The Pursuit of Justice: New Directions in Scholarship About the Practice of Law

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Clinical scholarship is currently developing an analysis of the practice of law that explores the lawyer's role in building a case from the infinite universe of facts.[1] Clinical legal education has traditionally focused on categories such as interviewing and counseling, fact investigation, negotiation, mediation, pretrial preparation, trial advocacy, and appellate advocacy. Clinical scholarship, however, is investigating processes that cut across these categories. It is exploring the lawyer's role in transcending differences of race, gender, class, religion, ethnicity, age, disability, sexual orientation, and other significant identifying characteristics. It is analyzing the process of framing the story of a case. It is investigating how lawyers tell the story of a case.

This essay surveys clinical scholarship about the lawyer's role in constructing a case from facts and law. I contend that this literature is creating a deeper analysis of what lawyers do when they represent clients. This developing analysis of the lawyer's role can improve the ability of practicing lawyers to anticipate problems and to resolve them, and it can enhance the ability of legal education to prepare students for practice.

The essay describes activities involved in building a case and organizes them into three processes: transcending differences, framing the story of a case, and telling the story of a case. The descriptions of lawyering activities found in clinical scholarship are often drawn from dilemmas encountered in actual practice, and the solutions proposed for particular problems may be

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1. I use the term *clinical scholarship* to refer to scholarship by writers who have supervised law students in live-client lawyering activities. Clinical scholarship is able to draw on insights gained from supervising law-student practice in live-client clinics and other settings, such as law office and judicial externships. For a discussion of clinical scholarship, see Lawrence M. Grosberg, Introduction: Defining Clinical Scholarship, 35 N.Y.L. Sch. L. Rev. 1, 3 (1990). The practice of law is only one of many subjects addressed by clinical scholarship. For instance, clinicians have written extensively about teaching methodology. See J. P. Ogilvy & Karen Czapanskiy, Clinical Legal Education: An Annotated Bibliography, 2d ed., Special Issue No. 1 Clinical L. Rev. 1 (2001). Clinical scholarship has also contributed substantially to law reform in numerous areas. See, e.g., Jon Dubin, Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings, 97 Colum. L. Rev. 1289 (1997), cited in Sims v. Apfel, 530 U.S. 103, 111 (2000).

applicable to only one area of law or one type of case. But literature describing particular cases and particular problems can lead to discovery of general principles and approaches.[2] This essay focuses on some of the dilemmas that appear to have the most applicability and to be the least case-limited. The dilemmas call for practical solutions based on theories and models of lawyering.[3]

Ten years ago the American Bar Association's MacCrate Report called on legal education to do more to prepare students for the practice of law. It identified ten essential lawyering skills: problem-solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.[4] Although the MacCrate Report describes each of the skills at length, it does not set out how the skills should be combined in practice to construct a case. Clinical scholarship is addressing that question.

The growth of clinical legal education has created a group of scholars whose primary focus is teaching students how to practice law. A central method of teaching practice is the live-client clinic, in which faculty licensed to practice law supervise students working on actual cases. The faculty have the opportunity to put their theories into practice and to receive rapid, sometimes harsh, feedback. As a result, the scholarship that has emerged from the clinical experience is rich with descriptions of dilemmas that clinical faculty and their students face in actual practice.[5] The articles and the dilemmas they describe—clients who walk away, hearings that do not go as planned, results that no one wants, and angry clients—have initiated a search for basic principles to guide a lawyer in practice.

This essay grows out of my work as lead editor of the *Clinical Anthology: Readings for Live-Client Clinics,* a volume intended for use in the classroom

2. It is beyond the scope of this essay to try to answer all of the questions raised by this new scholarship. My attempt is to demonstrate that a deeper analysis of what lawyers do can identify theoretical questions that lawyers and legal education must seek to answer.

3. See, e.g., Gary Blasi, What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory, 45 J. Legal Educ. 313, 389 (1995).

4. Section of Legal Education and Admissions to the Bar, American Bar Association, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum 138–40 (Chicago, 1992).

