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TELLING STORIES IN SCHOOL: USING CASE STUDIES AND STORIES TO TEACH LEGAL ETHICS

Carrie Menkel-Meadow¹

"We tell ourselves stories in order to live."
—Joan Didion, *The White Album* (1979)

"Their story, yours, mine—it's what we carry with us on this trip we take, and we owe it to each other to respect our stories and learn from them."
—William Carlos Williams in Robert Coles, *The Call of Stories: Teaching and the Moral Imagination* 30 (1989)

I.

Many years ago I suggested that law teachers, and especially clinical law teachers, could and should make better use of "real" cases ("real" as in on-going and in progress, instead of dried up and finished appellate cases reported in textbooks) to teach about lawyering, decision-making, the social impact of law and legal ethics.² Since I first made that suggestion twenty years ago, law teachers and lawyers have discovered the power of case stories and narratives to accomplish many things.³

1. Professor of Law, Georgetown University Law Center, Chair, Georgetown-CPR Commission on Ethics and Standards in ADR. Thanks to Meredith Weinberg for valuable research assistance.

2. Carrie Menkel-Meadow, *Two Contradictory Criticisms of Clinical Legal Education: Dilemmas and Directions in Lawyering Education*, 4 *Antioch L. J.* 287, 297 (1986) (suggesting the use of "case rounds" in law teaching as used in medical education).

3. For some descriptions of the law and literature movement generally, see Guyora Binder & Robert Weisberg, *Literary Criticisms of Law* (1999); Robert A. Ferguson, *Law and Letters in American Culture* (1984); *Law and Literature: Text and Theory* (Lenora Ledwon ed. 1996); Richard A. Posner, *Law and Literature* (rev. ed. 1998); Brook Thomas, *Cross-Examinations of Law and Literature*; Cooper, Hawthorne, Stowe, and Melville (1987); Richard H. Weisberg, *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (1984); Robin West, *Narrative, Authority, and Law* (1993); James Boyd White, *Acts of Hope: Creating Authority in*

Legal narratives put flesh on the bones of the eviscerated appellate case reports; they allow us entry into the subjective experiences of the actors (including lawyers, clients, parties, judges, clerks, victims, law enforcers and those affected by the law) and they demonstrate the “aftereffects” or consequences of legal decision-making and action. Because stories about the law (both fictional and real) allow us to visit the psychological and moral realms of legal actors both before and after they make decisions or take actions, stories and case studies have become an increasingly common way to teach about legal ethics.

Though the notion of stories, literature and narratives as tools for teaching readers about morality and ethics began long ago, outside the realm of law,⁴ legal ethicists, clinical teachers, legal scholars and lawyers have recently taken up their pens (should I say computer

Literature, Law, and Politics (1994); James Boyd White, *From Expectation to Experience: Essays on Law and Legal Education* (1999); Elizabeth Villiers Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, 23 Val. U. L. Rev. 267 (1989); and Elizabeth Villiers Gemmette, *Law and Literature, Joining the Class Action*, 29 Val. U. L. Rev. 665 (1995).

Critical race theorists, feminists theorists and other “outsiders” to the canon of mainstream doctrine and jurisprudence have used their stories and narratives to illustrate the harms and injustices that law inflicts by excluding some of us from its tales and remedies. *See generally* Symposium, *Legal Storytelling*, 87 Mich. L. Rev. 2073 (1989); *see* Robin West, *Law, Literature and Feminism*, in *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda and Bibliography* (Betty W. Taylor et al. eds., 1999); Patricia Williams, *The Alchemy of Race and Rights* (1991); Marie Ashe, *Zig-Zag Stitching and Stories of Law*, 13 Nova L. Rev. 355 (1989); Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA Women’s L.J. 287 (1992) (book review).

For some samples of fiction written or edited by lawyers that draw on legal narratives both to entertain and to teach, *see, e.g.*, *Legal Fictions: Short Stories About Lawyers and the Law* (Jay Wishingrad ed. 1992); Lawrence J. Fox, *Legal Tender: A Lawyer’s Guide to Handling Professional Dilemmas* (1995); Lawrence Joseph, *Lawyerland: What Lawyers Talk About When They Talk About Law* (1997). Of course, in my view the “master” of this genre still remains Louis Auchincloss, *see, e.g.*, *Powers of Attorney* (1963), *Diary of a Yuppie* (1986), *Atonement and Other Stories* (1997), with Arthur R. G. Solmssen, a lesser known, but equally interesting, chronicler of the twentieth century law firm, *see, e.g.*, *The Comfort Letter: A Novel* (1975). The massive outpouring of legal fiction and thrillers which I will not discuss here (*e.g.*, Scott Turow, John Grisham, Nancy Rosenberg, Lisa Scottoline and Linda Fairstein novels) demonstrate both lawyers’ needs to write about the dilemmas of their work and the continuing demand from lawyers and laypeople alike to read about them.

4. Most literary critics attribute the first use of narrative for moral or political purposes to Plato. *See, e.g.*, Martha C. Nussbaum, *Love’s Knowledge: Essays on Philosophy and Literature* (1990); Richard Posner, *The Edifying School of Legal Scholarship in Posner*, *supra* note 3; *see also* Wayne C. Booth, *The Company We Keep: An Ethics of Fiction* (1988); Robert Coles, *The Call of Stories: Teaching and the Moral Imagination* (1989) [hereinafter Coles, *The Call of Stories*]; John Gardner, *On Moral Fiction* (1978); Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (1995) [hereinafter Nussbaum, *Poetic Justice*]; Leo Tolstoy, *What is Art?* (Richard Pevear & Larissa Volokhonsky trans., 1995); Ian Watt, *The Art of the Novel* (1957).

fingers?) to compose, invent, create, report, recite, raconte and narrate morality tales. These range from the very real reporting of actual cases, fictionalized versions of real cases, simulated role plays, and made-up stories to the use of the texts of both high and low culture⁵ in order to explore the ethical dilemmas facing the modern lawyer.⁶ This Symposium provides some illustrations of these diverse

5. For some of the "classics" considered to be examples of "high culture" used for teaching about legal ethics or the morality of professionalism, see, e.g., Aeschylus, *The Eumenides*, in *Aeschylus, The Oresteia* (Robert Fagles trans., Penguin Books 1979); Robert Bolt, *A Man for All Seasons: A Play in Two Acts* (1961); Charles Dickens, *Bleak House* (1852); George Eliot, *Middlemarch* (Davis Carrol ed., Oxford U. Press 1997); Susan Glaspell: *Essays on Her Theater and Fiction* (Linda Ben-Zvi ed., 1995); Susan Glaspell, *A Jury of Her Peers* (1917) (play based on short story); Franz Kafka, *The Trial* (1925); Harper Lee, *To Kill a Mockingbird* (1960); Herman Melville, *Bartleby the Scrivener* (1853); Herman Melville, *Billy Budd* (1891); George Orwell, 1984 (1949); William Shakespeare, *The Merchant of Venice*; Sophocles, *Antigone*; that "classic" of modern popular culture, Robert Traver, *Anatomy of a Murder* (1958); and Anthony Trollope, *Barchester Towers* (1857). For a relatively obscure but interesting fictionalized "diary" of a nineteenth century American Lawyer, see Arthur Train, *Yankee Lawyer: The Autobiography of Ephraim Tutt* (Common Redaer e. 1999) (1943). More recent novelistic treatments of lawyers and legal ethics include Russell Banks, *The Sweet Hereafter* (1991); Alan Dershowitz, *The Advocate's Devil* (1994); William Gaddis, *A Frolic of His Own* (1994); and the entire corpus of John Grisham and Scott Turow. For an interesting collection of short stories exploring what "justice" and the use of lawyers means to those upon whom law is practiced, see *Outside the Law: Narratives on Justice* (Susan Richards Shreve & Porter Shreve eds., 1997).

For some interesting "comparative professional ethics" through literary treatments one can productively read George Eliot, *Felix Holt: The Radical* (1866) (politicians); Nathaniel Hawthorne, *The Scarlet Letter* (Nina Baym ed. Penguin Books 14 ed. 1986) (clergy); William Dean Howells, *A Modern Instance* (1882) (journalism); Kazuo Ishiguro, *The Remains of the Day* (1989) (butlers); Plato, *Gorgias* (Walter Hamilton trans., Penguin 1971) (rhetoreticians).

For treatments of legal ethics in more modern forms, films and TV, see e.g. Paul Bergman and Michael Asimov, *Reel Justice: The Courtroom Goes to the Movies* (1996); *Prime Time Law: Fictional Television as Legal Narrative* (Robert M. Jarvis & Paul R. Joseph eds., 1998). These I will not discuss here. See Carrie Menkel-Meadow, *Legal Ethics in Popular Culture*, *UCLA L. Rev.* (forthcoming, 2001).

This partial listing demonstrates how rich is our literary heritage in legal ethics stories in literary treatments (and these are just a few of those in English or easily available translation—I haven't even mentioned the Russian or French novels that could be listed here as well). As those who teach legal ethics reach further and wider for lessons about legal ethics and analogies to legal ethics from other professions, the canon of literary legal ethics stories is ever growing, as demonstrated by Robert Cochran's reading in this issue of Joseph Conrad's *Nostromo*, Robert Cochran, *Honor as a Deficient Aspiration for "The Honorable Profession": The Lawyer as Nostromo*, *Fordham L. Rev.*, this issue at 859.

6. This is my "genre" footnote, suggesting a few of the varieties of ways that both lawyers and non-lawyers have chosen to illustrate, through narratives, case studies, cases and stories, the work of the lawyer and the ethical issues raised by the practice of our craft. For some general lawyer accounts of the use of stories, both real and fictionalized, to illustrate legal practice ethical dilemmas, see, for example, Milner S. Ball, *The Word and the Law* (1993); *Law Stories* (Gary Bellow & Martha Minow, eds. 1996); *Law's Stories: Narrative and Rhetoric in the Law* (Peter Brooks & Paul Gewirtz, ed. 1996); Charles A. Reich, *The Sorcerer of Bolinas Reef* (1976); Thomas

L. Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics* (1985); Gerald M. Stern, *The Buffalo Creek Disaster: The Story of the Survivors' Unprecedented Lawsuit* (1976); Richard H. Weisberg, *Poethics and Other Strategies of Law and Literature* (1992); Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 *McGeorge L. Rev.* 1 (1999) [hereinafter Menkel-Meadow, *Sense and Sensibilities of Lawyers*].

