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# Narrative and Client-Centered Representation: What Is A True Believer To Do When His Two Favorite Theories Collide?

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# NARRATIVE AND CLIENT-CENTERED REPRESENTATION: WHAT IS A TRUE BELIEVER TO DO WHEN HIS TWO FAVORITE THEORIES COLLIDE?

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By nature I am a somewhat skeptical person. I do not trust much of what is in the papers, except perhaps the box scores contained in the sports section. Nor am I tempted to send away $19.95 plus shipping and handling for some cream which, when rubbed over the surface of my faded and rust-pitted car, is promised to magically restore the paint to its original condition. Yet when it comes to theories of Narrative and Client-Centered Representation, I believe with all my heart and soul.[1] In fact, it is probably fair to say that these theories provide the two main guideposts for my clinical teaching.

*(1) An affinity for narrative*

Take narrative. How could I not believe? You don't have to convince me that narrative—storytelling—is our most basic form of communication[2] and the primary lens through which we understand day to

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[1] Some time after I'd submitted this article to the Clinical Law Review, Volume 5 of that publication appeared in my mailbox. And there was Professor Kotkin's article—Minna J. Kotkin, *Creating True Believers: Putting Macro Theory Into Practice*, 5 CLIN. L. REV. 95 (1998). In over fifteen years teaching law, I truly believe that I have never seen the phrase "true believer" in the title of a law review article, and now (counting mine) there were two in less than a year, and both in the same journal. What could it mean? Suffice to say I immediately read Professor Kotkin's article (as any true believer would). It is a very thoughtful piece, challenging clinical teachers to explicitly bring large (macro) theory into their teaching. Interesting, though the focus of our two articles are very different, both Professor Kotkin and myself use the phrase "true believer" in the same sense, with even the same basic underlying macrotheories (i.e. narrative and critical lawyering theory). What could this mean?

[2] "It is useful to remind ourselves that narrative is the earliest and most enduring form of substantial human communication." David O. Friedrichs, *Narrative Jurisprudence and Other Heresies: Legal Education at the Margin*, 40 J. LEGAL EDUC. 3, 4 (1990). *See also* Anthony G. Amsterdam, *Telling Stories And Stories About Them*, 1 CLIN. L. REV. 9, 11 (1994); John Batt, *Law, Science, and Narrative: Reflections on Brain Science, Electronic Media, Story, and Law Learning*, 40 J. LEGAL EDUC. 19, 25 (1990); Teresa Goodwin Phelps, *Narratives of Disobedience: Breaking/Changing the Law*, 40 J. LEGAL EDUC. 8, 8 (1990); RUSS M. HERMAN, COURTROOM PERSUASION: WINNING WITH ART, DRAMA, AND

day human experience.[3] I live in the world, experience it, and fill my days telling and listening to stories large and small.[4] In my spare time, I read books, watch T.V., go to movies—stories, stories, stories.[5] While I recognize that narrative theory has become a trendy, post-modern buzz word, my interest in the concept has far more mundane roots. I always loved stories. Hearing them. Telling them.[6] When life did not go well on any particular day of my preschool youth, I would reimagine the situation so that it would turn out well. In the process, I became acutely aware of the possible alternative narratives which situations contained.

As I grew older, I continued my love of stories and became aware that people were constantly constructing stories to make sense of their experiences, not necessarily stories that rivaled great literature or drama, but stories nonetheless. And they used stories to make normative decisions, selecting among competing stories, judging the credibility of a particular story by comparing it to their own stock of tales, or using a story to justify a decision.[7] Sometimes their stories appeared to be so simple that they hardly seemed stories at all, yet upon examination, they were stories through and through.

For example, imagine the following dialogue: "You know that

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SCIENCE 214-19 (1997) [hereinafter "Persuasion"]; Russ M. Herman, *Telling The Story: Devices And Techniques*, 23 TR. LAWYERS Q. 47, 47-48 (Summer, 1993) [hereinafter "Devices"]; Gerry Spence, *Let Me Tell You A Story*, 31 TRIAL 72, 73 (February, 1995).

[3] JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 16, 89-90 (1986); James Boyd White, *Telling Stories In The Law And In Ordinary Life—The Orestia And 'Noon Wine'* Chapter 8, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 169 (1985) ("The story is the most basic way we have of organizing our experience and claiming meaning for it"); Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 291-92 (1989) ("According to Bruner, the narrative mode of thought is used to interpret stories about human intentions and the nature of human affairs [*footnote omitted*]").

[4] One author persuasively claims that the human brain is *hard wired* for narrative. *See* John Batt, *supra* note 2, at 43.

[5] I'm hardly alone in embracing narrative. *See, e.g., Lawyers As Storytellers & Storytellers As Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 VT. L. REV. 567 (1994) [hereinafter "Lawyers As Storytellers"]; *Pedagogy of Narratives: A Symposium*, 40 J. LEGAL EDUC. 1 (1990); *Symposium: Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); James Elkins, *A Bibliography of Narrative*, 40 J. LEGAL EDUC. 203 (1990). In fact the first three articles (out of seven) in the inaugural publication of the Clinical Law Journal all concerned narrative—Amsterdam, *supra* note 2; Nancy Cook. *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLIN. L. REV. 41 (1994); Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLIN. L. REV. 65 (1994).

[6] *See* James Boyd White, *supra* note 3, at 169 ("One fundamental characteristic of human life is that we all tell stories, all the time, about ourselves and others, both in the law and out of it.").

[7] In fact, across cultures, nations, and time, societies' notions of fairness and justice have been embedded in narratives, folktales. For the Aesop Award winning collection of such stories, see SHARON CREEDON, FAIR IS FAIR: WORLD FOLKTALES OF JUSTICE (1994).

you were supposed to put away the dishes before you went out last night. You didn't, and so you're not going out tonight." Hearing this encounter, we immediately have an interpretation of what is going on. Our schemata[8] triggered by this information would probably fill in a parent and child, the latter likely a teenager who is perhaps about to go out using one of the family's cars. But do we see this as involving a story? On its surface, this appears to be a rule (you must put away the dishes before you leave), a violation (you didn't), and a punishment (you can't go out tonight). But I believe that this is deceptive. Embedded within this seeming judicial-like pronouncement are likely a number of stories which give the parent's decision moral authority and meaning—stories about the particular family and their expectations of shared responsibility, archetypal cultural stories about the duty of children to their parents and the rights of parents to exact discipline, stories about previous occasions in which this child was given a break when she failed to carry out some responsibility, stories about other siblings who feel this one is favored and does not have to do a fair share of the work, stories about how a parent had an exhausting, frustrating day at work and came home only to find the dishes lying around, etc. So, seeing life as "competing narratives" came naturally to me, although I never would have put it that way in my pre-academic existence.

The claim that lawyers are always telling stories in and out of court[9] is equally unexceptional to me. I practice law, so I know. As for lawyers telling stories at trial[10]—at least if they're good law-

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[8] For a discussion of schema, see *infra* notes 86-97 and accompanying text.

[9] "Lawyers are by profession storytellers." James R. Elkins, *Pedagogy of Narrative: A Symposium*, 40 L. LEGAL EDUC. 1, 1 (1990). *See also* Douglas Maynard, *Narratives and Narrative Structure in Plea Bargaining* in NARRATIVE AND THE LEGAL DISCOURSE—A READER IN STORYTELLING AND THE LAW, 125 (David Paple ed., 1988) (negotiations bound by specific narrative structures); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 485 (1994) ("As a practical matter, lawyers have always seen their work as in part storytelling,. . . ."); White, *supra* note 3, at 174 (". . .it is plain that narrative is central to the intellectual activity of the lawyer. . .").

[10] As Professor Abrams states:

> For the trial attorney, "law" is inevitably about presenting concrete and nonlinear stories, about sensing the features of a narrative that will engage a judge's or juror's attention or expose the tension in a legal rule. Using and telling clients' stories requires trial lawyers to make constant assessments of what they mean, of what elements unite them, of which features are most important.

Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1043 (1991); *see also* Thomas Shaffer & James Elkins, *Solving Problems and Telling Stories*, in NARRATIVE AND THE LEGAL DISCOURSE—A READER IN STORYTELLING AND THE LAW 90, 98-99 (David Papke ed., 1989) (examining Gerald López' conception of a lawyer's job as storyteller); Kathryn Holmes Snedaker, *Storytelling in Opening Statements: Framing the Argumentation at Trial*, 10 AM. J. TRIAL ADV. 15 (1986) (examining the communicative features of the

yers[11]—what else is trial but a story,[12] in fact a work of fiction[13] complete with dramatic plots[14] and archetypal themes?[15] Look in a courtroom during trial. All that exists in that courtroom (save some visuals, and those are just like illustrations in a book) are words from which a tale is woven. No one in that calm courtroom is being exposed to asbestos, being robbed at gun point, or breaking a limb in a shattering car accident. All that already happened. This is just the story.[16] In fact, I so believe this that I use a narrative model to develop trial strategy when preparing my clinic students for trial in criminal cases.

As for the more academic views of narrative, I'm likewise a complete believer. It makes complete sense to me that our legal texts float in a sea of varied and often conflicting cultural and historical

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opening statement); Gerry Spence, *How to Make a Complex Case Come Alive for the Jury*, A.B.A.J., Apr. 1986, at 62 (comparing law's use of narrative to storytelling).

11 There is widespread belief among expert practitioners that the quality of the trial attorney's narrative presentation will consistently mark the difference between winning and losing. *See, e.g.,* David D. Gross, Ph.D., *Winning Narratives in Courtroom Rhetoric: Blending Stories and the 'Evidence' in Closing Argument*, 19 TRIAL DIPLOMACY J. 331 (1996); Herman, *Devices, supra* note 2; HERMAN, PERSUASION, *supra* note 2; JOHN D. MOOY, ADVOCACY AND THE ACT OF STORYTELLING (1990) (audiocassette with text); Murray Ogborn, *Storytelling Throughout Trial—Increasing Your Persuasive Powers*, 31 TRIAL 63 (August 1995); Spence, *supra* note 2. For an insightful exploration of telling erstwhile politically incorrect narratives in defense of one's client, see Eva Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1 (1994).

12 "It has long been recognized that storytelling is at the heart of the trial." Philip N. Meyer, *Introduction - Will You Be Quiet, Please? Lawyers Listening To The Call of Stories* in *Lawyers As Storytellers*, *supra* note 5, at 567. *See also* Steven Lubet, *The Trial as a Persuasive Story*, 14 AM. J. TRIAL ADVOC. 77 (1990); White, *supra* note 3, at 186.

13 "It [the trial] is always fictional." White, *supra* note 3, at 186.

14 *See* Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Argument to a Jury*, 37 N.Y. L. SCH. L. REV. 55, 64, 75 (1992). ("But if the defense argument is viewed as a tale with the jury as protagonist and the courtroom as its setting, it has not only a coherent narrative structure and almost classic narrative theme [of the "Hero"] . . . . . Because the subject of defense counsel's argument is the trial in 1991, its form of narrative is the Drama.").

15 Thus, *e.g.,* a prosecutor counters the lack of motive for a killing by drawing upon the stories of the "mad dog" killer who will kill for some invisible slight, Amsterdam & Hertz, *supra* note 14 at 37, while the trial in the Chicago Anarchists Trial of 1886 (the so called Haymarket Riots) turns upon an unspoken tale of a society in corruption for which a scapegoat must be found to purge the decay, Kathryn Holmes Snedaker, *supra* note 10, at 43-44.

16 Professor White makes a similar observation:

> What can the jury, sitting there in a high-ceilinged room on a summer afternoon, ever know about what it was like, for either side, that day on the highway when disaster struck without warning, or when in the chicken yard the farmer hit the stranger with an axe? At best, the juror can only decide whom to believe.

White, *supra* note 3, at 186; *see also* Kim Lane Scheppele, *Forward: Telling Stories,* 87 MICH. L. REV. 2073, 2082 (1989) ("Judges and Jurors are not witnesses to the events at issue; they are witnesses to the stories . . . .").

narratives from which their ultimate meaning is derived.[17] I've long since believed that you can't have meaning outside of context,[18] and that narrative provides the context for our law words.[19]

In fact, I accept that the very notion of law is grounded upon a story—*i.e.,* law is necessary for social order[20]—and that law itself is a story, a story of a path or bridge from this imperfect world to one fairer and more secure.[21] It's the yellow brick road to Oz, and I so completely believe that path is there that every year I eagerly try to guide new students down it. Even when I try to expose students to the increasing variety of legal theories, I now see stories; for underlying this variety of jurisprudential frames are narratives,[22] which some

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17 "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning." Robert J. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (footnote omitted). *See also id.* at 5, 17.

18 I have a great deal of company, and good and illustrious company at that, in this belief. *See, e.g.*, Thomas D. Eisele, *Wittgenstein's Instructive Narratives: Leaving the Lesson Latent*, 40 J. LEGAL EDUC. 77, 85 (1990); Gary Minda, *Jurisprudence at Century's End*, 43 J. LEGAL EDUC. 27, 35 (1993) ("At the core of antifoundationalism is an epistemology that denies any foundation to knowledge; but antifoundationalism is assumed to be prefigured by socially and culturally produced thoughts and propositions about knowledge.").

19 "Law, like every discipline and profession, is constituted by its stories." James R. Elkins, *From the Symposium Editor*" in *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC. 1 (1990). *See also* Cover, *supra* note 17. Thus, underlying the reasoning in legal decisions may be such foundational cultural stories as, *e.g.,* the debtor in bankruptcy who seeks a fresh start in life, David Ray Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, 40 J. LEGAL EDUC. 145, 49 (1990); the arms length bargainer in a contract negotiation between two parties of equal power, *id.* at 156; Kellye Y. Testy, *Reconsidering Grant Gilmore's The Death of Contract—An Unlikely Resurrection,* 90 NW. U. L. REV. 219, 222 (1995); the "redemptive" narratives of struggles against religious and racial oppression, Cover, *supra* note 17, at 65; or the "male head of household" which provided a dominant narrative in the structure of public benefits programs, Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 18 HASTINGS L.J. 108 (1992).