5. See, e.g., Anthony V. Alfieri, Speaking Out of Turn: The Story of Josephine V., 4 Geo. J. Legal Ethics 619 (1991); Naomi R. Cahn, Inconsistent Stories, 81 Geo. L.J. 2475 (1993); Nancy Cook, Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories, 1 Clinical L. Rev. 41 (1994); Clark D. Cunningham, The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse, 77 Cornell L. Rev. 1298 (1992); Clark D. Cunningham, A Tale of Two Clients: Thinking About Law as Language, 87 Mich. L. Rev. 2459 (1989) [hereinafter Tale of Two Clients]; Robert D. Dinerstein, A Meditation on the Theoretics of Practice, 43 Hastings L.J. 971 (1992); Jane M. Spinak, Reflections on a Case (of Motherhood), 95 Colum. L. Rev. 1990 (1995). For a discussion of legal restrictions on the use of client stories in legal research, see Nina Tarr, Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity, 5 Clinical L. Rev. 271 (1998).

sessions of live-client clinics.[6] It adopts two approaches that reflect the experiences reported by teachers in live-client clinics. First, it uses reading materials that identify "issues and dilemmas that lawyers confront in practice."[7] The focus on issues and dilemmas emphasizes the uncertainty that lawyers face in every decision about a case. Second, it avoids materials that simply prescribe how to perform particular lawyering activities without offering theoretical justification for the proposed methods. It draws on a new body of scholarship that is discovering relationships between lawyering practices and the fundamental values of the legal system.

Clinical scholarship has roots in the work of the legal realists, who advanced the idea that law is ever changing and that it grows in response to social and economic change. Jerome Frank, a leader of the movement, was an outspoken advocate of clinical legal education in the 1930s and 1940s.[8] But the legal realists were primarily concerned with the role of courts and judges, not the roles of lawyers and their clients. The primary concern of scholarship about the practice of law has been the role of lawyers and clients. Nevertheless, the premise that law is alive and growing underlies much of this scholarship.

The landmark textbook by Gary Bellow and Bea Moulton, *The Lawyering Process,* published when clinical programs at most law schools were in their infancy, laid the foundation for the scholarly attention to the practice of law that followed. Bellow and Moulton address lawyering skills under the topics of interviewing, constructing the case, negotiation, witness examination, argument, and counseling.[9] They finish every chapter on skills with a section on the ethical dimensions of the practice. Every section on ethical dimensions ends with a discussion called The Larger Puzzle, which looks beyond skills and ethical rules to the underlying questions. The Larger Puzzle sections lay out an agenda for research and foreshadow the debates that have arisen since the book was published.

For instance, Bellow and Moulton identify the ideal of promoting client autonomy as the basic principle underlying the practice of legal interviewing and counseling. But they also question the validity of individual autonomy as the guiding principle of lawyer-client relations, introducing an issue that continues to divide clinical scholars. The book's discussion of fact investigation as an aspect of constructing a case turns to Monroe Freedman for the basic principles necessary to solve the ethical dilemmas posed by the interaction of a lawyer and a witness. Freedman writes, "I would deal with ethical problems in context—as part of a functional sociopolitical system concerned with the administration of justice in a free society."[10]

Regarding the examination of witnesses, Bellow and Moulton caution, "No piece of advice can simply be accepted and applied."[11] Even the task of

6. Alex J. Hurder et al., Clinical Anthology: Readings for Live-Client Clinics (Cincinnati, 1997).
7. *Id.* at xv.
8. See Why Not a Clinical Lawyer-School? 81 U. Pa. L. Rev. 907 (1933).
9. The Lawyering Process: Materials for Clinical Instruction in Advocacy (Mineola, 1978).
10. Lawyer's Ethics in an Adversary System 43–49 (Indianapolis, 1975), *quoted in id.* at 427.
11. Bellow & Moulton, *supra* note 9, at 798.

arguing a case before a judge or an appellate court poses dilemmas that require lawyers to make judgments grounded on basic principles. Bellow and Moulton observe, "In the background of this discussion of the proper means is the question of the lawyer's responsibility for the integrity of the judicial process itself."[12] The common thread running through these descriptions of what lawyers need to know is that the choices lawyers make cannot be isolated from their understanding of the legal system and its fundamental values.[13]

The aspiration of clinical legal education to prepare students to make decisions grounded in the fundamental values and basic principles of the legal system cannot be met by teaching lawyering skills alone. Students must be prepared to use skills such as communication, fact investigation, and legal analysis in combination to represent a client. Attention to the processes involved in building a case can prepare them for the decisions they will face in practice.