For some examples of the new "bill and tell" genre (only slightly fictionalized versions or true journalistic accounts of life in the large modern law firm), see, e.g., Paul M. Barrett, *The Good Black: A True Story of Race in America* (1999); Lincoln R. Caplan, *Skadden: Power, Money and the Rise of a Legal Empire* (1993); William R. Keates, *Proceed with Caution: A Diary of the First Year at One of America's Largest, Most Prestigious Law Firms* (1997); Cameron Stracher, *Double Billing* (1998). For similar "diaries" of criminal lawyers, both prosecutors and defense lawyers, see David Heilbronner, *Rough Justice: Days and Nights of a Young DA* (1990); James S. Kunen, *How Can You Defend Those Guilty People?: The Making of a Criminal Lawyer* (1983); Stephen Phillips, *No Heroes, No Villains: The Story of a Murder Trial* (1977). For a harrowing memoir of a judge turned prisoner, see Sol Wachtler, *After the Madness: A Judge's Own Prison Memoir* (1997), perhaps the best argument for the effects of experiential learning.

The "ethical legal memoir" might be thought to date (in modern times) from those telling tales of legal socialization—the now canonical stories of competitive behavior in the first year of law school. See, e.g., Chris Goodrich, *Anarchy and Elegance: Confessions of a Journalist at Yale Law School* (1991); Richard D. Kahlenberg, *Broken Contract: A Memoir of Harvard Law School* (1992); John J. Osborne, *Paper Chase* (1971) (more fictionalized version); Scott Turow, *One L* (1977) (Doesn't anyone have any memories of any law school besides Harvard or Yale? Where are those would-be entertainment writers at NYU or UCLA?).

Lawyers' own narratives of their dilemmas in legal ethics and decision-making could productively be compared to more journalistic reporting of these issues situated in more contextualized and sociologically rich settings. See, e.g., Melissa Fay Greene, *Praying for Sheetrock: A Work of Nonfiction* (1991); Jonathan Harr, *A Civil Action* (1995); Janet Malcolm, *The Crime of Sheila McGough* (1999); David Margolick, *Undue Influence: The Epic Battle for the Johnson and Johnson Fortune* (1993).

Similarly, lawyer and journalistic accounts of the "single" illustrative or exceptional case could be compared to the perhaps duller but more accurate attempts of legal sociologists (some of whom are also lawyers) to study legal ethics empirically. See Jerome Carlin, *Lawyers' Ethics: A Survey of the New York City Bar* (1966); Jerome Carlin, *Lawyers On Their Own: A Study of Individual Practitioners in Chicago* (1962); Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (1991); Joel E. Handler, *The Lawyer and His Community: The Practicing Bar in a Middle-Sized Community* (1967); Douglas E. Rosenthal, *Lawyer and Client: Who's In Charge* (1974); Carroll Seron, *The Business of Practicing Law: The Work Lives of Solo and Small Firm Attorneys* (1996); Susan Shapiro, *Tangled Loyalties* (forthcoming).

Potentially most useful for an examination of how actual lawyers cope with and make ethical decisions are the numerous biographies and autobiographies of famous and infamous lawyers and judges. See, e.g., Clarence Darrow, *The Story of My Life* (Allan A. Dershowitz, Introduction, 1996); Gerald Gunther, *Learned Hand: The Man and the Judge* (1994); William H. Harbaugh, *Lawyers' Lawyer: The Life of John W. Davis* (1990); John C. Jeffries, *Justice Lewis F. Powell, Jr.* (1994); Laura Kalman, *Abe Fortas: A Biography* (1990); Andrew L. Kaufman, *Cardozo* (1998); Arthur Kinoy, *Rights on Trial: Odyssey of a People's Lawyer* (1994); William M. Kunstler, *My Life as a Radical Lawyer* (1996); Arthur L. Liman, *Lawyer: A Life of Counsel and Controversy* (1999); John Thomas Noonan, *Persons and Masks of the Law* (1976); Phillipa Strum, *Brandeis: Beyond Progressivism* (1993); Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall 1936-1961* (1998); Mark V. Tushnet, *Making*

ways in which we tell each other stories not only in order to live, but in order to learn how to live good (not well!).

In this Foreword I will explore why we use stories and case studies (and whether stories and case studies are equal to the task) to examine ethical and moral issues in the practice of law and provide an introduction to the interesting tales which will unfold in this Symposium issue. I conclude with some thoughts about how stories and cases should be used to teach legal ethics.

There is a feisty debate among literary critics, philosophers and now legal scholars⁷ about whether literature (including novels, poetry and now films and other cultural forms) have any responsibility beyond the aesthetic—simply to be good on their own terms—or whether narratives and other cultural forms can be or should be judged in terms of their moral or didactic messages. For legal scholars and journalists, this debate expands to the value of “real” as well as fictional cases and stories in teaching us how to be better or more moral human beings, as professionals and as “civilians” in the moral lives we lead. Whether we can tell each other stories not only in order to live but to exemplify “how” to live morally continues to spark debates about the use of stories, literature and cases, in law, as elsewhere.⁸ Richard Posner, for example, suggests that we are less likely to be “changed” by literature than to find confirmation of our true selves in what we choose to read.⁹

In a tradition which borrows from moral philosophers,¹⁰ literary critics and other professionals who use stories to teach about ethics,¹¹ legal educators have made the argument that stories (and real cases) enable us to develop empathy¹² or sympathetic understanding for

Constitutional Law: Thurgood Marshall and the Supreme Court 1961-1991 (1997); Attorney of the Damned: Clarence Darrow in the Courtroom (Arthur Weinberg, ed. 1989); G. Edward White, Justice Oliver Wendell Holmes: Law and the Inner Self (1993).

7. Jane B. Baron, *Law, Literature and the Problems of Interdisciplinarity*, 108 Yale L. J. 1059 (1999).

8. See, e.g., the debates between Richard Posner, *supra* note 3, Martha Nussbaum, *supra* note 4, and Robin West, *supra* note 3.

9. Posner, *supra* note 3, at 328. Baron, *supra* note 7, suggests that we “misuse” literature when we impose legal or ethical “readings” on a text, which, created for literary purposes, is not meant to be deterministically read by lawyers and legal scholars with insensitivity to the canons of proper literary criticism.

10. Nussbaum, *supra* note 4.

11. Robert Coles, *The Call of Stories*, *supra* note 4; see also Robert Coles, *Lives of Moral Leadership* (2000).

12. The term empathy in English is derived from the German “*einführung*,” literally translated as “feeling into.” See Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 Ga. St. L. Rev. 385, 389 (1992); see also Lynn N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574 (1987); Toni Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099 (1989); Robin West, *Law and Fancy*, 95 Mich. L. Rev. 1851 (1997) (book review) (discussing Martha C. Nussbaum, *Poetic Justice*, *supra* note 4).

“others” outside of our own experience. In the words of Robin West, “[l]iterature helps us understand others. Literature helps us sympathize with their pain, it helps us share their sorrow and it helps us celebrate their joy. It makes us more moral. It makes us better people.”¹³ Like Martha Nussbaum, who argues that telling stories can enhance the appreciation of others, build a sense of joint community and add (not substitute) emotional¹⁴ realities to those of rule and rationally-based judgments,¹⁵ many legal educators now suggest that the telling of stories is a way to deepen legal and ethical reasoning, by seeing those caught up in a legal case in a broader, more embedded situation. Nussbaum (and others) argue that moral dilemmas are “more vividly rendered in the works of imaginative literature than in books about ethics, which tend to be pious, predictable, humorless and dull.”¹⁶

The use of cases and stories are intended to give us a closer, more intimate, as well as broader *experience* (even if only vicariously) of situations—others’, so that we might function better in our own. By bringing vividness and inducing “feelings,” stories and cases are meant to make us feel more directly implicated in what we read and understand. “Feeling with” a character in a story or case allows us both to empathize or sympathize, as well as to criticize and consider what we might do differently in the same situation. Thus, the use of cases and stories is vicarious clinical experiential learning—thinking rationally and emotionally from someone else’s experience, to make judgments about what is wise or proper to do in a given situation.

Both literary and real cases offer opportunities to view ethical decision-making and choices by using the literary devices of representation, characterization and dramatization and by the author’s or characters’ discussions of the ethical or moral decisions available. Sometimes we are invited to provide our own judgments and choices by an author (literary or law teacher) of cases or stories, who gives the story and no more. Other times, we experience a more didactic treatment by the characters’ discussion about what to do. Additionally, the author may intrude now and then with a “Dear Reader,”¹⁷ philosophical disquisition or moral sermon, whether literal or ironic.¹⁸

13. West, *supra* note 3, at 263.

14. See Jon Elster, *Alchemies of the Mind: Rationality and the Emotions* (1999) (exploring the relation of a variety of emotions on thinking and decision-making processes for both groups and individuals).

15. Nussbaum, *supra* note 4, at xvi-xix.

16. Posner, *supra* note 3, at 317 (paraphrasing Nussbaum, *supra* note 4).

17. A device used disarmingly by Jane Austen.

18. See, e.g., Fyodor Dostoyevsky, *The Brothers Karamozov* (1881); Fyodor Dostoyevsky, *Crime and Punishment*; see also, Dershowitz, *supra* note 5; Scott Turow, *Presumed Innocent* (1987), *Laws of Our Fathers* (1996).

