintiff, the other team to represent the defendant. After the materials are circulated, each team member submits a proposed individual case theory and trial plan, which forms the basis for the first class. From that point forward, the team is responsible for presenting the case on behalf of its client, using a single case theory. The teams work together on many of the exercises, although typically students don’t share the task of presenting an exercise. Unlike a typical “mock trial” format, the trial does not proceed from start to finish, but rather in segments, with a discussion following each segment. The major focus of the discussion is the relationship between the exercise and the case theory for that team. This format allows the students to see very concretely the connection between case theory and advocacy, a connection that is often obscured in a trial that is not debriefed until the end.

Unlike in the Gillis simulation, in the trial advocacy simulation the students have to make *choices* about case theory and live with the consequences of those choices. In my experience, however, the complexities involved in choosing a case theory cannot be adequately taught without actual cases and clients.⁹⁵ While actual experience with clients enhances the teaching of any legal “skill,” some skills can be taught fairly well in a classroom setting. Specific trial advocacy skills, in particular, can be taught quite effectively in a classroom format that utilizes simulation. After a semester of trial advocacy, students can see the difference between opening statement and closing argument, and direct and cross-examination. They understand that the purpose of cross-examination is to emphasize facts that are

has undergone a number of revisions since then. The simulation has been taught as a civil simulation in a large clinic seminar, currently comprised of students from the Domestic Violence Clinic, and the Women and the Law Clinic, a clinic representing women on a wide variety of legal matters, beginning with representation in certain areas of family law and expanding to virtually any matter depending upon the needs and desires of the clients. Recently, I adapted the simulation for use in the Criminal Justice Clinic seminar, making the civil assault a criminal assault.

⁹⁵ For a good discussion of the limits of simulation as a teaching tool, see Maranville, *supra* note 11, at 133-34. *See also id.* at 135 (noting that “the responsibility involved in making difficult strategic and ethical decisions in a high-stakes arena affects the decision-making process in ways that can make simulations of limited usefulness”).

favorable to the client, and to undercut those that are not. Which facts those are, of course, is a question of case theory, but the contours of the skill can be learned in a classroom.⁹⁶ When it comes to choice of case theory, however, actual clients and actual cases are critical.

The idea of case theory achieves a clarity in this mix of story media that is not possible with fewer story ingredients. By this I mean something more than the clinic mantra that the only authentic clinic experience is one relying on lawyering experiences with actual clients, or the perhaps less widely held view (which I share) that the best clinical experience mixes actual client experience with readings and simulation, in settings ranging from individual supervision to the larger classroom. Case theory is an elusive concept, at once highly analytical and supremely intuitive. Language and metaphor matter; so does doctrine. Facts matter just as much. Somehow from this jumble the concept of theory of the case emerges. It takes a slow meandering path.

Several years ago one of my students revealed in her final evaluation meeting that she did not understand case theory until the end of the year. Other students have told me about their struggles with case theory, but this student's assessment was the most blunt, and the most surprising. By early in the semester, her second in clinic, I was confident that this student had a good grasp of case theory. In her work with me over one semester, she and her clinic partner had prepared two or three cases for trial. Each case was built around a well-thought out case theory, constructed after a lengthy fact investigation and hours of legal research and conversations in supervision sessions. Because their cases were resolved short of trial, she didn't have an opportunity to see how their case theories played out in front of a fact finder, but mooting sessions and case rounds discussions filled many of these gaps.

When we talked about my student's observation, she described her clinic experience of case theory as a series of building blocks that eventually came together in a coherent framework. As she surmised, the concept may have clicked because of the content of the final trial advocacy simulation or the intensity of that experience.⁹⁷ Or it may be that the accumulation of case theory settings, from our initial discussions during clinic orientation nine months earlier, the student's work as a prosecutor trying several cases before a judge, our consistent emphasis on case theory in the seminar, and the individual super-

⁹⁶ See Steven Lubet, *Ethics and Theory Choice in Advocacy Education*, 44 J. Legal Educ. 81 (1994); Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1 (1993).

⁹⁷ See *supra*, note 93, for a more general discussion of the time table for the simulation.

vision sessions with her partner and me, added up to understanding. Or perhaps her learning curve for case theory was nine months long. In any event, it was this combination of teaching methods and materials that was most likely to bring it all together.

CONCLUSION

Teaching case theory as storyline, through stories, has come to define my teaching agenda. I can assist my students in understanding lawyering, advocacy and representation in a very deep sense, one that captures human experience in a powerful way. This was not possible under a more cramped, doctrinal view of case theory. Even students' lapses into pure storytelling are a small price to pay for a more profound understanding of lawyering.

Ironically, my favorite classroom anecdote about teaching case theory comes not from clinic but from a simulation course that I teach entitled "Lawyers and Clients: Interviewing and Counseling." Several years ago, I added a class on case theory as the second class of the semester, and since then, I have focused more on case theory throughout the course. As a consequence, the class has developed into a class on client-centered advocacy in the context of interviewing and counseling, rather than a class focused simply on those skills. In one of the last classes of the semester, we were talking about case theory in one of the assigned law review articles. I think it was *Mrs. G.*, but I can't be sure. What I do remember is that one of my students just blurted out, "Oh, I see, case theory is legalizing the story." That definition of case theory was not in the assigned readings, and I have not come across it in my own research. So as far as I know, those words are entirely her own. In any event, her comment pretty well sums up what I am trying to teach.