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Leslie G. Espinoza  
*Boston College*

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# LEGAL NARRATIVES, THERAPEUTIC NARRATIVES: THE INVISIBILITY AND OMNIPRESENCE OF RACE AND GENDER

Leslie G. Espinoza\*

My first introduction to Denise Gray was through a form.<sup>1</sup> The intake sheet was dated October 17, 1994. The legal problem was straightforward:

*Divorce.* Married 7 years. Has lived with H [husband] on and off for 15 years. Two children from H born out of wedlock. Clt [client] married in Belmont, MA. Clt has children. H has not been living at home since Dec 1993 when clt found out from 12-yr-old daughter that H was sexually abusing her for the past 2 months. Clt got a temp TRO in Middlesex Probate Ct right away and an extension good til Dec 1994. TRO states H can't be alone w/daughter and can't be either physically or verbally abusive to Clt and children. DSS [Department of Social Services] filed a formal complaint in Dec 1993 but Clt and daughter did not want to press charges so matter was left at that. H supposed to attend "sex offenders" meetings and has not. H living w/another woman who is pregnant by him. Clt was hoping H got necessary help so he would come back and the family would be reunited. H doesn't pay support. W [wife] working til Aug 94. No court orders governing custody, support or visitation. Clt needs advice on all. Note: will probably have DPW [Department of Public Welfare] case soon.<sup>2</sup>

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\* Assistant Clinical Professor of Law, Boston College. B.A. 1974, University of Redlands; J.D. 1977, Harvard. — Ed. I want to thank Boston College Law School for research support and Ms. Lisa Orube for remarkable research assistance. Finally, I owe a debt to "Denise Gray" and all of her student attorneys; they brought honesty and courage to the troubling challenge of using the courts to sort out people's lives.

1. This article is based on interlocking narratives, all told from my perspective. I take the liberty to include *my perception* of factual events, feelings, and causes. See Melissa Harrison & Margaret E. Montoya, *Law Teaching in the Borderlands: "The Mind Knowing Doesn't Always Make A Difference That Matters,"* 5 COLUM. J. GENDER & L. (forthcoming 1996) (exploring the difficulties of recounting the "story" of a law case, including interpretive difficulties: "How many of our clients would recognize their stories in the legal narratives we construct for them? How many of our clients would recognize themselves as we construct them as clients?"). This writing is most distinctly my narrative, written from the shifting ground of my many identities, including teacher of legal theory, supervising attorney, lawyer, scholar, and the intertwining of professional identity with personal identity. See Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POLY. & L. 23, 26-27 (1994).

2. This is the exact phrasing of the intake sheet, including the abbreviations commonly used in legal practice (e.g., "Clt," "W," "H").

My introduction to Denise Gray would come much later. I am a clinical law professor.<sup>3</sup> The clinic, Boston College Legal Assistance Bureau, is known as "LAB."<sup>4</sup> I teach students law by supervising them as they represent, usually for the first time, a real person with real problems.<sup>5</sup>

Denise's case was assigned to my case docket.<sup>6</sup> I reread the intake sheet. The top of the form gave me Denise's name, address,

3. See generally Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1618-19 (1991) (describing the "outsider" status of clinical educators); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 589-610 (1987) (describing clinical education and particularly noting the problematic nature of the theory-practice label in legal education). For a historical perspective on clinical education, see John M. Ferren, *Goals, Models and Prospects for Clinical-Legal Education*, in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 94, 94-96 (Edmund W. Kitch ed., 1970).

4. LAB is primarily funded by Boston College Law School. It is also a branch of legal services in the Boston area and receives limited funding from Legal Services Corporation (LSC). Until the summer of 1996, LAB was a part of Greater Boston Legal Services. In 1996, Congress placed significant restrictions on legal entities receiving funds from LSC. See Naftali Bendavid, *LSC Cuts Hit Home*, *NATIONWIDE*, AM. LAW., Feb. 19, 1996, at 8 (stating that conservatives triumphed in cutting LSC budget to \$278 million and forbidding class action suits, lobbying, and representation of undocumented immigrants); Indira A.R. Lakshmanan, *Curbs Near in Legal Aid for the Poor; U.S. Budget Accord Could Limit Class-Action Suits, Other Cases*, *BOSTON GLOBE*, Mar. 26, 1996, at 1, 9 (describing the impact of White House-GOP budget compromise that eliminated funding for special programs for migrant workers, Native Americans, and a number of national legal aid centers and estimating that 300 offices will be closed, resulting in 500,000 annual clients being turned away); *Chances for Poor to Sue Clipped By Legal-Aid Cuts*, *PHOENIX GAZETTE*, July 19, 1996, at B6 (reporting that Congress cut 30% from 1995's \$400 million legal aid budget to \$278 million and restricted types of suits by, for example, prohibiting Legal Aid attorneys from filing class action suits or representing prisoners). Greater Boston Legal Services opted not to take LSC money because of the restrictions on the types of clients that could be served, the types of actions that could be brought, and the types of remedies that could be sought. Instead, the Volunteer Lawyers Project now receives LSC money for provision of legal services to the poor in the Boston area. LAB now receives LSC money from the Volunteer Lawyers Project and is operating under all the restrictions that are concomitant with LSC money.

5. See Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT 374, 383-84 (1973). Professor Goldfarb explains the important difference in this method of learning: "Confronting [a real-life legal problem], clinicians believe, brings the values at stake and the potential consequences of various courses of action into sharp relief. . . . Experience strengthens the motivation for inquiry, enlivens the critical issues, and provides a sound basis for examination and analysis." Goldfarb, *supra* note 3, at 1615.

6. Our process for representing any particular client is like most legal services offices. The person seeking services calls the office and speaks to the intake worker. The intake worker fills out a form, which provides basic information about the person calling and describes the presenting legal problem. See Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2111-13 (1991); Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going To Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599 (1979) (describing legal services intake process). The supervising attorneys and social worker at LAB meet twice a week with the intake worker to review requests for services. If a person requesting service is selected at that meeting, she is asked to come in for an interview with a student attorney. After the interview, the supervisor and the student attorney determine if LAB will represent the person. See Alfieri, *supra*, at 2112 (an example of the standard legal services approach).

and telephone number. It named her husband, Robert Gray, as the opposing party; his address was listed as unknown. Denise was 44, not deaf, and not in need of an interpreter. I assigned the case to Alisa, one of the students I was supervising that semester. The student contacted the client<sup>7</sup> and set up an interview. Following the interview, Alisa would develop a case plan and strategy based on Denise's goals. Alisa would eventually counsel Denise about her options. Alisa would then become one of a succession of student attorneys to move Denise's case slowly through the overburdened court system.<sup>8</sup>

The facts of Denise's case were disturbing, but not unusual.<sup>9</sup> All of the divorce cases on my docket involved abuse of the wife, chil-

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7. We refer to all persons calling for legal services as clients though they are not officially clients until a determination is made, usually after a full interview, that we will represent them. See generally Alfieri, *supra* note 6, at 2112. While there are basic issues of eligibility — indigence, conflict, geography — the initial interview also provides an opportunity to assess if the “client” has a legal problem for which our representation will make a difference. The demand for legal services so outstrips our ability to supply services that tough issues of priority have to be considered right up to the point of committing to representation. For a description of triage practices as they apply to legal services, see Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1104 (1990).

8. See Daniel Golden, *Better Probate Courts Asked; Backers Say Aid Hinges On Reform*, BOSTON GLOBE, Nov. 28, 1995, at 35 (stating that the probate court “system is crumbling under the weight of expanded responsibilities and inefficient management” leading judges, at times, to delay decisions for years); Daniel Golden, *Caseload Burying Mass. Probate System; Judges Struggle With Demands, Large and Small, of Dissolving Families*, BOSTON GLOBE, Nov. 26, 1995, at 1, 28 (describing the probate court system as overburdened because the court’s “workload has increased, its staff has diminished, its facilities have not been modernized . . . [causing] glacial delays, lost case files, interrupted trials that don’t resume for months, poor monitoring of guardians for disabled people, and rampant fraud on financial statements in divorce and child support cases”). The problems in the probate court have been recognized for years. See John H. Kennedy, *Many Seek Shakeup of Probate Courts*, BOSTON GLOBE, Mar. 5, 1991, at 1 (“[L]awyers and judges are hoping for a shakeup to a system that is no longer a backwater venue for divorces and wills, but a forum for profound and vexing decisions involving family violence and a person’s right to die.”). In our experience, it takes three to six weeks to get a date for a hearing on motions for temporary orders; six to eight weeks to get a date to hear a motion on a contempt proceeding (such as failure to pay child support); four to six months to get a date for a pretrial hearing, even in simple cases where the trial will only be a few hours; and six months to a year to get a trial date for a simple, less than four hour, trial. These practical delays are in sharp contrast to the rules of the probate court that provide an expedited process because of an understanding that family matters, especially those involving children, need to be decided quickly; they involve the daily lives of the parties. For example, domestic relations motions may be served with only three days notice, see MASS. R. DOMESTIC REL. P. 6(c), as compared to seven days notice for most other civil matters, see MASS. R. CIV. P. 6(c).

9. There is a great reluctance in our society to recognize the reality of sexual abuse of children and reliable statistics as to its prevalence are difficult to obtain. See Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 551 (1996) (describing the dispute over the validity of therapy-induced memories of abuse). The study data, however, do indicate a serious problem. See DIANA RUSSELL, *SEXUAL EXPLOITATION* 15, 181-83 (1984) (first truly random study found 38% of the women surveyed reported having experienced sexual abuse before the age of 18, and 28% reported experiencing sexual abuse before the age of 14); see also Gail Elizabeth Wyatt, *The Sexual Abuse of Afro-American and White-American Women in*

dren, or both. Often the abuse was sexual. Four pending cases involved undisputed rape or sexual abuse of a daughter or daughters by their father.<sup>10</sup>

After a while, try as we might, domestic attorneys, whether we are clinical law professors or representing for-pay clients, become inured to the most shocking of social taboos.<sup>11</sup> Abuse becomes normalized for us. Rape of a child is awful, but it happens. Family law attorneys have routine ways of redressing the situation.<sup>12</sup> This is the standard response: temporary protective orders in district

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*Childhood*, 9 CHILD ABUSE & NEGLECT 507, 513 (1985) (indicating that 62% of women surveyed reported at least one unwanted sexual experience prior to age 18); Lois Timnick, *The Times Poll: 22% in Survey Were Child Abuse Victims*, L.A. TIMES, Aug. 25, 1985. Likewise, general violence toward women in families is pervasive. Between 1978 and 1982, an annual average of 2.1 million women were victims of domestic violence; this may underestimate the problem since only 52% of incidents of abuse are actually reported to the police. See PATRICK A. LANGAN & CHRISTOPHER A. INNES, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN 1, 3 (1986).

10. There is much written now about, and much press attention paid to, "false" repressed memories of abuse. See ELLEN BASS & LINDA DAVIS, *THE COURAGE TO HEAL* 475-534 (1994); Bowman & Mertz, *supra* note 9, at 618 ("In an intriguing replay of the events of late nineteenth-century Vienna [when Freud initially analyzed hysteria as resulting from sexual abuse and then retreated from this analysis], the modern-day psychological profession and the media have, in recent years, first uncovered, and then to some degree renounced, child sexual abuse as a widespread source of adult psychological illness, particularly when the adult has recovered forgotten or repressed memories of abuse."). However, my experience over the years at LAB has been that most cases involving sexual abuse and rape of a child by the father are ultimately not disputed. Cf. *id.* at 622 ("We have no scientific basis for assessing the relative proportions of accurate to inaccurate claims except by reference to figures on actual abuse. These data show that sexual abuse is more prevalent than was previously suspected and thus seem to suggest that a substantial proportion of the memories could be accurate.") (citations omitted).

11. Even the legal terms "family sexual abuse" and "domestic violence" minimize the horror of the violations, beatings, and terror. The word "domestic" refers to the home, which has traditionally been viewed as part of the private realm and as a safe haven. See Elizabeth A. Stanko, *Fear of Crime and the Myth of the Safe Home: A Feminist Critique of Criminology*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* (Kersti Yllo & Michele Bograd eds., 1988).