As many of us have suggested,¹⁹ the use of narrative expands the sight-lines of reality and imagination for legal and moral reasoning. Cases and stories allow us to see backward (historically, how this situation came to be), side-ways (how others in the situation perceive it) and forward (the consequences and effects of what happened). Thus, cases and stories give us more information and more choices to consider than does the primary text of legal education—the “completed” appellate case. With a range of vision that is panoramic rather than snap-shotted, readers of (and participants in) stories and cases increase the possible readings and choices they make. We consider not only what has happened already but what might happen and how that future can be the product of our own choices, as well as external forces beyond our control. Reasoning about and making choices is what ethical lawyering is all about. So, a study of choice points more fully elaborated from multiple points of view and varied points in time necessarily must enhance the development of moral reasoning skills.

Perhaps the strongest argument for the use of stories (by “literary lawyers²⁰”) and real cases (by legal clinicians) is the value placed on contextual knowledge and decision-making. How is this particular situation constructed? How did it get this way? Who is involved? What can we do to make the situation better? When lawyers and students resist mechanistic rule application it is because they think the situation at hand may be different and that there is something about it that makes it unique. It is the way in which cases are different, not alike, that makes intensive case study and storytelling so significant for those seeking to make good moral and ethical choices. Consider legal ethical statements and choices like the following:

This criminal defendant was justified in what he did because. . . .

This plaintiff was hurt badly in a manner in which the law should be called to answer.²¹

We have to take this case, despite the seeming conflict of interest because we know all the parties so well, we can really be a “lawyer for the situation.”²²

19. My own arguments for the power of stories to teach empathically about law, justice and ethics can be found in Menkel-Meadow, *supra* note 3.

20. Robin L. West, *The Literary Lawyer*, 27 *McGeorge L. Rev.* 1187 (1996). James Boyd White has eloquently argued, as one of the primary founders of the law and literature movement, that all lawyers need to read literature (not just stories about law and lawyers) because the study of law is a humanity, not a social science, and thus broadens the lawyer’s understanding of human life, as well as legal rule making. *See, e.g.*, James Boyd White, *The Legal Imagination* (1985).

21. Robin L. West, *Caring for Justice* (1997) (describing the human hurts and harms as yet unrecognized by law and legal remedies).

22. *See* Geoffrey C. Hazard, *Ethics in the Practice of Law* (ch. 4) (1978) (describing the use of the phrase “lawyer for the situation” in Louis Brandeis’ law practice).

We must reveal this client's confidential information because if we don't, *x* will happen.

Knowing more than "just the facts, ma'am" is what makes legal issues and cases both interesting and morally challenging. Contextual information about a case or story tells us about people's motivations, their relationships with others, and among other things, the place of their legal "event" in the rest of their lives. "Thick descriptions,"²³ as such, give us more factors to take into account, more facts, more information, more emotional and sociological, as well as rule-based, inputs to consider when we decide what legal action to take. Context complexifies, but it also makes legal decision-making more human and realistic. Context allows us to "liberate" ourselves from the legal rules by fighting them off with grounds for exceptions, departures and even defiance.²⁴ Stories provide the moral justification for both rule compliance and rule challenge. Stories provide the textual elaboration of the exercise of discretion²⁵ and "legal sensitivity." Contextual reasoning, through the revived attention to casuistry²⁶ as a form of moral logic, teaches us to be more ethical and moral by forging the general and the particular in our thinking and in our actions.²⁷

There are those who fear or question the use of stories or case studies in legal process. There is the inevitable tension between stories and rules, narratives and principles (raised eloquently in this

23. Clifford Geertz, *The Interpretation of Cultures* (1973); Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (1983) (see especially Ch. 8, *Local Knowledge: Fact and Law in Comparative Perspective*).

24. Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 *Stan. L. Rev.* 1 (1988) (describing how organized resistance to legal rules can change the experience and content of the rules).

25. Many legal ethicists have urged the development of discretionary approaches to professional responsibility and legal ethical decision-making, see, e.g., William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (1998); William H. Simon, *Ethical Discretion in Lawyering*, 101 *Harv. L. Rev.* 1083 (1988); David B. Wilkins, *Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics in Everyday Practice and Troubling Cases* (Austin Sarat, ed. 1998); David B. Wilkins, *Who Should Regulate Lawyers?* 105 *Harv. L. Rev.* 799 (1992); David B. Wilkins, *Legal Realism for Lawyers*, 104 *Harv. L. Rev.* 468 (1990), while others urge a rule-based approach to legal ethical issues, see, e.g., Geoffrey Hazard and William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (2d. ed. 1990). For an eloquent elaboration of how actual decision-making oscillates painfully between rule and discretion, see Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" if You're Trying to Put that Lawyer's Client in Jail?*, *Fordham L. Rev.*, this issue at 997.

26. See, e.g., Paul R. Tremblay, *The New Casuistry*, 12 *Geo. J. Legal Ethics* 489 (1999); Paul R. Tremblay, *The Role of Casuistry in Legal Ethics: A Tentative Inquiry*, 1 *Clinical L. Rev.* 493 (1994).

27. As difficult as that may be, see William Carlos Williams, doctor and writer on medical ethics: "There's a big difference between our high talk, though, and how we behave ourselves when we're out there on our own. . ." Coles, *The Call of Stories*, *supra* note 4, at 108.

issue by Vanessa Merton).²⁸ When does a specific situation trump a well worn and fundamental principle or rule of law? What is the purpose of rules and principles if they can always be argued against by the power of particularities? How can we insure justice, which is based on treating like cases alike, if we treat every case or story as *sui generis*? The tensions between uniformity and generality on the one hand, and particularity and context, on the other, are inevitable in any exploration of individual cases and stories in a legal (and professional responsibility) world comprised of rules and commands.²⁹

Others are concerned about whose stories or cases are told and with whose voices. The entry of critical race and feminist narratives³⁰ into the legal canon was an explicit intervention in the control of legal discourse. Those claiming to be “outside” conventional legal discourse have dramatically and effectively changed the terms of legal discourse by telling their own stories, often from the perspective of the “acted upon,”³¹ as well as the actors within the legal system.

Many of the articles in this Symposium raise these issues both implicitly and explicitly—who tells the stories of legal ethical dilemmas—the deciding lawyers or teachers? The acted-upon clients? The empowered or disempowered student?³² While most of the stories discussed in these pages are told by lawyers, legal scholars and legal clinicians (many individual authors fit in all three categories) we might ask what the elaborated stories of legal decision-making would

28. Merton, *supra* note 25.

29. See discussion in Bellow and Minow, *supra* note 6, Introduction, of the three complex themes at issue in stories about law practice and legal decision-making: the role of context and particularity making understanding of institutions and situated action knowable only to those familiar with the context, the indeterminacy and incompleteness of most rules and other “constraints” on action which both opens up and paralyzes would-be legal actors, and the construction, alteration and negotiation of personal and professional identities as clients, legal workers and others interact with each other, dynamically, to work on or “solve” legal problems. Bellow and Minow, *supra* note 6, at 3.

30. Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991); *Beyond Portia: Women, Law, and Literature in the United States* (Jacqueline St. Joan & Annette Bennington McElhiney, eds. 1997).

31. See Stephen L. Carter, *Reflections of an Affirmative Action Baby* (1991); Mari Matsuda, *Where Is Your Body?: and Other Essays on Race, Gender, and the Law* (1996); Patricia Williams, *On Being the Object of Property*, in *Alchemy of Race and Rights*, *supra* note 3; Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485 (1994); Lucie White, *Subordination. Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 Buff. L. Rev. 1 (1990).

32. Several of the authors, including distinguished legal clinicians Mark Spiegel and Vanessa Merton assume full responsibility in their pieces for decisions made with participating students in legal clinical settings in which students are primarily responsible for their choices and actions.

look like if written by clients, students and family members of those involved in legal work.³³

Finally, there is the on-going debate about the validation of stories,³⁴ with the question of who decides whether a story is true/accurate/representative? Is the story valid on its own terms for teaching or some other reason? Must stories be empirically validated or verified? Are individual stories as valid as aggregated ones? What is the difference between a “narrative” story and empirical stories (anecdotes, made-up stories, “advocacy” (as in “a case made for . . .”) and data)? Susan Shapiro, in this Symposium,³⁵ represents the skilled sociologist who can do both—tell compelling individual and “representative” tales, as well as report on the aggregated stories of the systematically studied.³⁶

Who decides which stories we teach from? The debate between the aesthetic and didactic critics of literature suggests that there are as many immoral or amoral stories out there as edifying, purifying and inspiring ones, and so, how do we decide which story or case is most “useful” for teaching about ethics or morality? Does the ethical dilemma illuminated in a story make the reader a better decision-maker if a good decision is made and ethical rectitude is modeled or

33. How does an ethical choice by a lawyer affect that lawyer's family, from the decision to be so competent a lawyer that one overworks the law and never comes home. *see* Posner, *supra* note 3, at 315, or the “unethical behaviors” of lawyers who are then imprisoned and away from their families, *see* Lisa Lerman, *Blue Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 *Geo. J. Legal Ethics* 205 (1999)?

34. *See, e.g.*, Richard A. Posner, *Lies Like Truth? Narrative Legal Scholarship* in Posner, *supra* note 3; Daniel Farber & Susanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (1997); Daniel Farber & Susanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *Stan. L. Rev.* 807 (1993); Mark V. Tushnet, *The Degradation of Constitutional Discourse*, 81 *Geo. L. J.* 251 (1992).

35. Susan P. Shapiro, *Everests of the Mundane: Conflict of Interest in Real-World Legal Practice*, *Fordham L. Rev.*, this issue at 1139.