This essay examines how clinical scholarship has yielded a deeper, more complex analysis of the practice of law. Part I discusses the issues and theoretical approaches involved in transcending differences. Through inquiry into that process, writers seek answers to questions about the lawyer-client relationship and the lawyer's responsibility to learn about social forces that affect the client because of the client's identifying characteristics (race, gender, etc.). Part II examines the lawyer's role in framing the story of a case. That process requires a concept of the nature of a case and the roles of lawyer and client in planning the case strategy. Part III considers the process of telling the story of a case—a process that demands an understanding of the relationship of lawyers and their clients to courts and other decision-makers, to opposing counsel and adverse parties, to witnesses and the public. Part IV discusses the implications of the developing analysis of the lawyer's role in the construction of a case for legal education and the legal profession. Attempts by law schools and the bar to implement the recommendations of the MacCrate Report have revealed the need for a more thorough understanding of what lawyers do in practice. Clinical scholarship is beginning to shape a new understanding of what lawyers do.

I. Transcending Differences

Transcending differences of race, gender, class, religion, ethnicity, age, disability, sexual orientation, and other significant identifying characteristics is a necessary step in a lawyer's representation of clients. A lawyer can never learn everything there is to know about a client or fully understand a client's unique experience, but the task of representation requires a lawyer to achieve a sufficient understanding of the client's view of a case, her goals, and her

12. *Id.* at 961.

13. See also Robert Condlin, "Tastes Great, Less Filling": The Law School Clinic and Political Critique, 36 J. Legal Educ. 45, 47–48 (1986); Minna J. Kotkin, Reconsidering Role Assumption in Clinical Education, 19 N.M. L. Rev. 185 (1989); Ann Shalleck, Clinical Contexts: Theory and Practice in Law and Supervision, 21 N.Y.U. Rev. L. & Soc. Change 109, 110 (1993).

worldview to be able to agree on a joint course of action with the client. Without such an understanding, a lawyer-client relationship is likely to suffer.

Scholars describe numerous instances in which dilemmas arise when lawyers and clients from different backgrounds attempt to work together. A new analysis of the lawyer's role and responsibility when dealing with difference is beginning to emerge. Nancy Cook tells the story of a client who was arrested for disorderly conduct. The client was black, female, young, single, and unemployed. Her story was that she went voluntarily to a motel room with a man she met in a bar, and he raped her. When the police came, she was distraught and screaming. The man calmly told the white police officers that the woman had come to his room and would not leave. They arrested her, not him. The law student assigned to the case was white, female, and middle-class. She wanted to build a defense based on allegations of racism, sexism, and a "social structure built to disadvantage the poor." She investigated the case and found support for her theory that discrimination had played a role, but the client did not want to make an issue of her race, gender, or class. She wanted the court to vindicate her by believing that she had been a victim of rape and dismissing the case against her. Shortly before the trial she fired the student lawyer. The student wanted to know, "Had she alienated her with her whiteJewishmiddleclassfeminist 'theories'?"[14]

Cook identifies differences of race, religion, class, and political belief between the student and the client. Because the client disappeared, it is not possible to know whether any of these factors was responsible for the breakdown of the relationship between them, but one must ask whether a lawyer has a responsibility to recognize and to learn about such differences, and what role differences play in building a case.

A. Recognizing and Learning About Significant Identifying Characteristics

Identifying characteristics are characteristics that connect an individual to an identifiable community. They are significant to a case when the community has a current status or historical experience that is likely to influence the way the client views the case, or the way others view the case and the client. Failure to take into account a client's significant identifying characteristics can result in failure to understand the client's goals and inability to propose realistic strategies. As clinical scholars pay increasing attention to the problem of transcending differences, a new framework for dealing with difference is developing that has implications for a lawyer's role and a lawyer's responsibility.

