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Binny Miller

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# Telling Stories About Cases and Clients: The Ethics of Narrative

BINNY MILLER\*

## INTRODUCTION

In recent years, narrative has achieved great prominence in legal scholarship and in much other academic work,<sup>1</sup> although the concept is not new. The legal realists always have emphasized the importance of stories; as long ago as 1941, Karl Llewellyn published case studies of the Cheyenne and their dispute settlement practices.<sup>2</sup> In step with the popularity of narrative in legal scholarship, stories about the individuals behind the legal doctrine are increasingly common. While the terms “narrative” and “story” are sometimes used interchangeably,<sup>3</sup> they are not quite the same thing. A story describes an account of a happening, while a narrative denotes a broader theme or meaning.<sup>4</sup> Stories are the raw material of personal experience; narratives are a construction from those stories.<sup>5</sup>

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\* Professor of Law, American University, Washington College of Law. B.A. 1978, Carleton College; J.D. 1983, University of Chicago. I thank Carrie Menkel-Meadow, Russ Pearce, and Susan Carle, as well as all of my clinical colleagues at American University’s Washington College of Law for their insightful responses to an earlier draft of this Article. I am also grateful to the participants at the Fordham Law School faculty colloquium and the 1999 Law & Society Annual Meeting for their valuable comments. I could not have written this Article without the research assistance of Leane Renee and Chris Damiano. Many thanks to my research assistant, Miriam Friedland, for finetuning the Article in its final stages, and to Caeb Colravv and James Ferg Cadima for help with footnotes. This research was generously supported by Dean Claudio Grossman of American University’s Washington College of Law.

1. For collections of fascinating stories and justifications of narrative legal scholarship, see the essays in PETER BROOKS & PAUL GEWIRTZ, *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (1996) and GARY BELLOW & MARTHA MINOW, *LAW STORIES* (1996). For examples of the narrative traditions in other disciplines, see, e.g., MILNER S. BALL, *CALLED BY STORIES* (2000) (legal theory and theology); JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA ix-x* (1988) (historiography); Catherine Zuckert & Michael Zuckert, *Politics and Literature Symposium*, 22 *LEGAL STUD. F.* 529 (1998) (political science).

2. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT & CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

3. Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141, 145 (1997).

4. *Id.* at 147 (narrative signifies “a broader enterprise that encompasses the recounting (production) and receiving (reception) of stories” while story means “an account of an event or set of events that unfolds over time and whose beginning, middle and end are intended to resolve[] the problem set in motion at the start”). The term “tale” is sometimes used interchangeably with “story.” See Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 *MICH. L. REV.* 2459, 2463 (1989). Some sources equate tale, story and narrative. See 15 *OXFORD ENGLISH DICTIONARY* 797 (2d ed. 1989) (defining story as a “narrative, true or presumed to be true”); *id.* at 579 (defining tale as a “story or narrative, true or fictitious”).

5. See, e.g., PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW* (1997) (proposing a cultural theory of law with three central narratives of legal consciousness).

Put another way, stories add up to narrative. When legal academics tell stories, we aim to make a larger point beyond the confines of the story.

Although some doctrinal articles use the authors' personal experiences to explicate legal analysis,<sup>6</sup> the practice of storytelling is most common in theory-based movements<sup>7</sup> such as lawyering theory,<sup>8</sup> critical race theory,<sup>9</sup> critical literary and legal theory,<sup>10</sup> feminist theory,<sup>11</sup> lesbian and gay theory<sup>12</sup> and cultural legal studies. Some of these stories are about the people behind the cases;<sup>13</sup> others are not grounded in cases but instead in other real stories, including personal anecdote and biography. These stories portray the authors and their encounters with friends and families, acquaintances and strangers.<sup>14</sup> Examples include Patricia Williams' now-famous trip to Benetton<sup>15</sup> and Marie Ashe's account of

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6. See Sherri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 256-57 (1983) (comparing author's experience as a blonde, white woman pushing a shopping cart down the streets of New York with that of her Latino client in concluding that race plays a role in police decisions to detain individuals on the street); Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105 (1992) [hereinafter Miller, *Voting Rights*] (arguing for a more expansive interpretation of the *Voting Rights Act* based on author's experience as a voting rights attorney). For a discussion of the relationship between narrative and legal doctrine, see Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994) [hereinafter Miller, *Case Theory*].

7. I acknowledge Paul Gewirtz' insight that scholarly movements are not so easily categorized. See Paul Gewirtz, *Narrative and Rhetoric in the Law*, in BROOKS & GEWIRTZ, *supra* note 1, at 3 (introduction) (commenting that "as with so many young movements, political or scholarly, it remains an open question whether the participants in [law and literature] really have a common purpose").

8. See, e.g., Miller, *Case Theory*, *supra* note 6; Lucy E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) [hereinafter White, *Mrs. G.*]; Lucy E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988) [hereinafter White, *Lessons from Driefontein*].

9. See, e.g., PATRICIA WILLIAMS, *SEEING A COLOR BLIND FUTURE: THE PARADOX OF RACE* (1998); DERRICK BELL, *AND WE ARE NOT SAVED* (1987) (describing fictional encounter between author and Geneva Crenshaw); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (arguing that "formal criminal and administrative sanction — public as opposed to private prosecution — is [] an appropriate response to racist speech").

10. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (describing author's experience as an African-American individual and law professor).

11. See, e.g., *MOTHERS IN LAW* (Martha Albertson Fineman & Isabel Karpin eds., 1999); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (analyzing feminist and critical race narratives).

12. See, e.g., William Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994) (discussing the importance of gaylegal narratives); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992) (focusing on the importance of storytelling to counter gay stereotypes).

13. Eskridge, *supra* note 12; Fajer, *supra* note 12.

14. See, e.g., WILLIAMS, *supra* note 10 (author, friends and family); WILLIAMS, *supra* note 9 (relating interactions between the author and bank officers, white tourists in Harlem, and others).

15. WILLIAMS, *supra* note 10. Professor Williams first published the Benetton story, without identifying Benetton by name, in an earlier law review article. See Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 127-29 (1987) (describing how a "narrow-eyed, white teenager wearing running shoes and feasting on bubble gum" refused to buzz her into a store because Williams was African-American).

her pregnancies.<sup>16</sup> The biographical stories include stories about jazz music<sup>17</sup> and other things. Other stories are not real stories but are fictional accounts of encounters with civil rights lawyers, their half-brothers,<sup>18</sup> and others.<sup>19</sup>

In this essay, I consider the ethics of telling stories about cases and clients. While stories about actual clients have enlivened legal scholarship across a wide range of topics, lawyering theory relies most heavily on these kinds of stories, especially stories about clients whom the authors have represented. Within lawyering theory I include a loose-knit group of scholars who write about the intersection of theory and practice.<sup>20</sup> While writing in this area has taken off in a

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16. Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989) (using metaphor and symbols to describe a miscarriage, an abortion, and the birth of her two children to demonstrate the limitations of abstract legal writing in addressing women's reproductive rights).

17. See John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2132-38, 2147-60 (1992) (discussing jazz musicians).

18. Derrick Bell and Richard Delgado are the most prolific law professor authors in this field. Bell created Geneva Crenshaw in his famous work *And We Are Not Saved*, BELL, *supra* note 9, and authored a fictional chronicle with Jewish and African-American protagonists, and space aliens. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERSISTENCE OF RACISM* 158 (1992). Bell has also authored other affirmative action allegories. See, e.g., Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989) (storytelling symposium); Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595 (1989); Derrick Bell, *Foreword: The Final Civil Rights Act*, 79 CAL. L. REV. 597 (1991) (symposium on civil rights legislation in the 1990s). Delgado followed with Rodrigo Crenshaw, Geneva's half-brother, in fifteen chronicles where the author and Rodrigo meet to discuss race, civil rights, legal rules and culture, and lawyer-client relationships, among other things. See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (review essay); Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) (book review); Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993); Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993); Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993); Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993); Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears — On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994); Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995); Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996) [hereinafter Delgado, *Rodrigo's Eleventh Chronicle*]; Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997); Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105 (1997) (symposium); Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L.L. REV. 275 (1997) (symposium); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (book review).

19. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 227 (1990) (recounting Chinese fable); Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLINICAL L. REV. 41 (1994) (rape victims).

20. Others have identified this body of scholarship as the theoretics of practice. See, e.g., Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1748 (1993) (referring to theoretics of practice as a "growing body of work that attempts to unite theory and practice"); Lucie E. White, *Seeking*

number of different directions to include the ethics of advocacy and other inquiries, this movement at its heart addresses the question of the nature of the attorney-client relationship and what it means to represent clients. A number of strong voices within this movement urge a more collaborative approach to lawyering that integrates the perspective of both lawyer and client. These approaches are variously described as critical theory, client-centered theory, and clinical theory. I name these theories "collaborative lawyering theory."<sup>21</sup>

Since the explosion of clinical scholarship within the last decade,<sup>22</sup> it has become increasingly rare to read a story about lawyering that does not include a story about an actual client. These stories give life to otherwise wooden descriptions of lawyer-client interactions, make real the more theoretical and abstract underpinnings of the articles, and open a window on the lives of the individuals in the cases. Yet telling stories about clients raises different issues than telling stories about litigants from published cases or media accounts, characters in books, or the author's own life. Even if the ethical rules governing client confidentiality permit this practice where the client's identity is not disclosed,<sup>23</sup> the client focus of the collaborative lawyering approach suggests that legal academics need to consider whether clients should have a say in decisions about how their stories are told. Yet surprisingly, while clients are in the forefront of many law review articles, they are almost invisible in the decision making process about which story to tell or whether to tell a story at all.

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"... *The Faces of Otherness*:" A Response to Professors Sarat, Felstiner, and Cahn, 77 CORNELL L. REV. 1499, 1503 (1992) (defining theoretics of practice as "a new field of critical reflection on advocacy and pedagogy"). For a collection of works utilizing this term, see Symposium, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992).

21. Although others have used the term collaborative lawyering, I credit Lucie White, who brought the term to the forefront of clinical methodology in an article published in the first volume of the *Clinical Law Review*. See Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths From Rhetoric to Practice*, 1 CLIN. L. REV. 157, 157, 158 (equating the term with "'third-dimensional' advocacy" and "critical lawyering in the field"). Its editors describe the *Clinical Law Review*, a peer-edited journal, as "a specialized journal for scholarly pieces relating to clinical legal education." Stephen Ellmann, Isabelle R. Gunning & Randy Hertz, *Foreword: Why Not a Clinical Lawyer-Journal?*, 1 CLINICAL L. REV. 1, 3 (1994). Collaborative lawyering theory offers a progressive critique of traditional lawyering practices. See, e.g., GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (where "progressive" refers to a style of lawyering, not the politics of the causes that the lawyer represents). "Political" or "cause" lawyers are politically to the left of center in the causes they represent, but they are not necessarily collaborative lawyers. See, e.g. WILLIAM M. KUNSTLER, *MY LIFE AS A RADICAL LAWYER* (1994) (portraying author as front and center of the causes he litigated). For a work studying the phenomenon of cause lawyering, see *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Austin Sarat & Stuart Scheingold eds., 1998). See *infra* text accompanying notes 112-14 for a discussion of the different strands of the collaborative lawyering movement.

22. See *infra* Part I(A). For an anthology of clinical scholarship see ALEX J. HURDER ET AL., *CLINICAL ANTHOLOGY: READINGS FOR LIVE CLIENT CLINICS* (1997).

23. While authors have long assumed that changing client's names and some facts protects confidentiality, it may not be so simple. See *infra* Part II(C)(3). That, however, is the subject of another article.

Legal scholars have virtually ignored the ethics of the widespread practice of writing about clients.<sup>24</sup> While the ethics of scholarship literature examines the integrity of scholars' conclusions,<sup>25</sup> it does not look in depth at clients as the subject of scholarship. The authors of stories about clients also sidestep the ethical issues. Authors typically change the names of their clients or the content of the stories as they were initially told,<sup>26</sup> but only a handful seem to have explicitly discussed the written product with their clients or given their clients an opportunity to change the content.<sup>27</sup>

I have been among those authors who have used client stories without resolving the thorny ethical issues. In order to ground my analysis of case theory in an article entitled *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*,<sup>28</sup> I told several stories about a criminal case in which my clinic students represented an African-American client charged with assault and battery, resisting arrest, and disorderly conduct. One story was based on the public record of an earlier trial on the same charges, including the client's testimony. Another story gave a brief synopsis of how we came to represent the client and his decision to plead guilty rather than risk the consequences of another trial. Another story, looking back on the case after it was resolved, imagined alternative case theories that could have explained what happened to the client. Several of these theories used the lens of race to explain what happened to the client; another theory speculated that the client was gay and used sexual orientation to explain the client's arrest. We lost contact with the client after our representation ended and I did not obtain his consent to tell any of these stories in the article.

In the article, I argued that the traditional concept of case theory should be expanded to include the life experiences of clients, and that clients should play a

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24. The few exceptions are Kathleen A. Sullivan, *The Perils of Advocacy: Listening, Labeling, Appropriating* in *HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA* (Joel F. Handler & Lucie White eds. 1999); Nina W. Tart, *Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity*, 5 CLINICAL L. REV. 271 (1998); Allan W. Vestal, *Former Client Censorship of Academic Scholarship*, 43 SYRACUSE L. REV. 1247 (1992).

25. This literature includes the ethics of various interpretive practices, *Reading and Responsibility: Ethics and Interpretive Practice in Law and in the Humanities*, Association of American Law Schools ("AALS") Annual Meeting, Washington, DC, (January 9, 1999) [hereinafter 1999 AALS *Ethics and Interpretive Practice*], and discussions of the rules that should govern the disclosure of the financial or other interests that might affect scholars' conclusions. See, e.g. Ronald K. L. Collins, *A Letter on Scholarly Ethics*, 45 J. LEGAL EDUC. 139 (1995); 1999 AALS Program, *We Know What You Did Last Summer . . . Who Paid for It?*, AALS Annual Meeting, Washington, DC (January 9, 1999) (discussing current Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities and proposed alternative). For a good discussion of this debate, see Richard B. Schmitt, *Rules May Require Law Professors to Disclose Fees*, WALL ST. J., Jan. 31, 2000, at B1.

26. See *infra* Part II(A) & Part II(C)(3).

27. See *infra* Part II(A).

28. Miller, *Case Theory*, *supra* note 6.

larger role in developing, shaping, and choosing case theory.<sup>29</sup> I would like to say that I considered all of the ramifications of telling the story of the case at the time I wrote the article, but I did not. While I was troubled by revealing information as personal as my belief about the client's sexual orientation, like many authors, I glibly assumed that if I changed the client's name and other unspecified facts in the story, I could tell the story with impunity. I did not even see the irony of using a client story without permission in an article arguing for greater client autonomy in shaping the stories that lawyers tell during their cases.

It was not until after the article was published that I thought about whether the client should have been given a role not only in the telling of the story in the case, but afterwards as well. When several participants in a workshop where I presented the article criticized me for using a client story without consent,<sup>30</sup> I first began to grapple with the hard issues that this practice raises. If the rules of ethics allow lawyers under some circumstances to tell client stories without obtaining consent, how does this practice square with a view of lawyering that argues for greater client autonomy, control, and ownership over their cases? Can the use of client stories be justified, with or without consent, under any concept of client-focused lawyering? Is every story about a client equally a story about a case or a lawyer?

In Part I, I trace the explosive growth in the telling of stories about cases and clients in law review articles, and offer some reasons why this might be so. I then survey the kinds of stories law professors are telling about clients and cases — real stories, composite stories, and fictional accounts — and the reasons why telling stories is important, and in particular, why real stories are critical.

In Part II, I turn to the conundrum of telling real stories about real clients. These stories are powerful and compelling and offer important lessons, but the author must confront the question of whether the story belongs to the lawyer or the client and the role the client should have in telling the story. First, I document the near-invisibility of clients in this decision-making process and suggest several reasons why this may be so. Next, I discuss the ethics of this practice, not in the sense of the parameters of the ethical rules governing lawyer conduct, but in terms of its fit with concepts of appropriation and collaborative, client-focused lawyering theories. While collaborative lawyering theory addresses the practice of lawyers passing on client narratives *in the case* after reframing them, it may also address who has the greatest claim to the story in *after-the-fact* stories about the case. In addition, the writers of professional memoirs in other fields, especially medicine, confront some of these same questions, as do journalists and others who make a living telling other people's stories.<sup>31</sup>

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29. *Id.* at 553.

30. This presentation took place at a workshop on clinical scholarship at the annual meeting of the AALS in January 1996. I owe Margaret Montoya thanks for first raising the issue.

31. See *infra* Part II(C)(2).

Both Part I and Part II examine the ethics of narrative from the perspective of the process of authorship and the stories that emerge from that process. My conclusions about the role of clients in this process are much more tentative. Nonetheless, I suggest that client consent should not always be a prerequisite to writing and publishing stories about cases.

Given the renewed interest in the ethical dimensions of other legal arenas once on the margins — the ethics of legal commentary,<sup>32</sup> legal advocacy,<sup>33</sup> and interpretive practices in law and the humanities<sup>34</sup> — an understanding of the ethics of client storytelling is even more important. While this Article is primarily about using client stories in law review articles, similar issues are raised by using client stories in nonacademic writing and in teaching,<sup>35</sup> or telling client stories to friends and colleagues.

## I. THE STORIES THAT LAWYERS TELL

Lawyering theorists, many of them clinical teachers, are telling all kinds of stories about their cases. Stories about vengeful,<sup>36</sup> unethical<sup>37</sup> or incompetent

32. See Symposium, *A Proposed Code of Ethics for Legal Commentators: A Symposium*, 50 MERCER L. REV. 671 (1999) (discussing the ethics of legal commentary).

33. Examples include the three part series of articles by Anthony Alfieri on the ethics of racial imagery. Anthony Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) (Part I); Anthony Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997) (Part II) [hereinafter Alfieri, *Lynching Ethics*]; Anthony Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998) (Part III).

34. 1999 AALS Ethics and Interpretative Practice, *supra* note 25.

35. For articles describing the use of client stories in teaching, see Melissa Harrison & Margaret Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 428-29 (1996) (telling story of Frank Baca). See also *id.* at 411 (describing former prosecutor's use of witness story). I do not address the ethics of other practices that may be problematic in some ways that are similar to writing about clients, such as the practice of writing about students (Tarr, *supra* note 24; see *infra* notes 39-41), judges (*infra* notes 36-38), or other actors. Because these practices also raise different issues, each deserves its own article. For example, there may be risks to clinical programs and future clients in writing critically about judges before whom clinic supervisors and students regularly appear. Furthermore, clinic students may not want to serve as guinea pigs for their professors' writing projects. See Tarr, *supra* note 24, at 271-72 (noting the potential for exploitation in scholarship based on students' clinical experiences); cf. Abbe Smith, *Carrying On in Criminal Court: When Criminal Defense Is Not So Sexy and Other Grievances*, 1 CLIN. L. REV. 723, 736 (1995) (describing the effect on intimacy of a critique written by a former student "for my colleagues (and other students) to read"). But see Robert Dinerstein, *Clinical Education in a Different Voice: A Reply to Robert Rader*, 1 CLINICAL L. REV. 711, 711-12 (1995) (arguing for greater visibility of students in clinical writing).

36. See, e.g., Smith, *supra* note 35, at 732 (1995) (describing judge who "asserted her authority for no apparent reason except to flex her robes," and who ignored the prosecutor's recommendation for predisposition release and incarcerated a juvenile client for spray painting a sidewalk because she did not like his attitude or his family, and then threatened defense attorney with contempt when she protested).