12. Part of becoming a lawyer is being socialized into a world view. See Leslie G. Espinoza, *Constructing a Professional Ethic: Law School Lessons and Lesions*, 4 BERKELEY WOMEN'S L.J. 215, 216 (1989-90). The legal professional's world view is that moral conduct is a matter of placing the case in the right category and then of following the prescribed rule: "Law professors and lawyers erroneously believe that their legal training and their intellectual tools will enable them "to strip a problem, any problem, down to its essentials.'" James R. Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735, 740-41 (1978). This kind of thinking leads lawyers to miss the substantive considerations of complex, real-world problems. See *id.* Categorical lawyering is particularly dangerous for poverty lawyers.

Encased by tradition, poverty lawyers do not see the relevance of client struggle and do not encourage its production and reenactment. . . . They, in fact, presuppose that narratives of client struggle are unusable in advocacy. This presupposition silences the empowering voices of client struggle, a silencing tied to the denigration of client difference delineated by class, ethnicity, gender, race, sexual preference, and disability.

Alfieri, *supra* note 6, at 2123.

court,<sup>13</sup> divorce action filed in the probate court,<sup>14</sup> and temporary orders during the pendency of the divorce providing for support, custody,<sup>15</sup> and protection.<sup>16</sup> The temporary probate court orders become permanent upon the final adjudication of the case.<sup>17</sup>

The standard response is comforting to the attorney<sup>18</sup> — you get to feel like the knight in white armor.<sup>19</sup> It allows you not to think of the reality of what this family is going through. You do not have to ask the discomfoting questions about what happened, exactly, and who knew what when, exactly. It keeps the case and the attorney's focus forward looking. A contextual understanding of what happened does not really matter. Only enough of the background to support the outcome is relevant.<sup>20</sup> What matter are the

13. The Abuse Prevention Act was enacted in 1978; it allows protective orders to be sought in the district court, superior court, Boston municipal court, or probate and family court where the plaintiff has residence. See MASS. GEN. LAWS ch. 209A, § 2 (1994). Most orders are sought initially in the district court. The district court of Massachusetts is the first level trial court. See MASS. GEN. LAWS ch. 218, § 19C (jurisdiction of the district court). Most of the local, community lawyering — misdemeanors, landlord-tenant cases, small claims, domestic restraining orders, juveniles in need of services — are handled by the district courts.

14. See MASS. GEN. LAWS ch. 208, § 6 (1994).

15. See MASS. GEN. LAWS ch. 208, § 19 (1994) (temporary care and custody of minor children).

16. See MASS. GEN. LAWS ch. 208, § 18 (1994) (pendency of action for divorce; protection of personal liberty of spouse; restraint orders authorized). The protective order in the probate court preempts the earlier district court order. It has the advantage of continuing during the pendency of the divorce (not having to be renewed annually like the district court order) and of combining all matters in one action. See MASS. GEN. LAWS ch. 215, § 2 (1994) ("Probate courts shall be courts of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction . . .").

17. See MASS. GEN. LAWS ch. 208, § 21 (the court determines whether to continue the actions).

18. See Alfieri, *supra* note 6, at 2124 (arguing that the usual attorney role is comfortable because it establishes and maintains dominance over the client).

19. See Lori Nessel & Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*, 13 LAW & INEQ. J. 99, 138 (1994) ("Viewing poor as pitiful . . . invites the attorney to see himself as a rescuer, rather than a servant. Believing society has neglected the education of the poor, the attorney may discount client's intelligence [and] assume control of the relationship . . ."); Gary Brown et al., Comment, *Starting a TRO Project: Student Representation of Battered Women*, 96 YALE L.J. 1985, 2015 (1987) (discussing the importance of alerting students to their own "savior syndrome" and teaching appropriate professional distancing).

20. See Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157, 1173 (1990) (indicating that many poverty lawyers fail to perceive client autonomy and their own professional dominance in trying to get clients "something rather than nothing"); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients To Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 545 (1987-88) ("Not only do clients feel incapable of speaking and acting freely in the strange language and culture of the courtroom; in addition, their own lawsuits are often framed to render their perceptions and passions irrelevant to the legal claims.").

solutions.<sup>21</sup> Get the father out of the house, keep him away from the family. Get the mother control of her life and the children. Obtain physical and legal custody for the mother, no visitation for the father, and protective orders to allow the mother to get the police to help to keep the father away.<sup>22</sup>

This is exactly what happened with Denise Gray. It is now October of 1996. Denise is divorced. The children are with her. The children have no contact with their father. Their father is restrained permanently from coming close to them, from calling them, from having someone else call them on his behalf.

So why is it that I cannot just close the case file and move on from this case? Perhaps it is because of all the things that Denise and I did not discuss.

Right up to the day of the divorce hearing, Denise was extremely ambivalent about contacting her husband, Robert. She was clear *in stating* that she wanted a divorce and a "no contact" order. Indeed, she presented a polished account of the horrors of her years with Robert in a number of preliminary court hearings.<sup>23</sup> But

21. These are pre-ordained "lawyer" solutions, consistent with the system of knowledge and language that support the inevitable event or action. See Paul Ricoeur, *Structure, Word, Event*, in *THE CONFLICT OF INTERPRETATIONS* 79, 81 (James R. Edie et al. eds., Robert Sweeney trans., Northwestern Univ. Press 1974).

22. The actual protection provided by restraining orders is limited. A woman with a restraining order can call the police if her abuser appears at her door — assuming there is enough time to make the call and that the police respond. See Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 *HOFSTRA L. REV.* 1243, 1263 (1993) (noting police reluctance to respond to domestic calls); see also Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 *MICH. L. REV.* 1, 68-71 (1991) (describing "separation assault"). The myth is that the legal solution protects. The reality, and lived terror, for abused women is that the restraining order may trigger more violence. See ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 110 (1987) (estimating that half of the women who leave their abusers are further harassed or attacked). But see Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 *IND. L.J.* 1039, 1047-53 (1992).

23. Over the years, Robert went through cycles of violence. Cf. LENORE E. WALKER, *THE BATTERED WOMAN* 55-70 (1979) (battering tends to have a cyclical dynamic characterized by a tension building phase, an acute battering phase, and a loving-repentant phase). For example, when Denise was pregnant with Lily, Robert beat her so badly that she had to be hospitalized with a concussion. See *id.* at 105-06 (pregnancy is a nearly universal trigger for violence in a battering relationship). Robert would stop beating Denise for a while, usually during a time when he would stop drinking. Then the drinking, gambling, and violence would begin again. For an interesting historical perspective on the relationship between alcohol and abuse, see Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of Her Peers Who Appreciate Trifles*, 33 *AM. CRIM. L. REV.* 229, 260 (1996) ("For the first wave [of feminism], 'drinking was a veritable code word for male violence.' The Temperance Movement was highly successful in passing the Eighteenth amendment in 1919 prohibiting the sale of alcohol. . . . The second wave of feminism has also focused on temperance. Battered women's shelters first opened in 1973 for the wives of alcoholics and were funded by Alcoholics Anonymous.") (citations omitted).

Denise kept calling Robert.<sup>24</sup> A week before the final hearing, Denise called Robert at the prison where he was serving time for a number of offenses, including the sexual assault of his daughter. She apologetically told her lawyers that she missed him. In the two years of processing this case, the only time Denise cried was when reminiscing on what good friends she and Robert were, how close they were. Denise recounted how they struggled together, through long talks and much therapy, to address his drinking, gambling, and violence, and how much she missed him.

Certainly Denise, her succession of student lawyers, and I were aware of the significance of the divorce document that would detail the terms of the final order. We were devising a pattern for the interactions — or lack thereof — of this family. But we did not really think about or discuss the actual impact of the order. For example, what was the role of the extended families? How would the families be affected by the order? Did it matter that Denise and Robert Gray had two children, a sixteen year old son, Eric, and a now fourteen year old daughter, Lily? Did it matter that at the time of the final divorce hearing, Eric had a son; Denise and Robert were now grandparents? Did it matter that Denise was a white, Jewish woman? Did it matter that Robert was an African American man?

For Denise, the two years of court appearances and negotiating a divorce agreement were about much more than standard legal outcomes. This time was fundamentally about the way that Denise understood her life. Lawyers are not trained as therapists.<sup>25</sup> We are quick to remind our clients and ourselves that we are not therapists. And yet the construction of a legal story, the obtaining of the facts, the structuring and development of the background of the case, requires the client to build a narrative.<sup>26</sup> And like it or not, the building of a narrative is a powerful force in developing an understanding of self.<sup>27</sup>

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24. Few battering relationships are unidimensional. They involve love and companionship as well as violence and fear. See Mahoney, *supra* note 22, at 36.

25. See Nancy Blodgett, *Lawyer/therapist, Hear divorce clients out*, 71 *LAWSCOPE* 27 (1985); Stephen Ellman, *Critical Theories and Legal Ethics: The Ethic of Care as an Ethic for Lawyers*, 81 *GEO. L.J.* 2665, 2700 n.100 (1993).

26. See Naomi R. Cahn, *Inconsistent Stories*, 81 *GEO. L.J.* 2475, 2490-91 (1993); Sharon Creeden, *Telling Your Client's Story to the Jury*, *TENN. B.J.*, May-June 1991, at 10; Symposium, *Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 *VT. L. REV.* 565 (1994); Symposium, *Legal Storytelling*, 87 *MICH. L. REV.* 2073 (1989).

27. See, e.g., JANINE ROBERTS, *TALES AND TRANSFORMATIONS* 1-11 (1994).



The first part of this article will examine the importance of constructing a narrative to clients who have suffered domestic trauma.<sup>28</sup> These clients are overwhelmingly women.<sup>29</sup> Much has been written about the importance of giving voice to the client's story.<sup>30</sup> However, the psychological and sociological literature on victims of sexual and domestic abuse makes it clear that for most of these victims, especially at the time they become our clients, the story of their past is shifting and restructuring. As their present changes, as they break from an abusive relationship, they see events differently. The perspective they will ultimately adopt, for purposes of their own healing, as well as for purposes of a legal case, is still in the making.<sup>31</sup>

The way that the victims of trauma grow to understand *what happened to them* and *what was of their making* may be central to their survival.<sup>32</sup> Recovery is premised on the ability to see oneself, not only now but also in the past, simultaneously as a victim and a survivor.<sup>33</sup> This takes time. Lawyer interaction with a client who has been abused should allow the client the space to construct a story in her own time.<sup>34</sup> Lawyers should adopt a more fluid technique of interviewing and counseling that provides space for an evolving contextual understanding of the client's personal history. Even more challenging, legal interaction should incorporate cul-

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28. See JUDITH L. HERMAN, *TRAUMA AND RECOVERY* 3 (1992).

29. See *id.* ("[T]he subordinate condition of women is maintained and enforced by the hidden violence of men. There is a war between the sexes. Rape victims, battered women and sexually abused children are its casualties. Hysteria is the combat neurosis of the sex war."); see also BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA* 21 (1983) (stating that 95% of domestic violence victims are women).

30. See, e.g., Alfieri, *supra* note 6; Cahn, *supra* note 26; Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); White, *supra* note 20; Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

31. See ROBERTS, *supra* note 27, at 7-8 ("Therapists need to let the multitude of perspectives that clients bring be told, hold them, and then help them construct new meanings that work better for them and in their relationships with others.").

32. See BASS & DAVIS, *supra* note 10, at 31 (describing the healing power of stories for survivors of sexual abuse); TONI ANN LAIDLAW ET AL., *HEALING VOICES: FEMINIST APPROACHES TO THERAPY WITH WOMEN* xiv (1990) ("The healing [feminist therapists] refer to involves an inner change made up of two parts: the identification and expression of feelings and the reframing of destructive and unhealthy beliefs.").

33. See BASS & DAVIS, *supra* note 10, at 186; MIRJAM GREENSPAN, *A NEW APPROACH TO WOMEN & THERAPY* 265-82 (1983).

34. See LAIDLAW, *supra* note 32, at 4 (describing the need to let the patient choose the pace of therapeutic work); ROBERTS, *supra* note 27, at 10-11 (noting the importance of letting the story develop in all its retellings).

tural and sociopolitical exploration.<sup>35</sup> Recognition of the patterns of oppression that link victim-survivors to each other is a crucial element in constructing individual histories.<sup>36</sup> Clients and lawyers do not exist in a vacuum that separates us from social patterns. A less detached, less categorical,<sup>37</sup> and less judgmental form of client interaction will open doors to deeper understanding for both the client and the lawyer.<sup>38</sup>

In the second part of this article, I will challenge the predominant approach to client interaction as genderized and racialized. Lawyers reproduce in our individual relationship with clients the broader patterns of law that oppress outsiders.<sup>39</sup> We do not wrestle with the impact of gender-related trauma. Likewise we do not recognize that race matters. Race is invisible, it is mute, despite its omnipresence.<sup>40</sup> In our interactions with clients, we are silent about race. Lawyer silence is a reflection of the predominant theoretical approach to racial justice — colorblindness.<sup>41</sup> The law, and, ergo,

35. See Vincent Fish, *Poststructuralism in Family Therapy: Interrogating the Narrative/Conversational Mode*, 19 J. MARITAL & FAM. THERAPY 221 (1993) (arguing that therapists using narrative therapies must also be attentive to historical, political, and social context).