20 *See, e.g.,* Elkins, *supra* note 9, at 1 ("One mythic story of law speaks of law as fundamental to a social and ordered life."). *See also* White, *supra* note 3, at 176 (author discusses how the Greek tragedy *The Oresteia* celebrates the movement from the primitive world of unending feud to one in which disputes and grievances are brought to finality by the order of law).

21 *See* Robert M. Cover, *Folktales of Justice: Tales of Jurisdiction,* 14 CAP. U. L. REV. 179, 181 (1985) ("Law, I argued, is a bridge in normative space connecting . . . 'the world that is' with our projections of alternative 'worlds-that-might-be' . . . ."); Ekins, *supra* note 9, at 2 ("Law is one of the crafted fictions of modern life that helps us navigate the perilous movement from the reality of the world we have made with law to an imagined world that law makes possible.").

22 Thus, *e.g.,* underlying the current movement towards civic republicanism and communitarianism are utopian stories of a world in which a virtuous citizenry puts aside their personal desires in order to foster the goals of the broader community, goals set by rich public participation and discussion. *See generally* John D. Ayer, *Essay Review—Narrative in the Moral Theology of Thomas Shaffer*, 40 J. LEGAL EDUC. 173, 90 (1985) ("For one thing, Communitarianism always includes a fairly large dose of utopian vision."); Peter

credibly claim even fall within recognized literary categories.[23]

Narrative, however, does not come without a price. I believe as completely that there is a narrative darkside. When people say that there is no such thing as neutral, objective values[24] because we construct meaning from our own understandings,[25] biases, needs,

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Margulies, *The Mother With Poor Judgment And Other Tales Of The Unexpected: A Civic Republican View Of Difference And Clinical Legal Education*, 88 Nw. L. REV. 695, 696-97 (1994); Suzanna Sherry, *Civic Virtue And The Feminine Voice In Constitutional Adjudication*, 72 VA. L. REV. 543, 547, 551 (1986). Similarly, Law and Economics assumes the classic story of the free-market, filled with equally informed and powerful transactors. *See, e.g.,* Gary Minda, *supra* note 18, at 38; Pierre Schlag *An Appreciative Comment on Coase's The Problem of Social Cost: A View From The Left*, 1986 WISC. L. REV. 919 (1986); *The Problem of Transaction Costs*, 62 CAL. L. REV. 1661 (1989).

[23] "The Article argues that the narrative plots, protagonists, and images of major legal theories do, in fact, fall into recognizable literary categories [composed of combinations of romantic and ironic story modes, and comic and tragic world views]." Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 146-47 (1985).

[24] Professor Richard Delgado provides an excellent illustration of this notion which hits close to home when he discusses the application of "neutral, objective" criteria in a hypothetical law school tenure hiring decision in which the faculty (regretfully) chooses not to hire a minority candidate. "No one raises the possibility that the merit criteria employed in judging Henry are themselves debatable, *chosen*—not inevitable. No one, least of all Vernier, calls attention to the way in which merit functions to conceal the contingent connection between institutional power and the things rated." *Storytelling For Oppositionists And Others: A Plea For Narrative*, 87 MICH. L. REV. 2411, 2421 (1989). *Accord* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 44 (1985). *See also* Christopher P. Gilkerson, *Poverty Law Narrative: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 874 (1992) ("They [Feminists] inquire into the ways in which legal discourse turns explanations posited by the powerful into purportedly objective doctrines encompassing everyone."). In fact, the very notion of "objectivity" is itself value laden. *See* Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda For Theory*, 7 SIGNS 515, 541 (1982); Robin West, *Love, Rage and Legal Theory*, 1 YALE J. L. & FEMINISM 101, 103 (1989); Laura Gardner Webster, *Telling Stories: The Spoken Narrative Tradition in Criminal Defense Discourse*, 42 MERCER L. REV. 553, 558-59 (1991).

[25] Social theorists have long known that people differently situated in the social world come to see events in quite distinct and distinctive ways. How people interpret what they see (or what people see in the first place) depends to a very large extent on prior experiences, on the ways in which people have organized their own sense-making and observation, on the patterns that have emerged in the past for them as meaningful in living daily life. And so it should not be surprising that people with systematically different sorts of experiences should come to see the world in systematically different ways.

Scheppele, *supra* note 16, at 2082 (footnote omitted). *See also* P. BERGER & T. LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY (1966); Delgado, *supra* note 24, at 2416 ("My premise is that much of social reality is constructed. We decide what is, and, almost simultaneously, what ought to be. Narrative habits, patterns of seeing, shape what we see and that to which we aspire.").

For an application of this concept to the interpretation of texts and argumentation, see STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989); IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).

scripts,[26] stock stories,[27] experience, culture, etc., I nod in unquestioning agreement. It makes sense to me because it exactly reflects what I see in the world. Even when I believed that I was modern and never even knew there was such a thing as post-modern, I thought that. So from there I have no trouble believing that laws that superficially appear neutral are often only so because they are structured around embedded stories which justify the outcome—outcomes which favor those who have the power to dictate the defining narratives.[28] When

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[26] "Scripts" are stereotyped or prototype event sequences., Amsterdam & Hertz, *supra* note 14, at 114 n.146 ("In the terminology of Shank and Ableson, a *script* is a stereotyped sequence of events which is familiar to an individual in a culture and guides his or her experience."); Moore, *Cognitive Filters, supra* note 3, at 282 ("The typical event sequences involved in going to a restaurant and ordering food are an example of such a script."); Richard K. Sherwin, *Lawyering Theory: What We Talk About When We Talk About Law*, 37 N.Y. L. SCH. L. REV. 9, 38 (1992).

> In this book, *Tell Me a Story*, Roger Schank tells us that experience lets us know how to act and how others will act in given stereotypical situations. That knowledge is called a script. Taken as a strong hypothesis about the nature of human thought, a script obviates the need to think; no matter what the situation, people may use no more thought than what is required to apply a script. Schank's hypothesis holds that everything is a script and that very little thought is spontaneous.

Murray Ogborn, *Storytelling Throughout Trial—Increasing Your Persuasive Powers*, 31 TRIAL 63, 64 (August, 1995).

[27] In his article, Gerald López, who appears to have coined the phrase "stock story," explains "[t]he knowledge structures I have labeled 'stock stories' have been variously described as 'scripts,' 'schemas,' 'frames,' and 'nuclear scenes.' I make no effort in this essay to distinguish between the various usages." Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 n.1 (1984). *See infra* notes 86-97 and accompanying text for a discussion of schema. Applying this concept as a tool of persuasion, López states:

> Human beings think about social interaction in story form. We see and understand the world through "stock stories." These stories help us interpret the everyday world with limited information and help us make choices about asserting our own needs and responding to other people. These stock stories embody our deepest human, social and political values. At the same time, they help us carry out the routine activities of life without constantly having to analyze or question what we are doing. When we face choices in life, stock stories help us understand and decide; they also may disguise and distort. *To solve a problem through persuasion of another we therefore must understand and manipulate the stock stories the other person uses in order to tell a plausible and compelling story—one that moves that person to grant the remedy we want.*

*Id.* at 3 (emphasis added) [*footnote omitted*]. *Accord* John B. Mitchell, *Redefining the Sixth Amendment*, 67 SO. CAL. L. REV. 1215, 1332 (1994) [hereinafter, "Sixth Amendment"]. For discussion of the negative side of stock stories as a limitation on our powers of story creation and interpretation, see James R. Elkins, *The Stories We Tell Ourselves in Law*, 40 J. LEGAL EDUC. 47, 62 (1990); Margulies, *supra* note 22, at 709.

[28] The story of law in the United States is largely a story about one group of people, upper class white male . . . making law for all others in society. . . . [F]eminism has asked us to question everything as we recognize that what we know has largely been imposed on us as 'truth' by a particular class of truth creators and interpreters. [*footnote omitted*]

Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in Law*, 42 U. MIAMI L. REV. 29, 29, 43 (1987). Thus, *e.g.*, feminist scholars viewed

you read countless numbers of cases and spend a significant amount of time practicing in our courts, it's not hard to see that the stories of those without power are excluded from consideration when law is created.[29] And if by some chance their stories should ever be raised in court, they are either totally discounted[30] or, even if given lip service,

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the narratives underlying traditional contract law as being created from a male perspective, biasing the law towards men and against women. *See, e.g.,* Patricia J. Williams, *On Being The Object of Property*, 14 SIGNS 8 (1988).

> The feminist critique of contract has been sparse but acute. That is, feminist legal theorists either have been sharply critical of contract ideology or have ignored the institution altogether. Consistent with the central task of feminist legal theory, which is to expose male norms imbedded in the law as universal and immutable, feminist writers have criticized contract's emphasis on the bargain model of exchange. Finding the bargain model suspect because it presupposes norms of equality (of bargaining power) and freedom (to choose whether to contract), both of which have been denied to women, feminist writers have critiqued contract as a perpetrator of oppression. Contract's role in fueling a market-based economy has rendered it suspect in feminists' eyes as well, garnering it criticism for encouraging unadulterated self-interest and commodification. [*footnote omitted.*]

Testy, *supra* note 19, at 222.

[29] "The dominant group enjoys a privileged and highly advantageous position. Those in this group have the power to shape the world and promote their interests by creating a body of language and knowledge, and a system of beliefs that 'lock out' minority groups." Benita Ramsey, *Symposium—Excluded Voices: Realities In Law And Law Reform—Introduction*, 42 U. MIAMI L. REV. 1 (1987). *See also* Abrams, *supra* note 10, at 1033 (". . . 'excluded voices' narratives: they offer the stories of women who were victims of some gender-specific injury, whose voice had not been heard in social discussions of a problem, or in legal discussion of the proper remedial response."); Gilkerson, *supra* note 24, at 878 ("Universalized narratives of women in the family 'form underneath' and act as a foundation for legal doctrine and rules pertaining to family law, employment, property, commerce, education, and welfare, while defining and reinforcing social functions and experiences [*footnote omitted*]."); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1634 (1991) ("Exclusion questions help feminists develop structural theory from the narratives of experience explored in consciousness-raising. Asking such questions entails asking about the exclusion of various women's needs, perspectives, and experiences from law itself or from other social and political institutions."). These "others" stories even have been excluded from our legal classrooms and texts. *See, e.g.,* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L. J. 2107, 2132 n.89 (1991); Susan Bisom-Rapp, *Contextualizing the Debate: How Feminist and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law*, 44 J. LEGAL EDUC. 366, 366 nn. 1-2 (1994). In fact, we don't even allow real clients to emerge in our class discussions, limiting the analytic focus to a constructed client with no racial, ethnic, gender, cultural, or political attributes. *See* Ann Shalleck, *Constructions of the Client Within Legal Education*, 44 STAN. L. REV. 1731, 1733-34 (1993). *Cf. also* Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402, 405-07 (1998) (In discussing how to help students "relate" their learning, i.e., help them connect what they are learning to what they already know, the author suggests inserting friends and family members of the students' into hypotheticals, thereby making the client and situation "real.").

[30] Even with the demise of archaic laws which had held that women and people of color were not competent to testify in court in circumstances which might affect the interests of those in power, Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday*

will generally lose to the stories of those with the law defining power.[31]

A belief in the full implication of the darkside of narrative theory in fact takes one even further. In real life practice, those groups without power have to tell belittling and demeaning stories about themselves (stories that as individuals they often know to be untrue)[32] in

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*Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 9-13 (1990), views of outsiders, *i.e.*, those without power, are still nevertheless discounted in legal argumentation in a number of ways. First, what they say may be defined as "irrelevant." As such they will be legally, if not actually, silenced. About this, Professor Scheppele makes the following insightful observation:

> If the objectivist view is not point-of-viewless, then is the account it privileges still worth the reverence the law accords it? A great deal depends on just what the observer's point of view includes and excludes and what consequences such a view has. If the objectivist account is one point of view among many (and not point-of-viewless as against other point-of-viewful accounts), then one needs some other account explaining why it should be privileged, if indeed it is to be. One might begin such an account by saying that the objectivist view includes those things that should be included and excludes those things that should have no bearing on the legal outcome. And here is where the fate of the stories of outsiders might be considered relevant to a discussion of the point of view the law should take. If objectivist accounts systematically leave out the stories of outsiders and those stories should be considered, then perhaps objectivist accounts should not be privileged.

Scheppele, *supra* note 16, at 1091. Second, the very way in which the less powerful tell their stories may lead to being discounted. Studies in small claims court suggest that speaking in an informal, narrative manner emphasizing relationships, as opposed to a formalistic rule-based manner, will likely lead to losing regardless of the merits. William M. O'Barr and John M. Conley, *Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661 (1985). Significantly, socially powerless speakers tend to structure their testimony employing this narrative, relational logic. *See also* White, *supra* at 17. Additionally, studies indicate that those in traditionally less powerful positions use a speech syntax which gives their assertions less authority, Robin Lakoff, LANGUAGE AND WOMEN'S PLACE (1975); White, *supra* at 14-15, including in the courtroom, *see, e.g.*, E. Allan Lind & William H. O'Barr, *The Social Significance of Speech in the Courtroom* in LANGUAGE SOCIAL PSYCHOLOGY (H. Giles & R. St. Clair eds., 1979). For an excellent discussion of the effect of "women's speech" in the criminal procedure context, see Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L. J. 259 (1993).

[31] Professor Scheppele captures the notion that certain stories are given the power to "trump" or be "privileged" over others:

> It is the implicit contrast between those whose self-believed stories are officially approved, accepted, transformed into *fact*, and those whose self-believed stories are officially distrusted, rejected, found to be untrue, or perhaps not heard at all. Those whose stories are believed have the power to create fact; those whose stories are not believed live in a legally sanctioned "reality" that does not match their perceptions. "We," the insiders, are those whose versions count as facts; "they," the outsiders, are those whose versions are discredited. . . .

Scheppele, *supra* note 16, at 2070. *Cf. also* Minda, *supra* note 18, at 42 ("The goal of this [CLS] work was to demonstrate how legal interpretations of legal texts can privilege one meaning over other possible meanings.").