36. For other empirical accounts of law practice, *see, e.g.*, John Hagan & Fiona Kay, *Gender in Practice: A Study of Lawyers' Lives* (1995); Terence Halliday, *Beyond Monopoly: Lawyers, State Crises and Professional Empowerment* (1987); Joel Handler & Ellen Jane Hollingsworth, *Lawyers and the Pursuit of Legal Rights* (1978); Rand Jack & Dana Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989); Jack Katz, *Poor People's Lawyers in Transition* (1984); Donald Landon, *Country Lawyers: The Impact of Context on Professional Practice* (1990); Robert Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (1988); Michael Powell, *From Patrician to Professional Elite: The Transformation of the New York City Bar Association* (1988); Austin Sarat & William Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (1995); Seron, *supra* note 6; Eve Spangler, *Lawyers for Hire: Salaried Professionals at Work* (1986); Robert Stover, *Making It and Breaking It: The Fate of Public Interest Commitment During Law School* (1989). For a strange genre mixture of empirical study and fictionalized narrative, *see* Michael J. Kelly, *Lives of Lawyers: Journeys in the Organizations of Practice* (1994).

does the reader learn better from a bad moral decision in which the consequences of pain and grief are vividly amplified?³⁷

II.

The use of stories, cases and narratives to teach legal ethics proceeds from several assumptions: that we can accept the “truth” of the story as told by the storyteller or narrator (author, teacher, student, lawyer, client); that we can gather enough information from the storyteller to understand the context from which we must decide or evaluate a decision made; that we understand enough about the content of and share enough agreement about the “standards” which we apply to evaluate these stories (from an ethical perspective); that one story or case will teach us something not only about that case or story, but something more useful or generalizable for future cases; and finally, that we learn something more or different from using stories or examples to understand ethical issues than the study of abstract rules and standards or simple readings of ethics opinions and decided cases. These assumptions inform the stories and cases told and described in this Symposium, and while each assumption and each story or case told may be questioned by any reader,³⁸ together they provide a rich set of illustrative examples of what we can learn about legal ethics from stories and cases. After briefly summarizing what is significant about each essay in this Symposium, I will suggest some general issues, concerns and future agendas to consider in the use of stories or cases to teach legal ethics.

As you read each report, narrative or description of a case or story in this issue, implicating some issue of legal ethics, consider whether the story or case does the following:

1. Confirm what you already thought was the “right” rule/action in the described situation.
2. Alter your view of what the “right” resolution of a particular ethical dilemma might be. (Changing it completely, complexifying what you think the legal issues or relevant factors might be, suggesting alternatives you didn’t even think about).
3. Suggest an inadequacy (ambiguity, lack of clarity, contradictory conflict) in the current rules or principles you thought applied to the situation.
4. Illuminate some difficulty with, or new approach to, some similar situation with which you are confronted.

37. This question is not only for legal ethics. Thirty years of debates in clinical legal education and probably thousands of years of debates in moral education generally have posed the question of whether good or bad models are better for teaching. Do we learn better from mistakes or from positive models of behavior?

38. For an excellent review of the philosophical literature criticizing the use of “examples” for moral reasoning, see Heidi Feldman, *Beyond the Model Rules: The Place of Examples in Legal Ethics*, 12 *Geo. J. Legal Ethics* 409, 417-19 (1999).

5. Suggest some additional information that you might want to have to evaluate the situation or consider an action taken.

6. Cause you to question/reframe/reinterpret some general ethical principle, standard, rule or practice which claims to govern legal ethical behavior.

These questions (and others like them you might prefer) allow us to interrogate the stories and cases we read or hear about for what we learn from them—what insights, knowledge, epiphanies, awareness do we gain from a particular story that helps us to understand more generally the moral boundaries of ethical law practice and justice. Do these stories help us to “think” “feel” and “act” more ethically with respect to clients, students, other lawyers, judges and other actors in the legal system?

I introduce the essays in this Symposium in five categories of storytelling or case studies. I begin with the stories and cases which, for me, are the most powerful explicators and illustrators of the tensions between ethical principles and ethical actions—the real, ongoing case, in which ethical decisions must be made *in the moment* by lawyers, student-lawyers and their supervisors. These stories are told here primarily by legal ethicists who are also legal clinicians—Vanessa Merton, Stephen Ellmann and Mark Spiegel.

A second group of authors bridges the narrative span between reality and fiction, offering up examples, illustrations and concerns about the “fictionalization” of real cases to illuminate ethical dilemmas and perhaps widening the scope of what might be available from the overly contextualized “real” case. I include in this group the articles by Bruce Green, Lawrence Fox and David Orentlicher (the latter involving a discussion of a real, but already decided, case and therefore, “completed” story).

In the third category are legal ethicists who explicitly use fiction (in one case, legal fiction, Richard Painter on *The Comfort Letter* and in the other, Robert Cochran’s treatment of Joseph Conrad’s *Nostromo* as analogical ethical teachings) to explore the dimensions of lawyers’ choices, both at the micro-level of a particular choice in legal practice and to explore the more macro-ethical concerns of how to “live a good life”³⁹ as a lawyer and as a human being.

In the fourth category, legal educators Eleanor Myers and Edward Ohlbaum explore how the “enactment” of ethical dilemmas in fictionalized but experiential exercises allows students to “act” within cases and stories to recognize and make ethical choices, thus uniting ethical deliberation and action in the “practice” of cases and stories.

Finally, both Susan Shapiro and Elizabeth Chambliss, trained as sociologists, ask us to look at the macro stories of legal ethics, both temporal and organizational determinants of legal ethics practices.

39. See Nussbaum, Poetic Justice, *supra* note 4.

Taken together, the many levels on which stories about legal ethics can be told offer us a wide lens through which to look at legal ethics practices and, as I will conclude, provide us with exciting opportunities to use our own imaginations to broaden and expand the scope of how we teach legal ethics, ranging from the real cases of clinics,⁴⁰ the in-depth and contextually based study of real cases,⁴¹ fictionalized versions of real cases, to fictional stories of legal ethics, whether from literature or popular culture,⁴² constructed case-studies, role-plays⁴³ and films,⁴⁴ as well as data-based studies of lawyers.⁴⁵

Beginning with the strength and power of “real” cases in process, several of the authors here (principally as legal clinicians, practicing and supervising students on on-going cases) are able to describe, analyze and illuminate the ethical deliberative process. Vanessa Merton,⁴⁶ Stephen Ellmann⁴⁷ and Mark Spiegel⁴⁸ explore ethical dilemmas provided in their own (and students’) representation of clients *in the moment* where ethical choices have to be made and actions must be chosen.

Vanessa Merton’s story of the dilemma she faced as a legal ethicist and prosecutor who thought she had a clear ethical duty to report or otherwise deal with the incompetence of opposing counsel and yet couldn’t, presents one of the most compelling stories in modern legal ethics. If, as Professor Merton poses the question, an ethics teacher and scholar cannot “follow the rules,” what is the purpose of the rules of professional responsibility? As she so eloquently puts it “hard cases make bad lawyers” when in the crucible of deciding what to do in the middle of a case, Professor Merton could not report or take action against an incompetent defense lawyer who served up his client’s confession to domestic violence in a case in which her prosecuting students initially had some doubts about the quality of their case.⁴⁹ Professor Merton eloquently describes both her skillful

40. See, e.g., James Moliterno, *Professional Preparedness: A Comparative Study of Law Graduates’ Perceived Readiness for Professional Ethics Issues*, 58 *Law & Contemp. Problems* 259 (1995).

41. See, e.g., Lisa Lerman, *supra* note 33.

42. Steven H. Goldberg, *Bringing The Practice to the Classroom: An Approach to the Professionalism Problem*, 50 *J. Legal Educ.* (June 2000).

43. See Murray Schwartz & Carrie Menkel-Meadow, *Lawyers and the Legal Profession* (Supp. 1991).

44. Videotape: Stephen Gillers, *Adventures and Further Adventures in Legal Ethics* (NYU Productions 1992- 1994).

45. See, e.g., Susan Shapiro, *Tangled Loyalties* (forthcoming).

46. Merton, *supra* note 25.

47. *Truth and Consequences*, *Fordham L. Rev.*, this issue at 895. This “article” is actually a book chapter from a larger work, *Legal Interviewing and Counseling* by Stephen Ellmann, Robert Dinerstein, Isabelle Gunning and Ann Shalleck (to be published by West Publishing Co. in 2002).

48. *The Story of Mr. G.: Reflections upon the Questionably Competent Client*, *Fordham L. Rev.*, this issue at 1179.

49. Merton, *supra* note 25, at 1011. Professor Merton’s dilemma is all the more

exegesis of the applicable rules,⁵⁰ her committed deliberation in the exercise of “ethical discretion,”⁵¹ and the personal and political angst with which she eventually decides not to follow her intellectual and political principles to see that a poorly represented defendant gets adequate counsel. I don’t want to spoil the rest of the story—it is the telling of the troubling details and the quality of the writing that makes Professor Merton’s article as “can’t put it down” good as the last good mysteries I have read,⁵² but it is the compelling quality of the tale and its telling that is likely to make real, to lawyers and students who read it, the nature of real-world ethical decision making. Most importantly for the readers of this Symposium, Professor Merton does more than brilliantly describe her own reasoning and decision-making. She explores the difficulty of casuistry, lately in vogue in legal ethical circles, to question whether overly contextualized and particularized decision-making is particularly likely to get us to defend the particular choices we make in their “thick” contexts and thus, to escape from the commands of important, and more abstract, general rules.⁵³ Professor Merton thus interestingly and surprisingly can be read to be making an argument for an “explicit, codified directive”⁵⁴ that would have made her duty clearer than the “wiggle room” for situational and adversarial ethics that a “textured, nuanced and casuistic” approach to ethical decision-making allowed her. In the context of exploring her own (and her students’) dilemmas in confronting what obligation, if any, they had to an incompetently represented opposing client (who was causing real and serious harm to their own client), Professor Merton illustrates the many layers of pins on which ethical angels may dance. Failing a clear edict or directive from the rules, prosecutors must consider whether they have special duties to do justice (Rule 3.8) and, failing clear guidance within that specialized role, must further

painful and difficult because, in addition to her roles as legal ethics teacher and supervising clinician, she has a life-time commitment “to the other side” as a former defense counsel, and because she has been a professional ethicist in the leading ethics think-tank in the country, The Hastings Institute, and she has also been a bar disciplinary prosecutor.