36. See ROBERTS, *supra* note 27, at 130 (“Cultural stories also have profound implications for how the past can be explained as well as the future imagined.”).

37. See ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 44 (1988) (noting the tendency to establish categories that reduce people to a universal characteristic, failing to note significant differences).

38. See Goldfarb, *supra* note 3, at 1669 (“When feminism and clinical education claim that experience precedes explanation, and that explanation must remain open to experience, they are tacitly recognizing the role of affect in experience and, therefore, in human understanding.”).

39. “Outsider” is a term adopted by Professor Mari Matsuda to designate persons of color, women, gays, lesbians, and other oppressed groups. See Mari Matsuda, *Public Responses to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323 n.15 (1989). In support of this alternative terminology, Matsuda explains that the term “minority” is a misnomer because of the large numbers of persons in excluded groups. See *id.* Professor Matsuda also discusses the importance of recognizing outsider perspectives to various legal issues. See Mari J. Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN’S L.J. 1, 2 (1988) (arguing that society should include outsider perceptions in order to combat racist preconceptions); see also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989) (describing outsiders as “groups whose marginality defines the boundaries of the mainstream, whose voice and perspective — whose consciousness — has been suppressed, devalued, and abnormalized”).

40. See, e.g., IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); CORNEL WEST, *RACE MATTERS* (1993).

41. See, e.g., Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 2, 3 (1991) (“A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.”).

the lawyer, strive to treat everyone as if they were the same color, the same race.<sup>42</sup>

Colorblindness does not erase subordination, colorblindness perpetuates it. Colorblind lawyering acts as a barrier to any acknowledgment and response to the reality of the impact of race in our clients' lives.<sup>43</sup> Denise's lawyers knew her husband was Black, and that the children of this marriage were multiracial and categorized as Black by society and themselves.<sup>44</sup> This most salient factor of the family's dynamic was never mentioned. As a lawyer, I was not trained how to talk about race.<sup>45</sup> And I have not trained the next generation of lawyers how to talk about race. This article is a call for change, for race-conscious legal education.

For women of color and families of color who have suffered abuse and now seek legal assistance, the barrier to discussing trauma combines with the inhibition to discussing race. The confluence of trauma and race particularizes the need for women clients to develop a narrative that truly reflects the complexities of their experience.<sup>46</sup> Remembering that we live in a society in which language itself is limited in its ability to speak of oppression,<sup>47</sup> it is necessary to consciously reach for understanding through patience

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42. For a prominent example of this mindset, see *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118-19 (1995) (Scalia, J., concurring in part) ("To pursue the concept of racial entitlement — even for the most admirable and benign of purposes — is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.").

43. See generally T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) (discussing how colorblindness perpetuates racism and arguing for color-consciousness).

44. The politics of identity in our society erases any complexity of identity by imposing strict categories and classifying individuals by pushing them to the most oppressed category. See Espinoza, *supra* note 1, at 27; Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305 (1990) (arguing that impermeable boundaries are drawn both within and between the categories of race and gender).

45. For an excellent discussion of how legal education treats race as if it were irrelevant, while at the same time racializing in its subtext almost all interactions, see Judith G. Greenberg, *Erasing Race From Legal Education*, 28 U. MICH. J.L. REFORM 51, 55 (1994) ("[D]espite their claims to be color-blind, law schools provide inherent preferences for students who can act, think, and write white."). See also Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991).

46. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (noting the multidimensionality of Black women's lives); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 595 (1990); see also ROBERTS, *supra* note 27, at 130-38.

47. Noell Bisseret Moreau argues that "language is the medium through which the dominant and the dominated consciously and unconsciously perceive and interpret their social roles." NOELL BISSERET MOREAU, *EDUCATION, IDEOLOGY, AND CLASS/SEX IDENTITY IN LANGUAGE AND POWER* 59 (Cheris Kramarae et al. eds., 1984).

and empathy.<sup>48</sup> It is the obligation of the lawyer to facilitate the client's construction of narrative.

I am less optimistic than many legal scholars about our ability to empower our clients in the legal system. Often we seem to be a counterproductive force in our clients' ability to repair their psychological and social lives. There is a strong desire not to see that which we worry we cannot repair. The take-charge, straightforward categorization of the problem and application of the usual solutions is the prescribed attorney response. Lawyers are taught to avoid the complications and emotions of our clients' lives.<sup>49</sup> Our legal distance validates the dysfunctional normalization of abuse that usually occurs in abusive families.<sup>50</sup> Our discomfort in acknowledging race acts as a denial of the lived reality of racism that pervades the lives of our clients of color and their families. To represent race, to represent the oppressed, to represent the abused, we need to reexamine and reinvent lawyering in our individual interactions with clients.

## I. THE MULTIPLE INTENTIONALITIES OF CLIENT NARRATIVES

### A. *From Reminiscence to Fact to Reality: The Importance of Narrative to Self-Understanding*

For me, Denise's story began in October 1994. For Denise, her "story" is her life: her understanding and interpretation of past, present, and future are continually in the making.<sup>51</sup> This was clear to me throughout the two years of her legal representation. But it was frustrating.<sup>52</sup> I did not want to afford Denise the right to emotional ambiguity, to selective factual memory, to differential emphasis, or to editing. As Denise's past related to present and future,

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48. See Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989); Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1688 (1990) (stories can create "bridges across gaps in experience and thereby elicit empathic understanding").

49. See JUDITH N. SHKLAR, LEGALISM 1 (1964) (lawyering is seen as rule application, divorced from its subjective context).

50. See BASS & DAVIS, *supra* note 10, at 46 (explaining the minimizing and rationalizing phenomenon that take place in abusive families).

51. See ROBERTS, *supra* note 27, at 4 ("[In stories t]here is a resonance, an echoing of themes and issues, that helps us to understand that in the present we are always carrying our past as well as imagining our future. The present is the pivot point linking past and future.").

52. See White, *supra* note 30 (capturing, with insight and empathy toward lawyer and client, the frustration of a legal services attorney representing an impoverished client whose story was complex, as was her life).

I found myself fighting Denise's choices and actions, which so often seemed to me to be changing and contradictory.<sup>53</sup>

Why did I have so much trouble with Denise's fluidity (or vacillations, depending on one's perspective)? The right to ambiguity, to nonlinear understanding, is one I always give to myself in constructing my life story.<sup>54</sup> Although it is easy for me to give a detailed, chronological history of my education and employment, it is nearly impossible for me to recount a "story" of my personal relationships — whether platonic or intimate. I do not think of my life this way.<sup>55</sup> This is particularly true of those memories that are painful, embarrassing, conflicted, or traumatic.<sup>56</sup> If pressed, I can categorize. Given enough time, I can journalistically account. However, even the most "name, date, and place" account captures only the perspective of the moment of that telling. Why should Denise be different?

"People connect and make meaning of the events in their lives and express their values, beliefs, and visions through the stories they tell."<sup>57</sup> Storytelling — explaining what happened — is exponentially more complicated and emotionally laden for abuse survivors.<sup>58</sup> The narrator must position herself. She must place herself in relation to the other people involved in the case.<sup>59</sup> To cohere,

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53. See Mahoney, *supra* note 22, at 15-18 (describing the dual phenomenon of ambivalence and denial that are often part of the abused woman's response).

54. I think of my constantly evolving and shifting memories and ambitions as "insights." See ROBERTS, *supra* note 27, at 5 ("Stories provide a wealth of indices with which to connect information on different levels or in different ways. Because each person carries a unique set of life experiences, stories provide multiple possibilities for each individual to make meaning of them.") (citation omitted).

55. Roberts observes: "Our minds are constantly involved in internal dialogues and visualizations. When we speak, we share only a small portion of our experiences." *Id.* at 10.

56. See BASS & DAVIS, *supra* note 10, at 72 (memories tend to return in fragments); HERMAN, *supra* note 28, at 30-32, 68-129 (describing memory patterns of trauma survivors, including battered women, sexual abuse survivors, rape victims, and political prisoners); see also Bowman & Mertz, *supra* note 9, at 600-04 (describing the process of memory and effects of trauma) (1993).

57. ROBERTS, *supra* note 27, at 7.

58. See LAIDLAW, *supra* note 32, at 3 (describing feminist therapy based on challenging current psychotherapy models that refused to acknowledge the violence against women and their repression — and silenced the expression of that reality by patients); J. LAIRD, *WOMEN'S SECRETS — WOMEN'S SILENCES* (1993).

59. See James R. Elkins, *From the Symposium Editor, Pedagogy of Narrative: A Symposium*, 40 J. LEGAL ED. 1, 2 (1990) ("It is the story of law (as it is set alongside other stories) that locates us in relation to others: to family, community, work. We use legal narratives, as we use other stories, to give meaning to social existence, to ourselves as women and men, as people of color, as persons the culture welcomes or fears.")

the story must have a theme.<sup>60</sup> The client must position herself in relationship to the theme.

The telling of the legal "story" for the abuse survivor requires her to make choices about what is important, who is important, and why. She must cast intimates, children, family, and friends in roles. With her lawyer, she must play the lead character. The script that unfolds becomes the basis for her understanding of reality.<sup>61</sup> The lawyer and the legal system, often unwittingly, turn that script into the one "true" story.

Stories, however, are not static.<sup>62</sup> They develop and change as the storyteller's life changes. More importantly, the interaction between story, understanding, and lived experience is dynamic and dialectic.<sup>63</sup> Abuse survivors, in particular, need the space to develop their story.

It is of course impossible to talk about a legal problem without telling a story.<sup>64</sup> To move forward in the world of cases and courts, at some point a basic story must develop. The legal system then freezes that story in time. It becomes the official story.<sup>65</sup> The cohesion and persuasiveness of the story is the basis for case theory.<sup>66</sup> The power of legal stories is that they are binding once translated from client interview and counseling to courthouse.<sup>67</sup>

60. Individual and family experiences develop thematic structure. "Important behavioral sequences then become organized around these themes which often serve as metaphors for the type of symptom that is chosen. By 'theme' is meant a specific emotionally laden issue around which there is a recurring conflict." PEGGY PAPP, *THE PROCESS OF CHANGE* 14 (1983); see also ROBERTS, *supra* note 27, at 7.

61. See LAIDLAW, *supra* note 32, at xiv.

62. See ROBERTS, *supra* note 27, at 2; Cunningham, *supra* note 30, at 2474-75 ("In this model, language plays a central role in the constitution of knowledge out of experience. The very process of naming reduces the particularity of experience to reveal inherent factors of form and relation, then formalizes and stabilizes them. . . . By giving a name to experience, consciousness frees itself from passive captivity to sensation and experience and creates a world of its own, a world of representation. . . . The world of representation, the realm of knowledge, is in dynamic relation with the world of experience.").

63. See ROBERTS, *supra* note 27, at 3 ("Characters can be easily moved through time, new ideas introduced, and endings reworked and/or changed.").

64. See Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW'S STORIES* 14 (Peter Brooks & Paul Gewirtz eds., 1996) ("The law, focused on putting facts in the world into coherent form and presenting them persuasively — to make a "case" — must always be intimately intertwined with rhetoric and narrative.").

65. See Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES*, *supra* note 64, at 2, 5 (reminding the reader that "law is not literature," and that real people may be torn and twisted by the judicial system's evaluation of a client's story).

66. See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 *MICH. L. REV.* 485, 487 (1994) ("Case theory — or theory of the case — can be seen as an explanatory statement linking the 'case' to the client's experience of the world.").