[32] Although legal narratives influence and shape behavior, they often ring false when applied to individuals and groups about whom the narratives are supposedly told. Contradictions arise when universalized narratives oppose or reduce real experience.

order to be successful in a legal system where "victim,"[33] "learned helplessness,"[34] "needy with hand held out,"[35] and "dependent and powerless"[36] are the square pegs that fit into the square boxes of comfortably available legal categories and conceptions. At the same time, in the appellate arena, the decisions of judges in cases involving race, gender, or sexual conduct have historically been servants to one-sided, and frequently offensive, narratives—Asians are an all but separate species whom no white man could trust;[37] blacks are a "subordinate and inferior class of beings" and at times even become "property;"[38] the natural role of women is to keep the home, as her temperament is too weak and volatile for the professional workplace;[39] men lack the

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> *For example, in bringing any type of sex-based claim, whether civil or criminal, a woman is required to represent herself in a way that may contradict her experience.* To demonstrate harm and win relief, she must recount her ordeal and oppression by fitting her story within a legal narrative of "victim." The narrative imposes the costs of a further loss of individual power and self-esteem and compounds the trauma.

Gilkerson, *supra* note 24, at 875 (emphasis added).

[33] *Id.*

[34] While battered women may be anything but helpless, rather being involved in complex strategies over power and control, Abrams, *supra* note 10, at 988-89, the legal identity they are forced to adopt is otherwise.

> In particular, cultural images of battered women have both informed and been shaped by a small group of highly publicized, highly charged cases in which women accused of killing their batterers assert a claim of self-defense. *The expert testimony on "learned helplessness," which has been critical to women's victories on such claims, has contributed to an image of battered women as pathologically weak, that is, too helpless or dysfunctional to pursue a "reasonable course of action." This image has disserved battered women in other legal contexts, such as child custody, and hindered social response to the problem.*

Abrams, *supra* note 10, at 988 (emphasis added) (footnote omitted).

[35] Refusing to accept this self-description, in spite of the perspective of both the welfare system and her own attorney, is at the core of Mrs. G's now-classic stance in White, *supra* note 30.

[36] According to Professor Alfieri, poverty lawyers and the poverty law system subordinate and silence clients by casting them as dependent and powerless, rather than seeing them as people with dignity who are connected to a variety of communities. *See* Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4. GEO. J. LEGAL ETHICS 619 (1991).

[37] *See* People v. Hall, 4 Cal. 399 (1854) (court characterized Chinese as a "distinct people. . .whose mendacity is proverbial, a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point . . . .").

[38] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). These, moreover, are not stories which died after the civil war, a century and a half ago. *See, e.g.,* Derrick Bell, AND WE ARE NOT SAVED (1987); Delgado, *supra* note 24, at 2411 nn.10, 11. For a powerful account of how blacks are socially "punished" if they really try to set the story straight, see Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987).

[39] Thus, *e.g.,* the following language appears in the concurrence of a United States Supreme Court decision which refuses to keep a state from barring women from the practice of law:

> The nature and proper timidity and delicacy which belongs to the female sex evi-

child nurturing qualities of women;[40] the workplace can be properly divided into pregnant and non-pregnant people rather than be seen as divided between those who can procreate (private life) without jeopardizing their job (public life) and those who cannot;[41] young women are totally vulnerable and helpless in the face of young men who seek to undermine their chastity while leaving the young women alone with the consequences of pregnancy;[42] and on and on.

To counter this darkside of narrative, I also believe in narrative's redeeming, self-correcting force. Stories make us understand the

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> dently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . .,

Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring). *See also* Muller v. Oregon, 208 U.S. 412 (1908) (can limit right of women to contract for more than 10 hours a day of work because of the "inherent differences between the two sexes."). *See also* Gilkerson, *supra* note 24, at 877:

> Legal narratives of family and work are premised on two seemingly fundamental principles: (1) there is a normal or natural division of labor based on gender in both the workplace and the family; and (2) family roles are private while employment sector roles are public. Concepts of gender and the distinction between private and public privatize women's family responsibilities and devalue the work women do in the marketplace.

Sometimes the dynamics of these stories about women and work are quite complex. Conservative narratives say that "women are not interested in blue-collar work because it is dirty and requires physical strength . . . ." Bisom-Rapp, *supra* note 29, at 385, while liberal narratives speak of stereotyping and coercion, *id.* In fact, sociological research indicates that the reality is far more complex—"In this view, sex segregation is a phenomenon fueled by institutional structures, workplace social relations, and occupational cultures that prevent women from desiring or succeeding in non-traditional jobs." *Id.* For an extremely thorough and thoughtful analysis of this insight, see Vicki Schultz, *Telling Stories About Women And Work: Judicial Interpretations Of Sex Segregation In The Workplace In Title VII Cases Raising The Lack Of Interest Argument*, 103 HARV. L. REV. 1749, 1799-1839 (1990).

[40] Only recently was this particular story rejected. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 394 (1979) (court struck down law which gave unwed mothers, but not unwed fathers the power to unilaterally block adoption of their children by simply withholding consent noting—"[We reject the assumption that fathers are] invariably less qualified and entitled than *mothers to exercise a concerned judgment as to the fate of their children*"). *Cf. also* Orr v. Orr, 440 U.S. 268 (1979) (invalidating state law that authorized court to impose alimony responsibilities only on men); *Weinberger v. Wisenfeld*, 420 U.S. 636 (1975) (striking down provision of Social Security Act awarding survival benefits to widows, but not widowers).

[41] *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974) (California could constitutionally exclude pregnancy from disability coverage because it does not discriminate against women but rather distinguishes between pregnant women and non-pregnant people [comprised of men and women]). For extensive citations regarding the fictive public-private distinction, *see*, Gilkerson, *supra* note 24, at 877-78 nn.54-58.

[42] This is a story which persists to date. *See* Michael M. v. Superior Court, 450 U.S. 464 (1981) (statutory rape law forbidding sex with woman under 18 not violate equal protection when 17 1/2 year old male held criminally responsible for intercourse with 16 1/2 year old female).

world of others, those seemingly like us as well as those seemingly different.[43] All the abstract discussions in which I've been involved concerning racism in the execution of law couldn't add up to the single, sad story of an attorney friend who is black. He went home for vacation. He was driving back to his parent's house from a movie when police pulled him and his three passengers over, ordered him out of the car, slammed him against the hood, and spread eagled him. I was outraged, appalled. This was my friend. He's an attorney, and a good one. In response, he just gave me a sad smile, shrugged, and simply said, "that's the way it is back home." Hearing this wonderful man speak in such a sad, resigned voice transformed all my previous ideas about the racist use of legally sanctioned force[44] from a concept in my cortex to something that felt, yes felt, like a sharp kick in the stomach.[45] So I surely believe in the whole litany of narrative redemption: Hearing others' stories and feeling others' worlds in the concrete helps dissolve stereotypes,[46] leads one to respect and value those stories and, in the process, leads to incorporating those different stories into the development and analysis of law—a necessary step to counter skewed laws and law giving[47] which have limited the stories

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[43] When we read and take in a story, we honor the existence of other worlds. Some of us have difficulty seeing any world other than our own. We act as if the only world that deserves to be considered real is the immediate world of our own intentions and desires, the world of our own interests. We have difficulty hearing the "voice" of the other, embodied as it is in stories and worlds of experience and intention other than our own.

James R. Elkins, *The Stories We Tell Ourselves in Law*, 40 J. LEGAL EDUC. 47, 53 (1990) (footnote omitted). *See also* Bell, *supra* note 38; Goldfarb, *supra* note 29, at 1632-33 ("Stories, whether real or potentially real, provide listeners with vivid historical detail necessary for a vicarious experience that may awaken empathy."). *See also* Goldfarb, *supra* note 5, at 79. But as Professor Grose cautions, to be effective these "outsider narratives" must be integrated "into the common sense of insiders." Carolyn Grose, *Essay—A Field Trip To Benetton . . . And Beyond: Some Thoughts on "Outsider Narrative" In A Law School Clinic,* 4 CLIN. L. REV. 109, 119-20 (1997).

[44] The power of the state is the power to do violence: "The most basic of the texts of jurisdiction are the apologies for the state itself and for its violence. . . ." Cover, *supra* note 17, at 54.

[45] Narratives also carry the power of a moral yardstick against which to measure the actual workings of our law, West, *supra* note 23, at 209, and can offer a guide for our own ethical development, Goldfarb, *supra* note 5, at 66.

[46] *See* Margulies, *supra* note 22, at 702 ("Shared narratives also counter the use of stereotypes—stock stories, told by the oppressors without the input of the oppressed.").

[47] Much has been written about the power of narrative to confront bias and unfairness in the law, *e.g.:*

> [F]or over a century now, feminists have claimed that distinctive aspects of women's experiences and perspectives offer resources for constructing more representative, more empathic, more creative, and, in general, better theories, laws, and social practices.

Martha Minow, *Feminist Reason*, 38 J. LEGAL EDUC. 47, 49 (1988). *See also* Abrams, *supra* note 10, at 1034 ("Workers' narratives have been used, for example, to demonstrate

told and heard.[48]

### *(2) Client-Centered Representation—an inevitable conclusion*

Given how I feel about narrative, I naturally bought into the notion of client-centered representation hook, line, and sinker.[49] It

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that women's perspectives on the types of acts that constitute sexual harassment are different from men's and to argue for a 'reasonable woman' standard in evaluating sexual harassment claims; Menkel-Meadow, *supra* note 27, at 47 (footnote omitted) (discusses how stories of real women's work lives as pregnant women can impact current law); Delgado, *supra* note 24, at 2413, 2436 ("This proliferation of counterstories is not an accident or coincidence. Oppressed groups have known instinctually that stories are an essential tool to their survival and liberation. Members of out-groups can use stories in two basic ways: First, as a means of psychic self-preservation and, second, as a means of lessening their own subordination."); Gilkerson, *supra* note 24, at 874 (". . . the feminist goal is to redevelop the law by infiltrating legal doctrine with alternative narratives"); Goldfarb, *supra* note 5, at 65 (footnote. omitted) ("The critical bite derives from the commitment within each of these movements [critical race theory, feminist theory, law and literature, and narrative jurisprudence] to include the pluralist perspectives of subordinated peoples, whose stories have been so frequently overlooked in the formulation of legal theory and of the dominant stream of cultural understandings."); Brenda Waugh, *A Theory of Employment Discrimination*, 40 J. LEGAL EDUC. 113 (1990) (author uses poems about her experiences when interviewing for a legal job while pregnant to provide concrete view of the reality of gender discrimination). For a discussion, however, of how the mainstream Feminist analysis of contracts leaves out the experiences, and therefore concerns, of Lesbian feminists, see Testy, *supra* note 19, at 231-34. Similarly, Professor Chon has written extensively about the exclusion of Asian voices in the law and, at the same time, the paradox of attempting to speak in the "authentic" Asian (Asian-American, Chinese, Korean, Chinese-American, etc.) voice. *See* Margaret (H.R.) Chon, *Being Between*, 3 LOYOLA ENTER. L. J. 571 (1997); *Chon on Chen on Chang*, 81 IOWA L. REV. 1535 (1996); *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 U.C.L.A. ASIAN PAC. AMER. L. J. 4 (1995). At the same time she has cautioned about the limitation of narrative as a remedial tool:

> Legal storytelling is an attempt at these countercultural forms. Although the self-conscious use of "story-telling" is an important tool in the critical race toolkit, stories do both too much and too little. In a larger sense, stories are deployed to buttress myriad ideological positions and intellectual arguments. In a smaller sense, stories are not the trump card—they cannot convince those who are not inclined to listen carefully or those who might be captured by a different ideological identification.

Margaret (H.R.) Chon, *Acting Upon Immigrant Acts: On Asian American Cultural Politics by Lisa Lowe*, 76 OR. L. REV. 765, 772 (1997) (book review).

[48] In fact, the very use of stories as a legitimate means of argumentation combats the value-based notion that only rational, scientific argumentation is legitimate. *See, e.g.*, Abrams, *supra* note 10, at 976; Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 681-84 (1994). For a discussion of how even rational logic is culturally contextualized, see Jill J. Ramsfield, *Is 'Logic' Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEGAL EDUC. 157 (1997).

[49] The theory of client-centered represenation in lawyering initially evolved from the work of therapist Carl Rogers, *see* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal And Refinement*, 32 ARIZ. L. REV. 501, 538 (1990); Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of The 'Traditional' Interview And The 'Client-Centered' Interview*, 1 CLIN. L. REV. 541, 552 (1994); ANDREW S. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS (1976). The current theory of client-centered representation—a theory "accepted and adopted throughout the nation's law

couldn't be otherwise. If narrative was so central to advocacy and, at the same time, was a primary mechanism by which law creation and application became skewed, plainly I wanted my focus to be on getting the client's authentic story.[50] I confess that it wasn't always so. My client interactions in the earlier years of my practice as a criminal defense attorney were characterized by trying to get "relevant" information to fit into my legal categories.[51] The rest I edited out.[52] I assumed the client wanted to win in the most traditional sense. I know that I certainly did. It was my case, and I was incensed with any clients who inserted themselves into the process in a way that could screw up my case.[53] I liked my clients, and I consistently won their cases in my terms but in truth I saw them as the required ticket to play the game far more than as real individuals with real lives and stories. I

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schools," Smith, *supra* at 543—attained its present form in the works of GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978) and DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). *See also* DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991) [hereinafter, COUNSELORS]. Put succinctly: "[C]lient-centered counseling, or client decision making, holds that lawyers should interact with clients in a way that allows clients to make decisions themselves." Miller, *supra* note 9, at 503.

[50] For a clear articulation of the relationship between narrative and client-centered representation, see Cook, *supra* note 5, at 41:

> Many of us already know how to create a story. Theories of the case are stories, and we can learn much about story*telling* from our own examples. We are not the only authors of tales, however. There are others, clients and would-be clients, professionals and para-professionals, victims and victimizers, bureaucrats and agitators, who have stories to tell, and their stories will in all likelihood not fit within the plot and character outlines of either our case theories or our subplotted professional life stories. An awareness of the otherness of experience is a necessary ingredient to client-centered service and a role of enabling people to exercise their power. Again, that otherness often finds expression within a narrative framework.

*Id.* at 60.

[51] In some sense it would be fair to say that I could have been the poster boy for the so-called "traditional" approach. Contrast the client-centered conception of problems with a more traditional view:

> Under the traditional conception, lawyers view client problems primarily in terms of existing doctrinal categories such as contracts, torts, or securities. Information is important principally to the extent the data affects the doctrinal pigeonhole into which the lawyer places the problem. Moreover, in the traditional view, lawyers primarily *seek* the best "legal" solutions to problems without fully exploring how those solutions meet clients' nonlegal as well as legal concerns. [*footnote omitted*]

BINDER ET AL., COUNSELORS, *supra* note 49, at 17.