Lack of a framework for exploring how a case is affected by difference creates a dilemma for a lawyer who represents a client from a different background. The lawyer who is aware of generalizations and stereotypes, both positive and negative, about the group with which the client identifies runs the risk of acting on knowledge that does not apply to the individual client. On the other hand, failure to be aware of the social and historical context of the client's case and failure to learn how others perceive the client might make it

14. Cook, *supra* note 5, at 47–51.

impossible to counsel the client effectively or to plan realistic strategies. Christine Zuni Cruz advances a solution to the dilemma.[15]

Cruz describes the approach taken by the Southwest Indian Law Clinic to representing members of native communities in New Mexico. She identifies herself as a "member/citizen" of the Isleta Pueblo, a native Indian community.[16] Although her legal scholarship focuses on native communities in the Southwest, her concept of community can be a useful tool for learning about identifying characteristics of all kinds. She defines community broadly to include "participatory groups which one is a part of, which expand those which arise from blood, custom or societal obligations, and which arise as a result of some commonly shared bond, whether it is geographic or racial, religious or political identity."[17]

Cruz's definition of community is broad enough to encompass communities based on gender, class, ethnicity, age, disability, or sexual orientation as well as race, religion, and ethnicity. In her view, a person can belong to multiple communities. But one's connection to a community depends on numerous factors. One factor is the person's choice to identify with the community, to "embrace a community or reject it."[18] Another is the extent of the person's actual participation in the community—whether she chooses to reside in the community or not, to speak the language of the community or not, to take part in community events or not. Recognition by the community of the individual's connection to it, or membership in it, can be a critical factor. In the case of native Indian communities, law can define membership in a tribe, and thus legal status can be a factor, although not the sole factor, in determining a person's connection to a community.

Cruz's method of analyzing someone's connection to a native community can also be used to describe a person's connection to communities based on race, gender, class, religion, ethnicity, age, disability, and sexual orientation. Recognition of the many possible degrees of participation in a community allows a lawyer to learn about the client's world without making unfounded assumptions about the client as an individual.

B. Learning About Communities

Scholars are increasingly recognizing a lawyer's responsibility to learn about the communities in which she practices. Knowledge of the communities in which a client lives can make communication and cooperation between lawyer and client more effective. Michelle S. Jacobs recommends studying the history of a community and its relations with outsiders, finding statistics that illustrate community problems or needs, and attending meetings of community organizations.[19] The history of a community might be found in books and articles,

15. [On the] Road Back In: Community Lawyering in Indigenous Communities, 5 Clinical L. Rev. 557 (1999).

16. *Id.* at 559.

17. *Id.* at 565–66.

18. *Id.* at 575.

19. People from the Footnotes: The Missing Element in Client-Centered Counseling, 27 Golden Gate U. L. Rev. 345 (1997).

documentary films and videotapes, or oral histories by community members. Government agencies and community organizations often maintain statistics and surveys that reflect community problems and needs. Meetings of political and social organizations and cultural events can be a source of information about a community. Cruz observes that a lawyer can also learn about a community through working with a client or from the experience of representing many clients from the same community, but she cautions that a lawyer who is an outsider to a community should avoid exploiting the community through knowledge gained as a visitor and trusted adviser.[20] Knowledge of the communities in which a client lives allows a lawyer to understand the context in which the client's problem occurs, but it does not give a complete picture of the client. The search for information about a client's unique experience, values, and identity usually begins with interviewing and counseling.

C. Learning About Clients

Legal interviewing and counseling, protected by the shield of attorney-client privilege, can be the source of much information about a client. Interviewing and counseling have been the subjects of extensive scholarship by clinicians. Leading textbooks propose sophisticated processes to gather facts in support of legal theories, but they do not prepare lawyers to gather information about client identity and clients' communities. Some clinical scholars argue that gathering information about a client's significant identifying characteristics is essential for competent representation.[21] Planning realistic strategies and proposing creative solutions depend on knowledge of the context in which the client and the case are located.

Just as every client is unique, the extent of a client's identification with and participation in a community is unique to each client. Learning about a community entails an obligation to check the validity of the information learned and its applicability to an individual client. Information about a community, even when produced by formal sociological, anthropological, and historical studies, is necessarily general. Unfounded anecdotes and inaccurate perceptions can give rise to false information about a community. Either kind of information can produce stereotypical assumptions about individuals. A lawyer has the opportunity through legal interviewing and counseling—and the responsibility—to see through generalizations and stereotypes and to learn about a client as an individual human being.