50. Such rules as Rules 1.1. (Competence), 1.3 (Diligence), 1.4 (Communication), 3.4 (Fairness to Opposing Party and Counsel); 3.8 (Special Responsibilities of Prosecutor), 4.2 (Communication with Persons Represented by Counsel), 8.3 (Reporting Professional Misconduct) and 8.4 (Misconduct) of the Model Rules of Professional Conduct.

51. See Simon, *Ethical Discretion in Lawyering*, *supra* note 25.

52. Sarah Caudwell’s legal mysteries, if you must know. See *Thus Was Adonis Murdered* (1981); *The Shortest Way to Hades* (1984); *The Sirens Sang of Murder* (1989) and *The Sibyl in Her Grave* (2000). Sarah Caudwell, like Vanessa Merton, was (she died recently) a practicing barrister and solicitor while she wrote.

53. This concern about the use of specific examples, cases and stories to escape from more important general principles is precisely what causes some moral philosophers to criticize the use of stories. See, e.g., Onora O’Neill, *The Power of Example* (1986) *discussed in* Feldman, *supra* note 38, at 417-21.

54. Merton *supra* note 25, at 1004.

confront the question of what behavior is justified by the larger adversary system in which the choices to act are located.⁵⁵ Thus, Professor Merton's elaboration of her own ethical dilemma travels up and down the levels of experience (her students' clinical and novice experience, mediated by her own supervisory issues and the weight of clinical practice and scholarship),⁵⁶ rule deconstruction and interpretation, systemic loyalties and justifications (duty to client and prosecutorial role, as well as larger "justice" concerns) and finally, to the important moral philosophical questions of substance and method of whether clear rules and standards might better produce ethical "compliance" than the nuanced case-by-case deliberation so many of us are arguing for. In the best of literary and narrative traditions, the Merton story is like a good O'Henry story with a surprising twist at the end—after all the well-told "thick description" and suspenseful narration of the specifics of a single case, we may just hunger for that "large brooding omnipresent general rule in the sky." At least for newer lawyers, Professor Merton tells us, case-by-case deliberative ethical reasoning may only work well with seasoned experienced lawyers who fully understand *from experience* the context from which they are reasoning and acting. Case-by-case deliberation and arguing from particularities may not provide adequate ethical guidance when one does not have enough particularities from which to reason casuistically.

Like Professor Merton, Professor Mark Spiegel is troubled when he and his students also seem to make choices about advising and making decisions on behalf of a possibly "incompetent" client⁵⁷ that might go beyond the rules. In representing a "possibly" incompetent client with a public housing problem, Professor Spiegel and his students also confront the interstices of the directives of the rules. First, they have no clear guidance on how to determine if their client is, in fact, "incompetent" under the meaning of Model Rule 1.14. What if their client is sometimes, but not always, incompetent (depending on whether he takes his medication, is emotionally distraught, is manipulating his lawyers, is temporarily angry, is "irrational" with respect to some issues but not others)? To the extent that the text of the rule allowed the lawyers to use their own discretion about making decisions or seeking a guardian, how were they to exercise that discretion and make those judgments? The rule itself, argues Professor Spiegel, provided little guidance on these important issues

55. See, e.g., Monroe Freedman, *Lawyers' Ethics in an Adversary System* (1975); David Luban, *The Adversary System Excuse in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (David Luban, ed. 1983).

56. See, e.g., Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. Rev. L. & Soc. Change 109 (1993-94); James Stark et. al., *Directiveness in Clinical Supervision*, 3 B.U. Pub. Int. L. J. 35 (1993).

57. See Model Rules Prof'l Conduct, Rule 1.14.

(along with the many law review articles which have spilled ink on this topic).⁵⁸ Professor Spiegel suggests that, as with many other concepts in the Model Rules, “incompetence” (of a client) may be a matter of degree, not subject to the kinds of codified edicts that Professor Merton might prefer (at least in some contexts). Professor Spiegel’s client was clearly capable of making some decisions—he just seemed unable (or unwilling?) to recognize the gravity of his housing problem (that he might lose the apartment he wanted to remain in if he didn’t accept alternative housing offered to him). Does this make the client in this case any different from many clearly competent clients who simply don’t want to apprehend their “reality” if that requires them to make painful choices or do unpleasant things? Like Professor Merton, Professor Spiegel is about to be hoisted on his own petard—as a scholar of informed consent in legal decision-making,⁵⁹ Professor Spiegel has argued for allowing clients to make their own decisions, after being well informed by their lawyers. When his client seemed not to be adequately “processing” the legal information provided to him in textbook-directed counseling sessions, Professor Spiegel and his students want to talk about the requirements and limits of “legitimate persuasion” to convince the client to do what they think is in his best interests.⁶⁰ Unlike Professor Merton, they conclude that general rules may not help them and when, as in the case of the “questionably” competent client, the legal issue is one of degree, stories, variations and context may be necessary to determine what should be done.

Professor Spiegel’s story illustrates the difficulty of applying rules to gradualist, intermediate and continuum-based concepts where abstract rules will not work. Like Professor Merton, however, Professor Spiegel tells his story not just to ruminate about “lawyers like Mark Spiegel,” but to question what the relationship between stories and rule-making in legal ethics ought to be. Can rules take account of intermediate, uncertain or indeterminate “facts” when suggesting what ethical precepts might apply? Does the cumulation of stories of difficulty of rule application suggest that rules need to be revised? How is lawyer ethical discretion to be exercised?⁶¹

Like his clinical colleagues, Professor Stephen Ellmann also uses the story of a real case (an immigration asylum case) to challenge conventional wisdom, not only about the ethical rules of lawyer-client privilege and confidentiality, but the now canon-like “rules” about

58. See Spiegel, *supra* note, at 1191.

59. See, e.g., Mark Spiegel, *Lawyering and Client Decision Making: Informed Consent and the Legal Profession*, 128 U. Pa. L. Rev. 41 (1979).

60. Spiegel, *supra* note 48, at 1196.

61. See also William Simon, *Lawyer Advice and Client Autonomy: Mrs Jones’s Case*, 50 Md. L. Rev. 213 (1991); Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 BYU L. Rev. 307.

appropriate lawyer etiquette in lawyer-client interviewing. Like Professors Spiegel and Merton, Professor Ellmann can illustrate with an almost perfect “playback” of a lawyer-client transcript (reported in alternative formulations to demonstrate the choice points that a lawyer taking action has) exactly what transpires between lawyers and clients (in ways we almost never have access to in the reports of decided cases or other sources for legal ethics teachings). Professor Ellmann seeks to demonstrate the “consequences” for both lawyer and client of adhering to rigid, canonical and sometimes wrongheaded notions of what it means to promise a client confidentiality, while at the same time assiduously pursuing “all the facts” as suggested by today’s leading legal interviewing and counseling texts.⁶² By analyzing and rigorously deconstructing actual transcripts of real and hypothesized dialogues between lawyers and clients, Professor Ellmann explores and challenges some of the leading ethical questions facing lawyers in everyday practice: Is getting the truth always the right objective in interviewing? Having elicited the truth, what obligations or discretion do lawyers have to disclose it over a client’s objection? What advice should clients be given about the scope of confidentiality in light of the complexities and uncertainty about a lawyer’s duty to disclose some information (what I and others call the “client interview Miranda” problem)? What advice can lawyers give clients about the law governing their situations without compromising the lawyer’s obligations to the truth (otherwise known as the “Anatomy of a Murder”⁶³ problem)? How can lawyers develop trust and respect from their clients while trying to ferret out potentially damaging facts, some of which might have to be disclosed in some limited circumstances? How far should lawyers go in pressing their clients for the truth? All of these questions, and many others, which are addressed in Professor Ellmann’s article, are explored through the use of transcripts of lawyer-client interviews to demonstrate vividly the “consequences” of the truthful answers sought. Unlike more abstract discussions of lawyer-client privilege or confidentiality, these illustrative interactions prevent “what if’s” or hypothesized escapes from the “consequences” of learning, for example, that an asylum applicant has been engaged in unlawful activities that are likely to disqualify him from achieving asylum status.⁶⁴ Should the lawyer have stopped several questions earlier to prevent knowledge of this “bad” fact from coming to light? The implications of choices made cannot be avoided in the decision-tree like iterations of dialogues

62. See, e.g., David Binder, Paul Bergman and Susan Price, *Lawyers as Counselors: a Client Centered Approach* (1991).

63. See Robert Traver, *Anatomy of A Murder* (1958) in which a client is “coached” on the elements of the defense of “insanity” before reporting on the facts of his “state of mind” at the time of the murder.

64. Ellmann, *supra* note 47.

demonstrated. The elaboration of such “real” or fictionalized lawyer-client interactions provides the actuality from which students and lawyers can actually “see” the consequences of particular word choices—there is no escape from the real story.

Supplementing his own stories with those told in such realistic works of fiction as *Anatomy of a Murder* and *Presumed Innocent*, Professor Ellmann demonstrates that word choices and questions asked and answered in lawyer-client interviews can have real consequences for the client’s case and life. By exploring these stories and “opening them out” as modern films of theater pieces open up the action of the stage to the “off-stage” antecedents and consequential actions of the players, Professor Ellmann can question the accepted wisdom of such old saws as “I need to know all of the facts,” in light of such legal rules as *Nix v. Whiteside*⁶⁵ and Rule 3.3, which may require lawyers who “know” the facts to disclose them, with adverse consequences for their clients.

Professor Ellmann is able to explore the important issues, considered every day by criminal and civil lawyers alike, of how much lawyers should know and when they should know it, given conflicting loyalties to clients, the legal system and the public, divisions of responsibilities that remain unclear even in the aftermath of the approval of the Restatement of the Law Governing Lawyers.⁶⁶ As a legal clinician, experienced in the stories of cases, both real and reported, Professor Ellmann can frame solutions, suggest appropriate questions and help students develop nuanced ethical understandings, while learning legal skills at the same time. He offers alternative formulations of questions and approaches in light of considered explication of the consequences of knowing certain kinds of information, while at the same time making clear his own views about the proper lines of lawyers’ obligations to truth telling, as well as lawyers’ obligations to client loyalty and respect. This nuanced and concrete approach to the difficult questions of lawyer-client interactions about facts and truth, like Professor Merton’s, demonstrates the strength of the clinical case method. While discussing and remaining sensitive to the Model Rules and scholarly commentary on the operation of rules and the application of ethical principles, Professor Ellmann is able to situate those concerns in the actual contexts in which they will come up—in this case, the almost always hidden-from-view lawyer-client interview setting. To explore the ramifications of such ethical rules or principles in their actual applications, stories will have to be told and interactions will have to be recorded, in real and “fictionalized” transcripts. By “showing” us

65. 475 U.S. 157 (1986).