[52] *See* Gilkerson, *supra* note 24, at 898 ("Bent on extracting the most efficient account of the client's story, the lawyer hurriedly moves the client along her narrative stream, stopping to glean bits of information about the legal problem, casting away narrative 'static' about aspects of the client's life the lawyer perceives as immaterial (footnote omitted)").

[53] My views were apparently not unique within the profession. *See* BINDER & PRICE, *supra* note 49, at 17 ("Clients are less well regarded in the traditional conception. Lawyers adhering to the traditional view have often muttered, 'The practice of law would be wonderful it if weren't for clients.' (footnote omitted)").

can't say when that changed—when I grew up, when I fell in love, when I began to raise children—I can't say. But at some point, I began to see my relationship with clients differently. I still wanted to win in traditional terms, and it is in the nature of the criminal system that so did most of my clients, but not always. I came to respect that some wanted to plead guilty in a case I thought I could win because they risked losing their jobs if they had to keep coming to court, or they didn't want to involve their family in a public court proceeding, or such.[54]

By the time that I became aware of the literature on client-centered representation and its progeny, I was already culling much fuller stories from my clients and actively involving them in strategy and decision making. This earlier literature on client-centered representation guided me to seek even fuller stories, to continue to recognize how much many of my clients knew,[55] and overall to view my clients

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[54] Many cases in the lower courts tend to be relatively minor, even for the defendants. If the defendant has to keep coming into court for hearings on some cutting-edge motion dealing with a somewhat peripheral issue in the case, the defendant. . . may lose pay, or even a job. Also, being in court can be an unpleasant, pressure-filled experience for many. Prolonging a case with legal maneuvering that is unlikely to produce any beneficial result may therefore unnecessarily maximize the torment.

Mitchell, *Sixth Amendment*, *supra* note 27, at 1245-46. Thus, in one study, clients sometimes refused representation because having an attorney prolongs the process, costing them wages and time. *See* PAUL ROBERTSHAW, RETHINKING LEGAL NEED: THE CASE OF CRIMINAL JUSTICE 29 (1991). Similarly, Malcolm Feeley reported,

> Defendants whose applications for a PD have just been approved often approach a PD asking for and expecting an instant opinion, something that the PDs are loathe to express. Invariably the PDs firmly and politely tell them to make an appointment so that they can review the case in detail. While most defendants accede to these suggestions, *many of them continue to press the PD, emphasizing that they want to get their case "over with today," and become irritated when the PDs refuse.* This results in tension between PDs and many of their clients, a tension that contradicts popular opinion. For it is the defendant, anxious to get his case over with, who wants the quick advice, and it is the PD, anxious to preserve a sense of professionalism, who wants to extend the case and review it more carefully.

MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 222 (1979) (emphasis added). Further, as a number of recent authors have pointed out, "it can be a mistake to assume that a client is interested only in 'winning' [in traditional terms]," Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law As Language*, 87 MICH. L. REV. 2459, 2492 (1989). *Accord* Gilkerson, *supra* note 24, at 916 ("'Winning' the case is not always what disempowered clients want and need—how the client's story is told and how the client's harm is named may be more important."). *See also* Alfieri, *supra* note 29, at 2146 ("But 'winning' may often hold a different meaning in the poverty law context. Mere outcome may extend beyond material benefits and compensation to encompass deeper ideals of political and socioeconomic progress, and affirmation of individual and group ideals").

[55] In fact, the client may be a far better legal strategist than the attorney. *See* White, *supra* note 30, at 47. In any event, the client generally knows his or her unique goals and values and thus "is typically in a better position than you to choose which potential solution is best." BINDER ET AL., COUNSELORS, *supra* note 49, at 21, 23. *See also* Watson,

as real people, many deserving of great respect, some not.[56]

The recent literature evolving from client-centered representation theory termed critical lawyering or theoretics of practice had an additional impact on me.[57] It made me cringe when I thought about my early years of practice, because what the authors said was so true. By casting my clients as powerless and dependent, with my legal story as the only one that counted,[58] I set myself above them, enjoyed my superiority, and stole their voice—or at least made them self-edit that voice to give me what they knew I was seeking[59]—and, in the process, to an extent I hurt them. I took their dignity, if only for the brief term of our interaction.[60]

That has changed, though undoubtedly imperfectly. I now seek, and teach my students to seek, the full person—a unique person, in part defined by culture, gender, race, sexual preference, and the polit-

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*supra* note 49, at 43 (author characterizes the client in the interview process as "teaching" the lawyer about the client, the client's world and world view, while the lawyer is "taught" and "learns").

[56] From my experience, poverty and/or minority status does not by itself insure that the client will be wonderful, heroic, and admirable. Some are, some aren't. They're just people. Others agree. *See, e.g.,* Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L. J. 971, 985 (1992) (author sees as unrealistic the notion that "poor clients are seen as all-powerful individuals awaiting only their lawyers' assistance to unleash their potency."); Miller, *supra* note 9, at 525 ("Critical lawyers proffer a naive vision of clients, all of whom are pure of heart and eager to speak. But not all client stories are empowering, nor are all clients empowered. Like most stories in life, client stories reveal a broad spectrum of human character . . . .").

[57] The critical lawyers make a major contribution to the traditional understanding of case theory by involving clients in the choice of which story to tell and thus recognizing the importance of client life experience and strategic skills in this endeavor. [*footnote omitted*].

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These critical theorists posit that client voices have been muted by the narratives that lawyers tell on their behalf, and urge lawyers to set aside their own stories in favor of client stories.

Miller, *supra* note 9, at 486, 514 (footnote omitted). *See also, e.g., Symposium-Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTING L. J. 717 (1992); Alfieri, *supra* note 36; Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991, 1013 note 64 (1992); Goldfarb, *supra* note 29; GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VIEW OF PROGRESSIVE LAW PRACTICE (1992); Shalleck, *supra* note 29, at 1748-49. For a self-proclaimed "mild" criticism of the movement, see Dinerstein, *supra* note 56.

[58] This is precisely the conduct for which Professor Alfieri has properly taken attorneys to task. *See* Alfieri, *supra* note 29, and *supra* note 36. In fact, many clients do not want to tell the story that the attorney wants to tell in court. *See, e.g.,* Cunningham, *supra* note 54, at 2459, 2492; Cook, *supra* note 5, at 50-51; White, *supra* note 30, at 47-48.

[59] *See* Gilkerson, *supra* note 24, at 905 ("Furthermore, the hierarchical relationship between dominant lawyer and dependent client affects the telling of her story. . . .In response the client, knowingly dependent on the lawyer, may conform her story to the one the lawyer is attempting to elicit . . . .").

[60] *See* Alfieri, *supra* note 29, and *supra* note 36.

ical world, but ultimately unique.[61] I do so, not just because I believe it is the right thing to do, but because it makes me (and my students) better lawyers.[62] I know who I'm dealing with and can work in a relationship of mutual respect. And in truly hearing the client's story, the client and I (and/or the students) can make a range of strategic decisions which otherwise would not be possible. First, it guides us in deciding whether or not to even tell the story[63]—*e.g.*, tell the story because it's a winner. Tell the story even if it will lose because voicing the story regardless of consequences is what matters to the client.[64] Don't tell the story because it will lose. Or, even if it will win, don't tell it because it's private, intimate, and none of the business of a group of strangers and bureaucrats who would hear it. Second, it permits a full collaboration in creating the richest[65] case theory we can

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[61] In seeking out the full person, one faces a paradox and risk, *i.e.*, in seeking each aspect of their existence, one may wind up with a list of where the client falls on a spectrum of categories but, in the process lose the real person. Professor White insightfully articulates the dilemma in Lucie E. White, "*Seeking . . . 'The Faces of Otherness. . .': A Response to Professors Sarat, Felstiner, and Cahn,*" 77 CORNELL L. REV. 1499 (1992):

> But there is also a deeper problem with the two conditions for empathy that Professor Cahn's essay identifies. This deeper problem is that these two paths toward empathy are also practices of domination. The advice that we must find out the "facts" of the other to feel empathy toward her counsels us to objectify that person, to confine her subjectivity in categories that we construct. And the idea that to feel empathy with the other person we must identify with her, along such dimensions as race, parental status, and class, dashes all hope of empathy in many settings. In those few circumstances where empathy remains possible, this view condones practices of perception and definition that "essentialize" the other, naming her as more "like" us than she may wish to be. These practices of collecting facts about the other or cataloguing similarities with her may indeed enable us to feel closer to the other person. At the same time, however, such practices effect interpersonal domination. Perhaps we *must* take such steps, if we seek to understand the other. But we must also *renounce* these practices, or at least our confidence that they can work, if we are to recognize the other as a fellow—unique—human being.

*Id.* at 1508.

[62] Professor Goldfarb gave vivid expression to this belief:

> In other words, when student and client develop a contextualized presentation of the client's participation in events, rather than an oversimplified version that avoids the complexity and nuance of real life, they enable clients to retain and convey their personhood, and therefore their dignity, before lawyer, judge, and all others involved in the legal process. And when judges and other decisionmakers appreciate the personhood of those on whom they pass judgment, they reach better decisions, for they can locate these persons in their authentic situations, rather than see them as decontextualized cartoons.

Goldfarb, *supra*. note 29, at 1685 (footnote omitted).

[63] As Professor Miller points out, clients will have their own reasons for presenting or not presenting a particular theory, will possess a good sense of whether certain types of theories (*e.g.*, race) will persuade a jury, and be in the best position to decide what possible objectives are most desirable. *See* Miller, *supra* note 9, at 564, 569.

[64] *See* Gilkerson, *supra* note 24, at 916.

[65] For a discussion of the notion of "rich" narratives, see Mitchell, *Sixth Amendment, supra* note 27, at 1307-10.

put forth.[66] Third, it provides the capacity to assess whether to take the story as a wedge to move the constructed boundary between the legal and non-legal in an attempt to expand or redirect the particular area of law involved towards a new (and presumably better) understanding.[67]

In telling that story, whether viewed as collaborator[68] or translator,[69] I want it to be their story, their "voice."[70] I want to tell it as authentically as another person can, given that everything told me is filtered through my own interpretive screens.[71] I am sincere in this effort, committed to the endeavor. And all that I am doing is grounded in theory—narrative and client-centered representation theories interwoven, congruent, in harmonious reinforcement of each other.

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[66] Interestingly, Professor Miller, while sympathetic to the critical lawyering agenda, posits that the proponents of critical lawyering theory have swung the pendulum too far back from lawyer to client-control of the story. In exalting the client's voice, and viewing the lawyer-client interaction as a take no prisoners encounter between the client's and the lawyer's narratives, some critical lawyers seem to be opting for all but abandoning their skill and knowledge as lawyers to the client's detriment. Instead, Professor Miller suggests a client-attorney collaboration in the selection and development of case theory. Miller, *supra* note 9, at 503-504, 524-29, 564-66, 576. I agree.

[67] It has been said that "the line between legal and non-legal worlds in the lives of indigent clients" is a false construct. *See* Shalleck, *supra* note 29, at 1749-51. That I believe is true. But the falsity of this dichotomy between legal and non-legal goes beyond the world of the indigent. The dichotomy is an illusion which denies the mechanism by which law changes, *i.e.,* when the formally non-legal becomes "relevant" to legal outcomes. *See, e.g.,* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990):

> The expansion of existing boundaries of relevance based upon changed perceptions of the world is familiar to the process of legal reform. The shift from *Plessy v. Ferguson* to *Brown v. Board of Education*, for example, rested upon the expansion of the "legally relevant" in race discrimination cases to include the actual experiences of black Americans and the inferiority implicit in segregation. Much of the judicial reform that has been beneficial to women, as well, has come about through expanding the lens of legal relevance to encompass the missing perspectives of women and to accommodate perceptions about the nature and role of women. Feminist practical reasoning compels continued expansion of such perceptions.

*Id.* at 863. For a discussion of how "outsider narratives" helped alter the law of sexual harassment through making the previously non-legal (i.e., the emotional reactions of women to workplace harassment) relevant to the legal see Grose, *supra* note 43, at 120-21 (footnote omitted).

[68] For discussions of the nature of the attorney client interaction when the attorney is engaged with the client in collaborative storytelling, see Alfieri, *supra* note 29, at 2140-41; Miller, *supra* note 9, at 564-66, 576; Shalleck, *supra* note 29, at 1749.

[69] For detailed analysis of the attorney as "translator," see Cunningham, *supra* note 54, at 2482-93; Gilkerson, *supra* note 24, at 914-20.

[70] In referring to client "voice," of course it is important to recognize that we all have multiple voices. I am a husband, father, law professor, man, goof-ball, Jewish, etc., and at different times I speak with each of these voices. *See, e.g.,* Chon, *supra* note 47.

[71] *See, e.g.,* Shalleck, *supra* note 29, at 1749 ("[W]hile recognizing the importance of seeking out and describing the details of clients' lives, this work [critical lawyering theory] explicitly acknowledges the partiality and uncertainty of all clients and their world.").