37. See, e.g., Susan Bryant & Maria Arias, *A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering that Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207, 221 (1992) (describing appalling behavior of judge who berated a battered woman for seeking a civil protection order); Caroline Kearney, *Pedagogy in a Poor People's Court: The First Year of a Child Support Clinic*, 19 N.M. L. REV. 175, 180 (1989) (describing hearing examiner who conducted hearing after she had decided the case off the record in the absence of *pro se* respondent).



judges,<sup>38</sup> stories about challenging,<sup>39</sup> wonderful<sup>40</sup> and less than wonderful students,<sup>41</sup> stories about good and bad lawyering practices, and stories about the lawyers themselves. Finally, stories about clients abound. In recent years, most articles written about lawyering include a story about a client.

### A. ROOTS

This was not always so. Client stories made rare appearances in law review articles for many years. One of the earliest stories appears in Herbert Wechsler's article, *Toward Neutral Principles in Constitutional Law*,<sup>42</sup> an article that gained fame as a response to Judge Learned Hand.<sup>43</sup> Wechsler reveals that as a Justice Department lawyer in the *Korematsu v. United States*<sup>44</sup> case, he rewrote a portion of the Supreme Court brief at the urging of War Department officials, his client at the time. At first, Wechsler wrote the brief to include language urging the Court to ignore a discredited report finding that Japanese-Americans presented a substantial threat to American safety during the war. Wechsler then rewrote the brief to give more credence to certain facts contained in the report, and the Court relied on this footnote in finding a "military necessity" for the internment camps.<sup>45</sup>

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38. See, e.g., Johnson, *supra* note 6, at 257 (describing appellate court unanimously upholding race-based seizure despite one judge's comments at oral argument that he had engaged in innocent behavior identical to defendant's).

39. See Smith, *supra* note 35, at 732 (describing how clinic supervisor intervened in court after students were "rendered mute"); Margaret Martin Barry, *A Question of Mission: Catholic Law School's Domestic Violence Clinic*, 38 How. L.J. 135, 141 (1994) (describing students who could not comprehend client's situation); Bryant & Arias, *supra* note 37, at 219-20 (describing students who overwhelmed client seeking a civil protection order with a vast array of choices such that client declined to seek relief), at 220 (describing student who wanted to remove herself from the case of a client who missed appointments); George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZAGA L. REV. 415, 438 (1990/91) (describing student who became "psychologically paralyzed" and temporarily was unable to deliver closing argument); Miller, *Case Theory*, *supra* note 6, at 571 (discussing author's frustration with students who she felt were "insensitive to the pervasive power of race").

40. See, e.g., Cook, *supra* note 19, at 51-55 (describing socially and politically conscious student who took seriously her client's views about case theory); Mary Marsh Zulak, *Rediscovering Client Decisionmaking: The Impact of Roleplaying*, 1 CLINICAL L. REV. 593, 622, 629-30 (1995) (relating how students successfully engaged clients in roleplaying in order to involve clients in strategy decisions).

41. See e.g., Barry, *supra* note 39, at 145 (describing tendency of students to engage in "cultural voyeurism" in poor communities). For an especially biting but accurate critique of a colleague's student, see Dinerstein, *supra* note 35, at 711 (describing Rader's "flawed and inevitably partial" vision of clinical practice and his "too often whiny and self-indulgent" voice).

42. 73 HARV. L. REV. 1 (1959).

43. Wechsler's article is one of the most cited law review articles of all time. Baron & Epstein, *supra* note 3, at 151 n.34.

44. *Korematsu v. United States*, 323 U.S. 214, 217-24 (1944).

45. See Wechsler, *supra* note 42, at 27. Later commentators have noted Wechsler's ambivalence, noting his "confessional tone" in both justifying his distasteful advocacy as "in the line of duty as a lawyer" and distancing himself from it by calling the racially discriminatory treatment of the Japanese an "abomination." See Baron & Epstein, *supra* note 3, at 163.

In the 1970s and 1980s, there was a smattering of innovative scholarship that included client stories, but these received scant notice.<sup>46</sup> Then, in the last decade, stories about actual cases and clients burst on the scene. In 1988, Tony Alfieri published the first of his many articles that contained a client story,<sup>47</sup> followed by a second article in 1991.<sup>48</sup> In 1990, Lucie White published *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*,<sup>49</sup> the story of a thirty-five year old African-American mother of five daughters who White represented when she worked as a legal services lawyer in a rural North Carolina town. Although the articles written by White and Alfieri were not the first to include client stories, they joined the ranks of legal scholarship with great fanfare.<sup>50</sup>

Within the next few years, scholarship about lawyering and clients exploded. Other legal academics began writing client stories about clients they represented through clinical programs or clients they represented in practice before they began teaching law.<sup>51</sup> Clinic students followed in the footsteps of their teachers

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46. See, e.g., MARVIN S. KAYNE, CASES ILLUSTRATING ETHICAL PROBLEMS IN CLINICAL EDUCATION FOR THE LAW STUDENT 114 (1973) (working papers prepared for CLEPR National Conference); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83) (describing defense of Latino political group); Cunningham, *supra* note 4 (describing clients represented by University of Michigan Law School clinic); White, *Lessons from Driefontein*, *supra* note 8, at 723-24.

47. Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 692 (1987-1988) (describing litigation in *Williams v. Axelrod*).

48. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

49. White, *Mrs. G.*, *supra* note 8. An earlier article by Lucie White about the village of Driefontein in South Africa relied heavily on stories about villagers that she did not represent but who were assisted by a lawyer and a community organizer. White, *Lessons from Driefontein*, *supra* note 8.

50. White's story of Mrs. G. is one of the best known client stories in legal education, and is widely praised by lawyering theorists. See, e.g., Naomi Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23, 25 n.11 (1990) (stating that the article is "an eloquent (and elegant) deconstruction" of lawyer-client relationships"); Robert D. Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 CLEV. STATE. L. REV. 469, 470 n.4 (1996) (ranking *Mrs. G.* as "[o]ne of the most influential articles in the [clinical scholarship] genre"). The article is assigned as required reading in many clinical programs, and a Westlaw search reveals that White's article has been cited in nearly 300 legal periodicals in the law review database. White acknowledges that only one year after Alfieri's essay, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, was published, "it has been read widely by law students and their teachers." Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853, 853 (1992).

51. For examples of stories about clients from practice, see Alfieri, *supra* note 48 (telling story of Mrs. Celeste, a saintly class action litigant in a lawsuit challenging the impact of foster care payments on food stamp benefits); Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619, 633-43 (1991) [hereinafter Alfieri, *Josephine V.*] (telling story of Josephine V., a pregnant impoverished Hispanic client who persists with her story in the face of the judge's resistance); Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567, 2576-90 (1993) (telling the story of Bertie Johnson, a composite client standing in for a sample group of Social Security disability cases); Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65, 86-91 (1994) (describing heart-breaking story of the death-row client who author met during the summer after her first year of law school and corresponded with for more than thirteen years until he was executed); Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443, 449-54, 461-62 (1996) (exploring conflicts arising from the close connection

and wrote about clients they represented in clinical programs.<sup>52</sup> The practice has gained momentum until it is now more common than not for law review articles about lawyering practices and client relationships to contain client stories. Most articles by clinical teachers, even doctrinal articles, rely on client stories. The practice of telling client stories also has become increasingly common in other legal scholarship.

The trend of telling stories about clients fits with a number of developments in legal scholarship and legal education. It can be seen in part as an outgrowth of the various critical theory movements that emphasize the importance of voice and narrative. Critical race theory scholarship tends towards very personal expression and relies heavily on personal experience in seeking to change the law and the place of people of color in legal structures.<sup>53</sup> Feminist legal theory has similarly relied on stories as a key component of scholarship.<sup>54</sup> While legal realists always understood the importance of facts and the lived lives of the people behind the doctrine, only in the last decade or so has scholarship that includes stories gained a real hold in law reviews.

The growing interest in the intersection of theory and practice also has created a niche for accounts of real cases. Scholars, sometimes themselves practicing lawyers, exhort lawyers to document their lives in legal practice.<sup>55</sup> Collaborative lawyering theory, which can be seen as applied theory, thus borrowed a device from movements whose roots are more theoretical.

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between the author, who is an activist lesbian lawyer and law professor, and her lesbian and gay clients). For examples of stories about clinic clients, see Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992) (telling the story of M. Dujon Johnson, an African-American client represented by the University of Michigan law school clinic in a criminal case); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398, 1424 (1992) [hereinafter Cahn, *Reasonable Woman*] (telling the story of Arlene Sims, a composite client seeking a civil protection order); Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2485-93 (1993) [hereinafter Cahn, *Inconsistent Stories*] (telling story of Darlene Adams, a composite client facing an abusive male partner); Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 972-81 (1992) (telling the story of Mrs. Smith, a black immigrant from a West African country, charged with battery). Still other authors write stories gleaned from the public records of cases handled by other lawyers. See Anthony Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 794-96, 815-32 [hereinafter Alfieri, *Disabled Clients*].

52. See Robert Rader, *Confessions of Guilt: A Clinic Student's Reflections on Representing Indigent Criminal Defendants*, 1 CLIN. L. REV. 299 (1994); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 CLINICAL L. REV. 167 (1994).

53. See Calmore, *supra* note 17, at 2171; *supra* note 9.

54. See *supra* note 11.

55. See, e.g. Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687, 714 n.65 (1992) (urging practitioners "to write more and greater detailed accounts of particular practice situations, as we recognize the need for increasingly detailed information about alternative styles of practice"). For an argument that lawyers should use social science methodology to address the effect of race, class, and gender in lawyer-client interactions, see Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE UNIV. L. REV. 345 (1997).

Moreover, the increase in the number, size, and visibility of law school clinical programs in the past ten years has created a large group of legal academics with experience representing clients.<sup>56</sup> Many of these clinical teachers represented underprivileged clients before becoming law professors, or represented clients in social justice causes. As clinical teachers, these legal academics have ongoing relationships with clients, either directly, or indirectly through the clients that their students represent. Not only do clinical professors have ready access to client stories, the clinic methodology of reflection and learning from experience encourages telling stories about clients. Clinical teaching has always had a strong oral tradition of telling stories at conferences and using them in teaching.<sup>57</sup> These stories are the same stories that are examined in-depth in supervision sessions and dissected in case rounds and seminars.<sup>58</sup> Few other clients receive so much attention from the lawyers who represent them or have their lives examined in such depth.

The whole concept of learning from real cases and real clients logically opened the door for clinical professors to incorporate client stories into law review articles. For a clinic teacher or student,<sup>59</sup> it was not much of a leap to write those stories down on paper and publish them for the world to read. Clinical scholarship was an important step in integrating clinics into the mainstream of legal education.

Twenty years ago, few clinical teachers had academic appointments. They labored in the basement of legal academia, grinding out cases. Clinical teachers were not expected to write law review articles and few had appointments that gave them the time or resources to write. Now a large number of clinical law professors are in tenure-track or tenured positions.<sup>60</sup> Most tenure-track positions require that professors publish scholarship in order to obtain tenure, and after tenure, professors continue to write and to identify as scholars.

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56. For articles summarizing the development and evolution of clinical education, see Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L. J. 445, 446-47 (2000); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1463-74 (1998).

57. See Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 111 n.6 (1993-94).

58. See, e.g., Carrie Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education*, 4 ANTIOCH L.J. 287 (1986); Shalleck, *supra* note 57, at 111 n.6 (describing exchange of clinic supervision stories at clinical conferences). For a theory proposing a three-tiered clinic curriculum consisting of supervision sessions, case rounds and seminars, see Shalleck, *supra* note 57.

59. For accounts of cases by the law students who handled these cases, see *supra* note 52.

60. Compare *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 511 (1992) (subtitled *Report of the Subcommittee on Pedagogical Goals of In-House, Live-Client Clinics*) with *supra* note 56.

While clinical law professors write in a wide variety of doctrinal areas,<sup>61</sup> their pedagogical and intellectual focus is lawyering process issues. It is difficult to write meaningfully about what lawyers do without writing about clients. This is true whether clients are the subject of large-scale macro studies or small-scale narrative studies.<sup>62</sup> For those clinicians who write about teaching innovations in clinical programs, client stories are often the backdrop for explaining teaching methodology.

## B. REAL LIFE, COMPOSITE, OR FICTION

All stories contain a narrative, and the challenge is to tell a story rich with details, interesting in its own right, but one that conveys a larger point about the

61. See Barbara A. Babb, *Fashioning An Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998) (family law); Elizabeth B. Cooper, *Testing for Genetic Traits: The Need for a New Legal Doctrine of Informed Consent*, 58 MD. L. REV. 346 (1999) (informed consent doctrine); Miller, *Voting Rights*, *supra* note 6; Susan Bennett, "No Relief But Upon the Terms of Coming into the House" — *Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System*, 104 YALE L.J. 2157 (1995) (poverty law); Minna Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301 (1990) (employment discrimination); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family and Criminal Law*, 83 CORNELL L. REV. 688 (1998) (family law); Charles Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995) (immigration law).

62. See discussion *infra* Part I(B) (discussing difference between micro studies and macro studies). For decades, scholars have seen clinics as fertile grounds for empirical research. See Steven H. Leleiko, *Clinical Education, Empirical Study, and Legal Scholarship*, 30 J. LEGAL EDUC. 149, 161 (1979) (arguing that clinics should create "new research vehicles" for data analysis); Gary Palm, *Reconceptualizing Clinical Scholarship as Clinical Instruction*, 1 CLINICAL L. REV. 127, 131-33 (1994) (urging clinical teachers to write scholarship reporting on actual law reform efforts in their case work); Dinerstein, *supra* note 51, at 987 ("ultimately the theoretics literature must forge links with empirical work about lawyers and lawyering to fully ground its observations about the world of practice"). Yet at this point in time, only a few articles contain large-scale studies of clients, lawyer-client interactions, or legal structures in a clinical setting. See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 269 n.30 (1991) (noting the absence of empirical work in this area). For examples of empirical work in this area, see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFTSTRA L. REV. 533 (1992) (examining Baltimore's rent court by conducting exit interviews of the participants in the legal proceedings); Rodney J. Uphoff & Peter Wood, *The Allocation of Decisionmaking Authority Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 KAN. L. REV. 1 (1998). This is in contrast to the large body of empirical work in the field of socio-legal studies. See, e.g., AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS & THEIR CLIENTS* (1995); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC. REV. 483 (1988) (examining defendant satisfaction in criminal cases); Jonathan D. Casper, *Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment*, 12 LAW & SOC. REV. 237 (1978) [hereinafter Casper, *Having Their Day in Court*] (examining defendant's views of fairness in the criminal justice system); William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC. REV. 137 (1988) (discussing a study of small-claims plaintiffs); Austin Sarat, "... The Law is All Over:" *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990) [hereinafter Sarat, *The Law is All Over*] (comparing legal consciousness of the welfare poor with other groups); Austin Sarat, *Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989) [hereinafter Sarat, *Law Talk*] (looking at interactions between divorce lawyers and their clients); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC. REV. 51 (1984) (discussing a study of traffic and misdemeanor defendants).

meaning — or the theory — of the story without getting lost in the details.<sup>63</sup> This is true of all storytelling, but law review articles pose additional challenges. There are three basic ways to incorporate a story into an article. The author can set forth a theory or a concept, and then use the story to illustrate or dissect the theory. Alternatively, the author can tell a story and then explain the meaning of the story. Or the author can simply tell a story that speaks for itself.

Law review articles in the story-theory genre reflect the difficulty of truly integrating story and theory. Some authors write articles that are almost entirely story in which the author's analysis of the story takes a very secondary role.<sup>64</sup> Others write articles that are half-story, half-analysis but with little back and forth between the analysis and the story.<sup>65</sup> Others write highly theoretical articles in which post-modern theory vies with stories written from the perspective of indigent clients who live worlds apart from the worlds of Foucault and Derrida.<sup>66</sup> Others sprinkle bits and pieces of a story into the theoretical analysis of an article, leaving the actual telling of the story until later.<sup>67</sup>

In addition to determining how the story fits in the article, the author must also decide what type of story to tell. Stories about cases and clients can be placed on a spectrum, ranging from true stories based on real cases, to almost true stories with names changed or some facts altered, to composite stories that are a collection of true happenings, to pure fiction.<sup>68</sup> Given this range of stories, which makes for the better story?

Most of the stories about cases in law review articles are based on actual experiences with clients. I refer to these stories as "real" or "actual" client stories,<sup>69</sup> although they are not quite real because the authors have usually changed some facts. Lawyers tell two other kinds of stories about clients and

63. See Miller, *Case Theory*, *supra* note 6, at 489.

64. See, e.g., Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1991 (1995) (case chronology comprises sixty-nine pages in a ninety page article); Leslie Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901 (1997) (case chronology is twenty-four pages in a thirty-seven page article).

65. See e.g., Dinerstein, *supra* note 51 (juxtaposing story of black immigrant from a West African country against critique of the theoretic of practice movement); Joyce E. McConnell, *Securing the Care of Children in Diverse Families*, 10 YALE J. L. & FEM. 29 (1998) (juxtaposing story of single mother seeking standby guardianship against legal analysis of guardianship issues).

66. See, e.g., Alfieri, *Josephine V.*, *supra* note 51, at 621 n.8 (attributing author's analysis of rationality and discourse to Michel Foucault); Alfieri, *supra* note 48, at 2120 n.43 (attributing author's analysis of power in lawyer-client relationships to Michel Foucault, among others); Alfieri, *supra* note 47, at 696-98 (crediting the work of theologian Martin Buber and others for author's analysis of dialogue).

67. See, e.g., Alfieri, *Josephine V.*, *supra* note 51, at 624-25, 633-45.

68. Some articles include stories from both genres. See Cook, *supra* note 19 (combining an actual client story with a fictional story).