66. Restatement of the Law Governing Lawyers Third (2000).

the dialogues of lawyers and clients through stories and enactments, we can see how ethical choices are operationalized in practice.

Lawrence Fox has long understood the power of the story to teach legal ethics. In a series of “fictionalized”⁶⁷ stories demonstrating ethical dilemmas of modern legal practice,⁶⁸ Mr. Fox, a senior partner and litigator in a major Philadelphia law firm and former member of the ABA Ethics Committee, has made learning legal ethics as easy as reading a good short story. Here his story, *I’m Just an Associate . . . at a New York Firm*⁶⁹ marries the modern day dilemma of the young upwardly mobile associate who is eager to please and do as he is told to the real and actual story of partner concealment of evidence in the Kodak anti-trust case (which led to the conviction and eventual disbarment of some prominent New York lawyers, as well as the ruined reputation of at least one nationally known legal hero, John Doar).⁷⁰ The story, rather than the reported case, allows us to exist inside the subjective minds and hearts of at least some of the characters (author’s point of view, of course, limits our access to all the relevant actors). Thus, we are provided with not just the legal context, but the familial and in this case, the religious (Catholic) influences on our ethical deliberators. Mr. Fox sets his story in the early 1960s to use the form of fiction to give us a quick history and sociology lesson (*pace* Chambliss) about the exclusions of the legal profession. Paul, the young associate, about to be faced with a serious ethical dilemma of whether to report the activities of a partner in concealing evidence, is the first Catholic the prestigious Wall Street law firm, Stuyvesant & Main, has hired. Like his literary mentor, Louis Auchincloss, Mr. Fox knows that the story can telescope a number of issues at the same time—social and familial background of the players, law firm history, case facts, legal education and practice and ethical dilemmas are easily dramatized, and when well done can motivate the law student (or lawyer!) reader to want to understand what the actual rules really are. (This story implicates the rules of proper ethical supervision of lawyers, Model Rules of Professional Conduct 5.1 and 5.2, duties to report lawyer misconduct, 8.3 and 8.4, candor to the tribunal, 3.3, not to mention a variety of substantive

67. As a former practicing lawyer in the city of Philadelphia, I have to say some of these stories are pretty thinly disguised. Knowledgeable readers of these stories will recognize the law firms, the lawyers, the judges and the underlying events in many of them. These stories, then, have all the excitement of the roman a clef to those in the know. See also, the mysteries of lawyer-author Lisa Scottoline, which also take place in Philadelphia and those of Scott Turow, whose characters are similarly familiar to those conversant in the legal mores of Chicago.

68. Fox, *Legal Tender*, *supra* note 3.

69. Fox, *Fordham L. Rev.*, this issue at 939.

70. For a fuller description of the actual full Kodak story, see *Berkey Photo, Inc. v. Eastman Kodak Co.* 603 F.2d 263 (2d Cir. 1979); James Stewart, *The Partners: Inside America’s Most Powerful Law Firms* (1983).

rules which govern the concealment or destruction of evidence and procedural rules on the proper scope and exercise of discovery, use of experts and production of documents). By providing a dramatic and fully described moment, building in ethical suspense, the reader puts himself in the shoes of young Paul who wants to make partner, please his family and ultimately, live with himself, and who has to make some decisions which will clearly have life altering impacts on him and others close to him.

In this story, Mr. Fox joins the latest trends in popular culture by actually including and dramatizing disciplinary proceedings against some of the principals. (Depictions of ethical issues and disciplinary charges against lawyers and judges seem to be proliferating in both popular novels and lawyer TV shows like *The Practice* and *Law and Order*).⁷¹ He departs from his usual practice to conclude the story with a Dear Reader epilogue that includes you, the reader of this Symposium issue. Two law professors debate the merits of legal ethics as a scholarly and pedagogic discipline (an issue that is now pretty well settled, both by ABA accreditation requirements and by the outpouring of rigorous and interesting scholarship in legal ethics, viz, this Symposium and many others) and then provides you, the reader, with a sort of Cliff Notes of an issue spotter on the story. In case you missed any of the issues, legal or sociological, the law professors, engaged in conversation, spell it out for you. If I had my druthers, Mr. Fox would have left this part out. The beauty of his stories is that they make excellent ethical issue spotters which I would prefer students and lawyers would have to uncover for themselves. For like law practice, these ethics short stories situate ethical dilemmas as they will be found, embedded in the strategic choices lawyers make about how to handle their cases or how to live their lives. The greater the ambiguity in the story the better for ethical learning. For our students and practicing lawyers, ethics issues will not come in Cliff's Notes or Gilbert's outlines—they will have to be ferreted out in practices, cases and lives lived. For me, the advantage of a good fictional story well told is that it forces the reader to “spot” the issue before he or she can make any decisions about how the issues should be resolved.

Somewhat troubled by the sort of approach used by Larry Fox, Professor Bruce Green suggests that by “fictionalizing” actual cases we may lose important teaching opportunities. In *There But for Fortune: Real-Life vs. Fictional “Case Studies” in Legal Ethics*,⁷² Professor Green compares and contrasts the use of real cases and fictionalized cases (“parallel case studies”) to discuss the relative

71. See Menkel-Meadow, *Sense and Sensibilities of Lawyers*, *supra* note 6; Goldberg, *supra* note 42; see also John Grisham, *The Street Lawyer* (1998).

72. Green, *Fordham L. Rev.*, this issue at 977.

merits of different versions of the same “morality tales.”⁷³ He tells us first the “real” (but incomplete) version of a story of the discharge of an investment analyst from the brokerage house of Morgan Stanley who claimed discrimination⁷⁴ and who was then accused of falsification of evidence, while Morgan Stanley was accused of criminal discovery abuses. The real story, Professor Green suggests, remains a bit of a cipher since we cannot ever truly know the motives and inner thoughts of the principal actors—the analyst, the brokerage house partners who made decisions and the various lawyers who investigated, prosecuted and defended the various lawsuits. Press treatments may be inaccurate and give students and readers a distorted view of “what actually happened.” Thus, the moral lessons from the “real case” must remain ambiguous and unknowable. Professor Green analyses the issues as presented in the press and relevant legal materials, but many of the legal actions taken and the ethical rules governing them are uncertain or unclear. Thus, while the press characterized this case as a “cautionary tale,” the reality is far from known and understood. What moral teachings can we learn from an incomplete or unknowable story? Professor Green then presents a fictional version of the Morgan Stanley story, complete with stated “facts” and motivations (like the stories of Larry Fox and Louis Auchincloss).⁷⁵ The fictional version allows us to see how well-meaning lawyers can get trapped in the avalanche of legal matters and cascading legal events. It demonstrates how the organization of law offices can lead to compartmentalization of issues that prevents a holistic approach to ethical dilemmas. On the other hand, Professor Green suggests that because these fictionalized tales are not real, they too will have limited teaching value. “No real lawyer would act that way,” our students will disclaim (as well as the real lawyers who read their own stories and say “I did not act that way,” or “I did not act for that reason”).⁷⁶

73. See also, Thomas Shaffer, *On Teaching Legal Ethics With Stories About Clients*, 39 Wm. & Mary L. Rev. 421 (1998).

74. Several “fictionalized” versions of this story have appeared on the TV lawyer shows as well, including an episode of *Law & Order*. See *Law & Order: Trade This* (NBC television broadcast, Mar. 1, 2000); see also Dan Ackman, *L’Affair Curry Ends in Settlement*, *Forbes.com*, available at www.forbes.com/2000/09/15/mu7.html.

75. Whether lawyers actually can write good fiction or other literary forms remains a somewhat controversial question. Compare Robert Ferguson, *Law and Letters*, *supra* note 3, who suggests that early American lawyers were of necessity and inclination, literary men, with Thane Rosenbaum, *The Writer’s Story, and the Lawyer’s*, *N.Y. Times*, Aug. 20, 2000 (book review), at 27, who recently suggested that lawyers are hindered by their narrow legal training and perspective from being able to take the broader view and do the more “elegant” writing that great literature requires.

76. Lisa Lerman, has, however, successfully managed to convince some convicted lawyers, including Webster Hubbell, to come to her classes to describe exactly how they got into the trouble they did. See Lerman, *supra* note 33.