And then I go into court on some run of the mill criminal cases, and it all falls apart. The harmony between narrative and client-centered representation breaks down. And there is nothing special about these cases. They simply are criminal cases which include what I will term "troublesome" client stories. By that, I mean narratives in which the client wants to tell the story, can fully express his/her voice to the jury, can provide the jury with the concrete details of his/her world that provide the necessary context for evaluating that story, and the story is arguably true, but the fact finder will nevertheless automatically discount the story because the story is not plausible within the narrative structures available to the fact finder.[72]

I recognize that Client-centered Representation does not simplistically reduce to a single admonition: Tell the client's story. The concept is far more nuanced than that. It incorporates a constellation of ideas. Listen to the client's story. Hear what they want. Try to be creative about ways to tell the story. Look for opportunities to bring their story into the legal process. At the same time, join together to discuss any risks and problems which may result from various strategic choices, including the risks in even telling the story and whether those risks are worth it to the client. But, when all the dust settles, as a general proposition the theory of Client-centered Representation guides us towards telling the client's story, opening the jury to the client's true voice. Narrative theory, however, teaches us that all stories are socially constructed, and that the stories we hear will be evalu-

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[72] This seems to me to be of a different nature than the one faced by Professor Dinerstein when he had a client who wanted to tell her story, wanted to win the case, but, as a matter of law, her story was a loser. Dinerstein, *supra* note 49, at 972-73. Rather it is akin to the phenomenon Professor Grose describes when factfinders listen to "outsider" stories:

> Another term for pre-understanding is the one I used in the beginning of this essay: "common sense." Judges almost always admonish juries "not to leave your common sense outside the jury room." Indeed, common sense is much of the reason behind our jury system—if we didn't want the common understanding of the community to influence the outcomes of cases, we would let the judge decide the case. So when a fact-finder's common sense tells him or her that people don't act the way the plantiffs or defendants in this case acted, he or she is likely to reject that plaintiff's or defendant's story. The fact-finder cannot integrate these stories into his or her understanding of the world.

Grose, *supra* note 43, at 119. In fact, Professor Grose sees this same pre-understanding as an impediment to accurate evaluation of the client's story even in her clinic students:

> Indeed, unless the pre-understanding of the attorney—and, by definition, the law student—is challenged early on, certain clients' cases won't ever get to a judge or a jury. Their stories will be rejected as untrue or unworthy. As we saw, Marci's story was doomed before she had even begun to tell it to the Legal Services student. This was so not because the student interviewing her had no interest in representing her, or meant not to believe her, but because her story did not comport with his common sense about how the world worked.

*Id.* at 122.

ated against our own self-constructed narrative worlds. So you can offer the client's voice all you want to fulfill Client-centered Representation, but Narrative theory will guide the factfinders to discount that voice because it clashes with the world that is contained in their own stories. Therein is the collision between client "voice" and narrative theory.

In what follows, I present two criminal cases with "troubling" stories in which students in our clinic represented the defendant. I then discuss my own model of narrative theory that I use in preparing students to do criminal defense advocacy, and apply that model to the two cases. Next, I analyze the sources of conflict between narrative and client-centered representation in the two cases, specifically considering schema theory, social construction of personal reality, and the "story theory" of juror decision making. Lastly, I discuss the tack we took in the two cases to deal with this conflict—the use of experts—and then trace the journey that choice took us on.[73]

## I. Two Run of The Mill Criminal Cases

While every case is unique, and hence calling them run of the mill may be seen as misleading as well as understating their significance to the individual defendants, it is important to recognize that the two cases I am about to describe are not aberrational. They are much like the array of cases which year after year regularly come into the clinic.[74] These two cases are basically one-witness misdemeanor cases, with a police officer and a peripheral witness or two thrown in for a few details. One is a charge of attempted sexual assault, the other illegal possession of a concealed weapon (handgun). Our client in the sexual assault case is a man in his mid-thirties from an Asian country, which, for a variety of reasons, I will not identify. He has consistently had strong family and community support, particularly from his church, and a number of his supporters came with him on the day of trial. He immigrated to America five years ago and has since lived in an enclave of his fellow countrymen and countrywomen. He speaks very little English and thus requires an interpreter. On the date of the incident for which he stands trial, he was working as a piano player in a department store. At some point, he took a break and went to the

[73] For a powerful (wonderfully footnoteless) essay on, among other things, the importance of turning our narrative theories and storytelling into the actual practice and service of others, see Robert A. Williams, Jr., *Vampires Anonymous And Critical Race Theory*, 95 Mich. L. Rev. 741 (1997).

[74] I have taken the liberty of altering the details of these two cases (embellishing and adding elements from other cases) to the extent I felt required to protect our clients' privacy, to respect our confidential relationship with them, and to more clearly illustrate the issues raised in this essay.

nearby washroom. The alleged victim, a customer shopping with his family, claims that the defendant went to the urinal next to him and suddenly tried to grab the man's penis. As the man hurried out of the washroom, he claims the defendant also kept saying, "Hey man, you come back here . . ." Defendant has always denied ever trying to touch the man's penis or assault him in any other way.

The client in the handgun case is an eighteen-year-old black man, who is a senior at a local high school. He came to trial by himself, as has been the case with every appointment and court appearance we've had. He's a nice, articulate young man who a year ago was in a gang. He left the gang after some of its members were involved in a drive-by shooting and at the time of trial was in the process of deciding whether he wanted to attend college or vocational school after high school graduation. In his case, a witness had called the police saying he saw a young black man get out of the passenger seat of a car with a gun in his hand, look around, and get back in the car, at which point the car drove away. The car was driven by a second young black man, with a third in the backseat. The witness provided police with a very general description both of the man with the gun and the car. Ten minutes later, the same witness called the police again. The car and the suspect were now at a local 7-Eleven; the witness would wait for the police. When the police arrived, the witness pointed out three young black men getting into a white VW bug, and pointed out the man getting in the front seat passenger door as the man who had the gun. That man was our client. Police approached the driver and owner of the vehicle and obtained his consent to search. In the glove compartment, they found a handgun. Defendant was arrested and the gun taken into evidence. Our client denied that either he or anyone else in the car ever touched the gun and maintained that they had the wrong man.

## II. Using A Narrative Theory Model as an Advocacy Guide in Our Two Cases

### *A. The Narrative Model*

The model I employ for my clinical supervision in criminal advocacy rests on narrative theories, and can best be defined as one constantly directing and sensitizing the students towards competing narratives.[75] The model begins with the case theory. Case theory, an

[75] Interestingly, much of constitutional criminal procedure facilitates use of information in storytelling at trial. Rules regarding the jury venire make it more likely that the defendant will have a least some jurors whose culture and experiences will permit similar narrative interpretation of information to that of the defendant. Thus, the defendant has a right to have the jury panel selected from a "fair cross-section of the community," Taylor v.

overall strategic guide melding a legal framework and a factual story,[76] is the broadest narrative of many increasingly specific and complex ones with which the students will deal.[77] Sometimes the "story" will be rooted in that of the client, but not always. Again, a criminal defendant can put on no evidence and raise a purely reasonable doubt defense, attacking the prosecution's case as one whose narrative "does not make sense" or "cannot be trusted" or "raises suspicion, but nothing more." In this defense, if anyone's story is told, it will be one the defense tells of the prosecution's witnesses and their motivations, fear and confusion at the moment of their perceptions, etc. Even if based on the client's story, the client will not necessarily testify. The essence of the story may come out in the prosecution's

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Louisiana, 419 U.S. 522 (1975), and to have race excluded as a factor in selection of the jury panel, Turner v. Fouche, 396 U.S. 346 (1970), and even individual jurors, Batson v. Kentucky, 476 U.S. 79 (1986). Neither can gender lie at the basis of an individual jury strike. J.E.B. v. Alabama, 511 U.S. 127, (1993). Further, narratives must be based on trial information, not information in the form of prejudicial pretrial publicity. Irwin v. Dowd, 366 U.S. 717 (1961). And, of course, defense counsel has the right to give a closing argument, telling the client's story. *See generally*, Crane v. Kentucky, 476, U.S. 683 (1986) (fundamental principle of due process that defendant permitted to argue that the state has not proved all elements beyond a reasonable doubt). Likewise, it is access to and the use of "information" which is at stake when the Court speaks to potential withholding of exculpatory or so-called *Brady* material, Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985), when it finds due process violated by the government's deliberate presentation of false information, Napue v. Illinois, 360 U.S. 264 (1959), when it addresses destruction of information by the government, Arizona v. Youngblood, 488 U.S. 51 (1988), when it finds that due process demands that a state-created evidence rule must give way to a defendant's right to present evidence of his innocence, Chambers v. Mississippi, 410 U.S. 284 (1973), when it defines the scope of confrontation to include eliciting information about a witness's probation status, Davis v. Alaska, 415 U.S. 308 (1974), or address, Smith v. Illinois, 390 U.S. 129 (1968), Alford v. United States, 282 U.S. 687 (1931). *But see* McGrath v. Vinzant, 528 F.2d 681, 684 (1st Cir., 1976) (in context of case, constitutionally permissible for prosecution to refuse to divulge address of alleged rape victim), and when it establishes the showing a defendant must make in discovery to overcome a claim of state-created privilege, Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

[76] For an extensive discussion of the process of developing case theories and representational strategies (the overall strategy for achieving a client's objectives), *see* MARILYN BERGER, ET AL., PRETRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY 17-35 (1988) (hereinafter BERGER ET AL., PRETRIAL ADVOCACY); MARILYN BERGER, ET AL., TRIAL ADVOCACY TRAINING: PLANNING, ANALYSIS, AND STRATEGY, 17-33 (1989) (hereinafter BERGER ET AL., TRIAL ADVOCACY); *see also* Miller, *supra* note 9; Richard K. Neumann Jr., *On Strategy,* 59 FORDHAM L. REV. 299 (1990) (exploring the process of creating strategy, the effect of temperament on strategy, and the ways in which strategy is learned and most effectively taught).

[77] While I focus on the case theory narrative, I also try to make the students appreciate that, for a jury, an actual trial is a set of stories within stories (such as the stories of, *e.g.,* how the defendant or victim reacted on the stand, the interaction between the judge and one or more counsel, the actions of each attorney, the interactions between the attorneys, and so on). All these sundry "stories" will influence the ultimate narrative the jurors will accept, and thus their decision.

case from statements the defendant allegedly made, or from the direct and cross-examination of prosecution witnesses, or from defense witnesses.

Case theory, however, has its limitations. While it provides an overarching strategic structure, it is analogous to the outside steel frame of a skyscraper. More pliable material than legal theories and overarching stories, and thus a far more nuanced guide than case theory can offer is needed to fill in the details of the ultimate structure comprising an effective trial strategy. That more pliable raw material is "information,"[78] and with information as building material, the more nuanced guide for construction takes the form of a maxim: All that exists in a courtroom is information, lack of information, and the inferences[79] from that information and its lack; these inferences in turn create the narratives and subnarratives which eventually compose the case theory. Additionally, these inferences must make sense to the factfinder in terms of their notion of logic, personal experience, and cultural education/bias. It is here, in the assessment of what inferences may be drawn as well as the interrelated question of whether those inferences make sense, that the notion of diversity plays out.[80] The key is to understand the "significance" of all the information in the case (*i.e.,* the credible inferences and narratives).[81] This ultimately

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[78] *See* Marilyn Berger & John Mitchell, *Rethinking Advocacy Training,* 16 AM. J. TRIAL ADVOC. 821, 831-32 (1993); BERGER ET AL., PRETRIAL ADVOCACY, *supra* note 76, at 11-12; BERGER ET AL., TRIAL ADVOCACY, *supra* note 76, at 11-12.

[79] *Id.* For an excellent exposition of the role of inferences, see ALBERT J. MOORE, PAUL BERGMAN & DAVID A. BINDER, TRIAL ADVOCACY: INFERENCES, ARGUMENTS AND TECHNIQUES (1996); Albert J. Moore, *Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentiary Intuitions*, 34 UCLA L. REV. 611 (1987).

[80] *See* Mitchell, *Sixth Amendment, supra* note 27, at 1311-14.

[81] The analysis becomes more complex as one focuses upon the relationship between the information and the chain of inferences. Generally, some inferences in the chain formed between information and the ultimate statement in a narrative will be supported by assumptions, some of which require further information and some which do not. Imagine a case where one piece of information is that a particular organization has no record that one of the parties made a complaint. The other party wants to draw the following from this information: If a complaint had been made, the organization would have a record; since they have no record, there was no complaint; this is just the type of incident one would complain about; since we can infer that the party did not complain, we can infer that the underlying incident never happened. Now, this chain of inferences contains a number of assumptions. . . . For example, someone would complain about this type of incident. But would they? Whether or not you will need more information or can rely upon a rhetorical claim to some accepted cultural belief about behavior in our society will depend on the nature and circumstances of the incident. Even if you can rely on such a rhetorical claim, you still have to be careful. The party may be able to raise circumstances which would fulfill a culturally accepted exception to this otherwise general expectation (*e.g.,* he had amnesia). Also assumed in the above chain is that the organization has a procedure for complaints; that the system is accurate; and that the information in the system is being accurately interpreted. All this will likely require presentation of further specific information to the factfinder. The further assumptions that the party would have known about the

leads to being attuned to competing narratives, including those from the same piece or pieces of information.[82] Accordingly, you must always be wary of the adversary turning your own case on you.

### *B. Techniques for Applying the Model*

A "model" such as the one I have described, however, is likely to be of little interest unless it can be applied to developing effective case narratives in the context of an actual trial. A concrete understanding of the application of the model, in turn, is best achieved within concrete cases. I will therefore explore how the model guided the defense in our two cases. But first, a caveat. In actual practice, the creation of a case theory and supporting narratives involves, and even necessitates, more fragmented perceptions, sudden insights, intuition, luck, and cycling back and forth between narrative and information than any "model" can reflect. Nor can a model precisely guide the levels of nuanced rhetoric needed to tie it all together. Yet as a general description of how I apply the model when I work with students (and, for that matter, when I have tried cases myself or have acted as a consultant to experienced attorneys), the following captures the basic approach.

As an overview, the translation of the model to practice consists of two steps: (1) arrive at the basic assertions from which the narrative will be constructed; (2) determine the *precise* information and/or lack of information which provides the inferences which support the assertions. Fine. But how do you arrive at these assertions? That, after all, seems to be the big trick. Good question. In essence, I am asking students, "What is your story and what information do you have to support it; what is the adversary's story and what information do you have to attack it?" And there will be sessions during our time working together that this is the form my discussion with the students will take. Other times, I will concentrate upon problematic information in their case and/or strong aspects of the prosecution's case and explore how to deal with this information (*e.g.,* evidentiary or constitutional criminal procedure motions to exclude it, rhetorical strategies to turn the inferences in our favor or at least to neutralize the inferences, and as a last resort, *voir dire* strategies to desensitize the factfinder to the information: "You will see gory photographs. How will that affect

particular system of recording complaints, would have felt free to use it, and would not have chosen an alternative avenue for redress, may or may not require further information for support. Again this will depend on whether these assumptions along the chain of inferences are supported by general cultural beliefs.