67. See Cunningham, *supra* note 30, at 2461 ("Implicitly, every complaint, every brief, every opening argument, even every negotiation begins with the assertion, "this is a true story."'). The ability to change a story in the middle of a case is limited. The client loses

Thus, the problem for lawyers representing abuse survivors is first to see the client's story as necessarily flexible. A client should have the room to develop a variety of perspectives. This is part of the healing process. Storytelling often takes place and is understood on different levels with each retelling.<sup>68</sup> After care to develop the story has been given, the lawyer and client can work together to articulate the legal story.<sup>69</sup>

There is a second problem for the lawyer representing abuse survivors. Their stories capture more than the individual narrative and the family narrative. Client stories also capture the broader sociopolitical narrative.<sup>70</sup> This is particularly true of the stories of "outsiders." Often without the vehicle of a story, the story of oppression would be untold.<sup>71</sup> Stories are told within the universe of the dominant discourse.<sup>72</sup> Language as a product of a hierarchical society often renders mute the experience of oppression. It is through stories that understanding is derived.<sup>73</sup> Stories thus have

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credibility. See, e.g., White, *supra* note 30, at 48-49. Witness the difficulty judges have with domestic violence victims who understand their situation differently at different times and whose experiences do not conform with the experiences of the judges. See Karen Czapan-skiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 252 (1993) (relating a story of a woman who was denied a protection order because the judge did not believe that, if he were in the woman's situation, he would not stay in it, and thus he did not believe that the violence had occurred).

68. See BASS & DAVIS, *supra* note 10, at 107 (Ella, an incest survivor, explains the various levels of telling, and how each telling opened the possibility for the next kind of telling).

69. See Miller, *supra* note 66, at 523-24 (arguing that clients should be included in the development of the story used as case theory).

70. See ROBERTS, *supra* note 27, at 129 ("It is important to have the possibility of resonance between personal stories and cultural stories — resonance that allows people to see how their particular experience is intertwined with the political and social history of their society.").

71. "Outsider" clients are tasked with telling their story using the language of those in power. The challenge is how to use that language to provide appropriate meaning to experience not contemplated by the dominant language. See Gerald Torres & Kathryn Milun, *Translating Yonnonodio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 629 (asserting that traditional legal language has extreme difficulty describing the harms suffered by disempowered groups, particularly Native Americans); White, *supra* note 30, at 8-9 (writing about women: "Every word that they speak, every silence, carries the risk of subversion, of a double meaning that those in power can never fully understand").

72. See Delgado, *supra* note 39 (examining the use of narratives in legal discourse to challenge the status quo that is perpetuated and protected by the dominant discourse).

73. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 COLO. L. REV. 683, 695-96 (1992) (remarking that outsider scholarship "seeks to cross the boundaries that define [the] community by speaking to the dominant community, but in a different voice" and arguing that the voice often expresses itself through narratives and stories that expose oppression which is overlooked and ignored in mainstream legal discourse).

the power to build individual lives and to reveal the workings of the systems of power that affect those lives.<sup>74</sup>

The stories of women who are traumatized by abuse are suppressed<sup>75</sup> by the normalization of violence toward women and children.<sup>76</sup> Subordination of women—treating them like objects of property<sup>77</sup>—is our cultural legacy.<sup>78</sup> Historically, this violence has been acknowledged as the private right of men ruling families.<sup>79</sup> Violence and rape of women are now tacitly allowed by the suppression of knowledge about abuse and the failure of the society to redress abuse. When women and children do speak, their stories are distorted to make them willing victims, liars, provocateurs, and

74. See Robert M. Cover, *The Supreme Court, 1982 Term — Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Delgado, *supra* note 39, at 2437 (stories are therapeutic for outsiders); Minow, *supra* note 48, at 1688 (stories give “voice to suppressed perspectives” and help “build a reservoir of alternative understandings” of existing practices).

75. See BASS & DAVIS, *supra* note 10, at 479-83 (short history of suppression of reality of sexual abuse); HERMAN, *supra* note 28, at 28-30; ROBERTS, *supra* note 27, at 9 (noting that some therapeutic stories, “particularly women’s stories, may have become unspeakable or silenced. There may be no language to describe events such as torture, genocide, or severe abuse and trauma. . . . Stories may have been silenced because of male privilege, control of media, print and other forms of communication. Abusers may threaten and/or hurt their victims to keep them silent about violence, sexual molestation, and incest. Out of fear of their own safety, victims may not speak.”); see also Mahoney, *supra* note 22, at 11 (“massive denial [of domestic violence] throughout society and the legal system”); Murphy, *supra* note 22, at 1259 (“Because it has historically been linked to silence and inaction from the legal system, domestic violence is another area in which narrative can play a powerful role in destroying stereotypes and prompting legal change.”).

76. For example, even with all the official acknowledgment of widespread battering, media images are of individual, sensational cases. This works to “normalize” the everyday domestic violence. The horrific domestic violence, the extreme case, is the only “real” domestic violence. It is the only domestic violence worth doing something about, and it is by definition “rare or exceptional.” Mahoney, *supra* note 22, at 2-3; see also BASS & DAVIS, *supra* note 10, at 477 (“Extreme cases of abuse were presented as the norm so as to provoke disbelief about child sexual abuse.”). This phenomenon happens with rape as well. While acknowledging the widespread occurrence of rape, the myth, perpetuated by the power of media stories, is that rape is the action of a few horrific serial criminals. See Mary I. Coombs, *Telling the Victim’s Story*, 2 TEX. J. WOMEN & L. 277, 285 (1993) (“One can understand why men react as they do. It is in their gendered interest to believe rape and sexual harassment are rare events, attributable only to monsters. . . .”); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991).

77. See Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 5 (1988) (eloquently describing the commodification of people of color and of women).

78. See SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970) (describing the oppression of women throughout history); LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 3 (1988).

79. See Murphy, *supra* note 22, at 1262 (“Under the guise of protecting citizens from the state interference in the ‘private’ family sphere, common law in this country permitted a husband to beat his wife, as long as the beating was not ‘excessive.’”).



crazies.<sup>80</sup> Those who assist in the telling of these stories are likewise persecuted.<sup>81</sup>

For women who have been traumatized by male oppression, the individual story must be linked with and understood through the prism of the cultural story.<sup>82</sup> Therapists treating women and children who have been traumatized by violence and sexual assault use stories, individual and cultural, to heal.<sup>83</sup> The process of the story-telling can allow the individual to reexamine and reconstruct the meaning of her own life in a cultural context. However, "[i]t is hard to link past, present, and future in one's life when the cultural stories that frame one's experience are storied in stereotypical, inaccurate, narrow, and rigid ways."<sup>84</sup> Thus, the individual story must also be a vehicle for breaking the oppression of the stories of the dominant discourse.<sup>85</sup> The client narrative, developed through interviewing and counseling, has the power to articulate many different

80. See BASS & DAVIS, *supra* note 10, at 477 ("Most of the [press] coverage [of sexual abuse cases] has been extremely adversarial, belittling survivors, depicting them as gullible victims, vengeful children, or simply crazy."); HERMAN, *supra* note 28, at 8; Coombs, *supra* note 76, at 280-86 ("[F]act finders discredit women's claims of sexual violation by dividing them into two categories: 'Not True' and 'So What.' Within these categories, women are deliberate liars, or irrationally sensitive, or they were not really 'victims' but participants.).

81. See HERMAN, *supra* note 28, at 2; Bowman & Mertz, *supra* note 9.

82. See Fish, *supra* note 35, at 228 (arguing that therapists may have tendencies "to conceptually isolate the therapist-family system from any social, historical, economic, or institutional context, and to deny the existence or relevance of differences in power at an interpersonal level. Splitting off a separate world of language, divorced from any notion of a relevant social and material realm, they enforce a conceptual blackout which begins at the edges of the family's story, or conversation."). Obviously, cultural explorations may not be appropriate for all clients in all situations. See ROBERTS, *supra* note 27, at 134 ("It is important at the outset to say that the ways in which any of these techniques are done is essential to their usefulness. Whenever one tries to do some fitting between an individual's experience and larger external occurrences, there is the risk of overgeneralizing and/or stereotyping.").

83. See ROBERTS, *supra* note 27, at 134 ("It can be very healing for people to see that the dilemmas they are caught in are not unique to their experience, but rather are embedded in larger societal problems and societal change. This can help them move out of stances of self-blame to positions that recognize how the social context affects individual lives. Sometimes this also leads to political action or advocacy work."); cf. GINNY NICHARTY, *THE ONES WHO GOT AWAY* 3-5 (1987) (stating that the use of stories of battered women who leave empowers others to see their situation as part of a pattern, to not feel so uniquely hopeless, to see other possibilities).

84. ROBERTS, *supra* note 27, at 130.

85. See *id.* at 129-30. Roberts describes the two predominant strands of stories about Native Americans — the Noble Savage or the Fierce Savage. Neither dominant discourse archetype captures the reality of the richness of the lives of Native Americans (with over 700 tribes in the United States alone) nor the reality of calculated genocide by the Europeans. "[I]t is difficult for young Native Americans to imagine a multidimensional future when their present life is not seen and their past life has been storied in a banal manner." *Id.* at 130; see also ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (explaining how the dominant discourse has distorted understanding of Native American history and present).

visions.<sup>86</sup> With each retelling the client is better able to construct a meaning for her own life, and to sort through false visions of her individual story and of cultural stories that constrain her.<sup>87</sup>

### B. *Client Interviewing: Imposition of Dominant Legal Narratives*

October is the middle of the semester at LAB. Alisa was assigned Denise's case in October 1994. She had an upcoming hearing in another case. She consulted with me and scheduled Denise's initial interview for early November. There was no real hurry — the client was protected by a restraining order until December. Alisa and I both thought of Denise as "the client." She was not a person to us yet, though we knew many of the details of her private life. After all, it was late October. Alisa was now like me; she was comfortable being a lawyer. Denise was a "case."<sup>88</sup> She was a divorce with issues of custody and visitation, complicated by sexual abuse of a child; it was not likely that there would be money issues. The client was on Aid to Families with Dependent Children (AFDC).

Like most law school clinics, our students are taught to follow an interview model theoretically based on "client-centered" lawyering.<sup>89</sup> The model is developed in their course textbook.<sup>90</sup> The stu-

86. These individual visions also provide an opportunity to change cultural structures. See Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 764 (1994) ("Storytelling serves to create and confirm identity, both individual and collective.").

87. See Fish, *supra* note 35, at 230 ("Families and individuals do construct their lives, including their own stories: these stories both make possible and constrain their existence. . . . [However], they have not made these stories "just as they please". Nor may we assist them to construct new stories, and different lives, just as we please. There are circumstances which are, inevitably, directly encountered, by us and those we try to help, and these are the result of antecedent individual, group, and institutional processes." (citation omitted)).

88. See Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1609-10 (1989) (arguing that poverty lawyers who rely on conventional approaches to their clients' problems, justify this consciously by their own sense of expertise and unconsciously through desire for domination, while trying hard to seek their clients' "best interests").

89. See generally DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) (arguing for client participation in the lawyering process and shared lawyer-client responsibility for choices made in the case).

90. See DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). The client-centered philosophy is also the core of the other major clinical teaching texts. See ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 4 (1990) ("Most important, the text constructs a concept for lawyering that envisions lawyer and client as partners working toward a common goal, with the client responsible for the major decisions and the lawyer functioning as helper, adviser, and advocate."); GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978).

dent-attorney<sup>91</sup> begins the interview by asking the client in an open-ended way, "what brings you here today?" This begins a client-based articulation of the issue or problem.<sup>92</sup> The interviewer then asks the client to state her goals.<sup>93</sup> After these goals are articulated, the interviewer proceeds to obtain a factual chronology. This is the client's opportunity to "tell her story," but in a guided, timeline oriented way.<sup>94</sup> After developing the chronology, the student-attorney should ask follow-up questions in specific areas that give needed information for case theory development.<sup>95</sup>

In November, Alisa met with me and discussed her interview plan. We both assumed that it would be challenging. Alisa knew that she needed information about sensitive subjects, particularly the sexual abuse of Lily. She needed to know if the abuse was documented by medical records, a Department of Social Services report, or court findings. Alisa also needed to find out about any abuse the client or the other child, Eric, suffered. Alisa assumed that she would need to file a divorce complaint quickly and seek temporary orders in the Probate Court before the restraining order in the District Court expired. There was a lot of work in front of her, but Alisa told me she was glad to put in extra hours to protect this client and her children.<sup>96</sup>

Alisa said that she would meet with me about the case after the interview. As is the usual practice at LAB, with the client's consent, Alisa would video tape the interview. The video tape, as Alisa would explain to the client, would then be used only for the purposes of supervision within LAB.