69. I use these terms, however imprecise, because stories about actual clients, even with some facts changed, are more real than stories about composite clients or fictitious clients. See, e.g., Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2074 (1989) (distinguishing real stories from stories that "are not true."). Unless otherwise noted, the examples I include in this Article are stories about actual cases.

cases: fictional accounts of client interactions<sup>70</sup> and composite stories that the authors have created by merging a variety of "real" clients into a single account.<sup>71</sup> These composite clients are metaphors, not actual people but clients who bear a close resemblance to the clients that the authors have represented.<sup>72</sup> For example, Naomi Cahn described Darlene, a client who came to Cahn seeking a civil protection order against the man she was living with, and uses the account of her case to explore the various layers of inconsistencies among the stories that Darlene and others would tell. Cahn explains that the account "is based (somewhat) on my experiences as a clinical professor" where she frequently encounters clients who change their minds about pursuing civil protection orders, and that she uses a "composite of clients to construct one particular client's stories."<sup>73</sup>

Composite clients are a hybrid between real clients and purely fictional accounts that at first glance may look a lot like clients in real stories. If the author changed enough facts in an account of a real client, that client could begin to look like a composite client. For the most part, though, the facts that are changed in real client accounts keep the basic story intact. These accounts are not a merger of experiences with a variety of clients, but a story about one client with some facts changed. These facts tend to be general facts identifying the client or the case — such as the name of the client or location of the case — rather than the details of the story itself.<sup>74</sup>

70. See Cook, *supra* note 19, at 41-46; *supra* note 18 (authors rely on conversations with fictional characters who are protagonists, not clients)

71. See, e.g., LOPEZ, *supra* note 21; Alfieri, *Impoverished Practices*, *supra* note 51, at 2576-90; Cahn, *Inconsistent Stories*, *supra* note 51, at 2485-92 & n.51; Cahn, *Reasonable Woman*, *supra* note 51, at 1402, 1424-30 & n.132; Naomi Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23, 27 (1990); Buchanan & Trubek, *supra* note 55, at 694 n.42; McConnell, *supra* note 65. See also Sullivan, *supra* note 24, at 201 (referring to composites as one of the ways "narrative legal scholars traditionally tell stories."). I use the term composite client and composite story or case interchangeably, as do some of the others of these accounts. See Cahn, *Inconsistent Stories*, *supra* note 51, at 2478 (using term "composite of clients") & 2486 (using term "composite story"). It stands to reason that if the clients are composites, the cases described are as well. It is sometimes unclear how "real" the lawyers are in these accounts, or whether the lawyer experiences described are a compendium of one lawyer's experiences on multiple cases, or a compendium of a variety of a lawyers' experiences. See Buchanan & Trubek, *supra* note 55, at 694 n.42 & 694-704 (describing young litigator named Susan who works in private law firm and a young practitioner named Diane who works in a public interest law firm affiliated with a law school clinic); Cahn, *Inconsistent Stories*, *supra* note 51, at 2485 n.51 (noting that "[t]he story that follows is based (somewhat) on my experiences as a clinical professor"); Cahn, *Reasonable Woman*, *supra* note 51, at 1424 n.32 ("the attorney deliberations discussed *infra* are hypothetical"). For articles that rely on composite students, see Margaret Martin Barry, *Clinical Supervision: Walking That Fine Line*, 2 CLINICAL L. REV. 137 (1995); Jennifer P. Lyman, *Getting Personal in Supervision: Looking for That Fine Line*, 2 CLINICAL L. REV. 211 (1995).

72. Commentators have noted the distinction between metaphors and actual people in social science research. See Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 840-41 (1989).

73. Cahn, *Inconsistent Stories*, *supra* note 51, at 2478, 2485-87 & n.51.

74. See discussion *infra* Part II(C)(3) for examples.

Lawyers write stories about actual clients seeking a wide range of public benefits, ranging from clients fighting to receive food stamps for their foster families<sup>75</sup> to clients seeking milk and diapers for their infants<sup>76</sup> to a toddler suffering from sickle-cell anemia struggling to participate in a state-sponsored nutrition program.<sup>77</sup> Other clients face claims that they have received more public benefits than they are entitled to.<sup>78</sup> Lawyers write about clients charged with criminal offenses, including assault and battery,<sup>79</sup> driving under the influence of alcohol,<sup>80</sup> disorderly conduct,<sup>81</sup> and resisting arrest.<sup>82</sup> Some of the clients are homeless.<sup>83</sup> Others seek civil rights: prisoners challenging prison disciplinary procedures as unconstitutional<sup>84</sup> and African-Americans fighting for voting rights on a par with whites.<sup>85</sup> There is an endless variety of stories.

All of these real stories share something in common. These stories are compiled from notes of interviews with the client, case file notations, recollections of interactions with different actors as the case wound its way through various legal proceedings, and after-the-fact impressions of the client or the case. Most of these clients are poor, or at least not able to afford to pay a lawyer for her services. But these actual stories differ in how the client comes into the story. Actual case stories loosely fall into four different categories in terms of the role afforded the client: lengthy narratives, "case round"-type reports of cases, short, generic descriptions of clients for illustrative purposes, and socio-legal studies based on empirical research.

In the narrative type story, the client has a leading role.<sup>86</sup> Pages of the story are devoted to discussing the client and every aspect of her life that figured into the case in some way. Other actors may be prominent in the story, but the client is center-stage. The most extreme version of this is where the story of the case *is* the story of the client; it reads almost like a mini-biography of the client. Typically, the story is the bulk of the article.

Jane Spinak's story of the case of her client Lucy Parsons is an example of such a narrative. In a ninety-page article, Spinak presents an intricate and beautifully

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75. See Alfieri, *supra* note 48, at 2111, 2114-18.

76. See Alfieri, *Josephine V.*, *supra* note 51, at 637-43.

77. See Alfieri, *supra* note 47, at 693.

78. See White, *Mrs. G.*, *supra* note 8, at 23.

79. See Dinerstein, *supra* note 51, at 972; Miller, *Case Theory*, *supra* note 6, at 530.

80. See Cunningham, *supra* note 4, at 2464.

81. See Cunningham, *supra* note 51, at 1310; Miller, *Case Theory*, *supra* note 6, at 530.

82. See Miller, *Case Theory*, *supra* note 6, at 530.

83. See Gilkerson, *supra* note 52, at 938 (naming clients Tori M., Dawn E., Melissa H. and Maria C.).

84. See Cunningham, *supra* note 4, at 2465-67.

85. See Herbert Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 766 (1995).

86. See, e.g. Espinoza, *supra* note 64; Miller, *Case Theory*, *supra* note 6; Spinak, *supra*, note 64. Stories that use client composites tend to have the feel of a lengthy client narrative, or fall somewhere between a narrative and a case-round type report.



drawn portrait of her representation of Parsons over nearly three years. Spinak, with the assistance of clinic students, advocated for Parsons in numerous legal forums in an effort to return two of the three foster boys who had been removed from Parsons' care. The story begins several years before Spinak became Parsons' lawyer, and ends when Parsons adopts two of the boys. The rest of the story painstakingly details the heartbreaking ups and downs of the ensuing litigation, complete with actual case documents, and the fears and joys of Parsons as she battled an obtuse and often unresponsive system. Parsons' feelings and reactions are analyzed at every stage of the process. The story of the case is interwoven with Spinak's ruminations on the role of mental health and other social service professionals, the relevance of various law review articles and legal theory movements to the job of representing Parsons and other clients, the desired role and direction of clinical scholarship, and the ways in which Spinak's own experience as a mother affected her representation of Parsons. In this way, Spinak tells the story of the case, her client and herself.<sup>87</sup>

In case round type reports of cases,<sup>88</sup> the story about the client is a short anecdote or vignette that is detailed and specific to that client,<sup>89</sup> and serves as a backdrop to a larger story about a lawyer's experience in the courtroom,<sup>90</sup> a clinical teacher's experience supervising a student,<sup>91</sup> or something else. Barbara Babcock's wonderful account of Geraldine, a client that she once represented on drug charges, is an example of this kind of story. There, in an account that is alternately humorous and tragic, Babcock describes sending Geraldine for a mental examination, where she was diagnosed with the mental disease of "inadequate personality." Although Geraldine watched the seven-day trial with "only mild interest," after the jury returned a verdict of not guilty by reason of

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87. Spinak, *supra* note 64. I disagree with Spinak's assertion that the narrative of the case is not about her client, *id.* at 2052, although I agree that the narrative of the case is Spinak's story too. See *infra* Part II(C)(1).

88. For an excellent definition of case rounds, see Shalleck, *supra* note 57, at 144 (explaining that "a group of students draws upon the shared discourse of the classroom to discuss the issues in their cases."). Case rounds are also known by other terms, such as "group case analysis meetings." See Shalleck, *supra* note 57, at 110, 144 (using terms interchangeably).

89. See generally Menkel-Meadow, *supra* note 58. Memoirs written by lawyers about their life in the law (Randy Bellows, *Notes of a Public Defender in THE SOCIAL RESPONSIBILITIES OF LAWYERS* 88 (1988); J. L. CHESTNUT, JR. & JULIA CASS, *BLACK IN SELMA: THE UNCOMMON LIFE OF J.L. CHESTNUT, JR.* (1990); ALAN M. DERSHOWITZ, *BEST DEFENSE* (1983); JAMES S. KUNEN, *HOW CAN YOU DEFEND THOSE PEOPLE?* (1983); KUNSTLER, *supra* note 21; ARTHUR L. LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* (1998); GERALD SPENCE, *THE MAKING OF A COUNTRY LAWYER* (1996)), or particular cases (ROY BLACK, *BLACK'S LAW: A CRIMINAL LAWYER REVEALS HIS DEFENSE STRATEGIES IN FOUR CLIFFHANGER CASES* (1999); ALAN DERSHOWITZ, *REASONABLE DOUBTS: THE CRIMINAL JUSTICE SYSTEM AND THE O.J. SIMPSON CASE* (1997)), contain aspects of both lengthy narrative and case round type reports. But even when the descriptions of cases are quite lengthy, see LIMAN, *supra* at 3-9 (describing abuse heaped on Senate witnesses by Roy Cohn and Joe McCarthy), it is the lawyer, rather than the client, who occupies center stage.

90. Smith, *supra* note 35, at 731-32.

91. See generally Kearney, *supra* note 37, at 178-79 (describing experiences with students in paternity cases and child support cases).

insanity, she burst into tears, threw her arms around Babcock, and exclaimed, "I'm so happy for you." Babcock uses the case both as an answer to the question "How can you defend someone you know is guilty?" and as an example of her client's sharp insight that the case belonged to Babcock, not herself.<sup>92</sup> In a variation on this theme, other stories use clients very broadly as generic examples of particular types of cases or legal problems. These stories give clients such a limited role, for example, describing the type of case with no further mention of the client, that the story is not about the client at all.<sup>93</sup>

Whether the author uses the client as a main character or a supporting actor, these case stories are designed to study one or more lawyer-client interactions, either in-depth, or to make a more specific point. In contrast to these "microstudies," other authors write macrostudies whose purpose is to study a large number of clients in order to draw conclusions from empirical data. They are different in tone and content from case stories. Most of these macrostudies are socio-legal in nature;<sup>94</sup> most of these authors do not have a lawyer-client relationship with the individuals they study.

Macrostudies do not include true client narratives because the individual stories are not prominent. Rather, it is the cumulation of many stories that adds up to the study's conclusions. The lack of identifying detail about the clients' lives distances their opinions from themselves. In these articles, the cost of anonymity is that the voices of the clients are difficult to differentiate, even where their opinions differ. The stories are subsumed in the overall narrative of the article.

Austin Sarat's study of the legal consciousness of the welfare poor exemplifies the differences between a socio-legal empirical study and a true case story.<sup>95</sup> In the study, Sarat provides very little detail about the thirty-eight clients he interviewed in two legal aid offices in New England, and even less personal detail. He conceals the identity of the clients and the locations of the lawyers' offices. Some clients are described by name (either true name or pseudonym), others by name and age, and others more vaguely ("another man"). Sarat writes about their opinions of the welfare system, leaving out the story of how they got on welfare, their problems unrelated to welfare, or their small triumphs in an otherwise unresponsive system.

Other macrostudies focus on clients' opinions about lawyers or the legal system and the nature of interactions between lawyers and clients.<sup>96</sup> Like Sarat's

92. Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 178-79 (1983-84).

93. See, e.g., Eastman, *supra* note 85, at 766 (describing client as "[a] gay man staring death from AIDS in the face"); Kearney, *supra* note 37, at 181-82 (describing a paternity case in which the hearing examiner acted outrageously).

94. See *supra* note 62.

95. Sarat, *The Law is All Over*, *supra* note 62.

96. See, e.g., Sarat, *Law Talk*, *supra* note 62 (discussing lawyer-client conversations in the context of divorce cases); Casper, *Having Their Day in Court*, *supra* note 62 (discussing clients' opportunities to tell their stories in court).

study, these studies reveal few facts about the cases or the clients themselves — other than the outcome of cases and other matters of public record. Instead, they focus on the clients' experiences of the cases or the system the cases arose in.

In microstudies or case stories, lawyers have a role standing alongside their clients. The story of the case is the lawyer's story too, even for those stories that make the client's life story a centerpiece of the article. The lawyer has a role both in the case as it happened, and in reflecting about the case in the article. First, and perhaps most obviously, the story is told from the lawyer's perspective. Second, these stories often detail the decisions the lawyer made in the case, her feelings about the case and the client, and the actions she took. Some read like the lawyer's memoir of her own experience of the case.<sup>97</sup>

Other participants also have a role in case stories. Authors include stories about witnesses,<sup>98</sup> judges,<sup>99</sup> family members, law students who worked as the clients' lawyers,<sup>100</sup> and others. Sherri Lynn Johnson's article<sup>101</sup> exploring the role of race as a factor in police officers' decisions to detain suspects contains a classic example of a case story in which several participants have prominent roles. After case-crunching a number of appellate decisions analyzing detention under reasonable suspicion and probable cause standards, Johnson ends her article with the story of a case. Together, the stories of the lawyer, client, and judge make a point that none of these stories alone could make.<sup>102</sup>

Johnson begins the story by remembering her client Jose Tirado, "the man who began [her] interest in the subject."<sup>103</sup> Johnson represented Tirado when she worked as a public defender in New York City. Tirado was arrested after police officers stopped him in an impoverished neighborhood when they saw him pushing a shopping cart with a television and two speakers. Tirado, who was Hispanic and poorly dressed, picked up his pace when four non-Hispanic<sup>104</sup> plainclothes officers began to follow him. He was detained after he stopped to talk to a "large black woman."<sup>105</sup> The officers stressed her race and size. The trial court denied Johnson's motion to suppress and the appellate court affirmed that decision after oral argument. During oral argument, one of the appellate judges revealed the unusual coincidence that he had moved furniture with a shopping

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97. See Spinak, *supra* note 64. These differ in some respects from the kind of personal memoir described *supra* note 89.

98. See Miller, *Case Theory*, *supra* note 6, at 533-38.

99. See Johnson, *supra* note 6, at 257; Smith, *supra* note 35 at 731-32.

100. See Dinerstein, *supra* note 51, at 972-81; Smith, *supra* note 35, at 731-32.

101. Johnson, *supra* note 6.

102. Johnson, *supra* note 6, at 256. Since Johnson wrote her story, the Supreme Court's decision in *Whren* has made it all but impossible to argue that racially-based stops are impermissible under the Fourth Amendment, so long as other "objective" factors justify the stop. *Whren v. U.S.*, 517 U.S. 806 (1996).

103. Johnson, *supra* note 6, at 256.

104. The author tells us only that the officers were "of another race" than her client, and does not further identify their race. *Id.* at 256.

105. *Id.* at 257.

cart without being confronted by the police. Nonetheless, he voted to uphold Tirado's seizure.<sup>106</sup>

In conjunction with Tirado's story and the anecdote about the appellate judge, Johnson offers a personal story from her own experience, a story that was not part of the case in any direct way, but figured greatly in the story about the case. Less than a month before Johnson received Tirado's case, she pushed a similar cart with a television and speakers through the more affluent Brooklyn Heights neighborhood. She was blonde and dressed for court. None of the officers she passed stopped or even followed her.<sup>107</sup>

In a powerful mix of personal narrative, case anecdote, and client story, Johnson weaves the strands of these three seemingly separate stories about moving furniture in shopping carts on New York City streets into one thread demonstrating the pernicious impact of race in police decisions to detain individuals on the street. While the coincidence between the client's, the judge's, and the author's experiences may seem bizarre at first, it soon becomes apparent that moving furniture down the street in New York is a daily and common occurrence that receives little attention except when people of color are targeted. These stories add up to a narrative about race that would lose something in the telling without all three stories, just as each of these stories gains by juxtaposing it against the other two.

#### C. STORIES ABOUT CASES AND CLIENTS MATTER, AND REAL STORIES ARE AN ESSENTIAL PART OF THE MIX

Storytelling is now an accepted practice in legal scholarship, although it has its critics.<sup>108</sup> By now, narrative theory and the practice of narrative is a commonplace feature in many law reviews. The storytelling practices of the collaborative lawyering theorists share much in common with other legal theory movements, and lawyering theorists tell stories for many of the same reasons. Collaborative lawyering theorists have borrowed the insights of other legal theorists who are more concerned with the use of narrative in law rather than with lawyering

106. *Id.*

107. *Id.* at 256-57.

108. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) [hereinafter FARBER & SHERRY, *BEYOND ALL REASON*]; Arthur Austin, *Evaluating Storytelling as a Type of Nontraditional Scholarship*, 74 NEB. L. REV. 479 (1995); Dennis W. Arrow, "Rich," "Textured," and "Nuanced": Constitutional "Scholarship" and Constitutional Messianism at the Millennium, 78 TEX. L. REV. 149 (1999); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) [hereinafter Farber & Sherry, *Legal Narratives*]. While these critics see value in using narrative to explore how concrete experience and context function in legal theory, Farber & Sherry, *Legal Narratives*, *supra* at 821-22 (providing a nice example of Xerox repair technicians acquiring practical knowledge through experience), they argue that some objective standards be applied to narratives in order to standardize legal storytelling. See *id.* For an incisive response to Farber & Sherry's challenge to the use of narrative, see Abrams, *supra* note 11, at 1126 (reviewing *Beyond All Reason* and describing Farber & Sherry's critique as "flawed and inflammatory").

practices,<sup>109</sup> and applied their observations to the actual practice of representing clients.<sup>110</sup>

Stories can show us how law works in the world and provide a context for understanding legal problems in the larger society. Stories can change the legal status quo by challenging its assumptions and creating a new way of looking at the world.<sup>111</sup> Stories are better than traditional methods of legal analysis for understanding legal issues in context, and stories demonstrate that standards that seem neutral in the abstract are rarely so in practice.<sup>112</sup> Stories can build bridges across gaps of race, class, gender, sexual orientation, and other differences.<sup>113</sup> Circulating the stories and perspectives of the "other" can open the eyes of the majority to those perspectives. They can also make possible coalitions across oppressed groups and social change.<sup>114</sup> Personal experience almost always makes a concept more powerful than abstractions. Stories are lively and engaging in ways that doctrine often is not.

As a progressive critique of traditional lawyering practices, collaborative lawyering theory<sup>115</sup> — including critical lawyering theory, client-centered theory, and clinical theory — builds on these insights by emphasizing the importance of client voice and autonomy in the mix of stories that are told in cases. Critical theorists view lawyers as narrators who too often subordinate their clients — their stories and their lives — by telling stories that misrepresent or exclude client experience. The client-centered model, as exemplified by the classic work of David Binder and Susan Price, emphasizes that clients should play a greater role vis-a-vis their lawyers in making decisions in their cases.<sup>116</sup>

109. See, e.g., Baron & Epstein, *supra* note 3, at 141-42 (comparing use of narrative in litigation with its use in legal doctrine). For the narrative theorists, the law itself can be seen as narrative. *Id.*

110. See, e.g., Anthony G. Amsterdam & Nancy Morawetz, *Applying Narrative Theory to Litigation Planning* (April 17, 1998) (paper presented at the New York Law School Clinical Theory Workshop) (discussing application to case planning); Miller, *Case Theory*, *supra* note 6, at 514-29 (discussing application to case theory).

111. See, e.g., Buchanan & Trubek, *supra* note 55, at 692 (explaining narratives of transformative moments); Baron & Epstein, *supra* note 3, at 267-69 (noting that using stories as critique is a critical theme in the storytelling movement); Cahn, *Inconsistent Stories*, *supra* note 51, at 2479 & n.16 (citations omitted) ("[a]fter listening to stories, others can learn — at least to some degree").

112. See e.g., Baron & Epstein, *supra* note 3, at 256 (debunking the idea that "mainstream, ordinary and conventional standards are just 'there' and themselves already justified"); *id.* at 259 (arguing that stories demonstrate how power "can inhere in the most apparently 'neutral' standards").

113. Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of the Law*, 2 UCLA WOMEN'S L.J. 287 (1992) (reviewing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991)).

114. See, e.g., Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 9 (1989) (arguing for a "multiple consciousness" which chooses to "see the world from the standpoint of the oppressed" rather than randomly valuing all perspectives).