[82] Two by-products of this focus on information are that students become more attuned to the range and nuance of available information in discovery and investigation, and that they come to see evidence as concerned with controlling information (get yours in; keep theirs out) and, thus, ultimately as controlling the available narratives which may be told.

you? . . . Some people would look at those photos of that poor, dead woman and say that someone's going to pay and it won't take too much evidence for them to convict whoever they think did that. How do you feel about that? Etc.") At still other times, we will carefully work with the chain of inferences from a single piece of somewhat ambiguous information.

At some stages of our work together (and this intuitive judgment varies with each student team) more focused techniques are needed to guide the students in translating my model of competing narratives into the form which is usable for trial, *i.e.,* assertions and information. In the criminal defense arena where I supervise, I use two basic techniques to derive these assertions, each of which is grounded in narrative and its role in juror decision-making and helps put the following concepts into practice:

1. The prosecution story must "make sense" (as must the defense story if the defense is putting on more than a reasonable doubt defense); and
2. The narratives will be evaluated against the juror's own stock stories, scripts, schemata, etc.

In the first technique, I translate the notion that a narrative must "make sense" into a form which will yield useful assertions by asking the students: "*Assuming* your client did it as the prosecution witness(es) claim, what is there about the defendant's and/or prosecution witness(es)' behavior which does not make sense, is surprising, seems unlikely, is unexpected, would be extremely stupid?" Now all of us who have done trials know that truth is stranger than fiction, clients do incredibly unlikely and even extremely stupid things, and all these narrative elements which do not make sense are nevertheless possible. But that's all right. This is a criminal case. We are dealing in a regime in which the prosecution has the burden, and it is an extreme one. Possibilities do not help our adversary, particularly when they are unlikely possibilities. The prosecution must present the most likely possibility, beyond a reasonable doubt. Unlikely possibilities, on the other hand, become reasonable doubts when framed in the rhetoric of a criminal defense advocate. Similarly, asking the students at some point to assume the client is totally innocent, and then to determine what in the defendant's and/or the prosecution witness(es)' actions does not make sense, will yield problematic gaps in the defense narrative which must be addressed (through evidence, argument, *voir dire,* etc.). One must likewise account for such gaps if the defendant and/or defense witnesses actively take the stand and present a story.

The second technique I use is based upon the perception that in assessing information presented at trial, jurors evaluate the informa-

tion by using their own narratives that are triggered by the information. A vast array exists of such private stories that will be triggered by a trial, some of which are so idiosyncratic that you could never imagine them. As a technique I use three stock narratives to help create the story supporting our case theory: (1) the story of perfect guilt; (2) the story of complete innocence; and (3) the story of the total liar.

In using the "story of perfect guilt," I first ask the students to imagine the strongest prosecution case they can which parallels their facts, a defendant guilty beyond a reasonable doubt ten times over. Drawing upon their own experience and their understanding of the culture of the factfinder, they begin to fill in the story. From my experience, students come up with very similar renditions of this story regardless of their background. Once they have a full, rich story of guilt, I ask them to compare this story to their client's case and see what's "missing." With this analysis, they can derive information from which they can present a picture to the jury which is (perhaps significantly) removed from the story of perfect guilt, and in that contrast between the narratives perhaps raise a reasonable doubt.

Likewise, the "story of complete innocence" seeks a stereotypical image of innocence and then compares that to the client's behavior. To the extent the client's behavior corresponds with this story, it raises questions about his guilt. Behavior which conflicts with this story, on the other hand, is problematic and must be explained. This is a strange path upon which the students and I must journey because in some sense it is more myth-based than scientific or reality-based. How does an innocent person act when confronted by the police? They cooperate, says a middle-class jury reared in the '50s. That, however, is unlikely to be the view of everyone in the culture. What, after all, does cooperation have to do with innocence (unless perhaps the charge involves intoxication and police claim that the defendant was belligerent)? A guilty person may cooperate in hopes of conning the police. An innocent person may be uncooperative because of fear, past bad experiences with police, anger at being wrongly detained, or because of the behavior of the particular police. Nonetheless, the story of complete innocence is a good and necessary starting point from which students can then make the complex judgments about factfinder beliefs and unique client experience which a particular case may require.

The "story of the total liar" is a parody of a factfinder's image of the ultimately dishonest witness. As such, it incorporates the range of stock impeachment techniques (motive, convictions, inconsistent statements, perceptual problems) and applies them to the prosecution's witness(es). From the perspective of defense witnesses, on the other hand, to the extent they do not share these attributes of the

"total liar," they distance themselves from this negative story

### *C. Applying the Model to Our Two Cases*

Based on an analysis derived from the approach I've just described, the students and I concluded that there are two alternative narratives available in the sexual assault case, one if the client testifies, one if he does not. If the client does not testify, the students will present a reasonable doubt case along the lines that something probably happened in the bathroom, but, because the prosecution's story does not make sense, there is at least a reasonable doubt that it was not what the alleged victim claims. The first-level and initial problem with our attack on the government's narrative reflects a common and recurrent pattern in our criminal cases: Why would the victim lie about this event between himself and a total stranger; alternatively, how could he be mistaken? From the information the students intend to bring out at trial (based on the victim's signed statement to police, tape recorded interviews with neutral witnesses, and the police report), they anticipate reinforcing their "not make sense" approach by providing two stories in response to the question of how the victim could be lying or mistaken: A reasonable doubt exists because the alleged victim was an opportunist who saw the chance to accuse a man who could not even speak English in his defense, and then sue the store-employer for negligently hiring him. Alternatively, all the victim's perceptions were skewed by homophobia. The specific "information" and inferences from which these defense narratives were to be created was anticipated to come out in testimony as follows:

| INFORMATION | INFERENCES |
|---|---|
| • the defendant was working in the store as a piano player at the time<br>• he was Asian<br>• he was wearing a tuxedo<br>• the bathroom was a few hundred feet from where he had taken a break from playing the piano | Not make sense that defendant would do; one hundred percent chance would be caught, lose job, be arrested, etc. |
| • the victim had never seen the defendant before | Not make sense defendant would do |
| • the victim was relatively large, physically fit, and worked as a treetopper<br>• the defendant was small, slight | Defendant wouldn't do; would likely get beaten up.<br>Victim would likely have beaten up |
| • the victim never pushed or struck at the defendant when he allegedly grabbed for him<br>• victim never yelled at defendant<br>• victim did not jump back, merely stepped | Victim's behavior not consistent with what would expect if this really happened[83] |

[83] As discussed, the prosecutor will respond with a competing narrative: The victim was so taken by surprise and shocked by what happened that he couldn't respond. In fact, his

| | |
|---|---|
| back and zipped up<br>• victim didn't urinate on self<br>• victim told first store employee to whom spoke that man in bathroom acting "weird," never mentioned assault | |
| • not want to report to security | not make sense, if happened, victim would know defendant a danger to others[84] |
| • victim had several priors, including giving false information to a police officer | Draws victim's credibility in question; changes fact-finder's image of this "good citizen" |
| • Victim could tell that defendant barely spoke English<br>• Victim has retained an attorney to sue the store | Alleged victim an opportunist; has a motive to make money from this and thus distort the event |
| • Victim claims incident destroyed marriage; led to arguments as wife wondered if he had encouraged the defendant by showing sexual interest in a man | Hard to imagine this incident could have such a drastic effect, and thus victim's real motive and credibility in question |
| • always uncomfortable anyway urinating next to another man | Can also infer homophobia and thus possibility the alleged victim misperceived, reconceptualized, etc. whatever happened in washroom |
| • victim claims defendant reached around a divider to touch him<br>• photograph showing what washroom looked like at time of incident shows no divider between urinals | Victim lying to embellish, or at least misperceiving |

If the defendant testifies, his story will be that he had walked up to the urinal while the alleged victim was at the adjacent urinal. Because he thought he knew the man, our client said something in greeting, and went to shake his hand. The man backed away and left. Based on our client's story, the victim is misperceiving far more than lying, and merely attributing the wrong intent to our client. Most of the information supporting the "not make sense" defense would still be applicable. Once again it will be used to question whether defendant would have done such a thing under the circumstances, and to infer that, on some level, the victim must have perceived that the client's hand movements were not towards his penis. The lack of a divider and existence of a lawsuit along with the claim of a ruined marriage would reinforce that the victim misperceived, had a motive encouraging misperception, and a phobia underlying it all. The underlying problem with the client's narrative, and the problem which makes the story "troublesome" is, unlike the first-level problem of lying or being mis-

lack of any response is itself proof of the nature of defendant's actions. Defendant will respond that while this is a plausible construction of events, the burden is solely on the prosecution and therefore the prosecutor's alternative construction of the information does not make the reasonable doubts raised by the inferences drawn by the defense disappear.

[84] Again, the prosecution will have a counternarrative: This was upsetting and embarrassing, and the victim just wanted to get out of the store; he was also not going to be explicit with his family there.

taken, unique to the narrative or story of this case. Put simply: Why would anyone do what our client claims he did (*i.e.*, no one I know would go to shake someone's hand while pissing in the urinal)?

In the gun case, the story is the same whether or not the defendant testifies. Again, the first-level problem reflects a common, recurrent pattern: Why is the victim identifying the client if he's the wrong person? The answer is also a common pattern. There is a reasonable doubt based on misidentification, a reasonable doubt because defendant was not the person the eyewitness saw walking out of a car with a gun. The specific anticipated information (based on the police report and the witness's written statement) and accompanying inferences upon which the defense will rest is:

| INFORMATION | INFERENCES |
|---|---|
| • the witness told police that the suspect was black, 6', early 20s, wearing a blue jacket [our client is 18, 5'11½", 165 lbs.] | |
| • the witness gave no description of the suspect's face | |
| • the witness gave no description of the suspect's hair | |
| • the witness did not give police the suspect's weight | Witness poor perceiver; not get a good look; not same car—everyone knows a VW "Bug" and if witness had seen one, would have told police |
| • the witness merely described the vehicle to police as a "small white car" | |
| • the witness did not give the model of the car; never said it was a VW "Bug" | |
| • the witness did not give the make of the car | |
| • the witness did not give the year of the car | |
| • the witness did not describe any special tires, detailing, etc. | |
| • the witness did not provide any license or partial license number | |
| • witness was scared<br>• not want to draw attention to self | poor conditions for perceiving |
| • the witness described the suspect as wearing a blue jacket<br>• when arrested, the defendant was wearing a blue jacket with yellow collar and trim | circumstantial evidence that defendant the wrong person; yellow would stick out in mind of perceiver if had been defendant |
| • the witness and defendant went to school together<br>• the witness never told police that the suspect was someone from his school | witness would have told police when initially called<br>Alternatively, explains why identified defendant; recognized defendant from school, not incident |
| • police never saw the defendant touch the gun | |
| • police never saw defendant touch the glove compartment | |
| • police are not aware of his fingerprints being on the gun or glove compartment | |
| • defendant did not have any shells on his person | Except for the eyewitness, nothing ties defendant to the gun [except his proximity as passenger which, by itself, is not sufficient to even get to a jury] |
| • defendant did not have a holster | |
| • the gun was not registered to defendant | |
| • the car was not registered to defendant | |

- the driver was the owner of the car
- defendant was a passenger
- defendant did not have keys to the car
- defendant did not have keys to the glove box

The underlying problem with the narrative which makes it "troublesome" is equally clear: what a coincidence; there just happens to be a gun in the glovebox right in front of the very man the witness says was holding a gun!

## III. "TROUBLESOME" STORIES AND THE SOURCE OF COLLIDING THEORIES

In one of the most extensive studies of jury decision-making in a criminal case, sociologists Lance Bennett and Martha Feldman found that narrative provided the key to understanding juror behavior in two fundamental respects.[85] First, narrative allowed jurors to make sense of the trial. Opening statements aside, trials are often fragmented affairs in which evidence comes in a piece at a time, often without any deference to logical order, and at times consisting of extensive evidentiary foundations which are unrelated to the substance of the case. Jurors make sense of this by constantly trying to fit the information they are hearing into a story. Narrative also guided the jurors to their ultimate decision, as they looked at the stories being presented and assessed whether they "made sense" in terms of logic, common sense, their own experiences, their cultural biases and beliefs, and their own stories about how people do or do not behave in the situations raised in the trial. The recent study by Penning and Hastie confirms the Bennett and Feldman thesis.[86] Jurors do not make their decisions using mathematical models, Bayesian or otherwise.[87] They decide by what Penning and Hastie call the "story model." Like Bennett and Feldman, these researchers conclude that jurors order the information at trial into story representations and then compare their own stories to those offered by the parties in deciding the case outcome.[88] Their central finding was that "the story [which the individual juror constructs] will determine the decision that a particular juror reaches."[89] And again, these stories will be constructed from case specific information mixed in with the juror's

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[85] *See* LANCE BENNETT & MARTHA FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981).

[86] Nancy Pennington and Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520 (1991).

[87] *Id.* at 519-20.

[88] *Id.* at 521.

[89] *Id.* at 521. *See also id.* at 525

unique knowledge and beliefs about the world and those in it. In other words, the juror's socially constructed reality.[90] Here story model and schema theory intersect. This is hardly surprising since the schemas we use to describe daily life take the form of narratives.[91] Again, stories are how we discuss and describe human actions.

Recent cognitive psychologists who write on schema theory dovetail with Bennett and Feldman, and with Penning and Hastie. For these psychologists, understanding is not a mere matter of stimulus (a chair is in front of me) and response (I see a chair). Understanding is both active and imaginative. Exposed to pieces of data, we try to make sense of what we are perceiving by connecting the data to existing cognitive structures, which psychologists have labeled schema or schemata. In other words, we have a schema for a "chair." When we see a few legs, a seat, and a back, we search back and forth between the data and our array of schemata, settle on the schema for "chair," and then fill in the rest from our cognitive model.[92] At this point we

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[90] "Because all jurors hear the same evidence and have the same general knowledge about expected structures of stories, *differences in story construction must arise from differences in world knowledge; that is, differences in experiences and beliefs about the social world.*" *Id.* at 525 (emphasis added).