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91. Students in Massachusetts, as in most states, may act as a lawyer under the rules of court. See MASS. SUP. JUD. CT. R. 3:03 (1996) (restricting student attorneys to representation of indigent clients only and requiring students to be supervised). We emphasize at LAB that student lawyering is direct representation, with the clinical supervisor as supervisor, not co-counsel. This is problematic over longer cases because LAB is a semester program. Often, as with Denise, a client who has a case open for two years will have five or six different student attorneys. Student attorneys are required to keep detailed case notes and to write comprehensive transfer memoranda. Nevertheless, the one stable relationship is with the supervising attorney. While unspoken, both client and supervisor recognize the importance of having lived through the many experiences of the case.

92. See BINDER & PRICE, *supra* note 90, at 53-59. The more recent edition of the textbook slightly alters the descriptions of the interview model, but not significantly. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 1991).

93. See BINDER & PRICE, *supra* note 90, at 53, 59-60.

94. See *id.* at 53-54, 72-75.

95. See *id.* at 54, 85-92.

96. See Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 950 (1992) (noting the lure of the "rescue mission" for poverty lawyers).

Some hours later, Alisa appeared at my office door. I looked up and said, "What happened?" Alisa was visibly shaken. She told me that she did not know what to do. She did not know if she could continue with this case. The interview, she said, went terribly. Nothing happened as she planned it. I paused, and in my best "understanding supervisor" voice said, "Well, why don't we go watch some of the tape and talk about what happened."

The initial interview of Denise Gray began with her pronouncement that she wanted to work toward reconciliation with Robert. Alisa was dumbfounded, literally. Denise continued, uninterrupted. Alisa's interview plan collapsed around her. Denise explained that there had always been problems in her marriage, in her relationship with Robert. Actually, she said, she and Robert had worked out terrible things in the past. Robert, Denise explained, had an awful childhood. He is Black. He grew up very poor. He was beaten by his father continually. They both had been in and out of therapy, individually and together. She hoped that things could work out again. But she did want a legal separation.

Alisa, pulling herself together on the tape, then explained that LAB would need some general background information on the history of Denise's relationship with Robert. At this point, I stopped the tape and asked Alisa what she was thinking. The discomfort and anxiety poured out of Alisa. She repeated that she did not think that she could represent Denise. She explained that this feeling got worse as the interview went on. Denise, she said, wants to get back together with the guy who raped their daughter: "I can't work toward that." Denise, she said, only seems to care about losing Robert. She only seems to feel sorry for him.

Denise told Alisa that a year earlier, when Lily told Denise that her father was "messing" with her, she immediately confronted Robert. He did not deny it. Denise asked him to leave. She then went to the District Court and got a ten-day temporary restraining order. She did not go to court for the full hearing to extend it for a year because she hoped that the family could work things out. However, the Department of Social Services (DSS) was notified when the temporary order was issued. DSS informed Denise that if she did not extend the order, they would consider her neglectful of Lily. Denise went back and got the order issued for a year.

Denise requested that the order only restrain Robert from abusing Lily and keep him away from the house. The order did not prohibit contact with Denise or Lily. And though Robert was now living with his girlfriend, Denise saw him a number of times.

Denise also arranged for Robert to see Lily. He took her bowling several times. After all, Denise explained, he is her father.<sup>97</sup> Denise also explained, very matter-of-factly, that the abuse was only "digital."<sup>98</sup> It was when Robert tried to have intercourse with Lily that Lily told her mother.<sup>99</sup>

Alisa and I watched some more of the tape. We stopped and talked. Alisa raised all the big ethical issues. I gave them the labels of the profession. We talked about ethical rules and personal morals.<sup>100</sup> Neither of us could answer the most basic question of

97. Cf. Mahoney, *supra* note 22, at 20-21:

Since mothers bear much of the responsibility for the emotional ties between the fathers and children in our society, the new family structure changes her responsibilities to all parties: if the children are not physically harmed, the woman may hesitate to deprive the children of his companionship, even at substantial danger to herself.

Though her lawyers perceived a danger to the children, Denise was adamant that Robert's danger, sexually, to Lily was over because it was now out in the open.

98. This is the actual word Denise used to describe the abuse. The use of this clinical term seemed to distance Denise from the actuality of what happened and minimize the harm to Lily. It is common for mothers whose daughters are abused by their fathers to have difficulty either believing that the abuse happened at all or that it cannot be dealt with by the family. In her groundbreaking book on incest, Dr. Judith Herman writes of the experiences of forty women incest survivors:

Those daughters who did confide in their mothers were uniformly disappointed in their mothers' responses. Most of the mothers, even when made aware of the situation, were unwilling or unable to defend their daughters. They were too frightened or too dependent upon their husbands to risk a confrontation. Either they refused to believe their daughters, or they believed them but took no action.

JUDITH LEWIS HERMAN WITH LISA HIRSCHMAN, *FATHER-DAUGHTER INCEST* 89 (1981). However, it is important to beware of blaming powerless mothers for the heinous behavior of abusive fathers. We need heightened awareness of the complex and often violent reality of women who are unable to protect their children from the violence of abusive men. See Marie Ashe, "Bad Mothers," "Good Lawyers," and "Legal Ethics," 81 *Geo. L.J.* 2533 (1993).

99. Denise also told Alisa that she had been molested when she was a girl. That molestation also stopped when the man (a relative, not her father) tried to have intercourse with Denise, she refused and told her mother. Subsequently the abuse stopped, but nothing more was done. Bass and Davis note that abuse patterns tend to be repeated.

If the abuse took place within your own family, or if your family did not protect and support you, you grew up in a dysfunctional family. . . . Until you actively face your abuse and begin to heal from it, you are likely to repeat the same kind of parenting you had as a child.

BASS & DAVIS, *supra* note 10, at 42.

100. The traditional view is:

Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or the character of the client who seeks to utilize it. Provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established.

Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1, 5-6 (1975) (noting the traditional view, and subsequently criticizing it). On the other hand, "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.2 cmt. (1989). Lawyers are generally free to decline to represent a persons seeking their services and may be required to do so if their personal convictions would interfere with representation. See *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.7 cmt. (1989) ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a cli-

"Who is the client?"<sup>101</sup> Alisa began the interview thinking it was Denise. She ended the meeting feeling it was Lily.<sup>102</sup> And what was Alisa's role to be? She knew she was "the lawyer." She did not want to be "the therapist," but in many ways she was put in that position.<sup>103</sup> She knew that she had a duty to represent her client zealously.<sup>104</sup> But that duty is tempered by her duty as an officer of the court<sup>105</sup> and as a person responsible for her own moral choices.<sup>106</sup> Isn't it?

The end of the semester provided a facile solution. Alisa developed a counseling plan. Denise was informed of her options. The policy at LAB is generally not to represent in legal separation actions because they tend to be ongoing and because withdrawal as counsel, if there is a reconciliation, requires a court appearance.<sup>107</sup> Alisa did provide Denise with all the paperwork to file a separation herself. Denise was also informed of her option to renew the restraining order in the District Court. Finally, if she decided that she

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ent."). The earlier version of the code stated, more clearly, that "[a] lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the proposed client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-2 (1969).

101. "The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1989).

102. This was of course problematic, because Alisa felt that Lily's interests were different from Denise's.

103. Alisa knew that she could discuss with Denise the possibility of seeking supportive, emotional counseling with another professional.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work . . . . Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. (1989); *see also* Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990).

104. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. (1989) ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause . . . . The law, both procedural and substantive, establishes the limits within which an advocate may proceed."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1982) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.").

105. *See* MODEL RULES OF PROFESSIONAL CONDUCT pmb. (1989) ("A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

106. *See* Paul Lowell Haines, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L.J. 445, 448 (1990) (discussing the view of critics of the adversary system that the adversary system creates an environment where victory is more valued than justice by subordinating the importance of "truth" to other less important ideals, emphasizing legal autonomy while discounting moral autonomy, and de-emphasizing the importance of what is morally right.).

107. *See* MASS. SUP. JUD. CT. R. 3:07, DR 2-110 (1996).

wanted to proceed with a divorce, LAB would hold her file open for some months to give her time to decide.

With the most fastidious ethical positioning, Alisa and I avoided the ethical issues. We were oblivious to our not-so-subtle use of lawyer power to take the “client” out of “client-centered lawyering.”<sup>108</sup> If Denise had started the interview by saying that Robert was a rat, that she wanted a divorce and a restraining order, we would have been at her side.<sup>109</sup> We would have been a team. Instead, when she articulated a clear goal, legal separation working toward reconciliation—we said, sorry, we cannot help, except to give you some court forms.<sup>110</sup>

Her lawyers did not ask the hard questions. The initial interview lasted almost three hours. The subsequent meeting, which I attended, lasted two hours. Yet neither Alisa nor I asked Denise why she wanted to work toward reconciliation. We did not ask her whether she thought Robert and Lily could ever live in the same house again. We did not ask her open questions, such as, “What are your concerns? What troubles you?”

For Denise and for her lawyers, the traditional interview model did not work. The model failed to recognize the important interrelationship between articulation of a narrative and understanding of a goal.<sup>111</sup> Denise was asked for a goal when her narrative was still tenuous. She had committed fifteen years of her life to Robert. She had two children, whom she loved very much, with Robert. She was reluctant and embarrassed to talk about Robert’s violence

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108. In his study of poverty lawyers, Carl J. Hosticka concluded that the lawyers exercised almost exclusive control over how the client’s problem was to be defined and what was to be done about it. The lawyers did this without consciousness of their power by manipulating the paralinguistic aspects of the client interactions, including floor control, topic control, and question control. See Hosticka, *supra* note 6, at 599 (study of fifty interactions between clients and lawyers in legal services office).

109. See Mahoney, *supra* note 22, at 20 (“When women tell the stories of their commitment to relationships, stories which may include love and hope, the legal system often has no way to hear them.” (citations omitted)). Alisa and I were definitely part of the “legal system” at this point in the case.

110. The power of preordained lawyer solutions continues to amaze me. After the interview, we were surprised that Denise did not want a divorce. It was not until I was writing this article, and for the first time in a long time reviewing the original intake sheet, that I realized that Denise, from the beginning, had indicated her hope for reconciliation. Alisa and I unconsciously had screened out the information from the intake sheet that was inconsistent with the way we, the lawyers, wanted to see the problem.

111. See Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the “Traditional” Interview and the “Client-Centered” Interview*, 1 CLINICAL L. REV. 541, 574 (1995) (noting that for many of the clients studied, it “may be inappropriate and unnecessary” for the client to state their goal at the outset of their meeting with an attorney. For many clients, their goals “made more sense after the story was told; and the strongest demands seemed more justifiable once one understood everything that happened”).

toward her. Not surprisingly, it was not until the second meeting that his pattern of violence emerged.<sup>112</sup> The reality of Robert's rape of Lily, even though a year had passed, was not integrated into Denise's narrative. She articulated the facts — almost clinically. She had not yet positioned herself and others in relationship to the facts. What seemed to Alisa and me as callused and uncaring behavior toward Lily, was part of Denise's long process of making choices about how to structure her past and future.

There is a difference between speaking and writing. The speaker sees her audience. Who is listening and how they listen affect the ability of the speaker to talk. There is an interaction between speaker and listener.<sup>113</sup> In a symbiotic way they can work together for deeper levels of understanding.<sup>114</sup> In the first meetings with Denise, symbiosis did not occur. Denise's lawyers wanted one story; the straightforward story of abuse and legal solutions. Denise lived a much more complicated life. Although we tried to adhere to professional neutrality, there is now no doubt in my mind that Denise clearly perceived our aversion to her initially chosen narrative.

The thing that we, the lawyers, did correctly at the beginning of Denise's case was to move slowly and with caution. We did not abandon Denise, we did not tell her of our repulsion. We gave her some immediate guidance on the restraining order. Most importantly, we gave her time.<sup>115</sup> The irony is that once she adopted our chosen road, we stopped developing the case narrative. It was as if she had seen the light and we denied her right to a more complicated solution — or maybe to the same solution but from a more thorough process.

### C. *The Politics of Narrative Control*

Impoverished clients who are ambivalent are exposed to double jeopardy. Lawyer interests certainly play an unconscious, if not

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112. Denise was our client for almost a year before Robert's violence toward Eric was discussed by Denise. While there were only four or five major instances, one of these incidents was serious enough that Denise called the police.