The primary source of information about a client's connection to a community is the client. A client interview can tell the lawyer a great deal about how the client identifies himself and relates to a community, but it is not the only source of information. Anthony V. Alfieri writes that lawyers must create ways to hear the client's voice because clients can be silenced by the conventions of a legal interview and the power imbalance between lawyer and client.[22]

20. Cruz, *supra* note 15, at 562.

21. See, e.g., *id.* at 568–69.

22. The Politics of Clinical Knowledge, 35 N.Y.L. Sch. L. Rev. 7, 19 (1990).

He advises lawyers to accompany a client to community meetings and events to hear the client's voice in the context of his own community.[23] Cruz observes that in some circumstances a lawyer can learn about a client from family members and friends. She also argues that a lawyer has an obligation to be aware of her own status in relation to the client's community. Such awareness helps one realize the limits of one's own knowledge and influences how one gathers information about a client. An outsider should be careful to respect the customs of the client's community in order to show the client respect.[24] Words and gestures often convey different meanings in different cultures; a person unaware of cultural differences can unintentionally convey a lack of respect.

Angela McCaffrey describes techniques of showing courtesy, warmth, and respect when lawyer and client speak different languages. The lawyer must decide which language to use and whether to use an interpreter; the decision can involve questions of respect, rapport, and effective communication.[25] Someone who is fluent in a language may not have the vocabulary needed to discuss the issues in a particular case; a qualified interpreter may be necessary even when both lawyer and client are bilingual.[26]

Learning about a client also requires that the lawyer recognize her own identifying characteristics and how they affect her perception of the world. Jacobs recommends training law students to recognize their own value systems. She argues that without self-awareness students will not be able to judge the validity of the assumptions they make about clients and cases. She urges clinical programs to incorporate exercises that expose students to their own culturally based assumptions so that they can appreciate how unchecked assumptions limit cross-cultural communication.[27]

D. The Role of Difference in Building a Case

Building a legal case requires lawyer and client to overcome barriers imposed by differences. Although the courts will ultimately decide which facts are relevant, which perceptions are true, and which values should prevail, the process usually begins with the conversation of lawyer and client. They must reach a common understanding of facts, agree on joint goals, and plan strategies together.[28] A growing body of clinical scholarship is investigating the respective roles of lawyer and client at this early stage of the legal process. Much of it focuses on the lawyer-client relationship.

23. See Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 2107, 2131–33 (1991).

24. Cruz, *supra* note 15, at 578–79.

25. Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters, 6 Clinical L. Rev. 347, 359–60 (2000).

26. *Id.* at 354–55.

27. Jacobs, *supra* note 19, at 405–07.

28. I have described elsewhere the process of negotiating joint goals and methods of pursuing them. See Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration, 44 Buff. L. Rev. 71 (1996).

Clark Cunningham describes the relationship as the achievement of an identity between lawyer and client. He tells two stories about gaps that separate a lawyer and a client. In the first story a difference of language separates the two. The Spanish-speaking client responded to the allegation that he had committed a crime with *"Yo soy culpable,"* which can be translated "I am blameworthy." The client thought that if he pleaded not guilty, he would feel that he had made a false statement even though he had a defense to the charges against him. Cunningham asks, "On what authority, with what justifications, could we proceed to 'represent' him if we did not understand what he meant by 'culpable' and he did not understand what we meant by 'not guilty'?"[29]

In the second story a prisoner who had been put in solitary confinement after several disciplinary hearings filed a civil rights case to challenge the proceedings. His court-appointed lawyers saw the case as a complaint about lack of due process. The client saw it as "an assertion that the entire prison disciplinary system was illegal."[30] He did not want the lawyers to assert *their* theory of the case and told them not to show up in court. The lawyers did show up in court to request permission from the judge to withdraw as counsel and, with the client's consent, explained how his understanding of the case differed from their own. Cunningham says, "It was a challenging experience, this effort to speak to the court in my client's voice rather than my own."[31]

In both stories Cunningham sees the lawyers as "autonomous creators of meaning," unable to bridge the gap that separated their perception of reality from the client's.[32] In neither story did the lawyer satisfy the goal of achieving an identity with the client that Cunningham sees as the lawyer's proper role. He uses the metaphor of translation: as a translator, the lawyer reconstitutes the client's "experience into a different symbolic form."[33] The gap caused by differences of language, culture, and experience is a wide chasm between lawyer and client, but it must be bridged. Cunningham rejects the notion that the lawyer can be autonomous, and he also rejects the idea that the client's experience can be presented to a court without any transformation, or translation, by the lawyer. The lawyer has to interpret the client's experience in a way that gives it legal significance. By translating the client's perception of reality, the lawyer contributes to the development and growth of the law.