115. See *infra* note 21 for a discussion of this term.

116. See DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). This first edition has since been supplanted by a later edition, see BINDER, *supra* note 62, which adds Paul Bergman as an author. For thoughtful critiques of this work, see Robert D. Dinerstein,

Unlike its counterparts, clinic theory explores the pedagogy of lawyering. Clinic theory explores the boundaries between teachers and students in representing clients and sets out various models for experiential learning about clients. In their writing, clinical theorists draw on their experience representing clients and teaching law students about the art of representing clients in a law school clinic setting. Many authors who embrace critical or client-centered lawyering are clinical teachers or former clinical teachers, and most clinical teachers identify with one or more of these schools of thought.

While these schools of thought differ in some significant respects, the lines separating them are far from clear.<sup>117</sup> At bottom, however, these theories share in common the idea that cases belong to clients, not to lawyers, and posit that clients should have a role in determining how they are represented. They recognize the fundamental importance of client life experience and strategic skills in legal representation. They urge lawyers to tell stories about clients in their cases, and for clients to tell those stories themselves.

To support their theories about representation, advocacy, and the relationship between clients and their lawyers, law professor story writers tell client stories. Tony Alfieri draws from Josephine V.'s example of "speaking out of turn" at a hearing to illustrate how his client resisted her lawyer's and the administrative law judge's efforts to suppress her experience and her voice.<sup>118</sup> Adding client stories to the mix provides a way to recast the ethics of advocacy<sup>119</sup> and to enhance our understanding of legal doctrine.<sup>120</sup> Like other outsider stories, client stories point out gaps in the law and undo the erasure of experience.<sup>121</sup> Stories about the clients and the impact of the welfare system are lively and engaging. They provide a real picture of the impact of doctrine, lawyering styles, and complex administrative hearing systems on the lives of poor people. Through stories, readers have a better chance of locating themselves in an article and thus

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*Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990) [hereinafter Dinerstein, *Client-Centered Counseling*] (analyzing first edition) and Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697 (1992) (reviewing second edition).

117. See Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233, 1235 (1992) (describing the boundaries as "inchoate and perhaps irresolvable"). The critical lawyers, however, tilt more towards theory than practice. See Dinerstein, *supra* note 51, at 983-85. And at times their view of the possibilities of progressive lawyering borders on the hopelessly pessimistic. See Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747, 1750 (1994) (commenting on Gerald Lopez' work and noting that "I harbor little faith in the ability of progressive lawyers to redeem community in their individual and collective meetings with subordinated clients").

118. See Alfieri, *Josephine V.*, *supra* note 51, at 642-43.

119. Alfieri, *Josephine V.*, *supra* note 51, at 629; Miller, *Case Theory*, *supra* note 6.

120. See Miller, *Case Theory*, *supra* note 6, at 545-48.

121. See Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. at 1018, 1032 (1992); Cahn, *Inconsistent Stories*, *supra* note 51, at 2478-80; Matsuda, *supra* note 114, at 9 ("we can choose to know the lives of others by reading, studying, listening, and venturing into different places."); Lincoln Caplan, *Why Play-By-Play Coverage Strikes Out for Lawyers*, 82 A.B.A. J. 62 (Jan. 1996) (by combining storytelling with legal analysis, legal journalists link process with context).

a better chance of understanding and evaluating its thesis. While the collaborative theorists do not emphasize this point, articles about lawyering can be drab and dull without stories about the people affected.

The power of stories is evident in comparing articles about legal service practice and clinical programs published in the 1970s, which are distant and detached, to those published since storytelling took hold. For example, in an article published in 1971, Lawrence Sullivan argued that specially trained lawyers and legal services were necessary to address the specific needs of poor clients.<sup>122</sup> Sullivan makes the important point that poverty lawyers too often squeeze their clients' problems into solutions that fail to serve the real needs of those clients.<sup>123</sup> Although this valuable point is the same one made two decades later by Tony Alfieri and others, by today's standards the Sullivan piece would not stand a chance against the more colorful, contextual writing of these authors.<sup>124</sup> The absence of stories in his discussion of the role of the Housing and Economic Development Law Project in the then-new and innovative field of poverty law is devastating.

Without stories, Sullivan describes an amorphous administrative blob rather than a group of committed lawyers helping poor clients. General statements such as "the Project has acted" or "the Project has also received numerous requests,"<sup>125</sup> without the context provided by facts and detail, convey nothing about the actual practice of legal services lawyers. Sullivan fails to draw a picture of what these services could accomplish and who they could help. He never develops a clear image of his vision of legal services for the poor.

Lawyering theorists write stories because they want to create a set of stories about how law is practiced in order to start a dialogue about legal representation and what it means to be a lawyer working on behalf of a client. Stories are better than abstract models in devising alternative approaches to lawyering because they provide complex contexts in which lawyers actually work through problems.<sup>126</sup> These stories can shake up conventional understandings of the role of client and lawyer, and the power dynamics that affect

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122. Lawrence A. Sullivan, *Law Reform and the Legal Services Crisis*, 59 CAL. L. REV. 1 (1971).

123. See *id.* at 22 (noting that "lawyers representing [nonpoverty] client groups routinely engage in a wide range of functions not comprehended by the three categories into which service for the poor seem so easily to fit").

124. Alfieri, *supra* note 47; Alfieri, *Impoverished Practices*, *supra* note 51; Alfieri, *Josephine V.*, *supra* note 51; Alfieri, *supra* note 48. Commentators have criticized some of this writing as too disconnected from actual practice, or as presenting a too critical view of public interest lawyers. See Miller, *Case Theory*, *supra* note 6 (critiquing movement); White, *Paradox*, *supra* note 50 (critiquing Alfieri, *supra* note 48).

125. Sullivan, *supra* note 122, at 12.

126. Buchanan & Trubek, *supra* note 55, at 692-93 (arguing that alternative lawyering approaches "must emerge from actual lawyers' practices and their reflections on those experiences"). For examples of this, see Miller, *Case Theory*, *supra* note 6; White, *Mrs. G.*, *supra* note 8.

these roles. Many lawyering theorists want to change how law is practiced, or at least encourage a more thoughtful — and often egalitarian — approach to lawyering. The collaborative lawyers take their critique beyond a critique of conventional lawyering practices in which client goals and stories are subverted to a lawyer-driven agenda<sup>127</sup> to a critique of conventional legal education where facts are extraneous to classroom discourse.<sup>128</sup> In the classroom, law professors routinely exclude discussion of actual clients, replacing them with two-dimensional cardboard clients.<sup>129</sup> Stories, by putting the lives of clients back into the classroom, can counter the artificially constructed clients portrayed in appellate court decisions. The collaborative lawyers have a lawyering-change agenda, and at times, a social-change agenda.

As I have described the goals of the collaborative lawyering theorists, and I count myself among them, they begin to sound like the political and cause lawyers that they abhor. Is this an appropriate agenda for a lawyer whose client has not consented to the use of her “voice” outside the confines of the case? That is the question I address in Part II of the Article.

Given the value of stories about cases and clients, do the client stories have to be real to make a difference? Can we rely instead on composites or fiction to accomplish some of the same goals? Do we need case stories, or are empirical studies sufficient? If stories with lengthy client narratives didn’t offer something of value, we could simply choose not to tell them, and the ethical concerns in Part II would be less pressing.

Few authors discuss their reasons for choosing one type of story over another. While many exhort the need to ground theory in actual lawyering practices, few discuss what they mean by this concept or what different types of accounts might teach us.

There may be practical reasons to choose one type of story over the other. The author may have never represented clients, or represented clients so long ago that she does not have easy command of client stories. Or the author may represent clients whose stories do not fit easily with the article that she wants to write.

As for substance, composite stories, which lie in the middle of the spectrum between fiction and real-life accounts, have less to offer than fiction or actual stories. Their authors have made a valiant effort to respect clients by not repeating their stories wholesale,<sup>130</sup> while striving to retain many of the

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127. Miller, *Case Theory*, *supra* note 6, at 515-17.

128. See Matsuda, *supra* note 114, at 7.

129. See generally Shalleck, *supra* note 20, at 1732 (discussing law professors’ use of invisible “cardboard clients”).

130. See Cahn, *Reasonable Woman*, *supra* note 51, at 1424-30 & n.132 (using compilation of cases to “protect my clients and my future practice”). See *infra* note 170 for a discussion of the ethics of composite stories.



advantages of real life. Yet it is the fact that composites *are* neither fact nor fiction, and rest rather uneasily in the balance between the two,<sup>131</sup> that makes them in many ways the least useful stories.

By piecing together bits and pieces of real clients and real cases, the stories read like a hodgepodge of circumstance and character, in some ways less real than a fictional account. While all fiction is based on real life experiences to some extent,<sup>132</sup> there does seem to be a difference between “purely” fictional accounts and those that piece together real experiences to make a client and a case. Even when these stories are well-conceived, they often seem contrived and wooden.<sup>133</sup> Actual cases and clients provide a kind of detail and texture that make composite clients seem like stick-figures that even imagination can’t breathe life into. Composites muddy the distinction between made-up stories and real stories in a way that makes them less satisfying than either.

Whether fictional stories are better than real stories depends in part on the goal of the article. There may be pedagogical reasons to choose fiction over real life. Not everyone likes real stories. Real stories, whether from cases or life outside of law, can be criticized as neither typical nor true.<sup>134</sup> Some commentators are pessimistic that people can learn from hearing the stories of others’ diverse experiences,<sup>135</sup> or assert that storytelling has a greater impact in popular culture than in legal culture.<sup>136</sup> These critics include such disparate voices as scholars

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131. The authors themselves are ambivalent about how to define composite stories. Some authors see a composite story as fictional because it cannot stand on its own as something that “really happened.” See LOPEZ, *supra* note 21, at 8; Buchanan & Trubek, *supra* note 55, at 694 n.42 (classifying as fictional stories that “draw upon situations in which we have had an opportunity to participate or observe.”). Others see composites as closer to real. See Cahn, *Inconsistent Stories*, *supra* note 51, at 2485 n.51 (noting that “[t]he story that follows is based (somewhat) on my experiences as a clinical teacher”); Cahn, *Reasonable Woman*, *supra* note 51, at 1424 (describing a composite case as one that “occurred in our clinic”).

132. See Paul Gewirtz, *Narrative and Rhetoric in the Law* in BROOKS & GEWIRTZ, *supra* note 1, at 2-3 (explaining that “at it’s best, [law in literature] can help to illuminate the legal world in distinctive ways”); Alan Dershowitz, *Life is Not a Dramatic Narrative* 99 in BROOKS & GEWIRTZ, *supra* note 1, [hereinafter Dershowitz, *Life is Not a Dramatic Narrative*] (arguing that drama, though based on reality, only approximates it). It is surprising that as early as 1908 such a staid legal scholar as Dean John Wigmore urged lawyers to read legal novels because “the lawyer must know human nature and must deal with its types, its motives . . . for this learning, then, he must go to fiction which is the gallery of life’s portraits.” John H. Wigmore, *A List of Legal Novels*, 2 ILL. L. REV. 574 (1908), revised in 1922, cited in 7 CARDOZO STUDIES IN LAW & LITER. 31, 38 (1995) (compiling a first of its kind bibliography of legal novels).

133. Sullivan, *supra* note 24, at 195 (using term composite as a synonym for stereotype).

134. Farber & Sherry, *Legal Narratives*, *supra* note 108, at 819 (discounting on the basis of lack of truthfulness and “typicality” what authors term “first-person agony narratives” and “third-party accounts of victimhood”).

135. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1261 (1992) (explaining the empathic fallacy).

136. See Farber & Sherry, *Legal Narratives*, *supra* note 108, at 828 (arguing storytelling in forums such as television and movies has more impact than in law review articles).

from both the left and the right in legal academia,<sup>137</sup> as well as people whose lives are discussed in personal memoir. The recent furor over the accuracy of the events described in Frank McCourt's *Angela's Ashes*<sup>138</sup> and Rigoberta Menchu's *I, Rigoberta Menchu: An Indian Woman in Guatemala*<sup>139</sup> are cases in point. Some individuals who were "in the story" that McCourt relates about his poverty-stricken Irish home, including his mother, claim that McCourt played it fast and loose with the facts in his Pulitzer prize-winning memoir.<sup>140</sup> In a recent work, David Stoll, an anthropologist at Middlebury College, has cast doubt on some of details described in Nobel Peace Prize-winner Menchu's account of her life as an illiterate, impoverished peasant who witnessed atrocities committed by the Guatemalan military government.<sup>141</sup> For these reasons, some prefer fictional narration, including extended hypotheticals, to nonfiction stories.<sup>142</sup>

Even for those less concerned with typicality and truth, fictional accounts of lawyer-client interactions are not limited in the same way as are real stories. Fiction writers have more license to play with facts than do nonfiction writers,<sup>143</sup>

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137. While it is scholars from the right who are typically associated with the attack on narrative, Farber & Sherry, *Legal Narratives*, *supra* note 108, at 820 (expressing concern that legal reasoning will be lost in a sea of diverse and contrary experience), those on the left are not always supportive. Some critical race commentators think that narrative cannot create empathy across barriers of bias and prejudice, Delgado & Stefancic, *supra* note 135, at 1261, and others on the left argue that individual narratives don't count for much when measured against larger societal forces. Abbe Smith, *Commentary — Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1999) (arguing that criminal defense lawyer's so-called victimization narratives have a limited ability to increase racist stereotypes given the prevalence of these stereotypes in society at-large). *But see* Alfieri, *Lynching Ethics*, *supra* note 33; Alfieri, *Race Trials*, *supra* note 33; Alfieri, *Defending Racial Violence*, *supra* note 33.

138. FRANK MCCOURT, *ANGELA'S ASHES* (1996).

139. RIGOBERTA MENCHU, *I, RIGOBERTA MENCHU: AN INDIAN WOMAN IN GUATAMALA* (1984).

140. Tara Mack, *Anger Rises From Angela's Bashers*, WASH. POST, Jan. 20, 2000, at C1 (revealing that in Limerick, McCourt's tales "have been attacked as mean-spirited fiction and cruel exaggeration"); Linton Weeks, *The Brothers Grim and Grin: Out of "Angela's Ashes" Arose the McCourt's Storytelling Dynasty*, WASH. POST, Sept. 21, 1999, at C1, C2 (quoting McCourt as saying "[a] lot of people in Limerick say the details are not true"); *see id.* at C2 (Mccourt's brother Malachy remembers their mother standing up in the middle of a performance of the brothers' autobiographical plays and shouting "it didn't happen that way! It's all a pack of lies!").

141. Stoll's book, *Rigoberta Menchu and The Story of All Poor Guatemalans* (1998) challenges Menchu's account of the burning death of her brother and other Guatemalans, her illiteracy, her class background, and so on. *See* Joanne Omang, *When the Facts Stood in the Way of the Crusade*, WASH. POST, Jan. 25, 1999, at C2 (reviewing Stoll's book); Molly Moore, *Nobel Winner's Work Disputed*, WASH. POST, Jan. 21, 1999, at C1; Paula Selzer, *On Exaggerating "Facts,"* WASH. POST, Feb. 9, 1999, at A16 (letter to the editor) (arguing in favor of "an 'exaggerated version' of one woman's autobiography").

142. *See* Farber & Sherry, *Legal Narratives*, *supra* note 108, at 819 (arguing for narratives that don't rely on "radical differences in the voices or world views of different groups"); Austin, *supra* note 108, at 528 n.78. The narrative critics attack on different voice theory is the subject of a huge debate. For a broad scale critique of critical race and "different voice" theory, *see* Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). For a response to Kennedy, *see* Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 79 VA. L. REV. 95 (1990).

143. Journalists have lost their jobs for claiming that fiction is fact, as in the case of Boston Globe prize-winning columnist Patricia Smith. Howard Kurtz, *Columnist Admits to Fabrications: Boston Globe Demands that Patricia Smith Resign*, WASH. POST, June 19, 1998, at B1, B9. In an earlier interview, Smith was

and fiction can be more easily adapted to make a particular point.<sup>144</sup> The author of fiction is not bound by facts as they happened, however contingent those facts may be, or the limited number of characters in any real life account. As written, fictional stories may not contain within them a greater number of meanings than real stories. But in the process of creating a story the fiction writer is freer to choose its meaning. While real stories contain multiple layers of meaning for different readers, a real story cannot be so easily altered to create additional meanings, or to make points that are not suggested by how it really happened. The lesson, if there is one, is more inherent in a real story than a fictional one.

The value of fiction is similar to the reasons for using simulation in clinics. Performing a simulation differs from reading fiction because a simulation requires participants to assume a role with a given set of facts in order to solve a problem or perform some aspect of lawyering. The process of writing a simulation, however, can resemble fiction writing. Like fiction, simulations can be written to make whatever point the drafter wishes to make, and some issues may be more safely explored in simulation than in life.<sup>145</sup> Likewise, fictional accounts of lawyers and clients can incorporate facts that no one story could, and readers may find it easier to look at what a fictional lawyer did than what an actual colleague did.

Yet fictional accounts of cases and clients are not enough. Without discounting other forms of storytelling, there are some things that fiction cannot convey. If the goal is to look at what lawyers actually do and to examine the decisions actually made in the case, then real life is the answer. Sometimes the fact that it "really happened" in a particular way matters. Fiction cannot recreate an actual decision making process from which we can examine the wide array of choices available in any given situation, any more than simulation can replicate actual experiences with clients, however close it may come.<sup>146</sup> Simulated decision making cannot replicate actual decision making because the choices a participant makes among an array of simulated

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quoted as saying, "Journalism is tied into facts. Poetry is liberating; it allows you to fill in facts to create a story with the facts you wished were actually available." *Id.* at B1. And critics hardly knew what to make of Edmund Morris' *Dutch*, the biography of Ronald Reagan that blurred fact and fiction. See George Will, *A Dishonorable Work*, WASH. POST, Aug. 29, 1999, at A29; Bob Thompson, *Edmund Morris: A Memoir*, WASH. POST, Dec. 19, 1999, at 12 (magazine section).

144. See, e.g., Dershowitz, *Life is Not a Dramatic Narrative*, *supra* note 132, at 99 (in contrasting drama and life, noting that dramatists carefully choose those details which will carry significance for the story whereas "life is not a purposive narrative").

145. Simulations also provide a "safe" place to practice before practicing on real clients. See Mary Marsh Zulack, *Rediscovering Client Decision-Making: The Impact of Role-Playing*, 1 CLINICAL L. REV. 593, 622-23 (1995) (noting value of practicing skills for roleplays that include clients).

146. Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 CLINICAL L. REV. 123, 130 (2000). As early as 1933, Jerome Frank argued that lawyers need to study "specific decisions in definite pieces of litigation," Jerome Frank, *Why Not a Clinical*

choices might be different than the choices a participant would make if presented with those choices in actuality. A lawyer can think she would know what she would do in a particular situation but until she is faced with that situation she cannot know the answer. The only way to understand a particular judgment call or strategic choice is to actually *make* that judgment call or strategic choice and then analyze it against the other available choices.

Indeed, many of the reasons for writing real stories about clients and cases are similar to the arguments about the need for law students to represent real clients.<sup>147</sup> The whole concept of learning from real cases and real clients opened the door for clinical professors to incorporate client stories into law review articles. While the readers of a real story cannot live the experience of the case in the same way that the participants did because they are not “in” the story, they are closer to the facts than they would be to fiction. Stories about lawyers working with real clients are more real than fictional stories, just as memoir is more real than fiction, despite the inevitable bias of distance and perspective. Real stories may be to fictional accounts what experience with real clients is to simulation experience — one step closer to an actual experience in the world.