113. Professor Roberts observes: "People will choose what to share from their lives depending on how they feel they are being heard and how they see others being listened to." ROBERTS, *supra* note 27, at 9.

114. See Cunningham, *supra* note 30, at 2473 ("Yet the lawyer's work for a client cannot be limited to mere representation. New meaning is given to the 'reality' the client brings to the lawyer and in some way that 'reality' is altered.").

115. This was crucial. If we had closed her case, given the great demand for LAB's services, there was a real possibility that we would not have taken Denise's case if she reapplied for services. See *supra* notes 6-7.



conscious, role in case selection.<sup>116</sup> The poor client is in jeopardy that the free lawyers will reject her outright by declining to represent a troublesome, time-consuming client who does not really know what she wants. The poor client also risks losing her ability to receive free representation if she does not seize the opportunity when offered.<sup>117</sup>

Lawyer power operates to control not only what story is heard in court,<sup>118</sup> but also what story is ever known. In the clinical law literature, two important perspectives have developed about the role of the client's "story." In truly groundbreaking analysis, Professors Anthony Alfieri,<sup>119</sup> Stephen Ellmann,<sup>120</sup> Phyllis Goldfarb,<sup>121</sup> Gerald López,<sup>122</sup> Lucie White,<sup>123</sup> and others, have worked to develop a theoretic of practice.<sup>124</sup> Based on literature about professional control of client interactions,<sup>125</sup> they challenge lawyers, particularly those representing disempowered, or "outsider," clients to be truly client-centered by bringing the client's reality into the actual lawyering of the case.<sup>126</sup> The theoretic-of-

116. See Alfieri, *supra* note 6, at 2124 n.69 ("Classifying clients in terms of perceived dependence shuns clients who decline to participate in the approved lawyer-client ritual of manufacturing dependency.").

117. See Tremblay, *supra* note 96, at 960-61 ("[I]t is important to note that the resource allocation questions with which medicine struggles are much more unavoidable in the context of poverty law than in the area of private lawyering. The relatively and visibly finite resources available to address the vast array of legal problems facing individuals who cannot pay for legal services requires that allocation decisions be made all the time, even if the decisionmakers do not realize that they are doing so.").

118. See White, *supra* note 20 (stating that often attorneys frame poor people's claims in a way irrelevant to them because attorneys are more worried about choosing their plaintiffs strategically, about how the client's "story" will look to the court, and about how closely it will comply with a fact pattern that will compel the desired legal remedy); see also *supra* note 30.

119. See Alfieri, *supra* note 6; Anthony Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991); Anthony Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88).

120. See Ellmann, *supra* note 25; Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991 (1992).

121. See Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717 (1992); Goldfarb, *supra* note 3.

122. See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); López, *supra* note 88.

123. See White, *supra* note 30; Lucie White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990); White, *supra* note 20.

124. See Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1748-50 (1993) (describing theoretic of practice); Symposium, *Theoretic of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992).

125. See Smith, *supra* note 111, at 544 (detailing the use of language for professional control).

126. See, e.g., Miller, *supra* note 66, at 485-87 (emphasizing the need to integrate client narrative into the construction of case theory).

practice scholars argued, first, that to recognize the theory that narrative allowed oppressed persons a way to express themselves in the dominant society<sup>127</sup> and, second, that to take client narrative into the real-world arenas of administrative hearings and court proceedings. The movement aimed at a transformation of legal discourse from the "bottom up."<sup>128</sup>

Critique of this new approach has challenged the practicality and, frankly, elitism of the theoretics-of-practice reform.<sup>129</sup> In particular, there is a concern that poor clients are no different than rich clients. They come to lawyers for outcomes.<sup>130</sup> Professor Cathy Lesser Mansfield writes in critiquing theoretics of practice:

Undoubtedly, each client's whole story, in the client's own words and with the client's individual nuances, was relevant to an attempt at holistic knowledge of the client, or an understanding of the client's normative context. But neither Ellen Smith nor the Bakers [clients she represented] sought my help because they wanted me to know and understand every aspect of the normative reality of their lives. The Bakers came to see me because they did not want to be homeless. Ellen Smith came to see me because she did not want her daughter to be hit anymore.<sup>131</sup>

Certainly, Denise came to see me because she did not want her daughter to be sexually molested again. She wanted a separation. What is more complicated is how these goals fit in with the host of Denise's other goals. I could not recognize these goals, however, until I had a much fuller contextual understanding of the case; in fact, I am still learning about many of Denise's goals as I continue to contemplate the complexity of her life. For example, despite Denise's clearly stated push and pull feelings about Robert, we never really explored Lily's desires regarding contact with her fa-

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127. See *supra* notes 71-74; see also Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 210-15 (1994) (stating that outsider storytelling is a discursive technique for resisting cultural and linguistic domination through personal and collective redefinition); Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103, 106 n.6 (1987) (recognizing the double bind of understanding and using the term "white man," since in order to criticize those in that category, one inevitably engages in discourse steeped in "Eurocentric thought processes").

128. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-26 (1987) (arguing that legal discourse from the bottom, from minorities, offers a new perspective).

129. See Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOK. L. REV. 889, 891-93 (1995); Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187, 1191 (1992).

130. See Mansfield, *supra* note 129, at 897 ("[P]overty clients come to see poverty lawyers to obtain a certain result.").

131. *Id.* at 893.

ther. We assumed that she would want no contact. We gave lip service to, but never really explored with Denise, the possibilities other than a blanket, permanent restraining order. Would Denise and Lily have wanted supervised visits, or even unsupervised visits in public places? We really did not ask about Robert's continuing threat at all. And while we were so quick to believe that lawyers are not therapists, we were equally quick to assume that the right course for Lily's mental health was to have no contact.<sup>132</sup> To be honest, we were caught up in our concern — almost disgust — that Denise did not seem outraged by Robert's behavior toward Lily. Denise always seemed more concerned about her own loss of Robert. We were also torn by the tough ethical questions, none of which could be resolved comfortably.

For clients' stories to be powerful in transforming law, they must have a safe place to develop.<sup>133</sup> A major role of the lawyer in cases involving trauma may be to allow a client's voice to claim its place in the courtroom. But how can that be possible if the lawyer never gives the client the space, power, and authority to develop the narrative of the client's choice in the office?<sup>134</sup>

Likewise, for disempowered client outsiders, a focus on outcomes may be a focus on lawyer outcomes only. How can lawyers expect women who have survived trauma to be adept at articulating realities that they have yet to imagine?

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132. See Ellman, *supra* note 25, at 2700 n.100 ("Lawyers are not therapists and are unlikely to have either the skill or the opportunity for an attempt at therapeutic intervention into their clients' psyches. What they cannot do well, they generally ought not to attempt. Important as this caution is, however, it should not be overstated. Developing a bond with another person is not a function reserved to experts; rather, it is a major part of the stuff of everyday life. In addition, the clinical legal education movement's focus on training students in the skills of interviewing and counseling suggests that law students have the capacity to practice and refine techniques that enhance their ability to connect with their clients. The caring lawyer, recognizing the desirability of building such relationships, should — and can — work to improve her ability to do so.")

133. See Lenore E. Walker, *A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 223, 223-24 (1986) ("There is a fundamental difference between the way women tell of their battering experiences and what is permitted under the male-identified rules of evidence. Women tend to tell of the events in question rooted in their context, by weaving a tale of patterns of events and feelings in the context of how they happened.")

134. Professor Smith observes:

Much more study of inexperienced and experienced attorneys conducting "client-centered" interviews is needed in order to understand the kinds of questioning that may be appropriate and useful during an initial meeting. In the meantime, we should not require or expect our students to conduct linear, logical, theory-driven questioning. We should also encourage questioning driven by creative, exploratory thinking so long as it is sensitive to the client's concerns and related to the problem presented.

Smith, *supra* note 111, at 580.

Domestic cases involving traumatic family histories are different than cases involving, say, consumer fraud. Likewise, not all domestic abuse cases involve ambivalent clients whose understanding of their lives and what they want is still developing. Additionally, some consumer fraud cases are fraught with the kind of empowerment issues that require careful and creative fact development, case strategy, and goal assessment. Lawyering needs to be contextual to the client and the case.

The difficulty of denying the empowering interplay of cautious and fluid client narrative development is that some cases that seem simple to the lawyer really do involve complicated decisionmaking. This is particularly true where the cultural and ethnic backgrounds of the clients are different.<sup>135</sup> It is much harder to pick up clues from the initial client contact.<sup>136</sup> The lawyer must listen with care and without judgment.

## II. RACE AS PRAXIS, RACE AS REALITY

### A. *Context and Experience: Race Matters*

Before unpacking my thoughts onto a computer screen, I spoke with Denise and asked her permission to write about her case.<sup>137</sup> I told her that I thought a lot about her case and our lawyering of it. She assured me that all of her student lawyers were great and that she never could have gotten through the court system by herself.<sup>138</sup> I thanked her and agreed that her student attorneys were thorough, responsible, and excellent advocates.<sup>139</sup> I then explained that I could only write about her case and her experiences from my per-

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135. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1299 (1992) (explaining the difficulty of listening to "the other" and of both recognizing the difference of "the other" and of expanding one's own imagination to have some understanding of "the other's" story.).

136. Cultural factors not only include gender, race, and ethnicity, but also social categorizations such as disability and sexual preference. See, e.g., GREENSPAN, *supra* note 33, at 271-72 (chronicling that through use of narrative therapy, a woman therapy patient "restored" her life. She originally saw her lesbianism as a weakness but ended therapy by seeing her lesbianism as a strength); Diane Clare & Hildegard Grant, *Sexual-Abuse Therapy and Recovery Group (STR): A New Zealand Program using Narrative Therapy for Women Survivors of Childhood Sexual Abuse who are Intellectually Disabled*, 22 DEV. DISABILITIES BULL. 80 (1994).

137. I assured Denise that all the names and identifying characteristics would be changed.

138. See White, *supra* note 20, at 542-43 (discussing the "clash of cultures" between the community of poor people and the courts resulting in a fear of pursuing their rights in court).

139. See López, *supra* note 88, at 1656-57 (explaining that lawyering may be "brilliant and thorough" while at the same time counterproductive and disempowering).

spective.<sup>140</sup> I hoped, I said, that by telling the clinical teacher's story I might see some ways that I could help my students be better lawyers and help myself be a better teacher.<sup>141</sup>

We spent some time catching up on each others lives. She said that it was great to be off welfare and working full time. I talked about LAB, plans for the summer, changes in the neighborhood. I paused. "Denise," I said, "as I have been thinking about everything that happened over the last two years, all the meetings, all the court dates, all the discussions, I was particularly struck how we never mentioned race — at all." "Race was not really an issue," Denise responded. I waited a moment. Denise then puzzled, "Well, it was not really an issue between Robert and me."<sup>142</sup> It was an issue with the children." I waited. She then began talking about how the kids were mixed race, but really Black.<sup>143</sup> They think of themselves as

140. I told Denise that it was likely that my description of her case would only be somewhat recognizable to her. I saw only the thinnest slice of her life — and I saw that only through my interest as the supervisor of her student lawyers, or from the times during the summer that I acted directly as her lawyer. See Harrison & Montoya, *supra* note 1, at 27 (noting the need to question "the ability of one person to speak for another, particularly when the speaker is situated within the hierarchical structures of the academy or the legal system, and is speaking about persons who do not share the speaker's characteristics of race, class, sexual orientation, gender, language, or nationality.").

141. See Goldfarb, *supra* note 3, at 1672-73 (importance of critique for better education).

142. Denise and Robert began their relationship in the late 1970s in the Boston area. I could not help but remember the extreme racial tension in Boston at that time. The busing conflict was ongoing. Racial confrontation and violence were everyday news issues. "For thousands of families who lived through it, the onset of school busing in Boston was the defining experience of a lifetime. No other event in the postwar history of the city's neighborhoods engendered as much fear, as much soul-searching or as much righteousness." Michael Rezendes, *How Class Fueled the Boston Busing Crisis*, *Book Review of Boston Against Busing, Race, Class, and Ethnicity in the 1960s and 1970s*, BOSTON GLOBE, Mar. 17, 1991, at A17; see also J. ANTHONY LUKAS, COMMON GROUND (1986); *Boston in Turmoil: Uncommon Time*, 76 YALE REV. 62, 62-73 (1986). Boston historically was segregated and remains a racially divided city. Denise's comment was also personal to her analysis of her intimate relationship. Whether race was "not an issue" for Denise and Robert in the social context or in the personal context, to the extent the two can be divided, is a complicated question and not one I can answer. For a discussion of white opposition to interracial relationships, see OLIVER C. COX, CASTE, CLASS AND RACE: A STUDY IN SOCIAL DYNAMICS 387, 526-27 (1948); GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 58-60 (1964); Isabel Wilkerson, *Black-White Marriages Rise, but Couples Still Face Scorn*, N.Y. TIMES, Dec. 2, 1991, at A1.