[91] *See, e.g.,* Professor Moore's description of these "Social Schemas" (*i.e.,* schema for people, roles, and events) in Moore, *supra* note 3, at 281. *Cf. also* note 1 *supra.*

[92] All of us carry socially-constructed conceptions of the world composed of an array of cognitive structures that guide the constant process of interpretation that we call giving meaning to our experience. The influences that create these structures are both a function of our concrete experiences and our cultural knowledge base. Both of those components of course will likely differ with class, ethnicity, gender, and sexual orientation.

Mitchell, *Sixth Amendment, supra* note 27, at 1310-11 (footnotes omitted). Further elaboration of the basic cognitive processes of making meaning through interpretive frameworks, generally referred to as "schema theory," can be found in Richard C. Anderson, *The Notion of Schemata and the Educational Enterprise: General Discussion of the Conference, in* SCHOOLING AND THE ACQUISITION OF KNOWLEDGE, 415, 419 (Richard C. Anderson et al. eds., 1977); Robert Glaser, *Education and Thinking: the Role of Knowledge,* 39 AM. PSYCHOL. 93 (1984); John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education,* 39 J. LEGAL EDUC. 275, 277-83 (1989); David E. Rumelhart, *Schemata: The Building Blocks of Cognition,* in THEORETICAL ISSUES IN READING COMPREHENSION, 33 (Rand J. Spiro et al. eds., 1980); *see also* Jean Piaget, THE LANGUAGE AND THOUGHT OF THE CHILD (1932) (Piaget presents cognitive, as opposed to behavioral, theory regarding child development). This concept of schema theory has begun to appear in the legal literature in discussions ranging from juror decision making processes to the role of metaphor in legal reasoning. *See* Moore, *supra* note 3; Richard K. Sherwin, *Lawyering Theory: An Overview, What We Talk About When We Talk About Law,* 37 N.Y.L. SCH. L. REV. 9, 38 (1992); Richard K. Sherwin, *Preface to Lawyering Theory Symposium: Thinking Through the Legal Culture,* 37 N.Y.L. SCH. L. REV. 1, 1 (1992); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law,* 137 U. PA. L. REV. 1105 (1989); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning,* 87 MICH. L. REV. 2225, 2234-44 (1989). *Cf. also* Scheppele, *supra* note 16, at 2082. For an elaborate discussion of schema and legal expertise, see Gary L. Blasi, *What Lawyers*

see a chair, although we could be fooled by, *e.g.*, a two-dimensional construction which gives the optical illusion of depth. In a jury trial, jurors evaluate the information they hear in terms of their personal schema which the particular data triggers. Like the example of the chair, they too can be fooled when information triggers an incorrect or idiosyncratic schema. Any particular set of information could trigger a number of different story constructions or schemata.[93] What is chosen will be a function not only of the perceived relevance, but also of the intensity of the particular schema to the individual such that it can quickly be retrieved and brought to mind.[94] Once a schema is chosen, moreover, it biases perception. In a trial context, this means that once jurors construct their story, they will tend to focus on information in the case supporting their particular story, ignoring much other (perhaps highly relevant) information.[95] Thus the "stories" of the parties which they compare to their own may not at all be the story the parties are putting forth, but rather a limited tale responding only to the scope of the juror's idiosyncratic narrative.

Think what all of this means to our cases. Our two clients come from worlds diverse from those of the factfinders. One is a young black living in a very particular neighborhood/community. The other is an Asian immigrant living in an enclave of his native land located smack in the middle of an otherwise All-American town and neighborhood. The jurors, however, will evaluate the stories in terms of their own interpretive cognitive structure (*i.e.*, schema), not defendants'.

Think about the sexual assault case. All men on the jury have a public bathroom schema. That's how we all know what to do when we walk into a Men's Restroom. The urinal schema has a few very minor variations depending on whether it's individual urinals or a trough, manual or automatic flushing, but basically it's the same. You stand quietly in line, urinate, wash your hands, and leave. In a culture where most men are a bit uncomfortable about exposing the sexual portions of their bodies to other men, let alone complete strangers—some might even say more than a bit uncomfortable, homophobic—you do not look around at the urinal. You look straight ahead, watch your own and nobody else's. Every man on the jury (and likely most of the women) understands this. The notion then of trying to shake the hand of a neighbor at the adjoining urinal would be literally

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*Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995). *See also* Mitchell, *supra* at 275.

[93] *See* Moore, *supra* note 3, at 276-77, 292.

[94] *Id.* at 295-96.

[95] *Id.* at 277, 303.

unimaginable. I say literally because try as one might, one could never conjure that story, pictorial or otherwise, from that set of information. And that's not even adding the intense, Western culture bathroom hygiene schema. Shaking hands with someone who has just been holding his penis, and, on top of it all, urinating would be sacrilege and madness all in one. We simply have no schemata—other than deliberate vileness, or degeneration in serious measure—which would make that incident remotely possible, let alone plausible. And that's assuming fair minded jurors. It doesn't account for jurors who construct racist, xenophobic stories from the simple pieces of information that the defendant is an Asian immigrant who does not speak English.

The gun is as bad. Though some jurors will have guns at home or at least have friends who do, their glovebox schema is unlikely to contain an unregistered handgun. It will have maps, Kleenex, registration, insurance card, tire pressure gauge, car manuals, loose cassette tapes, brushes and combs. But no handguns. The appearance of a handgun next to the map instead fits into several likely alternative schemata—violent and dangerous people, street gangs (when you add handgun with several young blacks in an older car), criminals looking for their next mark (when you build a story around the fact the gun was unregistered), etc. Thus, in addition to the glovebox schema which makes the client's story highly implausible, there are a series of other schemata jurors might chose. These not only fit a story of bad character—i. *e.,* the defendant is just the kind of person to do what he victim claims he did—but also a story that makes the defendant everything a middle class (generally white) set of jurors fears on the streets.[96] Once cast in that story, the line between whether he did what is charged and whether he is just simply a dangerous person who needs to be removed from society will blur.

Again, this reality of "troublesome" stories has implications for both those espousing client-centered representation and narrative theorists. Recently, for example, Professor Miller has called for a collab-

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[96] This schema-related phenomenon of creating full stories from minimal pieces of information has been characterized by some as "gap-filling."

> Think about the phrases used by this client - "6 o'clock," "car," "driveway," "house," "front door," "open," "front steps," "ransacked," "family room." Each of these terms conjures up an image, but each of these terms is susceptible of many interpretations. Despite the range of interpretation possible and without knowing anything about the possible parties to this action or even the nature of this case, we have conjured up in our minds a picture of this woman, her car, her home and her discovery.

David F. Chavkin, *Fuzzy Thinking: A Borrowed Paradigm For Crisper Lawyering*, 4 CLIN. L. REV. 163, 177 (1997) (footnote omitted).

oration between client and counsel to create powerful case theories.[97] Clients can add a detailed understanding of social, cultural, ethnic and gender context to the attorney's legally trained skills. Together they can dynamically push the barriers of traditionally far more static conceptions of case theory.[98] I certainly wouldn't quibble with any of that. It embodies what is surely an excellent set of perceptions. From the perspective of counsel of two clients whose voices will be heard but not credited, however, the author's application of her concepts fails to come to grips with this real problem of narrative credibility, *i.e.,* believability of the client's voice.

Thus, in her article, the author tells the story of a black client accused of disturbing the peace, assault, and resisting arrest, all as a result of a run-in with white security guards while shopping.[99] In the course of analyzing the defense, she creates an elaborate narrative in which all events are conceptualized through the lens of racism and the reasonableness of the client's actions assessed accordingly.[100] In fact, the author tells us, this is not the client's story. The client rejected it and took a deal.[101] Maybe he was unwilling to deal with his case in terms of racism and his life as a black male janitor, maybe race really didn't play a defining role. We'll never know. What is significant is that this rich narrative was obviously compelling to the author, and I must admit to me too. But is that because it so eloquently unmasked the "real" story, the true voice? No, I don't think so. Again, we never know whether this, at any level, reflects the true story. Rather, the author and I are sucked in because it's just the type of story which comports with our committed world-view, or schema. It is the archetypal story that clinicians at the end of the Twentieth Century in America—educated, politically appropriate, committed to the oppressed—would believe, and eagerly so. Yet, that's the real problem with telling the client's story and with letting the jury hear the client's voice. If a jury is not so attuned to the context in which your client's story arises, you can elucidate that voice all you want, that's easy. But *why* should they believe what they hear? That's a little harder.

Public defenders face this all the time. A client accused of grand theft auto will tell his attorney that he had no idea that the Mercedes the police stopped him in was stolen. Some man he never met before, who he knows only as "Red," was sitting next to him at the bar and started telling him all about his fancy new car. When the defendant

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97 Miller, *supra* note 9, at 564-66, 576.

98 *Id.* at 527-29.

99 *Id.* at 529–38.

100 *Id.* at 542-45.

101 *Id.* at 538–39, 542.

said that a car like that must really handle well, Red reached in his pocket, handed defendant the keys, and told him to give it a spin. Now, unless the jury believes that there is a world somewhere where perfect strangers, who you know only by nicknames, just hand over the keys to fifty thousand dollar automobiles, defendant better take a deal.[102]

Likewise, clients often accuse the police of lying. In a DWI case, the officer is lying about how the client performed on a field sobriety test. In a possession of crack case, the officer found the drugs in a trash bin and is now lying about finding it in the client's coat pocket; it's all racist. Fine, you tell the client. That may well be just what happened, and, if that's what they want to say to the jury, you'll help them; but unless there's something *really* funny about the case, the officers, and/or the department that you can discover and transpose into admissible evidence—which generally is highly unlikely—forget it. The client is going to be found guilty. Is O.J. the exception? No. First, there was plenty that was "funny" about the evidence, police, and LAPD that was formally and informally before the jury. Second, the defendant never testified, never told a story on the stand contradicting the police. Anyway, our two clients are not famous media personalities. We could put them on the stand and do our best in witness preparation to anticipate and blunt the inevitable hammering they will face on cross-examination. But *why* would we expect a jury to accept our assault client's story that, for whatever reasons, he thought it was fine to shake another man's hand while both were urinating; or our gun client that guns in gloveboxes are as common in his neighborhood as Kleenex and registration cards in mine? Obviously, we needed credible information to bolster these central elements of our clients' stories and thus through education to expand the jurors' evaluative schemata in a manner which would lead to more positive inferences for the defendants.[103] That to me meant experts.[104]

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[102] I am not contending that just because a client is a member of a marginalized community that it will always be true that everything about that community is different than the one in which I live, or that the defendant will accurately and honestly report what, from the point of view of the factfinder, is unique about that community, or that, even granting such a uniqueness, the particular defendant's behavior was in fact an innocent product of those unique aspects of that community.

[103] *See* Mitchell, *Sixth Amendment*, *supra* note 27, at 1312-13.

[104] I am not the first to suggest the possible use of experts in such a situation. Evaluating Penning's and Hastie's *Story Theory* study, *supra* note 86, Professor Lempert comments on one interaction which took place between mock jurors concerning the fact that the defendant had been carrying a knife.

> A major cause of different juror stories is the different background information that jurors bring to their deliberations. For example, in the mock trial which forms the basis for much of Pennington and Hastie's story model research, one evening the defendant, Johnson, carrying a knife, entered a bar frequented by a man, Caldwell,

## IV. USING EXPERTS TO EXPAND THE CONTEXT

Why experts? An expert can add information about the client's world and culture from which a juror might then draw different inferences from the client's story than would be the case if that story were solely evaluated by the juror's pre-existing schemata. The new information in fact might expand or modify that juror's existing schemata. In any event, this new information from the expert gives the client's story a genuine chance of being believed, thus resolving the conflict between narrative and client-centered representation.

If twenty-five years ago a woman accused of shooting her husband had claimed self-defense in light of repeated and escalating abuse—even though she never left him, never told the police, never told family or friends, and never went to a doctor—jurors assessing that story in the context of their understanding and experience would have judged it as not making sense and dismissed it as self-serving fabrication. Times are now different, as we have become increasingly sensitive to the world of abused women. Yet it is important to recognize that Battered Woman Syndrome is no more than expert infusion of *information* which alters the inferences jurors might reasonably draw from the remaining body of information.[105] Our tactic in the two cases was similar. Provide information through experts which would alter the jurors' washroom and glovebox schema/narratives. Now for the journey from the theoretical reconciliation of my two favorite theories to the implementation of the resolution in practice.

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> with whom he had quarreled that afternoon. Middle- and upper-class jurors were more prone than lower-class jurors to find the defendant guilty of first-degree murder. The reason was that they could construct no story which made sense of the fact that Johnson was carrying a knife other than the story that he planned a murderous assault on Caldwell should a confrontation occur. Working- and lower-class jurors on the other hand found it not only plausible but perhaps likely that a man like Johnson would carry a knife wherever he went for general protection. Indeed, in one filmed deliberation of this trial that I observed, a woman juror, arguing that the presence of a knife carried with it no sinister implications, stated that she probably had a knife in her pocketbook at that very moment.

Richard Lempert, *Telling Tales in Court: Trial Procedure And The Story Model*, 13 CARDOZO L. REV. 559, 571 (1991). Professor Lempert then goes on to posit that in theory some experts could qualify under Fed. R. Evid. 702 to be able to explain to the factfinder that "people of defendant's social background regularly carry knives." *Id.* at 571. *Cf. also* White, *supra* note 30, at 55 ("Bennett and Feldman suggest the use of expert witnesses to educate juries about the risk that they might discredit testimony because of social barriers encoded into a witness's speech [*footnote omitted*]."). Note: Professor White suggests a number of possible other solutions to the problem of powerless speech which take the form of institutional and structural changes. *Id.* at 55-56.

[105] In fact, this perspective of the battered woman is now so much a part of our culture, that I've actually seen prosecutors try to imply that the fact that the victim did not call the police or tell anyone leads to the inference that she is "a classic battered woman," and, therefore, defendant is guilty. Q.E.D.