These are the reasons that make reading a real story about a case different than reading fiction. Yet writing a real story also is different from writing fiction. Storytelling is an essential part of lawyering.<sup>148</sup> I am good at telling real stories, I am not so good at imagining them. Fiction writers who are not lawyers have written wonderful stories where law, lawyers, and clients figured prominently: David Guterson’s *Snow Falling on Cedars*,<sup>149</sup> Jane Hamilton’s *Map of the World*,<sup>150</sup> Charles Dickens’ *Bleak House*,<sup>151</sup> Rosellen Brown’s *Before and After*,<sup>152</sup> Harper Lee’s *To Kill A Mockingbird*,<sup>153</sup> Tom Wolfe’s *Bonfire of the Vanities*,<sup>154</sup> and Ernest Gaines’ *A Lesson Before Dying*.<sup>155</sup> I cannot make up stories that are as good as the ones that I encounter in my practice. I am not sure why this is so, or if this is true for other lawyers writing about lawyer-client relationships. There are, after all, lawyer-authors who have written compelling stories about clients and cases. John Grisham wrote *A Time to Kill*,<sup>156</sup> Scott

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*Lawyer-School?*, 81 U. PA. L. REV. 907, 910 (1933), and that clinical education should be a key component of legal education. *Id.* at 917-23.

147. See Leleiko, *supra* note 62, at 152-53 (offering sociological justification for clinical education).

148. See Miller, *Case Theory*, *supra* note 6, at 485 n.2 and sources cited therein; LIMAN, *supra* note 89, at xii (speculating that his son, a movie director, “inherited from me a lawyer’s ability to tell a story”).

149. DAVID GUTERSON, *SNOW FALLING ON CEDARS* (1994).

150. JANE HAMILTON, *A MAP OF THE WORLD* (1994).

151. CHARLES DICKENS, *BLEAK HOUSE* (1853).

152. ROSELLEN BROWN, *BEFORE AND AFTER* (1992).

153. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

154. TOM WOLFE, *BONFIRE OF THE VANITIES* (1987).

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

156. JOHN GRISHAM, *A TIME TO KILL* (1992).

Turow wrote *Presumed Innocent*<sup>157</sup> and John Mortimer wrote many stories about Rumpole of the Bailey.<sup>158</sup>

When I wrote the client narrative in the story of Mr. Jay, much of the story spoke for itself. I made choices about what to include and exclude, and the choices I made about language made the story more powerful. Yet I did not need to start from scratch in imagining Jay as a person, let alone imagining his role in a case. I do not think that I could have done that well. While good writing should be able to transcend the particular discipline, fiction writing is an art different from the one that I have learned. Like most law professors, I have been a legal writer for most of my career, and even worse, an academic writer. Perhaps I am making an excuse for my limitations as a writer, or as an imaginative or creative person. Or perhaps client stories are simply at hand or convenient, and don't require me to stretch myself in the same way that fiction would. But it does seem that insight about issues of representation and the lawyer-client relationship do not go hand in hand with the ability to create a story.

Telling stories, teaching about stories, and learning from stories, goes to the heart of lawyering. We need real stories that include client narratives standing side by side with fictional ones.<sup>159</sup> In telling stories, authors need not choose between real life and fiction, but can have the best of both worlds. Some authors don't choose between the various story genres, but rather, write fictional stories and true stories that stand side by side and inform one another.<sup>160</sup> The same is true of courtroom advocacy and teaching. The truly great lawyers combine the "facts" of the story of the case with other stories, both real and fictional.<sup>161</sup>

Teachers of lawyering practice try to do the same thing. In the clinic seminar that I teach along with other colleagues at American University, we focus on case

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157. SCOTT TUROW, *PRESUMED INNOCENT* (1987).

158. Mortimer has published many collections of stories about Rumpole, see JOHN MORTIMER, *THE FIRST RUMPOLE OMNIBUS* (1984); JOHN MORTIMER, *THE SECOND RUMPOLE OMNIBUS* (1988); *THE THIRD RUMPOLE OMNIBUS* (1998), a novel entitled *RUMPOLE AND THE ANGEL OF DEATH* (1997), and the Rumpole plays, for which he was awarded the British Academy of the Year Award. See JOHN MORTIMER, *RUMPOLE AND ANGEL OF DEATH* cover page (unnumbered) (1997).

159. For a discussion distinguishing the kind of narrative found in client stories from the truncated version found in socio-legal studies, see *supra*, Part I(B).

160. See, e.g., Cook, *supra* note 19, at 41-46, 55-59 (telling fictional story of a rape together with various actual stories about a case, a client, a law student and the author herself). See also Ashe, *supra* note 16 (using her own experience with pregnancy to explicate the case of Angie Carder, a woman forced by a court to undergo a Caesarean section to save her fetus).

161. A good example can be found in Michael Tigar, *The Power of Myth: Justice, Signs, and Symbols in the Criminal Trial*, 26 *LITIG.* 25, 30, 70 (1999). There, he weaves the story of the Sanhedrin and the story of Joseph from the Old Testament, and the MTV version of Joseph from the *Technicolor Dream Coat*, together with the facts of the case, in convincing the jury not to sentence Terry Nichols to death in the Oklahoma City bombing case.

theory.<sup>162</sup> Case theory is a concept which describes the short version of the lawyer's story of the case; it is the lawyer's effort to legalize the story.<sup>163</sup>

In teaching case theory, we talk about a wide variety of stories. We use real stories from the students' experiences with the clients they represent. In addition to these real stories "in the moment," we also assign reading that includes real stories about lawyers and clients. We assign my case theory article,<sup>164</sup> Clark Cunningham's piece about representing a client in prison litigation,<sup>165</sup> and Lucie White's story about Mrs. G.,<sup>166</sup> which are real stories about real clients, and an essay by our colleague Michael Tigar, which includes snippets from a sample closing argument from an actual case that he tried.<sup>167</sup> His argument weaves stories from the Old Testament, which is difficult to classify as either fact or fiction, together with the facts of the case. We talk about newspaper accounts in which lawyers make pithy statements about case theory, including the defense lawyer's opening statement in the Lorena Bobbitt trial in which she told the jury that the case is about whether "a life is more valuable than a penis."<sup>168</sup> We also assign the *Stories and Theories* chapter from Robert Coles' wonderful account of the psychiatrist-patient relationship in *The Call of Stories: Teaching & the Moral Imagination*.<sup>169</sup> The students also read the first chapter from Ernest Gaines' powerful novel *A Lesson Before Dying*, which includes the white lawyer's closing argument in a capital case in which he characterizes his young African-American client as a "hog" who was incapable of planning a crime.<sup>170</sup> He tells the jury that the man they see before them is "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" but not a person capable of planning the crime.<sup>171</sup>

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162. Since I began law teaching, I have taught this seminar in a number of different formats, and with a number of different colleagues. In one version of the seminar, we taught a "joint" seminar to students from the Criminal Justice Clinic, the Women and the Law Clinic and the Domestic Violence Clinic. For a description of the seminar, see Dinerstein, *supra* note 116, at 583 n.372; Miller, *Case Theory*, *supra* note 6, at 568 n.369.

163. See Miller, *Case Theory*, *supra* note 6, at 487 ("Case theory — or the theory of the case — can be seen as an explanatory statement linking the 'case' to the client's experience of the world.").

164. *Id.*

165. Cunningham, *supra* note 4.

166. White, *Mrs. G.*, *supra* note 8.

167. Tigar, *supra* note 161 (summation on behalf of Terry Nichols in the penalty phase of the Oklahoma City bombing trial).

168. Martin Kasindorf, *Bobbitt Denies Assault on Wife*, *NEWSDAY*, Jan. 11, 1994, at 6.

169. ROBERT COLES, *THE CALL OF STORIES: TEACHING AND THE MORAL IMAGINATION* (1989). Coles' work is directly relevant to lawyering, see Miller, *Case Theory*, *supra* note 6, at 553-55 (praising Coles' work for its insights into case theory); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 *HASTINGS L.J.* 1175, 1181 n.30 (1992) (citing Coles to support the value of lawyers "helping the client tell his or her story in a clear and compelling way"), and falls squarely within the narrative tradition. See Abrams, *supra* note 11, at 971 ("Coles exemplifies the kind of fruitful, humane attention that narrative scholars and others are beginning to bring to the law.").

170. GAINES, *supra* note 155, at 8. The novel, which takes place in the South in the 1930's, tells the story of an African-American teacher's relationship with the young man after he was convicted and sentenced to death.

171. *Id.* at 7-8.

We also use film, including *Miracle on 34<sup>th</sup> Street*, *Anatomy of a Murder*, *Ghostbusters II*, *Philadelphia*, and *Amistad*.

The students then develop a case theory in a simulation exercise based on cases that former clinic students and colleagues handled. The simulations include cases in which clients were charged with sex offenses and child neglect. They are detailed and fact specific. We sometimes divide students into teams and ask them to tell the story of the case from various perspectives, including novelists, journalists, psychologists, politicians, and talk show hosts. The results are quite amazing. There is something about the combination of storytelling medium and techniques that really makes the material come alive.

## II. THE CONUNDRUM OF REAL STORIES

All case stories raise questions about whether the client should have any say in whether the story is told, or how it is told. These questions are variously framed as issues of ownership, appropriation, misappropriation, privacy, confidentiality and disclosure. The different types of stories — fiction, composites and real stories — raise these issues to a greater or lesser extent.

Fictional accounts would seem to vest the greatest control in the author. Even if the fiction writer owes something to the real people upon whom her accounts are loosely based, these people are not “in” the story in the same way as they would be in nonfiction. Similarly, those authors that portray composite clients see themselves as relying on hypothetical figures for whom disclosure is not an issue.<sup>172</sup> By using a compendium of real life experiences, composites are better than real stories in protecting client identity. And indeed, the authors cite respect for client stories or concerns about confidentiality as reasons for choosing this storytelling medium.<sup>173</sup> Yet composites do not entirely avoid the ethical bind of telling someone else’s story. The “real” parts of every composite, gleaned from different clients, raise similar issues to lifting a story wholesale from a single client. Each of the clients in the composite has the same claim to the part of the story that is about her that a client has in a single client narrative. And to the extent that clients are completely unrecognizable in composites, then composites are not actual composites, but simply fiction in disguise.

Real stories are about real people, and raise the most pointed question of the role that these clients should have in the telling of the story. Not every real story, though, is equally problematic. Macrostories pose fewer ethical dilemmas because they have a different goal and a different focus on clients than true client

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172. See *supra* note 71-72 (discussing the nature of composite stories).

173. Cahn, *Reasonable Woman*, *supra* note 51, at 1424-30 & n.132 (using compilation of case to “protect my clients and my future practice.” Other authors go even further, changing the details of the facts of the cases used to build the composite story. See Alfieri, *Impoverished Practices*, *supra* note 51, at 2576-77, n.40 (noting that author has “deliberately altered or omitted details, such as names and dates, that might threaten the privacy of clients or prejudice their claims of entitlement”).

narrative.<sup>174</sup> To the extent that lawyer-authors rely on public records of cases to write about clients who are not their clients, there are fewer ethical issues. The authors do not have a lawyer-client relationship with the client or the case, and the facts that the story is based on have already been revealed. On the other hand, ethical issues arise to the extent that these authors rely on discussions with these clients' lawyers or unpublished materials from case files.<sup>175</sup> When authors rely on public records to tell the stories of cases that they handled,<sup>176</sup> there is the risk that they will reveal more than the record demonstrates. For both types of "public record" stories, the fact that the story has been told in one forum does not mean that the client would grant permission to publish the story.

#### A. WHERE IS THE CLIENT?

Real stories written by lawyers about their cases and clients are the focus of my discussion of the ethics of narrative. It is these stories where clients have the biggest claim to vetoing the story, or participating in the telling of the story. Most of these clients, however, have been afforded no role in how their stories are told in print. Instead, the authors sidestep the question of consent by not identifying the client by name, or changing some facts of the case.<sup>177</sup> Their use of this device is a great irony, given that most of the authors of these stories are collaborative lawyering theorists who advocate an active role for clients in how their stories are told *during* legal representation.<sup>178</sup>

For most authors of real case stories, the client is invisible in the process of telling the story. Most of these authors do not address the issue of client consent. They do not state that they have asked clients for permission to use their stories, let alone that clients have consented to publication.<sup>179</sup> While it is possible that

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174. There are even fewer ethical issues for macrostudies authored by individuals who did not represent the clients who were the subject of the study, see *supra* note 96, or those where the clients' lawyers and the clients themselves consented to the use of their opinions. Sarat, *The Law is All Over*, *supra* note 62, at 343 (relating an interesting anecdote about a client who consented after expressing surprise that Sarat had "nothing more important to do.").

175. See, e.g., Weisselberg, *supra* note 61, at 935 (noting that a source of information in the case of Ignatz Mezei is "the collection of papers belonging to Ignatz's late attorney, Jack Wasserman").

176. See Miller, *Case Theory*, *supra* note 6, at 530 n.260; Johnson, *supra* note 6, at 251.

177. See *infra* Part II(C)(3) for a discussion of the various ways of attempting to disguise client identity.

178. See, e.g., Cunningham, *supra* note 4 (urging lawyers to translate client stories in a way that meets client goals); Dinerstein, *supra* note 51 (urging a greater emphasis on client narrative, empowerment and collaboration); Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081, 1083-86, 1091 (1992) (stressing feminist, consciousness-raising concepts); Miller, *Case Theory*, *supra* note 6 (arguing for valuing the client perspective on case theory).

179. See, e.g., Miller, *Case Theory*, *supra* note 6; Gilkerson, *supra* note 52; Eastman, *supra* note 85; Cunningham, *supra* note 4, at 2463 (only mention of consent is reference to client's permission to be videotaped); Maranville, *supra* note 178. For notable exceptions, see Alfieri, *supra* note 48, at 2109 n.2; Alfieri, *Josephine V.*, *supra* note 51, at 620 n.4; Alfieri, *Disabled Clients*, *supra* note 51, at 777 n.29; Cunningham, *supra* note 51, at 1304, n.13. In some instances, consent would have been impossible to obtain because clients



clients were included in the process in some way, it seems unlikely that the authors would omit mention of this kind of discussion.

When authors indicate that they obtained consent for the use of the raw story, few discuss the parameters of consent or the process of obtaining consent.<sup>180</sup> We learn few of the details of that consent, and the authors describe the process of obtaining consent in a muddy way. For example, one author explains that he has changed pertinent names and withheld certain facts and that "other matters pertaining to [the client's] story are discussed with her permission based on case notes, file documents, and a state administrative hearing."<sup>181</sup> While it is clear that the source for the story are documents in the case file, it is unclear whether the client gave her permission to use the documents to tell a story, or whether the client approved the story that was actually told. These are two very different kinds of permission.

Despite my strong allegiance to collaborative lawyering theory, I left Mr. Jay, the client who is the subject of the lengthy narrative in my case theory article, out of the picture. I did not tell Jay that I wrote an article about his case, used pseudonyms for his name and the names of other individuals, and changed some facts.<sup>182</sup> Before the article was published, I didn't think much about the propriety of writing about the case. When I felt a nagging doubt about revealing intimate details of the client's life, including my speculation about his sexuality, I took solace in the fact that the story was based on trial testimony and my own impressions, and not directly on information revealed by the client. None of the many friends and colleagues who read the draft, either at workshops or as individual readers, raised any questions about the ethics of including the story in the article.<sup>183</sup> These audiences were composed of clinical teachers, who like myself, think a lot about representation and the boundaries between lawyers and clients. Perhaps all of us should have known better, but we didn't. The question is why have so many authors written so freely and so publicly about their clients, without the consent of the clients, let alone any process resembling collaboration?

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lost contact with their lawyers during or after representation and the lawyers were unable to locate them. *See* Dinerstein, *supra* note 51, at 979-80; Miller, *Case Theory*, *supra* note 6, at 574.

180. Among the authors who discuss consent, for example Alfieri, *supra* note 48, at 2109 n.2; Alfieri, *Josephine V.*, *supra* note 51, at 620 n.4; Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 485 n.1, 486 n.5 (2000), only one author discusses consent in any detail. *See* Cunningham, *supra* note 51, at 1304 n.13. To her credit, Abbe Smith obtained her clients' permission to quote her letters, *see* Smith, *supra* at 485 n.1, but the extent to which she consented to her use of her story is unclear. *Id.* at 486 n.5.

181. Alfieri, *Josephine V.*, *supra* note 51, at 620 n.4.

182. Miller, *Case Theory*, *supra* note 6, at 529 n.253.

183. Before the article was published, I presented it at the Mid-Atlantic Clinical Theory and Practice Workshop in Washington, DC and the New York Law School Clinical Theory Workshop. For a discussion of the role of clinical workshops, *see* discussion *infra* notes 185-86 and accompanying text. It was not until after the article was published and I presented it at an AALS workshop that the ethical issue was raised. *See supra* note 30.

## B. WHY HAVE THE "STORYTELLING" LEGAL SCHOLARS WRITTEN SO FREELY ABOUT CLIENTS, AND WHY ARE THEY SO INVISIBLE IN THE TELLING OF CASE STORIES AFTER-THE-FACT?

One answer is that most authors assume that by changing some the facts, they have satisfied the ethical requirement that they not disclose client confidences without permission, and that the authors have not considered whether a collaborative lawyering practice would require something more. There are other aspects of the process of writing about clients, however, that are less obvious.

### 1. CLINICAL AND ACADEMIC CULTURE

The tradition and culture of clinical education is part of the answer to this question. Many writers in the field of lawyering theory identify as clinical teachers, and clinical teachers always have shared stories about cases and clients. Writing stories follows in the footsteps of the tradition of oral storytelling that is deeply embedded in clinic culture.<sup>184</sup> Because of the common identity that clinical teachers share, sharing stories seems like sharing stories with colleagues in a law firm, a practice that the ethical rules clearly permit.

Clinical conferences have facilitated the culture of storytelling. For many years, clinical teachers across the country have gathered at annual conferences or workshops focused on clinical education.<sup>185</sup> These conferences, sponsored by the Association of American Law Schools, have spawned smaller regional conferences,<sup>186</sup> as well as conferences sponsored by the Clinical Legal Education Association. While the names of the conferences and the titles of the sessions have varied over the years, all of these gatherings share one common theme. They address the theory and practice of how to teach about representing clients.

In teaching about how to represent clients, conference presenters tell stories.<sup>187</sup> The stories that are told at conferences look remarkably like the stories that are

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184. See Shalleck, *supra* note 57, at 111 n.5; Dinerstein, *supra* note 50, at 474 (describing oral tradition to include presentations at "professional conferences and workshops, schools and prisons (through street law programs), bar meetings [and] presentations to judges and attorneys").

185. For an apt description of the culture of clinic and the role of conferences and workshops, see Shalleck, *supra* note 57, at 111 n.5 ("clinicians have a strong sense of community, a rich oral tradition, a distinctive culture, and, through teaching conferences and workshops, a set of common intellectual experiences").

186. These include the workshops such as the Mid-Atlantic Clinical Theory and Practice Workshop, the New York Law School Clinical Workshop and the New England Clinical Workshop, which typically revolve around the more conventional presentation of papers, as well as conferences such as the Midwest Clinical Teachers Conference, which fit more squarely in the oral tradition. For mention of these workshops and conferences see David Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507 (1998); Stephen Ellmann, Isabelle R. Gunning & Randy Hertz, *Why Not a Clinical Lawyer-Journal?*, 1 CLINICAL L. REV. 1, 3 & n.7 (1994) (forward to symposium *The Many Voices of Clinical Legal Education*).