143. See Espinoza, *supra* note 1, at 24-25 ("The politics of dichotomous categorical identity require individuals to be placed into or to be forced to choose one particular defining identity."); Gotanda, *supra* note 41, at 24 (noting the classification of who is black by a rule of recognition or rule of descent—for example, "one-drop" of blood—is inadequate); Sharon M. Lee, *Racial Classifications in the U.S. Census: 1890-1990*, 16 ETHNIC & RACIAL STUD. 75 (1993) (arguing that a belief in "pure" race is reflected in official census data). Controversy over census categories continues. See Lynn Norment, *Am I Black, White or In Between? Is there a Plot to Create A "colored" Buffer Race in America?*, EBONY, Aug. 1995 (discussing politics of the push to categories, and worrying about the current effort to officially dilute Black power with mixed race classifications). Census categories are particularly galling for Latino/as. See JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY 99-100 (1995) (American dominant culture has long refused to recognize the

Black.<sup>144</sup> And of course they are Black . . . but also mixed race.<sup>145</sup> It has been a challenge for her as the children grow older. There are so many issues and problems because they are Black.<sup>146</sup>

It was like opening a floodgate. We talked as two women amazed at the complexity of a world that the mother and that the lawyer wished were simpler, easier for them to understand and fairer to live in. When Eric and Lily were in elementary school, they were two of a few Blacks at their school.<sup>147</sup> They had a mix of friends. In middle school things changed. There were seven or eight elementary feeder schools to the middle school and there were many more Blacks. The Black students grouped together. They were segregated.<sup>148</sup> Denise paused. She explained, "I understand why Eric and Lily feel like they have to do this. It's just sad that everyone is in separate groups."<sup>149</sup>

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progeny of interracial sex, indeed the very term "mulatto" comes from the word mule, the sterile offspring of a horse and a donkey); Clarence Page, *Showing My Color; Biracial Kids Face Burden of Two Worlds*, Hous. Chron., Mar. 14, 1996, at D1, D12 (most Mexicans regard themselves as "mestizo" — part Spanish and part indigenous; mixed race is almost part of the official culture in Mexico, and Mexico has not asked the "race" question on its census since 1921).

144. See, e.g., ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* ix (1992) ("Dividing people into races started as convenient categories. However, those divisions have taken on lives of their own, dominating our culture and consciousness, coloring passions and opinions, contouring facts and fantasies.")

145. The operation of racism is to eliminate other identities that might alter the power structure. See Lee, *supra* note 143, at 75 (identifying and discussing four themes in U.S. race classifications: importance of skin color, belief in "pure" race, role of census categories in creating pan-ethnic groups, and the confusion of race and ethnicity classifications).

146. "It is utterly exhausting being black in America . . . . While many minority groups and women feel similar stress, there is no respite or escape from your badge of color." MARIAN WRIGHT EDELMAN, *THE MEASURE OF OUR SUCCESS* 23 (1992); see, e.g., MYRDAL, *supra* note 142 (discussing how the "Negro problem" affects all other social, cultural, economic, and political problems in America); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (noting that being Black constructs all aspects of life; race affects everything from how you are treated at a Benneton store to your educational opportunity to your safety on the streets to your sense of self).

147. Denise did not talk about the isolation and stigmatization I feared her children suffered as two of the sprinkling of Black children used to integrate their elementary school. See generally REUBEN M. BARON ET AL., *SOCIAL CLASS, RACE AND TEACHER EXPECTATIONS, TEACHER EXPECTANCIES* 251-69 (1985) (examining research that exposes teachers' gross stereotyping as well as their inaccurate, negative, and rigid expectations of black and low-income children, and how these expectations are the foundation for self-fulfilling prophecies of academic failure).

148. I believe it is important to recognize that this phenomenon works both ways in a racist society; the outsider clings to his or her group for protection and identity, but the outsider is also pushed outside by the exclusionist politics of racism. See Espinoza, *supra* note 1, at 25 ("The choice is to assimilate [assuming you can] or to be pushed into some distinct category of "other," whether it fits or not.")

149. Denise was expressing the pain of a parent whose children do not make the same choices. I felt she was also expressing her feelings of exclusion from the world of her children. There are pains she cannot protect them from; pains she cannot know directly.

“But,” Denise explained, “it is mostly at school. They both have white friends too.” But this often is complicated. For example, a few months ago Eric was arrested in Framingham. Eric was one of five boys who were in town visiting friends. Three of the boys were white, two were Black. The police came by and said they were too loud. Somehow arrests were made. Only the two African American boys were arrested.<sup>150</sup> The police let the three white boys go.<sup>151</sup> The police did not call Denise until 4 a.m. By this time she was frantic. Eric is sixteen. He was in an adult holding tank. When Denise picked him up, he told her that the police roughed him up and would not listen to him when he told them that he was a minor.<sup>152</sup>

### B. *Subverting the Dominant Discourse: A Call for Cultural Recognition in Client Interactions*

When lawyers are silent about race, we deny that it matters. Most of us do not want to be called a racist and do not want to be racist. We seek to conduct our human interactions in just and equal ways. But how does one accomplish fairness? Is it by treating everyone the same?

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150. See, e.g., Alexander Cockburn, *All in Their Family*, THE NATION, July 24, 1989, at 113, 114 (reporting the alarming statistic that “[t]oday more black men are in jail than in college”); Derrick Jackson, *The Double Standard on Drug Crimes*, BOSTON GLOBE, Aug. 23, 1996, at A19 (“The result is that African-Americans, 13 percent of the drug users, make up 35 percent of the arrests, 55 percent of the convictions and 74 percent of the sentences for drug charges. African-Americans and Latinos make up 90 percent of those sentenced on drug possession in state courts. Affirmative action may be out for jobs but very in for jails.”).

151. Black males are perceived to be threatening by their very presence.

The image of the criminal black is one many whites are introduced to, not through individual experience, but rather through the media. Indeed, given the fact that most aspects of life such as neighborhoods and schools are still highly segregated . . . the only sustained contact that whites and blacks have is through the media. Therefore, the media plays an important role in the construction of a national image of the criminal (transgressing) black. . . . It is the image of the dangerous black criminal that apparently convinced jurors in the Rodney King case that it was Officer Laurence Powell, not Rodney King, whose life was threatened in the encounter between the two. This, despite the video showing that Powell continued brutally to beat King on the head (about thirty times) after it was clear that he could have arrested him without any resistance.

Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2264 (1993).

152. It is common that black males are stopped by the police, not listened to, and not believed. See, e.g., WEST, *supra* note 40, at x-xi (remembering “[u]gly racial memories” of being stopped while driving and falsely accused of drug trafficking and being mocked when he said he was a professor; of being stopped three times in ten days for “driving too slow” in a residential area of Princeton; and of his fifteen-year-old son having similar experiences); Jerome McCristal Culp, Jr., *Notes from California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199, 201 (1993) (relating the story of a large Black male student, stopped by the university police while crossing campus and arrested, despite showing his student identification card, when he became angry for being stopped).

Feminists have recognized the problem with “sameness” equality.<sup>153</sup> Equality under this theory means that women are treated the same as men. Unfortunately this approach often perpetuates discrimination. The standard by which men and women are to be measured is one defined by men and established with men in mind.<sup>154</sup> Further, “sameness” equality fails to recognize the lived reality of the disparity of power between men and women. Most importantly, “sameness” equality denies the valuable differences women have and wish to retain.<sup>155</sup>

Racial justice has traditionally used the rubric of “sameness.”<sup>156</sup> At times, the “sameness” was about “separate, but equal.” Now it is about “colorblindness.” Colorblindness has become the prevailing understanding of racial equality<sup>157</sup> — whether we are discussing access to education and jobs, or whether we are discussing how we treat each other in individual encounters. Conceptually, colorblindness has all of the difficulties of gender sameness.<sup>158</sup> Racial outsiders are measured against a standard that is defined by whites.<sup>159</sup>

153. See CATHARINE A. MACKINNON, *Difference and Dominance*, in FEMINISM UNMODIFIED 32-45 (1987).

154. See Martha Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

155. See, e.g., Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988) (discussing the value of emotion and empathy in decisionmaking); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

156. Racism and sexism cannot be equated. This article is not an effort to do so. However, a comparison of the distortion of the concept of “equality” in both systems of oppression unmasks their similar hierarchical ends. See Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 372-74 (discussing the limitations of both a race-sex correspondence or independence); Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 1991 DUKE L.J. 397. This article is an epistemological endeavor, not a political project to see which oppression “trumps” the other.

157. See Culp, *supra* note 41, at 163.

158. Professor McIntosh writes:

Thinking through unacknowledged male privilege as a phenomenon with a life of its own, I realized that since hierarchies in our society are interlocking, there was most likely a phenomenon of white privilege that was similarly denied and protected, but alive and real in its effects. . . . I have come to see white privilege as an invisible package of unearned assets that I can count on cashing in each day, but about which I was “meant” to remain oblivious.

Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22-23 (Leslie Bender & Daan Braveman eds., 1995).

159. See Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 973 (1993) (“Thus whites rely on primarily white referents in formulating the norms and expectations that become criteria of decision for white decisionmakers. Given whites’ tendency not to be aware of whiteness, it’s unlikely that white decisionmakers do not similarly misidentify as race-neutral personal characteristics, traits, and behaviors that are in fact closely associated with whiteness.”).



The defining system of white advantage, white privilege, is invisible. To be colorblind is to force assimilation to the standard of whiteness.<sup>160</sup>

Racism is resilient because of its ability, as a system of oppression, to “hide its horns.”<sup>161</sup> The power of colorblindness is that it makes us *feel* that we are being fair. It becomes the standard for behavior. We focus on the process of justice — Blacks and whites took the same test,<sup>162</sup> the voting districts were historically and geographically drawn,<sup>163</sup> and so on. Colorblindness hides the actual exclusion and suppression of outsiders.<sup>164</sup>

Too often those desirous of racial justice adopt and defend policies that lure them into the quick fix. Colorblindness is an easy approach — until one thinks about it. To be colorblind assumes that one notices race, but then “chooses” not to notice it and does so without the first noticing influencing the interaction.<sup>165</sup> This is a denial of the fundamental process of cognition. One must assume the nonexistence of unconscious racism and the ability not to mask conscious racism.<sup>166</sup> Colorblindness is conceptually ludicrous in this very raced society. But there is no humor in this twisted policy; racial justice is too painfully important.

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160. See generally RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

161. Karl Marx is reputed to have identified the ability of capitalism to “hide its horns” and thus make its oppression invisible.

162. One of the most pernicious examples of white-based cultural measures are standardized tests. See Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121, 122 n.8, 126 n.32 (1993) (discussing test bias, the LSAT’s unproved correlation to success, and the myth of predictive precision); see also STEPHEN J. GOULD, *THE MISMEASURE OF MAN* 146-234 (1981) (describing the long-documented bias of the Stanford-Binet IQ exam and other intelligence tests).

163. In *Shaw v. Reno*, 113 S. Ct. 2816 (1993), the Court struck down redistricting in North Carolina that would have provided for a few Black majority districts, noting that the plaintiffs who challenged the redistricting plan were seeking “to participate in a “color-blind” electoral process.” 113 S. Ct. at 2824.

164. See Culp, *supra* note 41, at 173-75 (discussing and critiquing the “sacrosanct” decision of *Loving v. Virginia*, 388 U.S. 1 (1967), by noting that the real ability of interracial couples to exist was not addressed).

165. See Gotanda, *supra* note 41, at 18.

166. See Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1560 (1989) (“The claim of pervasive, unconscious racism is easily devalued. The charge has come to be seen as egregious defamation and to carry an aura of irresponsibility. Nonetheless, the claim is well founded.”) (citation omitted); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987) (“We were all victims of our culture’s racism. We had all grown up on *Little Black Sambo* and *Amos and Andy*.”).