Cunningham's experience illustrates the necessity of dealing with differences of identity, culture, and experience in order to construct a case. In both cases the lawyers could not achieve a sufficient understanding of the client's perception of the case to agree on a joint course of action. Their dilemma raises questions about a lawyer's responsibility in the relationship with a client. What steps should a lawyer take to see the world as the client sees it, to imagine walking in the client's shoes? Clinical legal education has not resolved the question.

29. Cunningham, Tale of Two Clients, *supra* note 5, at 2465.

30. *Id.* at 2467.

31. *Id.* at 2468.

32. *Id.* at 2472.

33. *Id.* at 2482–83.

Advocates of the client-centered approach to lawyering encourage lawyers to rely on empathic understanding to bridge differences between lawyer and client. Other writers suggest a process of dialog in which both client and lawyer teach and learn about themselves and the communities with which they identify.

The reliance on empathic understanding that is the hallmark of the client-centered approach reflects an emphasis on individual autonomy as a core value of the legal system.[34] The approach borrows from psychological counseling the technique of nonjudgmental listening as a means of encouraging free expression of the client's values and decisions. It encourages lawyers to develop empathy as a means of understanding how the client views himself and the world around him.

The client-centered approach is often criticized for taking a neutral stance toward the identifying characteristics of client and lawyer.[35] Alternative approaches suggest dialog and conscious attention to identity as a means of transcending differences.[36] A growing number of writers call for explicit recognition of differences and creation of a framework for dealing with them.[37]

Attention to the need to transcend differences reflects the premise that a lawyer should be able to communicate effectively with a client and to share a vision of the client's world in order to perform other critical lawyering functions, including framing the story of a case and telling the story. The ability of a lawyer and client to transcend the differences between them permits the collaboration that produces creative solutions to legal problems.

The developing consciousness of practices that enable lawyer and client to bridge the differences between them also raises questions about a lawyer's responsibilities. If lawyers have a responsibility to learn about the communities with which clients identify, how far-reaching is that duty? The clients described above identified with communities that have faced historical discrimination based on such factors as race, gender, class, and ethnicity. One of the challenges to clinical scholarship is to ask whether all lawyers have a responsibility to learn about clients in the context of their communities, regardless of whether the client identifies with a community that has been subjected to a history of unequal treatment. Both the diversity of the legal profession and the diversity of our society make encounters with difference inevitable. Furthermore, the growth of international practice has increased

34. See, e.g., Robert D. Dinerstein, Client-Centered Counseling: Reappraisal and Refinement, 32 Ariz. L. Rev. 501 (1990); David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach (St. Paul, 1991); Fred C. Zacharias, Reconciling Professionalism and Client Interests, 36 Wm. & Mary L. Rev. 1303 (1995).

35. See, e.g., Alfieri, *supra* note 22, at 16; Cruz, *supra* note 15, at 570; Jacobs, *supra* note 19, at 345–49.

36. See, e.g., Gerald P. Lopez, Rebellious Lawyering, One Chicano's Vision of Progressive Law Practice 51–53 (Boulder, 1992).

37. See, e.g., Bill Ong Hing, Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses, 45 Stan. L. Rev. 1807 (1993).

the pressure on lawyers to find ways to transcend differences of culture, language, and religion. We need more empirical study of what lawyers do, as well as study of the lawyer's role in the legal system.

II. Framing the Story of a Case

Framing the story of a case is the stage of the lawyering process where the moral values of the client, the community, and the lawyer are forged into a conception of justice. The process begins at the initial meeting between lawyer and client, before a decision is made to litigate, to negotiate, to seek mediation, or to engage in a transaction. Framing the story and telling the story are different processes. Framing the story of a case is the process of organizing facts into a story with legal significance for use in resolving a dispute or conducting a transaction. It requires a blending of facts, moral values, and legal norms to create a coherent and compelling story. Telling the story of a case is the process of using the story that has been framed to persuade an adversary, a court, or the public that the client's claim for relief is a just one.