Perhaps for that reason Professor David Orentlicher prefers to return to the most conventional forms of legal storytelling—analysis of the implications of an actual reported case. In his article, *Fee Payments to Criminal Defense Lawyers from Third Parties; Revisiting United States v. Hodge and Zweig*,⁷⁷ Professor Orentlicher discusses the impact of a case which held that lawyers may not hide behind the lawyer-client privilege when prosecutors seek to discover whether their fees are being paid by a third party (such as a criminal gang) who is implicated in criminal activity, and which thus invokes the crime-fraud exception to the lawyer-client privilege rule. While this essay does not really suggest anything new about the use of case studies or stories in legal ethics teaching and thus, simply reinforces the continued importance of conventional legal scholarship in the ethics field, it at least suggests that when we analyze conventionally reported or criticized cases it is important to understand both the context and the effects of such decisions. By reviewing the impact on criminal defense lawyers of the rule enunciated in this case, Professor Orentlicher suggests that criminal defense lawyers may be hampered in whom they may take fees from, and what they may ask about the sources of their fees. Like Professor Ellmann's interviewees, these lawyers may have to ask unpleasant questions or they may be implicated in criminal conspiracy actions themselves. By exploring the implications of the case beyond its literal holding to drug gang activities, Professor Orentlicher suggests that third-party fee arrangements may have broader implications for corporate representation of individuals. Thus, one story told and decided may have an important impact on another story yet to be told. (This is, after all, how the common law system operates—by the cumulation of story upon story until a cumulation of short stories produces a novella or novel of "truth" for a general subject area—until a better story comes along).⁷⁸

Professors Painter and Cochran prefer the other end of Professor Green's suggested choices, at least here. As between real and fictionalized stories about ethics, they see the value of learning from fiction, both legal and non-legal. Professor Painter's *Irrationality and Cognitive Bias at a Closing in Arthur Solmssen's The Comfort Letter*⁷⁹ explores the novelistic and fictionalized account of another real case—SEC v. National Student Marketing Corp.,⁸⁰ one of the first cases to hold lawyers responsible for "aiding and abetting" securities fraud. The attorneys in the real case allowed a merger to go forward after they learned information about the misleading earnings figures of the

77. Orentlicher, *Fordham L. Rev.*, this issue at 1083.

78. Consider the continuing debates about who told the "definitive" story of 19th century Russia—the more religious Tolstoy or the more cynical Dostoyevsky?

79. Painter, *Fordham L. Rev.*, this issue at 1111.

80. 457 F. Supp. 682 (D.D.C. 1978).

subject company which had fraudulently induced stockholder approval of the merger. In the novel, unlike in real life, the lawyer-hero instead determines that he cannot issue the "comfort letter," an opinion letter which is necessary for a large transaction to close. Professor Painter reports the significant dialogue between lawyer and client in which the client realizes that his lawyer is not going to be the loyal professional and simply close the deal, but instead will act from his own place of moral rectitude and responsibility. The novel ends dramatically with the deal not closing (in contrast to the actual case) and nicely opens the way for a legal ethics class to discuss what the lawyers should have/could have done to learn the relevant information earlier, spot the ethical issues and determine what legal advice and actions, if any, might have avoided the problem. The novel thus provides that rare example of lawyers seeming to do the "right" thing but only problematizes how lawyers are to recognize the "right" thing when it is first happening.

Professor Painter uses this wonderful novel⁸¹ to examine recent scholarship on the social, personal and cognitive biases which affect lawyer-client relations and decision-making,⁸² thus rigorously marrying legal ethics, fiction and important theoretical and empirical work that examines how lawyers and clients actually behave. Professor Painter demonstrates how these biases—risk and loss aversion, framing effects, over-optimism and over commitment and agent-principal distortions—can affect how lawyers and clients interact with each other and produce poor decision-making. By illustrating, with passages from the novel, how these principles actually work, Professor Painter makes vivid for students and readers the operation of complex psychological dynamics which affect legal transactions but which are often difficult for lawyers and students to understand in their more abstract forms.⁸³ Thus, vividness (itself a possible cognitive bias) through the use of stories and fiction can illuminate more abstract and complex ideas about the internal motivations and incentives that lawyers may or may not be aware of when counseling clients and making their own decisions. I suspect that any student taught about these cognitive and social biases so recently incorporated into the legal canon, through the novel *The Comfort Letter*, will remember them longer than students taught this same material from the primary sources of the studies which document their existence.⁸⁴

81. I have always thought this novel should be required reading in any corporate or securities regulation class.

82. See, e.g., Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 Vand. L. Rev. 1499 (1998).

83. See *Barriers to Conflict Resolution* (Kenneth Arrow et. al eds., 1995).

84. This would make an interesting empirical project—to study whether certain concepts are better remembered through the use of fiction and stories than through

Professor Cochran uses fiction to explore more “macro” issues of legal ethics. In *Honor as Deficient Aspiration for “The Honorable Profession”: The Lawyer as Nostromo*,⁸⁵ he explores the relationship of honor, money and moral downfall, not through a story about lawyers, but through Joseph Conrad’s tale of money, mining, politics and corruption in a fictional South American country. Like those who have recently used Kazuo Ishiguro’s *The Remains of the Day*,⁸⁶ a tale about a butler’s loyalty to his employer, analogically applied to lawyers’ duties, Professor Cochran suggests that Nostromo, literally “our man”, loyal and hardworking, but who dies sadly, confessing his secret life of theft, can be thought of analogically as the modern day hardworking, loyal, but ultimately, corruptible lawyer. Professor Cochran explores the novel’s treatment of such issues as materialism, love of money, the ambiguity of politics, loyalty without conviction or belief, and “the human tendency to destroy creation.”⁸⁷ Using the novel as a “foil” against which to discuss the meaning of character and honor in a profession that seems to value material success over all else, Professor Cochran hopes to have readers and students see, as through a refracted lens of another “profession,” what is most disagreeable and questionable about their own. As in the uses of *The Remains of the Day*⁸⁸ the methodological approach here is to teach through deflection. The use of fiction, literature and “other professions” illuminates and puts in relief particular qualities of the legal profession and particular character flaws or gifts that particular individuals demonstrate.

Literature is an especially good locus for exploring comparative professional ethics and many legal ethicists are beginning to turn to a wider canon of novels and stories about other professionals faced with ethical dilemmas. Elizabeth Chambliss here⁸⁹ opens her discussion of the importance of studying the historical and sociological organization of the legal profession by focusing on Mark Twain’s classic reportage (a sort of literary journalism) of his work as a pilot on a riverboat,⁹⁰ in which she suggests he offers a “sociological primer on the stages of professional development.” Using Mark Twain’s story of the professionalization of the riverboat pilot, she reports how, like lawyers,⁹¹ riverboat pilots were able to gain control over the training

either abstract, theoretical or empirical materials.

85. Cochran, *Fordham L. Rev.*, this issue at 859.

86. *Supra* note 5.

87. Cochran, *Fordham L. Rev.*, this issue at 874.

88. See, e.g., Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day*, 105 *Yale L. J.* 177 (1995); David Luban, *Stevens’s Professionalism and Ours*, 38 *Wm. & Mary L. Rev.* 297 (1996).

89. *Professional Responsibility: Lawyers, a Case Study*, *Fordham L. Rev.*, this issue at 817.

90. Mark Twain, *Life on the Mississippi* (1883).

91. See Richard Abel, *American Lawyers* (1989); Magali Larson, *The Rise of*

and licensing of new pilots. Twain laments the loss of more voluntary associational ties to more rationalized, bureaucratic and exclusionary practices (which eventually succumbs to the diversion of passenger traffic to the railroad, itself organized through unions). Twain's story of the monopolization of riverboat piloting echoes many of the legal profession's founding stories, the "old boy network," followed by increased credentialing, schooling, licensing requirements and more rationalized forms of exclusions. Professionalization, including education, licensing and professional ethics rules promulgation, has similar trends and effects in a variety of professional settings and may illuminate both what is gained and what is lost in such processes.

Like Twain's *Life on the Mississippi*, several other 19th century literary works are useful for exploring both professional development and individual ethics issues. Nathaniel Hawthorne's *The Scarlet Letter*⁹² dramatizes the monopoly of the clergy over the morality of an entire community, while demonstrating the hypocrisy of professional morality violated in personal lives. William Dean Howells' little-studied novel, *A Modern Instance*,⁹³ explores the early days of journalistic ethics, both in the tensions between ownership of a newspaper and control over its content (the journalists' form of the "hired gun" problem) and individual ethics issues about use and abuse of sources, "pandering" to a public that seeks the sensational, and tensions about "objectivity" and "neutrality" in authored and anonymously written stories, as well as conflicts of interests.⁹⁴

Elizabeth Chambliss suggests that like these "stories" of professional development, whether fictionalized, fiction or journalistic, another "story" of legal professionalism can and should be told to students through the use of sociological approaches to the subject. She suggests that students should be exposed to the "master narratives" which explain how the profession was formed, organized, is regulated and whom it excluded and why, as necessary background information for understanding anything meaningful about the origins of particular ethics rules or precepts. Chambliss suggests that law students and lawyers should understand that their own "creation myth" often obscures the issues of conflict and power within the master narrative of monopolization of technical knowledge. By teaching the story of the history of the profession, the modern legal ethics teacher can conclude with one of our most recent and contested

Professionalism: A Sociological Analysis (1979).

92. Hawthorne, *supra* note 5.

93. Howells, *supra* note 5.

94. This novel, which is more noted for its treatment of divorce in late 19th century America, suggests some very interesting analogies to legal ethics and legal profession development. (See, e.g., editorials, like lobbying, as a form of interest advocacy, whether tied to paying "clients" or owners, writing or representation that does or does not express the true values of the professional, conflicts of interests and "side-switching", etc.)

stories—multi-disciplinary practice⁹⁵—to explore how the profession continues to seek to prevent competition from others, both lay and professional.

Like Elizabeth Chambliss, Susan Shapiro believes that legal scholars and teachers look for cases and stories in the wrong places—at the top of the mountain (whether in Supreme Court cases or ethics rules systems) rather than in the valleys or “base camps” where the real action is. Thus, she points to empirical work, both quantitative data analysis and in-depth qualitative interviewing of the lawyers who actually interpret and live with legal ethics rules in their day to day practices. Like Elizabeth Chambliss, Susan Shapiro, a sociologist, suggests that the “real” stories of legal ethics may be located in social structure and organization, as well as in individual action. In a brief report here of a masterful book-length study of the practices of Illinois lawyers in conflicts of interest situations, Dr. Shapiro redefines the meaning of a “case” or “story” by describing how lawyers actually understand what a “conflict of interest” is in their daily practices and how they navigate and negotiate around the meanings of rules and the demands of practice. She is able to tell the “real” stories that lawyers have told her (anonymously, but characterized by size of practice and location in the state) about how they understand the roles and rules of legal ethics. In what is likely to become a classic study of the empirical reality of conflicts of interest, Dr. Shapiro reports the lawyers’ understandings of what conflicts are (technical rule definitions; financial, interest or positional conflicts) and how they are “managed” in both large and small firm settings. She is able to explore how organizational factors affect choices about conflicts of interest (size of firms, availability of replacement clients, finances, conflicts among laterally moving lawyers, “ethnically” based practices, small town reliance on the wise professional to be the “lawyer for the situation”) thus providing a much richer (and far more interesting) story of how conflicts actually operate than the reported cases I have been teaching for twenty years are able to convey. For Dr. Shapiro’s subjects (practicing lawyers in Illinois) the law seems strangely absent. Conflict of interest rules are widely regarded as anachronistic,⁹⁶ scholarship on the subject is not useful and bar committees’ advice and ethics rulings are also regarded as providing inadequate guidance. Lawyers facing conflicts of interest issues simply “muddle through,” making decisions as best they can. In Dr. Shapiro’s words these lawyers seem to hunger for a broader form of education, one that will teach them, not just case reading and analysis, but more fact intensive

95. See, e.g., Laurel S. Terry, *A Primer on MDPs: Should the “No” Rule Become a New Rule?* 72 *Temple L. Rev.* 869 (1999); Symposium, *Future of The Profession: A Symposium on Multidisciplinary Practice*, 84 *Minn. L. Rev.* (2000).