Colorblind lawyering did not serve Denise, Lily, or Eric well.<sup>167</sup> In sorting out this family's life through the legal process, race was important. Denise loves her children. She does not want to be segregated from them physically or psychologically. But she is. Lily and Eric will have very different life experiences than Denise.<sup>168</sup> Their experiences are complex and dynamic. In the same way that Denise "storys" herself individually and within a social context, so do Lily and Eric. We cannot construct ourselves or our children "just as we please."<sup>169</sup> Lily and Eric are caught in a tangle of social oppressions and stigmas. Denise could try to raise Lily and Eric to think white, dress white, talk white, and act white,<sup>170</sup> but they still must go out in a world that treats them as Black because they physically look Black.<sup>171</sup> Likewise, Denise could try to raise Lily and Eric as mixed race. However, American society does not recognize "mixed" racial and ethnic categories.<sup>172</sup> The possibilities of parenting are limited by the social reality.<sup>173</sup>

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167. See Earlene Baggett, *Cross-Cultural Counseling*, 18 CREIGHTON L. REV. 1475, 1477 (1985) ("Therefore, to understand adequately any significant cultural problems and influences that their cross-cultural clients are experiencing, attorneys must rely on knowledge previously obtained about a particular minority culture and variations within it. In many cases, attorneys will have gained this 'knowledge' primarily from stereotypes endorsed by and embedded in the dominant culture and conjecture. . . . [R]eliance on knowledge derived in this way can create barriers to effective legal counseling and can cause other serious problems.").

168. "Being Black or White affects every element of individual existence including access to jobs, education, housing, food, and even life or death." ROBERT STAPLES, INTRODUCTION TO BLACK SOCIOLOGY 250 (1976).

169. Fish, *supra* note 35, at 230 (citation omitted).

170. Denise never discussed her Jewishness with us, and we did not ask. Racial and cultural inquiries seemed taboo, whether asking about Black identity or Jewish identity, regardless of whether Jewishness is defined as religion, ethnicity, or race.

171. Professor Gotanda explains:

American racial classifications follow two formal rules:

- 1) *Rule of recognition*: Any person whose Black-African ancestry is visible is Black.
- 2) *Rule of descent*: (a) Any person with a known trace of African ancestry is Black, notwithstanding that person's visual appearance; or, stated differently, (b) the offspring of a Black and a white is Black.

Gotanda, *supra* note 41, at 24.

172. See *id.* at 25 (noting failure of legal system to acknowledge intermediate, "mixed" racial categories).

173. Many of these issues are raised in the debate regarding transracial adoption. For an excellent discussion reviewing the literature and arguing that studies of children who have been transracially adopted are at odds in that the data seem to indicate good adjustment but the recommendations are for race conscious adoption, and thus it is too early to draw conclusions about the long-term effect of transracial adoption on Black children, see Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 37 (1993-94). Compare Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991) (tracing the history of transracial adoption in the U.S. and arguing that the needs of minority children are better served by transracial adoption than by strict race-matching policies) with Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE

Could Denise raise Lily and Eric as African Americans?<sup>174</sup> How could she do this?<sup>175</sup> She could try to develop her own bridge between cultures. She could reach out to the African American community. She could choose a Black church.<sup>176</sup> She could develop cultural ties.<sup>177</sup> But Denise would have to consciously work at building and maintaining a bridge.<sup>178</sup>

It would have been bad lawyering not to ask Denise if she and Lily had considered supportive psychotherapeutic counseling.<sup>179</sup> Why was it not bad lawyering to not ask about support for issues of identity?<sup>180</sup> We left it for the therapists to wonder how Lily felt. Lily did receive therapy for a while. As lawyers, we asked her mother about it. Denise assured us that Lily had therapy, as did Denise, in early 1994. We encouraged Denise to consider whether she and Lily might need further therapy. We carefully mapped our language when raising this issue in counseling sessions. Did they have someone to talk to about all that had happened? Many of our

J. GENDER L. & POLY. 131 (1995) (arguing that transracial adoption primarily benefits white adults seeking to adopt and does not adequately consider interest of Black children).

174. This is particularly problematic because of the unconscious racial cues in our society. See DARLENE POWELL HOPSON & DEREK S. HOPSON, *DIFFERENT AND WONDERFUL: RAISING BLACK CHILDREN IN A RACE-CONSCIOUS SOCIETY* (1990) (noting the imperative of discussing race in order to promote healthy psychological and emotional development); Perry, *supra* note 173, at 61-65 (noting the importance of "survival skills"); Alvin F. Poussaint & James P. Comer, *The Question Every Black Parent Asks: What Shall I Tell My Child?*, REDBOOK, Jan. 1971, at 111-13.

175. See Adrian Piper, *Passing for White, Passing for Black*, 58 *TRANSITION* 4, 30-31 (1991) ("What joins me to other blacks, then, and other blacks to another, is not a set of shared physical characteristics, for there is none that all blacks share. Rather, it is the shared experience of being visually or cognitively *identified* as black by a white racist society, and the punitive and damaging effects of that identification.").

176. Choosing a Black, or well integrated, synagogue would be more challenging.

177. Professor West argues:

[T]he major enemy of black survival in America has been and is neither oppression nor exploitation but rather the nihilistic threat — that is, loss of hope and absence of meaning. . . . The genius of our black foremothers and forefathers was to create powerful buffers to ward off the nihilistic threat, to equip black folk with cultural armor to beat back the demons of hopelessness, meaninglessness, and lovelessness.

WEST, *supra* note 40, at 15.

178. bell hooks reminds us:

[S]ubject to subject contact between white and black which signals the absence of domination, of an oppressor/oppressed relationship, must emerge through mutual choice and negotiation. . . . [S]imply by expressing their desire for "intimate" contact with black people, white people do not eradicate the politics of racial domination as they are made manifest in personal interaction.

BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 28 (1992).

179. See *supra* note 103 (noting the appropriateness, and perhaps duty, of lawyers to make referrals to other professionals).

180. For example, the psychotherapeutic literature has recognized the need for culturally appropriate counseling. See Clemont E. Vontress, *Racial and Ethnic Barriers in Counseling*, in *COUNSELING ACROSS CULTURES* 42 (Paul Pedersen et al. eds., 1976); *UNDERSTANDING AND COUNSELING ETHNIC MINORITIES* (George Henderson ed., 1979).

other clients who had similar experiences found it useful to have some support, to have someone to talk to. We gave Denise lists of referral resources. Denise assured us that neither Lily nor she has felt more counseling is necessary. We, the lawyers, left it at that.

I thought I knew a lot about Eric and Lily. Denise discussed them with the succession of student attorneys and with me. But we never met Eric and Lily. Denise's attorneys never talked directly to them about what relationship they would want with their father. It did not seem necessary.<sup>181</sup> We knew that Robert had occasionally physically assaulted Eric; we knew he had raped Lily. But we did not know what the children's positive ties to Robert were. And to be honest, it made our job easier to demonize him. How much more difficult for Eric and Lily to demonize him. Robert is their father. He is also the link for Eric and Lily to their racial identity. What was it like for Eric and Lily to have to sort out their identity, their multi-identities, in the context of this fractured family? Should Denise, a white mother of black-multiracial children, have considered the need for racial identity as a factor in sorting out future contact with Robert?<sup>182</sup> Should I, her lawyer, have counseled her about the importance of racial identity? There are a number of ways we could have approached a discussion of race. Do the children have support — have you considered big brother-big sister programs, ties to other community groups?<sup>183</sup> We could have used many of the language planning tools we use to address other sensitive counseling issues. But we did not.

As I began writing this article, and as I worked on it over time, I wanted to talk to Denise more about race. I wanted to know if she lived in the same community, if her friends had changed. I wanted to know if the children had ties to the African American community that would help them navigate a world where race matters — all the time. I wanted to know if the children interacted with their father's family. But I did not know enough about the past to war-

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181. See Lee M. Robinson, *The View from the Minors*, 82 A.B.A. J., Sept. 1996, at 74, 75-76 (discussing the importance of listening to and including children's views, particularly of the lawyering/legal process, in domestic relations cases).

182. Eric and Lily have identities that do not fit into neat categories. Like women of color, they straddle boundaries and will be challenged by the complexity of their identities. Cf. Crenshaw, *supra* note 46, at 162 (noting that for white women, feminism was the development of a consciousness distinct from and in opposition to white men, but "the racial context in which Black women find themselves makes the creation of a political consciousness that is oppositional to Black men difficult").

183. Obviously, there must be a well-developed client relationship before a lawyer broaches the subject of intrafamily race relations. Cf. BASTRESS & HARBAUGH, *supra* note 90, at 264 ("Skillful use of advanced empathy requires not only insight but also caution.").

rant examination of the present. The "case" was over. Denise had her divorce; she had her restraining order; Robert could not visit the children, he had to stay away from them. Denise asked if she could see the article when it was finished. I said, "of course." We wished each other well and said good-bye.

### CONCLUSION

In 1994 Lily had a conversation with her mother. It was a courageous assertion of self-preservation. It forced acknowledgment of forced sexual contact, of rape by her father, of forced incest. That conversation precipitated the long, slow progression of events that culminated in a divorce and permanent restraining order. It immediately forced a confrontation with her father and, despite her mother's and her own ambivalence, his expulsion from the home. As lawyers, is it our role to wonder how Lily's understanding of these events is affected by her mother's understanding. How much do we have to learn about Lily's life? Do we need to understand how Lily's life is affected by her mother's legal decisions?

Denise's lawyers were well intentioned. No one knows that better than I. However, the complexity of Denise's case challenged our "usual" lawyering. We needed to engage in contextual lawyering. We needed to examine our judgmental response to Denise's attachment to Robert. We needed to allow her to make her choices in her time. We should have developed a relationship, through Denise, with Lily and Eric. And we should have engaged in a discourse about racial identity.<sup>184</sup> This discourse would be pursued only after development of the client relationship and only if considered contextually appropriate. Such counseling would have had to be carefully planned and cautiously implemented. We needed to abandon comfortable colorblindness and grapple with the reality of the lives of Denise, Lily, and Eric.

Had we engaged in race-sensitive representation, I believe that the outcome of this case would have been different. This is of course speculation based on my assessment of different choices Denise might have made. These choices were not discussed as possibilities because they had not been developed. Her lawyers needed to enrich the discussion of her life and creatively design options that were tailored to meet her desires and address her fears. For example, rather than a permanent restraining order against

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184. See Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 7 (1989) (urging the development and use of "multiple consciousness" in thinking about lawyering practice and theory).

Robert, we might have fashioned an order that allowed limited contact in a supportive, protective environment, at the option of Denise, Lily, or Eric.<sup>185</sup>

A flexible plan would have left open the option, within the control of Denise, Lily, or Eric, to engage with Robert. Such engagement might have been in a therapeutic, counseling setting. It might have been in combination with Robert's extended family. Or it might have been conducted with family friends who are close to Robert. My belief is that Denise wanted to talk with Robert about Lily and Eric's racial identities and the challenge of being Black in America. My worry is that Lily and Eric need to process their relationship with their father, and explore issues of racial identity, and that the blanket, permanent restraining order inhibits them from making contact. Indeed, it may inhibit Lily and Eric psychologically from even exploring if they would want to make contact and how that might be effectuated.

Had we discussed with Denise a permanent restraining order with limited contact, she might have said, "No, I do not want any contact." The final order in the case might have been the same. Nevertheless, the outcome of the case would have been different because the process of lawyering would have been different. We would have talked about race. A discussion of race would have led to other types of referrals regarding Lily and Eric. The lawyers would have understood the importance of meeting Lily and Eric. Lily and Eric would have been participants. This legal case, this divorce, constructed a family story as well as an individual story. That story was untold. The individual story and the family story are part of a larger cultural story. That story was silenced. Race-sensitive lawyering would have endeavored to nurture all the stories, with each overlay leading to renewed understanding and the hope of healing the raw horror that is rape, the tragic pain that is racism.

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185. Such an order might have read: "The Husband is permanently restrained from contacting the Wife or Children. However, if the Wife or Children desire contact with the Husband, they will contact the Husband and set out a specific plan of contact, including time, duration, place and supervision if requested. The Husband will be allowed contact within the limits of the specific plan."