187. For instance, at the most recent AALS conference, the Section on Clinical Legal Education sponsored an all-day workshop on Jan. 6, 2000 where the opening plenary was entitled *Storytelling*, for which the workshop materials promised that "client stories will be highlighted." *The Evolution of Clinical Skills*, AALS Annual Meeting, Section Extended Programs (Jan. 6, 2000) [hereinafter *2000 AALS Clinical Skills*].

told in law review articles, and there is little indication that clients have granted permission for the use of these case stories. While some clinical teachers have begun to question this practice,<sup>188</sup> it continues unabated.<sup>189</sup> And what began as an oral tradition has now metamorphized into a written tradition.<sup>190</sup>

Our strong common identity as clinical teachers also makes it easy to overlook the ethics of telling stories about cases and clients outside of our clinic law firms. When asked what I teach, I almost always say that I teach clinic. Only later do I add that I teach a criminal defense clinic, or a class on interviewing and counseling. The same is true of many clinical teachers, even those who teach large stand-up courses in other substantive areas. Most of us think of ourselves first and foremost as clinical teachers, even if we have taught or written in other areas. This identity is based on a number of factors.

Many clinical teachers came from similar practice backgrounds before entering law teaching.<sup>191</sup> They worked as legal services lawyers, public defenders, and lawyers representing various public interest causes.<sup>192</sup> Others

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188. Dinerstein, *supra* note 35, at 711 ("many of our current discussions about clinical scholarship decry the absence (or appropriation) of client voice in clinical scholarship"). At a plenary session sponsored by the Clinical Section at the 1999 AALS conference, a client named Lucy was the subject of a story and an ensuing discussion. Jane Aiken, who teaches at Washington University School of Law, asked "how comfortable would Lucy be with this conversation." AALS Annual Meeting (Jan. 7, 1999).

189. At a plenary session on storytelling sponsored by the Clinical Section at the most recent AALS conference, presenters told stories about cases and clients. 2000 AALS *Clinical Skills*, *supra* note 187. Elinor Mahoney, a community legal worker at Parkdale Community Legal Services in Toronto, Canada, told a story about a client who was a gay prostitute and a drug addict. Laila Bramwell Yasin, the executive director of the Legal Resource Center in Jamaica Plain, Massachusetts, told a story about a Somali student ("let's call him Mohammed") and a Somali client.

190. See Chavkin, *supra* note 186, at 1508 n.1. This written tradition includes contributions to the newsletters published by the Section on Clinical Legal Education of the AALS and the Clinical Legal Education Association ("CLEA"). For an argument that the frequency of clinic conferences has slowed the creation of scholarly writing, see Dinerstein, *supra* note 50, at 469-70.

191. See Chavkin, *supra* note 186, at 1509 n.5 (distinguishing the career routes of clinical teachers and their non-clinical colleagues). As an aside, I also find it interesting that while clinical teachers often reveal their practice backgrounds in their scholarly writings, nonclinical teachers rarely do, even when it is relevant to the substantive scope of the article. Compare Miller, *Voting Rights*, *supra* note 6, at 131 n.152 (explaining relevance of work as a voting rights attorney to voting rights theory articulated in article) with Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697 (1999) (omitting reference to former employment as a voting rights attorney for the NAACP Legal Defense and Education Fund in article discussing electoral reapportionment). There seems to be an explicit exception where authors are concerned about conflict of interest issues, see Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 3 n.10 (1991) (noting that "in the interest of full disclosure, I should note that I have represented Mr. Whitfield [the plaintiff in a the cited case] throughout the pendency of this litigation"), but no acknowledgment of the importance of perspective. Indeed, at the recent discussion of scholarly ethics at the 2000 AALS Meetings, see *supra* note 25, many participants argued that this type of background information was irrelevant. A notable exception was Carrie Menkel-Meadow, a law professor who identifies as a clinical teacher.

192. See Chavkin, *supra* note 186, at 1509 n.5; Dinerstein, *supra* note 50, at 470 & n.3. The practice backgrounds of law professors are included in the Directory of Law Teachers, published annually by the AALS, where each full-time faculty member at member law schools is listed alphabetically by last name and described in a bio. For example, a reader who looked me up in the current directory would learn that I clerked for a federal

worked as government lawyers enforcing civil rights. Most share a common commitment to equal justice, to representing the weak against the powerful, and meeting the needs of clients who cannot afford to hire a lawyer.<sup>193</sup>

Many clinical teachers entered legal academia before they were eligible for tenure or tenure-track positions. They were not given academic status or academic privileges. They bonded in much the same way that other groups fighting for status and position in an institution create alliances and adopt a common identity.

Clinical teachers also share similar theories about teaching. Clinical theory is in part a theory about how to teach, and in part a theory about how to lawyer. Clinical teachers believe in the value of experiential education and an interactive classroom. We use a wider variety of teaching methodologies than is typical in many law school classrooms. We mix simulation, role-play, brainstorming, small group work and lecture-discussion, and use a variety of teaching medium, including film, video, novels, law review articles, and actual experience.

Given our strong sense of identity, and our shared cultural tradition of storytelling, it is not then much of a leap to write stories down and to publish them. It is almost as if we are writing those stories for ourselves rather than for all the world to read.

The culture of clinical practice may not be unique. Lawyers in other practice areas share stories too.<sup>194</sup> A friend of mine jokingly refers to the "great story" exception to client confidentiality, and she is not alone. Most lawyers can recount hundreds of conversations with other lawyers about cases, conversations in which the names were changed to protect the innocent, but little else.<sup>195</sup> The same is true of conversations with friends and family. The difference is that many of these lawyers are not publishing stories about their clients.

Legal academic culture is also part of the answer to the question about why authors have written so freely about clients without including them in the process of storytelling. Many clinical teachers have dual identities as law professors and as practicing lawyers. These dual identities create a number of challenges and

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judge for two years and practiced as a voting rights attorney for the U.S. Department of Justice before I became a law professor. The AALS Directory of Law Teachers 717 (1999-2000).

193. See Chavkin, *supra* note 186, at 1509 n.5; Dinerstein, *supra* note 50, at 470.

194. Examples of organizations of lawyers that share a common practice area are the National Association of Criminal Defense Lawyers, National Legal Aid and Defenders Association, and Employment Lawyers Association.

195. Not long ago one of my clinical colleagues invited a friend, who is a prosecutor, to speak as a guest lecturer in one of our classes. The subject was defense advocacy and the need to see advocacy as extending beyond the courtroom. The prosecutor, who is a former defense attorney, spoke about how defense attorneys can be effective advocates for their clients with prosecutors. In passing, he mentioned the importance of sharing stories with defense counsel with whom he shares a good relationship, and explained that defense counsel who practice in different jurisdictions from where he practices often discuss their cases and clients with him, changing only names.

sometimes competing loyalties,<sup>196</sup> and at times, one aspect of identity is more prevalent than the other. When I wear the mantle of law professor, I write papers, present them at conferences and workshops, and publish them. My sources are books, law review articles and other journals, newspapers, and other written materials. Rarely do I have to consider whether we have permission to cite these sources, with the exception of works-in-progress with the familiar "do not cite without the permission of the author."

As a law professor I also work with clients in my job as a supervising attorney. My goal in bringing clients into our clinical program is to give my students a good learning experience and to achieve good results for our clients. At the same time, I think of our cases and clients in ways that go beyond the needs of the individual clients and the students who represent them. I use cases to energize our case rounds and to write simulations for the benefit of future clinic students. I also use cases and clients as material for future law review articles on topics such as case theory, counseling, and jury selection.

The danger is not conflict of interest in the conventional sense. While the dual identity as author and lawyer can create a conflict of interest,<sup>197</sup> my own work has not raised this issue. My writing about clients occurs after the case has concluded. I have never thought about working with students on cases in a way that would make a "better" story for publication later. Even if I were tempted to do this, the nature of my clinic practice would make this nonsensical. My students represent a number of clients every year; all of them have fascinating stories and many of their cases lend themselves to inclusion in law review articles. There is no need to alter the story to make it fit a law review article; there are plenty of stories to go around.

Moreover, the story that I would write in a law review article does not take shape until after the case is over. I don't have time to think about the case in the kind of reflective way that writing about the case would require until long after the case is over. My students' cases move at a very fast pace; most are concluded within a month of agreeing to represent the client. But I suspect that even if the cases had a longer life I would be too much in the case as a supervisor for my students to step outside of it as an author. It is not until after the case is over that the story about the case emerges.

Instead, the danger is in the ambiguity between the client and case *as client and case*, and the client and case *as story*. The temptation is that the case and the

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196. In another context, Nancy Polikoff has written about the difficulties encountered from her dual identity as a lesbian political activist and a lawyer representing gay and lesbian clients. Polikoff, *supra* note 51.

197. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(d) (1983) [hereinafter MODEL RULES] (stating that "prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."). Comment 3 notes that "[m]easures suitable in the representation of the client may detract from the publication value of an account of the representation." MODEL RULES Rule 1.8 cmt. 3.

client *after-the-fact* look like the other kinds of sources we rely on for writing. After the fact, I look at the client less as a lawyer would look at the client, and more as a law professor author would look at the client. It is tempting to look at cases and clients as material for storytelling, just as books and articles are material for storytelling of a different type. They become data or narrative rather than clients, and the ethical considerations are easy to overlook.

Promotion, tenure, and scholarly reputation are other aspects of academic culture that encourages the telling of case and client stories without a great deal of reflection about the appropriate boundaries. As I have described in Part I, the lawyer storytelling movement is in part rooted in the acceptance of clinical teachers into the academy.<sup>198</sup> Once we become part of the academy, we write. We write because we see ourselves as academics, or we write because we like it, or both. We also write because we have to write, either to achieve promotion or tenure, or to achieve a reputation in our fields.

For law professors writing about lawyering theory, clients and cases are a ready source for scholarly writing. Not only do real stories add a critical dimension that fiction and composites lack, they are an easy source of scholarship, especially for clinical teachers. As a clinical teacher, I am engaged in thinking about lawyering theory most days of the week, and I apply those theories in concrete situations. If I want to publish, stories about cases and clients are the easiest to draw on. I am to some extent building a career on the backs of my cases and clients. I don't mean to sound either harsh or cynical; stories about cases and clients also is what I know best, and the world of legal academic writing is a better place because of real stories. Nonetheless, lawyer-authors need to recognize that self-interest plays a role in our desire to write about cases and clients. This self-interest may cloud our judgment about the deference that clients are owed when we write about their cases.

## 2. BARRIERS TO TALKING WITH CLIENTS ABOUT CASE STORIES

Within the familiar space of legal representation, it is not easy to figure out how to really involve clients in the process of legal representation. Scores of law review articles have been written on the subject, and more are likely to follow.<sup>199</sup> Authors find it easier to assert the need for collaboration than to explain exactly how to achieve a lawyer-client relationship that is truly collaborative. But the difficulty of collaborating with the confines of a case pales in comparison to the challenge of collaborating with a client on a story about the case.

On a practical level, many clients do not want to collaborate with their lawyers. They simply want to achieve certain goals, and want the lawyer to accomplish

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198. See discussion *supra* Part I(A).

199. Dinerstein, *supra* note 116 (counseling); Miller, *Case Theory*, *supra* note 6 (case theory); White, *Mrs. G.*, *supra* note 8 (case theory); Alfieri, *Disabled Clients*, *supra* note 51 (pleadings and trial testimony).

these goals. Even if the lawyer only wants to ask the client's permission to publish the story, many clients are difficult to locate after the representation has concluded.<sup>200</sup> Some leave the country; others change addresses or disconnect their telephones.

At a more substantive level, I would guess that many authors are uncomfortable showing our clients the stories that we have written about them. Lawyer-authors are accustomed to being advocates. We know how to tell a story, and we know how to tell a winning story. Some of us know how to talk to clients about the stories we tell in their cases from instrumental and noninstrumental perspectives. But when we step out of our role as advocate in a case, it is harder to know what to say.

Moreover, not all of these stories are flattering, nor should they be. But because we are writing about cases after the fact, some of the things we write about clients were not necessary to share with our clients during representation. Others are things that we would rather not share.

Our relationship with clients as clinical teachers makes matters even more difficult. For many of us, we are not our clients' lawyers; our students are the lawyers for clinic clients.<sup>201</sup> We often take a back seat to our students in interactions and discussions with clients. Some of our observations are insights that we have shared with our students, but not their clients. In some cases, we have not had conversations with these clients separate from our students. We do not have the kind of relationship with the client that would make for an easy conversation about the story we plan to tell.

All of these factors are exacerbated by the fact that many articles are not published until years after the representation has concluded. It would be difficult to gather this data since the relevant dates are often among the facts not disclosed in order to preserve anonymity. But from my own experience writing a story about a case and reading drafts written by other authors, it is often years between the initial draft and publication, and, perhaps, years more between the time when the case was active and the article is eventually published.

As far as I know, no one has written about the process of writing a law review article that includes a story about a client. For my part, the process took quite a long time, longer than I could have imagined. When I began my research, I did not have a story about a specific case in mind. At the time that my students represented Mr. Jay, I had no idea that I would use his case as an example of collaborative case theory or would publish an article about the case. The process of writing was a fluid one. I wrote portions of the more theoretical piece of the article, I thought about the case story that could support the theory that I proposed, and I changed my theory to fit the story that I eventually told. A portion

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200. See Miller, *Case Theory*, *supra* note 6, at 574; Dinerstein, *supra* note 51, at 979-80.

201. See Chavkin, *supra* note 186, at 1507; Shalleck, *supra* note 57, at 137-38.

of the story of the case was not even written until several days before I submitted it for publication. It was not until that point that I even thought to include my own experience as a lesbian representing a client that I thought might be gay.

Even if an author has a story about a case well in mind, no models exist for how to talk to clients about the content of the stories that we write about their cases. Clients may or may not be familiar with the world of legal practice; even fewer clients have experience with academia. It would be difficult to explain to clients the meaning of their case story in that world. But perhaps even more importantly, the author needs a clear vision of the boundaries of ownership and control over the story. These boundaries are entirely unclear, and from talking with other authors, I believe that many of us have a great deal of ambivalence about the propriety of writing about cases and clients without their consent. Until we have resolved our ambivalence, it will be difficult to have a meaningful conversation with our clients or former clients.

### C. SOME ETHICAL CONSIDERATIONS: HAS THE CLIENT'S STORY BEEN APPROPRIATED?

If we use stories for ends not approved by our clients, are we guilty of appropriation or misappropriation?<sup>202</sup> Although the charge is levied at lawyers and others who tell client stories,<sup>203</sup> since the term is rather new to legal scholarship, its meaning is still elusive.<sup>204</sup> As Kathleen Sullivan defines it, misappropriation "is sometimes the way the story is taken, sometimes the way it is told, and sometimes the way it is used by outsiders."<sup>205</sup> This may be just a

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202. The terms are sometimes used interchangeably. See Sullivan, *supra* note 24, at 195 (using the term "misappropriated"), 196 (noting that "'outsiders' fairly systematically appropriate poor women's stories").

203. See generally Sullivan, *supra* note 24; Margaret Montoya, *Mascara, Trenzas, y Grenas: Un/Masking the Self While Unbraiding Latina Stories and Legal Discourse*, 186 HARV. WOMEN'S L.J. 185 (1994).

204. The concept of appropriation may be informed by concepts of privacy or ownership in other doctrinal areas. For example, recent work in intellectual property argues for increased protection for cultural heritage and symbols, see Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997); Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003 (1995). Plaintiffs also argue novel tort theories in well-publicized lawsuits. In one suit against the Walt Disney Company, the plaintiffs sought to prevent the dissemination and alteration of their pictures (as they appeared decades ago in a junior high school yearbook) on the children's television show "Mrs. Munger's Class." Justin Blum, *Ex-Students' Suit Forces "Mrs. Munger" to Retire*, WASH. POST, Dec. 30, 1998, at B1; Justin Blum, *When TV Imitates Class, Former Woodbridge Students Sue*, WASH. POST, Dec. 25, 1999, at A1. In discussing his clients' decision to file a lawsuit, one of the lawyers for the plaintiffs stated "[w]e discussed the chutzpah of ABC and Disney to say, 'let's appropriate these photos and do with them as we please.'" Blum, *Ex-students*, *supra* at B8 (emphasis added). In another lawsuit, the plaintiffs, the parents of a woman murdered in 1989, sued author Patricia Cornwell, alleging that Cornwell violated their privacy in basing her novel *All That Remains* on confidential autopsy reports. *Crimes of Passion*, WASH. POST, Aug. 15, 1997, at A24 (editorial); David A. Vise et al., *Metro in Brief*, WASH. POST, Dec. 16, 1998, at B3. The trial judge dismissed the lawsuit, finding that Cornwell's characters were fictitious. Vise, *supra*. And a librarian sued the author of *Primary Colors*, a satire of the Clinton administration, for "putting what she called a recognizable cameo of her in a tryst with the fictional counterpart of President Clinton." *Crimes of Passion*, *supra* at A24.

205. Sullivan, *supra* note 24, at 196.



different way of asking whether the practice of telling stories outside of cases respects client autonomy and life experience, or whether clients can claim ownership of the underlying story.<sup>206</sup>

This is a different question than the question of whether confidentiality has been breached. For example, using a story about a gay client in the classroom is not a breach of confidentiality if the client's identity is not revealed and the story could not be traced to a particular individual. Nor is it a breach of confidentiality if the story is contained in a pleading filed in a case or a hearing transcript from a case. The use of the story without consent might, however, constitute appropriation if we consider that the client has the right to determine when and how that story is told.<sup>207</sup> For some, even consent cannot cure the problems associated with appropriation, either because of the power differential between lawyers and clients,<sup>208</sup> or because white middle-class scholars can never understand the experiences of people of color.<sup>209</sup>

# 1. WHEN THE LAWYER VOICE MATTERS: ARE CONSIDERATIONS OF CLIENT VOICE AND AUTONOMY AS STRONG "OUTSIDE" THE CASE AS "INSIDE" THE CASE?

The first place to turn for questions about the ethics of storytelling is collaborative lawyering theory. Although the parameters of the ethical rules sometimes intersect with theories of lawyering,<sup>210</sup> the rules do not by themselves provide a vision of client empowerment or address how responsibility is shared between lawyers and clients.<sup>211</sup> While other theory-based movements rely on storytelling, they typically look at law through the prism of identity. In contrast, collaborative lawyering theory is explicitly concerned with the dynamics of the relationship between lawyers and clients, and how responsibility and control should be allocated between lawyers and clients in the process of representation. These lines are flexible, not rigid, and may change depending on the circumstances, but at bottom, these are the lines that matter to collaborative lawyers.

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206. In the social sciences, appropriation means taking something that is not yours and using it for your own purposes, usually to the detriment of the person or community to which it belongs. Tangible property is not stolen or appropriated; rather, ideas, concepts, and stories that originated with an individual, a community, or a culture are claimed by scholars and used for their benefit. It is a kind of plagiarism of the raw material that forms the basis of empirical research and scholarly writing.

207. See Sullivan, *supra* note 24, at 196.

208. See *id.* at 201.

209. See Delgado, *Rodrigo's Eleventh Chronicle*, *supra* note 18, at 70-74, 89-91 (1996) (relating conversation between author and Rodrigo).