96. Shapiro, *supra* note 45.

instruction on contextual and social organizational decision-making and judgment,⁹⁷ as it occurs in the real world.

The sociological vision allows us to look at legal professionalism issues from without—as others might see us. So, as literary treatments of lawyers allow us inside to examine individual subjectivities, intentions and motivations, Chambliss' and Shapiro's work allows us to see the legal profession issues from a "bird's eye view,"⁹⁸ widening students' appreciation (or depreciation) of the profession they are about to enter.

Eleanor Myers and Edward Ohlbaum demonstrate that realistic stories, presented through case role-plays and experiential exercises can make real for students all the levels of analysis they must confront when making choices as legal actors. In *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*,⁹⁹ they dramatize one of "the three hardest questions"¹⁰⁰ in criminal advocacy—can a lawyer cross-examine and discredit a truthful witness (here in the ethically charged case of a criminal rape case)? Through the use of enacted dramatizations of direct and cross-examinations of the complaining witness and closing arguments to a jury, Professors Myers and Ohlbaum ask students to enact and consider what limits exist or should exist to protect a truthful witness, should the nature of a crime (context) affect the rules and choices made, how should both defense lawyers and prosecutors exercise what discretion they have from system-differentiated role obligations and what does advocacy or partisanship suggest about the obligations of counsel to clients, the truth, the system and the jury? After students have read relevant rules and skills materials they are placed in actual roles and by enacting choices must deal with skill, ethics and sociological and legal role tensions in what they choose to do. Discussion of what is appropriate when the students themselves have watched or participated in a demonstration makes real the many context-specific and general choices that lawyers in such situations face. What rule, if any, applies? What loyalty to client justifies departures from any

97. On the importance of teaching problem-solving, decision-making and judgment in legal education, see, for example, Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 Temp. L. Rev. 811 (1999); Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 Wash. L. Rev. 527 (1994); Carrie Menkel-Meadow, *Aha? Is Teaching Legal Creativity and Problem Solving Possible in Legal Education?* 6 Harv. Neg. L. Rev. (2000); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 Temp. L. Rev. 785 (1999).

98. Actually, my favorite image of seeing the world from above to gain greater knowledge about boundaries etc., is Merlin's magical transformation of the young Arthur into a bird so he might see the stupidity of human boundaries over the natural. See, e.g., T.H. White, *The Sword in the Stone* (1939).

99. Myers & Ohlbaum, *Fordham L. Rev.*, this issue at 1055.

100. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966).

particular set of rules?¹⁰¹ How ought the adversary system operate? What is the goal of adversary justice? Truth? Protection of individual liberty and fairness? Professors Myers and Ohlbaum report that class discussions of both micro-behavioral ethics choices and the larger system and political issues implicated in this famous ethics dilemma are far richer with a live, demonstrated “case” or “story” than more traditional readings of cases, rules and legal scholarship on the subject.

III.

In my view, like Joan Didion’s, in order to decide how to live and how to live good, we need stories. Stories tell us how others before us have resolved similar issues. Some stories exemplify the good characters we aspire to,¹⁰² others merely reveal the difficult situations we may be placed in (whether to cross-examine a truthful witness, whether to do something about an incompetent counsel on the other side, whether to report on a client’s wrongdoing) so we can anticipate them in less than real and harmful situations. Reading stories allows us to try on our own resolution of difficult problems as we examine with hindsight, foresight and peripheral vision what happens in books to other people. Stories dramatize real human need, pain and difficulties so we can empathize with others like ourselves—clients, victims, others affected by legal actions, judges, the lawyers on the other side—and hopefully, expand our sympathetic range of judgment and action. Stories can make vivid what is otherwise dull and hard to learn.

From the moment I began teaching legal ethics, just about twenty years ago, I began with “stories ripped from the headlines”¹⁰³ by writing role-plays, based on real cases,¹⁰⁴ to place students in the actual role of having to make a legal ethics choice in a simulated situation (so that no real consequences would flow therefrom and possibly hurt a client, but in which a student would feel and experience what making a choice of behavior was like). My students have been prosecutors, divorce lawyers, class action lawyers, legal aid lawyers, public defenders, corporate lawyers, labor union lawyers, clients, disciplinary board members, paralegals, associates, partners, cabinet officers, public officials, candidates for public offices or judgeships, judges, political radicals and conservatives, truth tellers

101. This implicates the continuing controversy of the duty of the defense counsel with respect to allowing a client to commit perjury. *See Nix v. Whiteside*, 475 U.S. 157 (1986); Monroe H. Freedman, *Understanding Lawyers’ Ethics* (1990).

102. For so many criminal defense lawyers the canonical inspirational texts are Harper Lee’s *To Kill a Mockingbird* (1960) and Clarence Darrow’s biographies, *see supra* note 6.

103. *Law & Order* (NBC television broadcast) (current advertising tag line).

104. *See Schwartz & Menkel-Meadow, supra* note 43.

and truth exaggerators. They have negotiated, counseled, examined witnesses, tried and decided cases, presided over office meetings, testified to committees and administrative agencies, lobbied and made decisions about who gets hired, fired and who gets legal services. Placing students in these roles has made vivid and real the learning (beyond even the Problem Method so popular in the leading ethics casebooks)¹⁰⁵ and allowed us to explore simultaneously the legal ethics issues of rule application, philosophical and moral principles and discourse and the sociological organization of law practice.

Stories and role enactments allow multiple levels of analysis to be explored at the same time and with the different points of view of those in role (the acting “lawyers” or “clients”) and those outside of role who watch, analyze, criticize and contribute to the ethical dialogue which follows each role enactment in my classes. Increasingly, I also turn to literature and journalism to explore the antecedents and consequences of legal actions taken and to broaden the context of information that these stories provide.

More and more, as this Symposium demonstrates, the “real” reported cases can be read and contrasted to fictionalized accounts (Morgan Stanley, National Student Marketing, A Civil Action, etc.) in other media so students can compare and contrast alternative actions and choices.

I am a totally committed and converted legal ethics storyteller, as are most of the authors in this Symposium, and, I suspect, most of its readers. Yet, we must also consider the stories or lessons that these stories tell us. Vanessa Merton counsels us to examine the dangers in casuistry and case-by-case deliberation. If our contexts are so rich and our advocacy so good that we can justify almost anything in every *sui generis* case, then what is the purpose of rules, moral principles and generalizable aspirations for us all? If real cases present the difficulty of applying rules, as the work of Professors Spiegel, Ellmann and Dr. Shapiro suggest, what should we do about rule drafting, amendment, and enforcement? If fictional stories do not seem real to our students, as Professor Green suggests, what will our students take away from our fictionalized stories, great literature or creative role-plays? Does truth in role-playing or literature matter? And, how should we evaluate the “truth” function of the legal ethics stories we tell? I find the latter question particularly troubling as the television shows depicting lawyers increasingly dramatize legal ethics issues. I love the coverage, but I fear that the overly dramatic and often incorrectly depicted treatments and “answers” to these questions will actually give out more bad information and practice than good.

105. See, e.g., Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* (4th ed. 1995); Andrew L. Kaufman, *Problems in Professional Responsibility* (3d. ed. 1989); Deborah Rhode & David Luban, *Legal Ethics* (2d. ed. 1995).

Do vividly portrayed examples teach too much? Do dramatic stories ignore the equally difficult but more common everyday legal ethics problems (conflicts of interest, client trust accounts, billing practices, competence)?

If we tell stories in order to live (and in order to teach) we must be aware of their strengths and their weaknesses. Particular stories should not allow us to skip over general moral principles, while concern for achieving systemic or generalized "justice" should also not blind us to particularized mercy and other human values. Stories and cases, as illustrated by the examples depicted in this Symposium, exist on a continuum from the real, on-going case, to the decided, reported and finished real case, from the "fictionalized" story or role-played simulation of a real case, to the journalistic "documented" version of the "facts" of the real case, to the totally fictional and artistic or merely "trendy" popular cultural depiction of legal ethics dilemmas.

If this Symposium tells any story of its own it is that the kinds of stories we can tell are now enormously rich and various and the methods of storytelling and case studies we can use are increasingly diverse and ever more vivid. Since the levels of legal ethical discourse vary so much we should pay some attention to which forms of storytelling and what kinds of case studies illuminate best which kinds of issues we should study. There are issues of individual ethics, motivations, intentions, deliberations and choices. There are issues of rule drafting and organizational structure. Most profoundly, there are deep jurisprudential issues of system design (is the adversary system still the best we can have?)¹⁰⁶ and whether our legal system produces, in the end, more justice than less. For the storytellers, truth seekers and ethicists among us these are good times indeed to be teaching legal ethics, for as our methods and stories proliferate we have more interesting ways to teach that which it is most important to teach—how we may lead good lives in this legal profession we have chosen.

106. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern Multi-cultural World*, 38 Wm. & Mary L. Rev. 5 (1996).