Most of the existing literature treats framing the story and telling the story as the same process. I separate them because the theoretical questions that underlie each are different. A focus on framing the story poses questions about the proper roles of lawyer and client in planning the strategy of a case. It raises questions about how to resolve potential conflicts between the moral values of the client, the lawyer, and the community.[38] The process requires exploration of all the avenues for relief that are available for resolution of the case. It allows lawyer and client to choose from all the strategies available for the solution of the problem or the resolution of the dispute. For instance, the story of the case, framed in one way, might support a strategy of settling the case privately without the intervention of a court or other public authority. Framed in another way, the story might support a strategy of changing case law or statutory law if existing law does not afford an appropriate and just solution to the client's problem. When existing law supports a client's claim for relief, the story of the case should organize facts in a plausible and compelling way so that the decision-maker grants the desired relief.

Lucie E. White's influential article, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.," raises fundamental questions about the lawyer's role in framing the story of a case.[39] Mrs. G. was a recipient of welfare benefits under the Aid to Families with Dependent Children program. She was an African-American single mother with five daughters. She received $300 a month to live on, an amount that had to be reduced by the amount of any additional income that came into the family. When Mrs. G. received a $600 insurance payment, she reported it to her

38. See, e.g., Thomas L. Shaffer, On Teaching Legal Ethics in the Law Office, 71 Notre Dame L. Rev. 605, 610–13 (1996); Paul R. Tremblay, Practiced Moral Activism, 8 St. Thomas L. Rev. 9 (1995).

39. 38 Buff. L. Rev. 1 (1990).

caseworker, who told her that it was not income and would not affect her benefits. After an audit, the welfare office decided to withhold two months of welfare benefits.

Mrs. G. appealed the decision, and White, then a legal services lawyer in North Carolina, agreed to represent her at her administrative hearing. After doing a legal analysis, White presented Mrs. G. with two possible stories that she could tell at the hearing. In the first story, Mrs. G. would say that she had relied on the faulty advice of her caseworker, an African-American woman whose job was at the bottom of the hierarchy of the welfare bureaucracy. In the second story, Mrs. G. would say that she had spent the extra money on life necessities and repayment should be waived. Both stories had legal merit. White asked Mrs. G. which theory of the case she preferred to rely on, and Mrs. G. said both. At the hearing, Mrs. G. did something else. When given a chance to testify, she told a different story, a story that resonated with the moral values of the community. She said she had used a good part of the money to buy Sunday shoes for her five daughters. She left the hearing "elated."[40]

The hearing officer found against Mrs. G., and White filed the next appeal. Three days later the county welfare director called White and said that he was withdrawing the claim for repayment. The county had decided "it wouldn't be 'fair' to make Mrs. G. pay the money back."[41]

White credits Mrs. G. with devising a better strategy than her lawyer:

> The lawyer had tried to "collaborate" with Mrs. G. in devising an advocacy plan. Yet the terms of that "dialogue" excluded Mrs. G.'s voice. Mrs. G. was a better strategist than the lawyer—more daring, more subtle, more fluent—in her own home terrain. She knew the psychology, the culture, and the politics of the white people who controlled her community.[42]

The story of Mrs. G.'s hearing is as discomfiting to those who read it as it was to Lucie White. Mrs. G.'s strategy did two things that White's plan had failed to do. First, it envisioned a just solution based on a moral view that was not yet incorporated in the law. Second, it took advantage of the reality that there were alternative avenues to relief: the county welfare director had the power to define what was fair independently of the hearing officer's decision.

Many scholars have called on practicing lawyers to do what Mrs. G. did, to translate the moral values of a community into a new conception of justice. Much of this literature has focused on how lawyer and client together frame the story of a case. For instance, Binny Miller advocates a new concept of case theory that gives prominence to the process of framing the story of the case. She criticizes the traditional concept of case theory as too limiting because it tends to start with legal theory and to value only the facts that support elements of possible legal theories. Miller redefines case theory more broadly as an explanation that links the case and the client's experience of the world.

40. *Id.* at 31.

41. *Id.* at 32.

42. *Id.* at 47.