210. See Jean Koh-Peters, *Ten Thoughts on the Question of Difference*, 4 CLINICAL L. EDUC. ASS'N NEWSLETTER, (Sept. 1995) (the purpose of the professional rules is to "explain to lawyers how, concretely, to respect their clients."). The role of these newsletters in the community of clinical teachers is described *supra* note 190.

211. See Miller, *Case Theory*, *supra* note 6, at 506-07 (ethical rules provide little guidance about whether the lawyer or client controls case theory).

Collaborative lawyering theory is at once a theory that aims for expanded political power for disadvantaged clients, respect for the autonomy of all clients, and increased appreciation of client voice and life experience. At the same time, collaborative lawyering theory is exactly that — *collaborative*. While many theorists on the critical end of the spectrum do not equally value the contribution of the lawyer's perspective to the story that is ultimately told,<sup>212</sup> those that do see that the most powerful narratives combine both perspectives. It is the juxtaposition of these perspectives that leads to the most effective lawyering from the standpoint of both lawyers and clients.<sup>213</sup>

Except at the far end of the spectrum of critical lawyering theory, lawyers are not mere bystanders in the process of representing clients.<sup>214</sup> Both the client and the lawyer are crucial to developing legal narratives and strategies.<sup>215</sup> Lawyers shape the cases they present on behalf of clients by the questions they ask in interviews, the fact investigations they conduct, the motions they file, the questions they ask at trial, and the case theories they argue. In most instances, the full story that emerges in the case is not an unexpurgated client story.<sup>216</sup>

Still, when it comes to telling stories *in* cases, most collaborative lawyering theorists give the nod to clients rather than lawyers. Lawyers should consult clients about which case theory to offer, and offer only those theories that the client has approved. When case theories collide, the client should have the ultimate call about which case theory is presented.<sup>217</sup> This theory of case theory is premised on voice, autonomy and the importance of client life experience.

From the standpoint of autonomy, the case belongs to the client and the client should have the right to make decisions about the case, however right or wrong those decisions might be.<sup>218</sup> Autonomy and the power to make decisions go

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212. Miller, *Case Theory*, *supra* note 6, at 524-29.

213. See LOPEZ, *supra* note 21, at 49-53; Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1018, 1018, 1032 (1992); Miller, *Case Theory*, *supra* note 6, at 516-17; White, *Lessons from Driefontein*, *supra* note 8, at 763.

214. See Miller, *Case Theory*, *supra* note 6, at 524-29.

215. See LOPEZ, *supra* note 21, at 49-53; White, *Lessons from Driefontein*, *supra* note 8, at 763 (describing third-dimension lawyering modeled after Paulo Freire and consciousness-raising); White, *Mrs. G.*, *supra* note 8, at 27-32, 46-52 (describing tension between whether the lawyer or the client controls the story that is told at a hearing); Miller, *Case Theory*, *supra* note 6, at 489-90, 516-17, 552-75.

216. Others have argued for client stories that emerge untainted by lawyers. See Alfieri, *Disabled Clients*, *supra* note 51 at 846; Gilkerson, *supra* note 52 at 898-99; Delgado, *Rodrigo's Eleventh Chronicle*, *supra* note 18, at 87-92.

217. See Miller, *Case Theory*, *supra* note 6, at 503.

218. For definitions of autonomy, see Dinerstein, *supra* note 116, at 512 & n.52 (citations omitted). For a courtroom example of autonomy in action, see *People v. Stansbury*, 17 Cal. Rptr. 2d 174, 183 (1993) (granting the defendant's request that he have "the right to make any final decisions . . . regardless of how foolish they may be"), *rev'd on other grounds*, 511 U.S. 318 (1994).

hand-in-hand.<sup>219</sup> While the legal expertise of lawyers can assist the client in reaching a decision, the decision is the client's to make. Although collaborative theory does not always focus on storytelling as an aspect of decision making,<sup>220</sup> its rationale for the importance of autonomy in decision making generally can be extended to client stories.

Client voice and experience also support client choice of case theory. Client voice is important for its own sake, and for the sake of political empowerment for the client and similarly situated individuals. Client experience is important because it provides lay knowledge that lawyers often lack.

Does a theory that privileges client voice and autonomy *during* representation apply equally *after* representation? Respect for client autonomy and client voice figure into the question of whether a lawyer can write a story about a case without client consent, but these issues play out in somewhat different ways than they do during representation. I share the concern expressed by others about appropriation, especially where the stories of disadvantaged clients are concerned, but the contours may be more complex than they acknowledge. Every after-the-fact story about a case and a client is a story about a lawyer and lawyering, and it is not easy to determine who has the greatest claim to ownership and control. This difficulty is exacerbated by the variety and complexity of the space that clients occupy in stories. Where clients are described only generically, and painted with a very broad brush, they are barely in the story enough to merit a claim of ownership. The same is true for most articles containing short anecdotes or vignettes where the piece about the client lacks much detail. For these types of stories, it is harder to accuse the author of taking something that belongs to someone else and making it her own. True client narratives are the most problematic.

With respect to autonomy, the argument that the client owns the story is stronger during representation than afterwards. It is the client who suffers if the lawyer tells a story in the courtroom that is different from the one the client wants told. While the question of choice of case theory is central to the lawyer-client relationship in all types of cases, the question is starkly posed in cases involving mental illness or mental defect defenses.<sup>221</sup> If the lawyer portrays a client in a criminal case as mentally ill over the client's objection, and loses, then the client will go to jail thinking that a different case theory might have resulted in an acquittal. Even if the lawyer's case theory prevails, this choice of theory means that the lawyer has defined the client as mentally ill to the outside world and that

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219. Among collaborative lawyers, the client-centered theorists are the strongest proponents of autonomy as the justification for client decision making. See Dinerstein, *supra* note 116, at 512 (arguing that autonomy is one of two arguments that provides the best support for client-centeredness).

220. See Miller, *Case Theory*, *supra* note 6, at 504-05, 511-14.

221. The well-publicized case of Theodore Kaczynski, also known as the Unabomber, presented exactly this dilemma about choice of case theory. William Booth, *Kaczynski Trial Remains at Standstill for 2nd Day; Suspect May Want to Represent Self; Experts Say*, WASH. POST, Jan. 7, 1998, at A8; William Glaberson, *Unabomber Defense Planning Illness Strategy in 2d Stage*, N. Y. TIMES, Jan. 3, 1998, at A7.

he will be institutionalized until he is found sane. Some clients don't wish to be portrayed as mentally ill or to be committed for mental health treatment. These clients would rather run a greater risk of jail on a weaker case theory where the consequences of a winning theory are so personally devastating.

When a lawyer writes about a case and a client after the fact, the simple fact of telling a story that the client hasn't consented to has much less of an immediate impact on the client. While the client may not like the story, unless the client's identity is revealed, the consequences that the client suffers are less direct.<sup>222</sup>

Yet during the course of representation, the case is about the client, not the lawyer, in a sense that is not premised on the client being subject to the consequences of the outcome. The client is a party in the case because the client did something, or didn't do something, that gave her that status. The story that the judge or the jury wants to hear, and the only story that is legally relevant, is a story that involves the client's circumstances, not the lawyer's. While the story that the lawyer tells is inevitably shaped by who the lawyer is, her background, her experience, and the groups she identifies with,<sup>223</sup> the actual words of the story are not about the lawyer.<sup>224</sup>

It is different with stories that lawyers tell outside of cases. Part of every story about a case is also a story about a lawyer and a story about future clients the lawyer will represent. These stories are enmeshed in the facts of the story, including facts about the client. In telling case stories, lawyers are also constructing new narratives about themselves and about how to go about representing future clients. In the delicate dance of power between lawyer and client, the balance may shift once the two are outside the confines of cases. These insider stories do matter,<sup>225</sup> and they are sometimes the very stories that clients would not want told.

For example, in writing about the relationship between sexual orientation and case theory in a case, I revealed my instinct that the client was gay. I reached this conclusion as the students, the client, and I were milling about outside the

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222. At the same time, the lawyer's status as a legal expert, which is cited as the key factor which justifies lawyer intervention in clients' case decisions, *see* Dinerstein, *supra* note 116, at 506, 578; BINDER, *supra* note 62, at 3, is not necessarily a factor in telling stories about cases after-the-fact. In the courtroom, the lawyer may be better at picking the winning case theory or deciding which facts best support that theory. In a counseling session, the lawyer may be better at predicting whether the client will spend less time in jail following a plea or a trial. But after a case is over, legal expertise plays no role in the decision about how to tell the story of the case. When there is no legal outcome at stake, the lawyer's perspective is no better than the client's in any way that matters to the client, and the client gains nothing from the fact that the lawyer is the better legal expert.

223. For a discussion of the role that lawyer life experience plays in shaping case theory, *see* Miller, *Case Theory*, *supra* note 6, at 570-72.

224. For an insightful analysis of how cases can nevertheless come to belong to lawyers, not clients, *see* Babcock, *supra* note 92, at 179 (describing a client named Geraldine, who after the jury returned a verdict of "Not Guilty by Reason of Insanity," threw her arms around her lawyer and "I'm so happy for you.").

225. *See, e.g.,* FARBER & SHERRY, *BEYOND ALL REASON*, *supra* note 108; Farber & Sherry, *Legal Narratives*, *supra* note 108, at 813, 816 (arguing that storytelling is practiced by both outsiders and insiders).

courtroom for our first and final court appearance in the case. It was not based on anything the client told me, but on several intangible cues that I picked up from the client. If my impressions were correct, there are ample reasons to think that the client would not have agreed to disclosing this fact to a wider audience. The client had never raised the issue of sexual orientation with me or the students. A client who had kept his sexuality to himself during our representation would not be the first to reveal his sexuality to the world, even in an article where his identity was disguised. Many clients would opt for nondisclosure if they had the choice. I don't know what decision this client would have made because I didn't ask him.

The question of who controls the telling of a story, inside or outside of a case, never arises if the lawyer and the client want to tell the same story. The hard question is what to do when the lawyer and client would tell a different story about a case, or when the client wants no story told. Conflict between lawyers and clients over how to tell the case story is less likely to arise when lawyers write about the "good" client or portray clients as heroic. It is most likely to arise in writing about less than perfect clients, or clients with whom the lawyer had a difficult relationship, or where deeply personal issues arise. The client may disagree with the lawyer about what actually happened, or agree with the lawyer's version of the story but not want the lawyer to publish the story. It is these stories that most need to be told.

Taking an approach that values the lawyers' perspective about the meaning of the case story above the meaning the client attaches to the story is replete with danger. We lawyers will inevitably get the story wrong, impose our values on our clients, bend our clients to our will. We are especially prone to getting the story wrong where we relate facts gleaned more from a cold record than from a person, or where our representation is one step removed, as in the case of a supervisor in a clinic where students have primary responsibility for students.<sup>226</sup> As storytellers, we must always ask ourselves whether we are truly hearing the voices of others or stifling those stories by imposing unwanted categories. This is a dilemma faced by all storytellers, whether researchers in the field, folklorists, or clinical law professors recounting tales of client representation.

But this dilemma is ultimately unresolvable. An act of storytelling is by definition an act of interpretation or translation.<sup>227</sup> Interpretive moves by necessity either do more or less damage but they are at bottom one person's effort to make sense and give meaning to the world around her. The only seeming way out of this dilemma is for the lawyer to tell the unexpurgated

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226. See Critchlow, *supra* note 39, at 435, 438-40 (noting that a clinical teacher's knowledge of facts and legal strategy in a case affects the decision to intervene). For an article arguing for the seemingly startling proposition that clinic teachers are not the lawyers for their students' clients, see Chavkin, *supra* note 186, at 1507.

227. See Cunningham, *supra* note 4; Cunningham, *supra* note 51.

client story, by publishing the entire transcript of an interview, or by allowing the story to emerge untainted by the lawyer at a hearing, and then publishing the hearing transcript. But even these stories are inevitably constructed, tainted, or improved (depending on how you look at it), by the way the lawyer asked the questions at the interview, or the interaction between lawyer and client in earlier discussions when the story was first told.<sup>228</sup> The best that we can hope for as lawyers is that we recognize the ways in which we shape case stories, and know that the story that we tell is different from the story that the client might tell.

The broader educational project is to tell these stories outside of the context of individual cases so that all clients may benefit from the cumulative value of client stories. Only then can the real impact of client stories be felt in the legal system. In this project, the lawyer balances the need of past clients against present and future clients. This is not unlike the subtle ways in which lawyers are forced to weigh the need of one client against other clients, and make tradeoffs that may compromise the interests of some clients.<sup>229</sup> Individual client voice does not always prevail, even for a lawyer committed to a collaborative lawyering practice.

As a collaborative lawyer, and hopefully an empathic one, I am deeply troubled by writing a story that a client would not want me to write. Yet I acknowledge that the question is not simply "Does the client like what I'm doing?" Although this question matters, collaborative lawyers do many things that their clients don't like. In counseling clients, they push clients on hard decisions, rarely telling clients what to do, but insisting that they look at all the possible choices and the consequences of those choices.<sup>230</sup> They insist on clients attending meetings even when clients would prefer not to.<sup>231</sup> They challenge client stories when they appear not credible. And sometimes they tell stories that clients would veto if given the chance.

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228. See Gay Gellhorn, Lynn Robins & Patricia Roth, *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 CLINICAL L. REV. 245, 278-92 (1994) (discussing the impact of interview techniques on the story that emerges).

229. See, e.g., Charles Ogletree & Randy Hertz, *The Ethical Dilemmas of Public Defenders in Impact Litigation*, 14 N.Y.U. REV. L. & SOC. CHANGE 23 (1986) (explicating potential conflicts of interest arising from legal arguments that help some clients and hurt others); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996) (discussing competing visions of the public defender's role).

230. See Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 31-35 (1993); Miller, *supra* note 6, at 504, 563-70 (describing process of counseling client about available case theories premised on race). For a discussion of the circumstances under which lawyers should actually tell clients what to do, see BINDER, *supra* note 62, at 347-61.

231. For a discussion of the different meanings lawyers and clients sometimes attach to meetings, see Miller, *Case Theory*, *supra* note 6, at 538 & n.277.

## 2. WHAT ARE THE PRACTICES OF OTHER STORYTELLING PROFESSIONS?

Lawyers and law professors are not the only professionals who write stories about the people they serve. For years, medical doctors, especially those identified with humanist and patient-centered movements, have been telling stories without patient consent.<sup>232</sup> In addition to lawyers and doctors and others who tell stories in professional memoir, other professions make a living telling other people's stories. These include journalists and documentary writers, authors of biography, and anthropologists. Finally, personal memoir, which purports to tell the author's story but also includes the stories of friends, family, and acquaintances, has become an immensely popular writing genre. The ethics and practices of these professions might shed some light on the nature of appropriation and the question of how much stories belong to clients.

While these comparisons are the subject of another article, the comparison between law and medicine initially seems the most promising. Both professions are helping professions whose task is to serve others. Both professions have spawned a category of writing that I call professional memoir, which is writing about work in a personal, narrative vein. Doctor-authors and lawyer-authors understand that storytelling overlays the daily work of their professions. Doctors write about their knowledge of pain and loss,<sup>233</sup> while lawyers write of these things as well, and also of the difficulty of meeting clients across the divides of race and class,<sup>234</sup> and their clients' demoralization in the face of entrenched bureaucracies,<sup>235</sup> among other things. Although I have just scratched the surface

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232. See, e.g., COLES, *supra* note 169, at 1-30 (recounting "the stories . . . that begged to be told" of patients Coles encountered on a rotation in the psychiatric ward of Massachusetts General Hospital); OLIVER SACKS, *AWAKENINGS* 1-6 (1983) (presenting the "lives and responses of [sleeping sickness patients] which have no real precedent in the entire history of medicine" in the form of case studies detailing their responses to laevo-dihydroxyphenylalanine, also known as the awakening drug); OLIVER SACKS, *THE ISLAND OF THE COLORBLIND* AND *CYCAD ISLAND* 37 (1997) (discussing author's study of genetic eye disorders isolated among the populations of four South Pacific Islands); RICHARD SELZER, *THE DOCTOR STORIES* (1998) (recounting stories of his patients); LEWIS THOMAS, *THE YOUNGEST SCIENCE: NOTES OF A MEDICINE-WATCHER* 195-97 (1983) (collection of essays in which one piece focuses on Hubert Humphrey's stay for cancer treatment at the Memorial Sloan-Kettering Cancer Center while Thomas worked there); WILLIAM CARLOS WILLIAMS, *DOCTOR STORIES* (1984) (collection of essays and poems dealing with patients Williams' encountered in his years of practice); Richard Selzer, *A Question of Mercy*, N.Y. TIMES MAG., Sept. 22, 1991, at 321 (recounting author's consultation with an HIV-positive gay man seeking medically-assisted suicide). The writings of these authors have spawned other work; Selzer's story of the HIV-positive patient, Selzer, *supra* inspired the play *A Question of Mercy* by David Rabe, and one of Sacks' works, *Awakenings*, *supra*, is the basis for the Robin Williams' movie of the same title.

233. See Marie Arana-Ward, *The Pen and the Scalpel*, WASH. POST, July 19, 1998, at Book World 10. (comparing the writing of Chekhov, William Carlos Williams, and Richard Selzer).

234. See Miller, *Case Theory*, *supra* note 6, at 529-52, 564-76; Smith, *supra* note 230, at 15-27; Spinak, *supra* note 64, at 1990-92, 2079.

235. See Spinak, *supra* note 64, at 1992-2007; 2080-82.

of the genre of doctors writing about doctoring, it appears that some members of this genre share a sense of community,<sup>236</sup> as do clinical law professor storytellers.

In medicine, as in law, both case histories and narrative have their place.<sup>237</sup> Case histories are the raw material of a doctor's work in which a doctor tracks the daily progress of a patient's case, just as a lawyer documents the progress of a client's case in notes to the file, memoranda, and pleadings. These histories are prepared for that particular case, although they often have teaching and learning value beyond the individual case. In contrast, narratives, whether based on an individual case or a number of cases, seek to put individual cases in a larger framework that go beyond the facts of what happened.

Richard Selzer, a surgeon turned professional writer at the age of fifty, writes of his life as a doctor.<sup>238</sup> As a doctor, he kept a daily record of his patients' illnesses, the treatment he ordered and the conclusions he drew, and whether the patient worsened or recovered. He writes that "[s]uch keeping seems to me a higher genre than mere storytelling; there is a life at stake at the center of each tale."<sup>239</sup> He explains the difference between case histories, which are the stories told in individual cases, and after-the-fact stories about cases:

[T]he best writing that I have ever done in my life may have been done in medical charts where the patient is the hero, a character whose very existence is a work of art . . . . Still, those were case histories [.] I [now] write stories that reach for privileged moments of revelation. Unlike a CAT scan or an MRI, these stories don't look for concrete answers. Their aim is more difficult to define; they are apt to be ambiguous.<sup>240</sup>

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236. Robert Coles wrote the foreword to William Carlos Williams' book *Doctor Stories*, and pays homage to the legacy of Williams in his own book, *The Call of Stories*. See WILLIAMS, *supra* note 232; COLES, *supra* note 169, at 30 (praising Williams' "respect for narrative as everyone's rock-bottom capacity, but also as the universal gift.").