Based on the initial discussions with our Asian client, we thus sought an expert who could say that men from his culture, even when transplanted to this culture, are far less conscious about showing their bodies to other men than are most American males, and that within this set of cultural values almost certainly unfamiliar to the jury, attempting to shake the hand of someone you know as you both urinate is plausible. Fine. The next problem was to find such an expert, and that took until a few days before trial. As people trained in graduate schools ourselves, we naturally looked to academia. For weeks, the students tried to locate Asian experts in the defendant's culture from the surrounding colleges and universities. But this didn't work. First, only one professor really had any expertise on this aspect of the culture, and he was unwilling to give us any real time, let alone testify. Second, even if he had been willing, I do not believe his opinion would have held much weight after cross-examination. The professor was an expert on values in a particular Asian country. Our client, however, was no longer in that country. He had been living here for five years in an enclave. In short, we needed an expert on the values of the émigrés of the client's country living in enclaves in the Pacific Northwest.

Two days prior to trial, the students found our expert, interviewing him by phone. He was out of town but said he was returning the next day and agreed to meet with the students during lunch hour of the first day of trial. That cut it rather close, but we had no real choice. He was perfect. The expert was a native of defendant's country who had lived in the same enclave as our client since our expert's arrival in America fifteen years ago. He was very articulate. In the enclave, he taught English as a second language and headed a program on assimilation skills. In order to run this program, he needed to understand the experience of an émigré in the enclave, American cultural values, work expectations of local employers, traditional cultural values of his native country, and the traditional values which are retained by those in the enclave even when in the wider American culture. In his opinion, our client would retain those traditional values which make men in his culture unselfconscious about displaying their bodies before other men. Thus, in the expert's opinion, the client's story is entirely plausible.

In the gun case, we needed an expert who could testify that, in the defendant's world, it was very common for people to carry handguns in their cars. This testimony would undermine the inference that it would be implausible for the defendant to be identified, and to be sitting in front of a glove compartment holding a gun, and yet nevertheless be the wrong man. The problem, again, was to find our expert.

This took some creativity. Police were naturals,[106] but realistically not available to our side. The local police were assisting in the prosecution; police from other jurisdictions were hardly going to come into the local court to assist the opponents of their fellow police.

We eventually located the "Safe Streets" (a community block watch and crime prevention organization) coordinator for the area in which the defendant lived. A middle-aged mom, PTA president, and worker in the "Safe Streets" project for seven years, we believed that her knowledge and experience qualified her to speak[107] about the access to and possession of handguns in defendant's community as a response to crime and violence. She explained to us that a "community" can be a few square blocks or several miles, and that even adjacent poorer minority communities a few blocks apart can have very different customs, practices, behaviors, and expectations.[108] She had worked in defendant's community for the past three years, meeting in the community with residents or neighborhood organizations at least three days a week, and had phone conversations with community members several hours each day. She was willing to testify that because of fear of crime and drug gangs, many residents carry handguns on their persons and in their cars. While most of the guns are licensed (again, the one in the car in which defendant was a passenger was not licensed), a significant number are not. So, we found our two experts.

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106 To the extent that the police subscribe to a true "community policing" model, their knowledge of the practices and behaviors of those in their communities would likely be even keener. *See generally* Dennis P. Rosenbaum, *The Theory and Research Behind Neighborhood Watch: Is It a Sound Fear and Crime Reduction Strategy?,* 33 CRIME AND DELINQUENCY 103 (1986); Peter K. Manning, *Community Policing,* 3 AMERICAN JOURNAL OF POLICE 205 (1984). *See also* V. A. Tomovich & D. J. Loree, *In Search of New Directions: Policing in Niagara Region,* 13 CANADIAN POLICE JOURNAL 29, 48-49 (1989) (explores different notions embodied in concept of "community policing"). *See also* James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY 29 (March, 1982).

107 An expert witness may be qualified by "knowledge, skill, [or], experience . . ." FED. R. EVID. 702.

108 Once a "community" is no longer equated with a formal political unit or sub-unit, drawing exact boundaries is no longer obvious or easy. For example, the "Communities That Care" program of community mobilization to prevent drug and alcohol abuse provides the following broad parameters:

> Several kinds of communities may choose to use the "Communities That Care" strategy. For example, a city, a neighborhood within a city, a high school and the schools that feed into it, a small town, a rural county, or a Native American community can use the strategy. The most important requirement is that the community be a clearly defined geographical area and identified as a community by people who live and work there. The smaller and more clearly defined the community, the more effectively it can be mobilized. Larger and more geographically dispersed communities are more difficult to mobilize, but the community must be large enough to have access to the resources to successfully implement their strategy.

J. DAVID HAWKINS, RICHARD F. CATALANO JR., AND ASSOCIATES, COMMUNITIES THAT CARE 25-26 (1992).

That was a third of the battle. Gaining admissibility and then conveying their information in a convincing manner to the jury to support the inferences we wanted the jury to draw was the rest.

In the trial briefs we had been revising until late the night before trial, we characterized the experts as "experts on the defendant's world."[109] Interestingly, this type of expert is very common, although not for the defense.[110] Consistently, police, FBI agents, and such are allowed to enlighten the jury about a variety of criminal "worlds"—car thieves,[111] gangs both in prison[112] and on the streets,[113] drug dealers,[114] drug users,[115] prostitutes,[116] panderers,[117] purveyors of illegal gambling,[118] runaways,[119] shoplifters,[120] "till-tappers,"[121] pickpockets,[122] con men,[123] and burglars.[124] This expertise can in fact be as

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[109] Similarly, in Immigration Law, one must be prepared to present information to the Immigration Judge explaining cross-cultural behavior in order to prevent the judge from drawing incorrect inferences (for example, the fact a Guatemalan highland Indian does not have a particular date in mind correlating to each significant event in his case does not mean he is not telling the truth). *See* VERONICA KOTT, THE IMPACT OF CULTURAL FACTORS ON CREDIBILITY IN ASYLUM CONTESTS (1988).

[110] State v. Wu, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991) (ordered not published) is the rare exception. There the court found the murder defendant (accused of killing her child after attempting suicide) was entitled to transcultural psychologists and an instruction that her culture could be considered as it bore upon the relevant mental states. *Id.* at 883, 884, 886. In fact to say that legal recognition of such defense experts is the rare exception is really under-statement since the *Wu* court could find no other appellate authority on the subject. *Id.* at 882.

[111] *See* State v. Oldaker, 304 S.E.2d 843 (W. Va. 1983).

[112] *See* United States v. Abel, 469 U.S. 45 (1984).

[113] *See* People v. McDaniels, 166 Cal. Rptr. 12 (1994).

[114] *See, e.g.*, State v. Berry, 658 A.2d 702 (N.J. 1995); United States v. McDonald, 933 F.2d 1519 (10th Cir., 1991); United States v. Dawson, 555 F. Supp. 418 (E.D. Pa., 1982); State v. Salazar, 557 P.2d 552 (1976); Benefield v. State, 232 S.E.2d 89 (1976). A minority of courts have attempted to curb this form of expert testimony about the "world" of drug dealers either under the rationale that the jury does not need the testimony because the information is obvious, United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991), or devaluing testimony on the "ultimate fact" of intent to distribute (vs. personal possession) when evidence ambiguous, United States v. Boissoneault, 926 F.2d 230 (2d Cir. 1991), or by finding the testimony to be forbidden "profile evidence," People v. Martinez, 10 Cal. Rptr. 2d 838 (1992).

[115] *See* United States v. Foster, 939 F.2d 445, 451-52 & n.6 (7th Cir. 1991); State v. Reliford, 343 So. 2d 1376 (La. 1977).

[116] *See* People v. Crooks, 59 Cal. Rptr. 39 (1967).

[117] *See* State v. Simon, 831 P.2d 139 (1991); State v. McCray, 327 So. 2d 408 (La. 1975).

[118] *See* United States v. Scavo, 593 F.2d 837 (8th Cir. 1979); Moore v. United States, 394 F.2d 818 (5th Cir. 1968), *cert. denied*, 393 U.S. 1030 (1969); United States v. Barletta, 565 F.2d 985 (8th Cir. 1977).

[119] *See* Rodriguez v. State, 741 P.2d 1206 (Alaska Ct. App. 1987).

[120] *See* Hooks v. United States, 373 A.2d 909 (D.C. App. 1977); State v. Woods, 487 P.2d 666 (Or. App. 1971).

[121] *See* People v. Clay, 38 Cal. Rptr. 431 (1964).

[122] *See* United States v. Jackson, 425 F.2d 574 (D.C. Cir. 1970).

[123] *See* State v. Tucker, 567 P.2d 1089 (Or. App. 1977); United States v. Stull, 521 F.2d

specific to a particular community as drug dealing in New Orleans, Louisiana,[125] or the use of narcotics paraphernalia in Durham, North Carolina.[126] Why should the result be any different with our experts?[127] This is especially so in a criminal case where rejection prevents the defendant from effectively presenting his case and arguably even interferes with his right to testify (*i.e.,* why take the stand to tell a story the jury won't believe?). Of course, my rhetorical questions did not ensure that the judge would both accept our theory and find our witnesses qualified. What we were attempting was likely to appear both unusual in terms of the judge's and prosecutor's common experience (*i.e.,* these are unusual defense experts presenting an unusual expertise) and important to the outcome of the case. The combination of unusual and important always guarantees a real fight, and a fight in which you cannot confidentially predict the outcome.

In fact, the showdown never came. Our expert for the sexual assault case called the first evening of trial. He was out of state on a family emergency and would not be back for several weeks. Because the students had never met him in person, with their contact being limited to a series of telephone conversations, they had never subpoenaed the expert. No subpoena, no continuance in spite of the thoughtful argument the student's made for the record. So we went to trial without the expert. In the end, the client did not take the stand and the students raised the reasonable doubt defense. The jury came back with an acquittal. Our expert on the gun case showed up, but the state's main witness did not. The case was dismissed. Pretty anticlimatic . . .

## V. EPILOGUE

Trials are funny animals. With all the strategic preparation and analysis we put into telling "the client's story," in the end neither cli-

687 (6th Cir. 1975), *cert denied,* 423 U.S. 1059 (1976); Commonwealth v. Townsend, 27 A.2d 462 (Pa. Super. 1942).

124 *See* State v. Gervais, 394 A.2d 1183 (Mo. 1978).

125 *See* State v. Carter, 347 So. 2d 236 (La. 1977).

126 *See* State v. Covington, 206 S.E.2d 361 (N.C. App. 1974).

127 In a sense, such defense experts really serve the function of storytellers, telling stories of a particular community. Taking a similar storyteller role were the FBI agents who told tales of gamblers, till-tappers, and junkies. In some strange way, these "community" experts bring the jury back toward that time in the early history of the system when jurors knew the community and players in full, rich context. Maybe too full and rich, because we traded them for a "neutral/unbiased" jury in the sense that they did not personally know the context. The problem seems to be that we have become so dispersed and fragmented into subcultures and subcommunities that the factfinder is ignorant of the world-contexts in which the incidents they are reviewing arose; *i.e.,* the very type of knowledge they need to assess case narrative, and the very type of knowledge early juries possessed to the hilt.

ent's was told. The sexual assault client did not take the stand and, instead, raised a reasonable doubt defense. Of course, the handgun defendant never got near the stand as his case was dismissed at the eleventh hour. I wonder though whether, if it had come down to it, we would have gotten in either expert's testimony. The expert on the immigrant enclave seemed to have more traditional credentials and be speaking on a more traditional subject than the expert in the handgun case. In the latter case, the Judge might well have been uneasy about sanctioning "experts" who are testifying about the customs and practices of specific two-block areas in the city (although there is a sense in which our particular young black defendant likewise lived in an enclave of sorts). The Judge might have intuitively feared that such testimony will become commonplace and routinely put jurors in the position of facing an expert telling them that, "nothing you understand about the world pertains, because this event did not take place in your neighborhood."[128] But who knows? Maybe the Judge would have been influenced by the legitimacy of an opinion voiced by a spokesperson of what is at its core a crime prevention organization. No matter how many times I turn it over in my head, I don't know. And, if the judge had let the expert testimony, what would the jury have thought? Again, I didn't know. I will, however, find out some day. Because I do know that with all the procedural safeguards in the world,[129] unless diverse defendants can tell their stories to the factfinders without being saddled with credibility problems touching critical story elements of their narratives that are due, not to the stories, but to the schemata of the factfinders, this group of defendants cannot receive a "fair trial." Yet, what is the solution? How do you convince a jury, to whom a defendant's world is foreign and even fantastic, that it really exists as your client is claiming? Finding experts proved very difficult and time consuming in our two cases, and ultimately unsuccessful in the sexual assault case. Surely this effort is not realistic for public defenders who handle most cases involving these

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[128] Professor Lempert expressed a similar concern:

> Expert testimony on such background issues as whether people of the defendant's social class regularly carry knives is , in theory, allowed under FRE 702, because the rule provides that "specialized knowledge" from experts is admissible if it will "assist the trier of fact to understand the evidence." In practice, however, the admissibility of such evidence is largely discretionary with the judge, and many judges are reluctant to allow experts to testify to "what ordinary people know." The problem is that ordinary people know different things about the same subject matter, yet they may believe that everyone "knows" what they do.

Lempert, *supra* note 104, at 571.

[129] A similar notion is expressed in Professor White's *Sunday Shoes* piece as she explores the limitations of "formal procedural equality" when representing clients who are outsiders, subordinated, etc. *See* White, *supra* note 30, at 2-3.

diverse defendants. What then is available beyond the scattered, infrequent efforts of individual attorneys? Perhaps the public defender and defense bar in general need to develop a panel of volunteer or court-compensated experts[130] who can describe the "worlds" of their clients for jurors. Certainly, issues would arise as to the bias of panel members ("so you only testify for the defense. . . . In fact, you know defendant's family. . . . ) as well as their possible use by the prosecution or development of a prosecution counter-panel.[131] So be it. At least it would give these defendants a fair chance to have their stories really heard by a jury. And that's all most of them ask for. It would also help allay the anxiety of a true believer to see his beloved theories of narrative and client "voice" become a harmonious whole once again.

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[130] States generally have statutory bases to obtain compensation for expert witness, as well as constitutional grounding. See Ake v. Oklahoma, 470 U.S. 68 (1985). *See also* John F. Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents,* 51 U. CINN. L. REV. 574 (1982). *But see* David A. Harris, *Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for Indigent,* 68 N.C. L. REV. 763 (1990).

[131] In fact, in People v. Wu, 286 Cal. Rptr. 868, 880 (1991), the prosecution did put on a counterexpert who "noted that nothing in Chinese culture or religion encourages filicide."