237. While the analogy between doctor-patient relationships and lawyer-client relationships is not perfect, see 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2380 (a), at 828-32 (J.T. McNaughton rev. ed. 1961) (distinguishing legal and medical privileges); Arana-Ward, *supra* note 233, at 10 (noting distinction between the words "patient" and "client"), there are many similarities between the two types of relationships. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR, 333-42 (1982); Linda F. Smith, *Medical Paradigms for Counseling: Giving Clients Bad News*, 4 CLINICAL L. REV. 391 (1998); Mark Spiegel, *Lawyering and Client Decision Making: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979); Dinerstein, *supra* note 116, at 525, 532-34 & nn.142-44 (drawing distinctions and parallels between the medical and legal professions). For sources comparing the psychotherapist-patient relationship and the lawyer-client relationship, see Miller, *Case Theory*, *supra* note 6, at 554 n.310 (citations omitted).

238. Dr. Selzer is the author of the *Doctor Stories*, which was nominated for the 1999 PEN/ Faulkner Award for Fiction. RICHARD SELZER, *DOCTOR STORIES* (1998). The PEN/Faulkner, together with the Pulitzer and the National Book Award, is one of the most prestigious awards for fiction. For background on Dr. Selzer's career, see Arana-Ward, *supra* note 233, at 10.

239. Richard Selzer, *The Writing Life: Five-Finger Exercises*, WASH. POST, July 19, 1998, at Book World 1, 10.

240. *Id.*



For Selzer, the reflective stories that he writes about his work are narratives about what it means to be a physician and to heal, and he sees value both in narrative and the story itself.

For other physician-authors, the question of appropriation lingers just below the surface of their writings. This is evident in the foreword that Robert Coles wrote to William Carlos Williams's book *Doctor Stories*, in which he quotes Williams as saying "I would learn so much from my rounds, or making home visits. At times I felt like a thief because I heard words, lines, saw people and places — and used it all in my writing."<sup>241</sup>

A study of the work of other doctor-authors, as well as journalists, documentary writers, and anthropologists, may in the end hold more answers to the questions of clients' role in storytelling about their cases than does the work of the collaborative lawyering theorists.

### 3. DOES CHANGING THE "FACTS" OR CALLING THE STORY "FICTION" TAKE THE CLIENT OUT OF THE DECISION?

The silent pact that lawyer-authors have made with their clients is to change the facts of the story of the case in return for not seeking their clients' permission to tell that story. This rests on the assumption that if real names are not used and other facts are changed, the author has complied with the ethical rules regarding confidential information. Whether or not this assumption is accurate is beyond the scope of this article. Nonetheless, whatever the rules require, authors should not assume that these altered stories always hide the facts that they intend to hide, or make their clients unrecognizable, either to themselves or others. Even authors who have carefully crafted their stories to avoid disclosing the identity of the client often inadvertently reveal a great deal of information about the client.

Authors begin by changing the name of the client and other actors, or omitting names altogether.<sup>242</sup> Some clients are identified by some combination of their first name, title, and the initials of their last name,<sup>243</sup> others by pseudonyms using similar combinations.<sup>244</sup> It is also common for authors to change or omit

241. Coles in WILLIAMS, *supra* note 232, at xiii.

242. See Alfieri, *Josephine V.*, *supra* note 51, at 620 n.4; Spinak, *supra* note 64, at 2082, n.2 ("names [] have been altered in the interest of privacy and confidentiality"); Gilkerson, *supra* note 52, at 938 (using first names and initials of last name of clients); Cunningham, *supra* note 4, at 2464-65 (omitting names); Dinerstein, *supra* note 51, at 972 n.4 (changing the name of the client). Some authors change names even when clients have consented. See Alfieri, *supra* note 48, at 2109 n.2 (explaining that client chose a different name for herself and that he changed other names to protect privacy). For examples of authors who do not change the names of their clients, see Eastman, *supra* note 85, at 765.

243. See Maranville, *supra* note 178, at 1088 (identifying client as "Ms. H").

244. See Miller, *Case Theory*, at 529 (identifying client as "Mr. Jay") and n.253 (indicating that name is fictitious).

institutional references<sup>245</sup> and to change other facts of the representation.<sup>246</sup> The authors typically do not reveal which facts were changed; to do so would make it easier to identify the client and the case.

Yet, some of the devices that lawyers use to hide certain information make little sense. While authors almost never reveal the name of the jurisdiction involved in the case, this information is often obvious from the context of articles written by clinical teachers. Law reviews always state the school where the author teaches, and the geographic location of law schools is public knowledge. Once the reader has this information, it is not difficult to infer the jurisdiction where the case arose. Most clinics practice in a single jurisdiction, usually the jurisdiction where the law school and the clinic are located. Once the reader knows that the author teaches at Cornell it is not a stretch to realize that the case probably took place in or near Ithaca. While this is less true for clinics located in larger metropolitan areas with several jurisdictions and courts to choose from,<sup>247</sup> information about the jurisdiction where a particular clinic practices is public information that could be easily obtained.

In other articles, authors take great pains to keep secret the town where the client resides, and then provide tantalizing information that discloses this information. My favorite example of this is Lucie White's story of Mrs. G. There, White states that she met Mrs. G. when White "was a legal aid lawyer working in a small community in south central North Carolina."<sup>248</sup> Unless the reader knew where White formerly worked, this statement doesn't pinpoint the client's residence. But then White goes on to tell us that the county where the town was located had "two claims to fame."<sup>249</sup> These were that it was the county where "the state's arch-conservative senior Senator had grown up" and where "Steven Spielberg filmed *The Color Purple*."<sup>250</sup> When students read *Mrs. G.* for my interviewing and counseling class last year, several of them instantly named the county White was talking about.

Some authors state the time period during which a clinic represented a client,<sup>251</sup> in other instances this information can be inferred. If an author mentions that the client was represented in the first year of the clinic, and later

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245. See Alfieri, *supra* note 48, at 2109 n.2.

246. See Dinerstein, *supra* note 51, at 972 n.4 (changing "some characteristics of the case"); Miller, *Case Theory*, *supra* note 6, at 529 n.253 (changing "some characteristics of the case").

247. For example, Harvard's Criminal Justice Clinic is located in Cambridge but the students practice in Roxbury. See Smith, *supra* note 35, at 742.

248. White, *Mrs. G.*, *supra* note 8, at 22.

249. *Id.*

250. *Id.*

251. See Spinak, *supra* note 64, at 2062.

states when the clinic started,<sup>252</sup> it is easy to put two and two together. Even if the author leaves out the date the clinic started, that can be learned from a telephone call.

The name of the clinic that represented the client, the time period that a client received legal assistance from a clinic, and the jurisdiction where the client's case was heard would make it easier to identify a client from a given set of facts. Authors also reveal a great deal of other information about clients who they want to remain anonymous. Clients are always identified by gender,<sup>253</sup> often by age,<sup>254</sup> race or ethnicity,<sup>255</sup> and sometimes by marital status.<sup>256</sup> All of this information makes it more likely that anonymous clients will be identifiable, and in some instances, especially in the case of age, identifying a client with such specificity seems unnecessary to the story. So it is surprising that authors reveal their clients' exact ages, when the alternative of describing a client as a member of an age group is an obvious alternative. For example, a client can be described as middle-aged or a baby boomer, rather than as fifty years old.<sup>257</sup> Yet in the absence of a name, revealing a client's age makes the client more real and less anonymous than she would otherwise be, and in this sense, it adds an important element to a story.

The authors also describe highly personal details of their clients' lives, including the fact that their clients have endured childhood sex abuse,<sup>258</sup> AIDS, or drug addiction,<sup>259</sup> or engaged in practices such as corporal punishment.<sup>260</sup> Others have speculated about their clients' sexuality.<sup>261</sup> Some clients are

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252. See Kearney, *supra* note 37, at 175, 178-79, 181 (reader can infer that client was represented during 1986, the first year of the clinic).

253. In my review of the literature I found no article that failed to identify the client's gender. Nor did any of these articles indicate that the named gender was not necessarily the client's actual gender.

254. See Alfieri, *Disabled Clients*, *supra* note 51, at 794 (depicting Mrs. Hill as a 50-year old widow); Buchanan & Trubek, *supra* note 55, at 694 (identifying client as 35 years old); Miller, *Case Theory*, *supra* note 6, at 530 (identifying client as 30 years old); Spinak, *supra* note 64, at 1992-93 (fact that client is in her late 40's can be gleaned from comparing the relevant dates in the case with her age at that time). See also Buchanan & Trubek, *supra* note 55, at 694 (identifying lawyer as twenty-seven years old).

255. See Alfieri, *supra* note 48, at 2110 (describing Mrs. Celeste as a "Hispanic,"); Dinerstein, *supra* note 51, at 972 (describing his client as "a black immigrant from a West African country"); Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection and Voice*, 63 GEO. WASH. L. REV. 1071 (1995) (writing about Anna Novo, a Thai immigrant); Miller, *Case Theory*, *supra* note 6, at 530 (identifying client as "black").

256. See Alfieri, *supra* note 48, at 2110 (describing Mrs. Celeste as a "divorced Hispanic foster parent"); Alfieri, *Disabled Clients*, *supra* note 51, at 794 (depicting Mrs. Hill as a widow).

257. See Buchanan & Trubek, *supra* note 55, at 704 (identifying lawyer as "young").

258. See Eastman, *supra* note 85, at 766; Cahn, *Inconsistent Stories*, *supra* note 51, at 2529-30.

259. See Eastman, *supra* note 85, at 766.

260. See Spinak, *supra* note 64, at 1992-95 (describing representing a foster mother accused of hitting her children).

261. See Miller, *Case Theory*, *supra* note 6, at 573.

described in shorthand;<sup>262</sup> other times the descriptions are lengthy and detailed.<sup>263</sup> It is the abundance of detail — which both engages the reader in the lives of interesting people and sometimes overwhelms the point of the story<sup>264</sup> — that makes it difficult to preserve anonymity.

The length of the client story does not determine whether the client will be recognizable. Even short descriptions are sometimes enough to recognize the person. In many instances clients would instantly recognize themselves, and friends and family would know the identity of the person described.<sup>265</sup> Once the author connects a client to a particular location, it might be easy for a reader who knew the client to recognize her.<sup>266</sup>

While it may seem like a remote possibility that clients can be identified from law review stories, it is not a completely improbable one. A story that Kathleen Sullivan tells in *Perils of Advocacy*<sup>267</sup> demonstrates the difficulty of shielding client's identities. Sullivan, a clinical teacher at Yale Law School, teaches a class that includes Yale law students and high school students from a teen parenting class in a local school. In the class, Sullivan uses a simulation case selection exercise in which the law students and high school students are put in lawyer roles to choose clients from a series of client profiles. The profiles were based on former clinic clients, and like many authors, Sullivan took great care to change names and certain details. One of the high school students told Sullivan that she thought she recognized the real person behind one of the client profiles.<sup>268</sup>

A story from my own personal experience demonstrates that Sullivan's experience is not an anomaly. All of us have stories like this to tell — stories of unlikely coincidences. The stories that we tell often cross paths with unlikely audiences, who make connections to those stories that we never dreamed imaginable. Stories have a life of their own that is all but impossible to control.

Many years ago I was in a taxi in Mexico, on my way to Cancun, after disembarking from the ferry boat from Isla Mujeres on a very hot day. My partner

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262. For example, Herb Eastman describes his clients as "a young woman, sexually abused as a child, forced to undergo unjustified strip searches that aroused the nightmares of her childhood . . . . A gay man staring death from AIDS in the face . . . . A recovering drug addict holding his addiction at bay with the support of a group home." Eastman, *supra* note 85, at 766. See also Gilkerson, *supra* note 52, at 863, 938 (including short descriptions of several clients); Cahn, *Inconsistent Stories*, *supra* note 51, at 2529-30 (relating story about a client of a clinic colleague).

263. See Cunningham, *supra* note 51, at 1304-31 (client story is twenty-seven pages); Miller, *Case Theory*, *supra* note 6, at 529-52 (client story is twenty-three pages); Spinak, *supra* note 64, at 1990-2007, 2009-10, 2012-15, 2021-24, 2026-45, 2057-72, 2074-75, 2080-82 (client story is sixty-nine pages); Espinoza, *supra* note 64, at 901-08, 917-923, 925-30, 933-37 (client story is twenty-four pages).

264. For examples of articles in which the story is most of the article, see Espinoza, *supra* note 64.

265. See Sullivan, *supra* note 24, at 201-02.

266. Maranville, *supra* note 178, at 1088 ("a single parent of a special needs child [who] had worked part-time as an assembly line piece-worker making buttons for political campaigns").

267. Sullivan, *supra* note 24.

268. *Id.* at 201-02.

and I shared the taxi with two blonde-haired men in their early thirties. As I was dozing in the back seat of the taxi sitting next to the two men, I wondered whether the men might be from my home state of Minnesota, but didn't want to wake up from my nap to engage in small talk. As I was drifting off into a deeper sleep, I heard one of the men talking about a restaurant business venture in Minneapolis that a friend of theirs had approached them about investing in. In my mental fog, I heard the other man begin to talk about the owner of the business, and I realized with a start that they were talking about my step-brother Peter. They were astounded when I sat bolt upright and said, "You must be talking about Peter," and the conversation ground to a halt. With just a few facts, I was able to put the pieces of identity together. So much for anonymity.

If changing the facts doesn't always protect anonymity, would changing the label we give the story matter? If Lucie White told us that she was telling a fictional story based in part on real events, or if Kathleen Sullivan told her law school and high school students that the client profiles were made up, would this make a difference in the ethical equation? And what about the ethics of a lawyer-author characterizing a story as fiction when it is largely fact?<sup>269</sup> Is the problem that we want all the advantages of telling real stories, without the consequences that sometimes attach to these stories? The answers to these questions are important, and largely unexamined.

### CONCLUSION

The issues involved in the ethics of telling stories about cases and clients without consent are deeply complex. In the process of writing a story, the lawyer-author balances her own desire to write the story the way she sees it, the benefits to potential readers and future clients, and the way that the story treats the client. Moreover, the myriad of possible stories about cases and clients suggests that the ethics of any particular story must be determined on a case-by-case basis.

A story that "began" in a classroom at the law school where I teach demonstrates the utter seamlessness of the decisions that a storyteller must make. One day last year in a first-year torts class at my law school, the topic was the intentional infliction of emotional distress. One of the assigned cases was *State Rubbish Collectors' Association v. Siliznoff*.<sup>270</sup> One of the students in the class knew more about one of the defendants than anyone could have predicted. I stumbled on this story completely by happenstance; it is almost too good to be true. I first heard a version of the story that follows from one of my research assistants, Caeb Colravy, who had heard the story from someone else. Caeb was

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269. See Lisa Lerman, *Lying to Clients*, 138 U. PENN. L. REV. 659 (1990) (arguing that lawyers' lies are proscribed under some circumstances, but not others).

270. 38 Cal.2d 330 (1952).

reminded of it after he read a draft of this article. He put me in touch with Holly Agajanian, who has given me permission to tell the story in this article. These are her words:

I knew as soon as I read the name of the case that there would be a story. *State Rubbish Collectors Association v. Zilznoff*. It was a California case. I scanned the case, looking, waiting, to see the name of one of my relatives. But it wasn't there. I was a little bit relieved as I read the name of another Armenian fellow who was the chief defendant in this case which I've subsequently learned was one of the first convictions of intentional infliction of emotional distress. So, I picked up the phone and called my dad in Los Angeles.

"Dad, do you know anybody by the named, John Andikian?"

"Suuuuuuure, John Andikian, the man with the gun!"

"What?"

"That's what your grandfather and uncle used to call him: 'the man with the gun.'"

"Why'd they call him that."

"Because he always had a gun on him." Obviously.

I should have known.

"Don't you remember him?" my dad asked me. "He spoke at your Uncle Jim's funeral. He was a sweet man. A wonderful guy."

I thought it was funny that my dad was describing 'the man with the gun' as a sweet guy. I can appreciate the humor in that, even though on many levels it's not funny. So I told my dad a little bit about the case, which basically involved the Rubbish Collectors Association strong-arming a guy into either joining or giving up his trash route so that other members of the association could have it. To my surprise, he knew exactly what I was talking about. Growing up a trash man's daughter, I'd heard a lot of stories about "the old days" and how things used to be when my grandfather and his brother were first starting out in the Los Angeles trash hauling business. But I'd never quite appreciated the reality of what a genuinely tough business that was.

"You've got to understand," my dad told me, "back in those days when somebody threatened you and you were a trash man, that was serious. You hauled your own routes at 3 or 4 in the morning. You were in dark alleys with rats trying to run up your pant's legs. It would have been easy for somebody to take you out. There wouldn't have been anybody around to see it." That kind of explanation made me understand exactly why this guy was suing the Association (which, by the way, my dad subsequently informed me was headed by my uncle at the time of this lawsuit. John Andikian was, appropriately, the sergeant at arms).

I thought the whole thing was amusing. I've never been one to turn down telling a good story, even if it left me or my family the butt of the joke. So when I went to class the next day I told one of my classmates about what had happened. What I didn't know, was that later during the break, my classmate told our professor. When class resumed I got called on to brief the case. This

was at the beginning of the year, mind you, and I had never been called on or spoken in a law class. I was nervous. I have a tendency to babble sometimes when I'm nervous. Between that bad habit, and the fact that I found the whole thing rather funny, I launched into a detail description of what my dad had told me, complete with details about my uncle, "the man with the gun," and the history of the trash business in Los Angeles.

The professor was enthralled. My classmates were thrilled. I was a little surprised by the whole thing, but it was over quickly enough.

What I wasn't prepared for was the aftermath. For weeks afterward, people came up to me and asked me to tell them the story. While I was talking to another professor, one of my classmates walked by and made a joke about my family being a bunch of thugs, and advising the professor to give me an A (that didn't work, by the way). Even after the jokes tapered off, the incident was referred to throughout the school year by both classmates and professors. All of it was in good spirits and nobody ever said anything judgmental or hostile. But I was embarrassed by the whole thing. Not just for me; I can handle being at the receiving end of a joke. But I was embarrassed for my family. I wondered if I had let them down by relating a thirty year-old story to my Torts class.

I've asked myself if I would change it if I could do it over again. I think I might. It's one thing to poke fun at yourself, but I think it's another thing to bring anyone else be it friends or family, into the joke unless they want to be there. I know my grandmother would kill me if she found out about it. Some of my younger relatives think it's funny. I told my aunts about the case, and as soon as I said the name Andikian they both said in unison "oooooh, 'the man with the gun.'" I think it's important, though, to consider everyone involved, and because I was nervous I failed in that respect. But I've had enough experiences on my own that somehow I know, somewhere down the road, another case will come up where I know details that nobody else does, and when that happens I'm sure I'll raise my hand. I don't think I could turn down the opportunity to tell a good story.

In the case of clients, I want to conclude that once confidentiality is satisfied, the balance tips in favor of the author. My ambivalence, however, is so profound that I could be convinced of the opposite tomorrow. In this balance, we need to fashion an ethics of narrative that respects client stories beyond the confines of confidentiality. Considerations include notice to clients about the content of the story, a real analysis of how the story might be used and the risk of harm to the client in telling the story, and some thought as to whether clients should share in the monetary rewards of our writing.

The exact parameters of this ethic will remain elusive until the practice of writing about cases and clients comes out of the shadows and the authors of these stories start a real dialogue about the meaning of authorship and the impact on clients. This kind of dialogue poses a real challenge. It is difficult for an author to look objectively at a piece of her own writing in order to determine whether she crossed an ethical line, let alone at the work of a friend or colleague. But until we take a hard look at this practice, the questions will remain unanswered.