> By defining case theory as an explanatory statement linking the case to the client's experience of the world, we create a context for seeing what we might not otherwise see. Case theory creates a perspective for the facts, relationships, and circumstances of the client and other parties that is grounded in the client's goals.[43]

Her redefinition of case theory has significant implications. It allows an expanded view of what a case is, and it gives the client a greater role in defining the case. Miller asks, "What is the case and what does it mean to the client?"[44] Her definition is less tied to litigation and makes the question whether to litigate or not an issue that might depend on the theory of the case. In Miller's view, her concept of case theory necessitates a different lawyer-client counseling dialog. The role of the client in the dialog is more powerful because the client's expertise in matters relevant to choosing a case theory is indispensable. The client has knowledge of the community's values and prejudices that the lawyer might not have. The client knows how she wants to be portrayed when the story of the case is told. And the client knows her own goals and priorities.[45]

Miller's objective is "to explore how the practice of lawyering can be reconstructed to embrace a greater role for clients in constructing case theories."[46] She constructs the roles of lawyer and client by examining the legal system, especially the process required for the construction of a case.

The initial steps in that construction involve the choice of an avenue for relief. Gerald P. Lopez describes the early stages of a hypothetical civil rights case in which one option is to file a section 1983 complaint in federal court. Lopez explains, however, that a court is only one of the potential audiences that might supply the relief the client wants.

> However much a court's interpretation of the situation shadows all that is done in shaping the relationships in question, a lawyer must take seriously the need to identify other audiences with the potential to satisfy more or less a client's needs or desires. This aspect of lawyering is underappreciated and is too often pursued uncritically and haphazardly. Failing to appreciate that a court is not the only audience with a defined remedial culture (constituted in large part by an "approved" repertoire of stories and arguments and storytelling and argument-making practices), lawyers often blow a chance to help a client by overlooking or crudely responding to the practices of an available audience.[47]

Lopez gives the example of a restaurant owner who claims that city police are discriminating against him because he is Chicano. The potential audi-

43. Give Them Back Their Lives: Recognizing Client Narrative in Case Theory, 93 Mich. L. Rev. 485, 553 (1994).

44. *Id.*

45. *Id.* at 564–66.

46. *Id.* at 488.

47. Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 Geo. L.J. 1603, 1630 (1989).

ences include the mayor, the chief of police, the business community, and sympathetic citizens, as well as the courts. Each audience might respond best to a different way of framing the story, and the story chosen would in turn give direction to the investigation of facts. If the client chooses to seek relief from the court, the story will have to be constructed from facts that satisfy the court's rules of evidence. If the client chooses to negotiate with one of the city's powerbrokers, the story of the case might rely more on community perceptions of what is happening.[48]

Scholarship about the practice of law has increasingly focused on the process of creating new conceptions of justice from the stories of clients' lives. Phyllis Goldfarb suggests that clinical legal education teach students how to construct stories that reflect the perspectives of their clients by using five methods developed by the feminist movement. She argues that the methods women have used to explore "the workings of a gender system" can help anyone who wants to challenge preconceived rules.[49] Goldfarb describes the feminist methods as consciousness-raising, storytelling, asking the exclusion question, contextual reasoning, and asking epistemological and ethical questions.

Consciousness-raising is a group sharing of experience that can enable people excluded by the dominant culture to identify common thoughts and feelings that they had not been conscious of. The consciousness-raising that Goldfarb describes requires an inhibition-free setting that may not be consistent with lawyer-client dialog.[50] But recognition that a client might need assistance in developing her own perception and interpretation of the events affecting her can influence the way a lawyer approaches interviewing, counseling, and case planning. Some writers have stressed the importance of client-client dialog as a means of developing client voice.[51] Such techniques reflect the need of the client as well as the lawyer to develop a consciousness of what is fair and unfair in relations with others in order to conceive and implement solutions to a legal problem.

James Stark has described an analogous process in which a skillful mediator helps the parties to a conflict identify their own needs and significant feelings. The mediator allows each party to make an opening statement during which "the mediator assists the party who is speaking to vent feelings, describe facts and broadly develop his or her understanding of the issues at stake."[52] The mediator takes an active role in helping the parties identify feelings and discover relationships between events.

48. *Id.* at 1612–36.

49. A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education, 75 Minn. L. Rev. 1599 (1991).

50. *Id.* at 1627–28.

51. See Anthony V. Alfieri, The Antinomies of Poverty Law and a Theory of Dialogic Empowerment, 16 N.Y.U. Rev. L. & Soc. Change 659, 698–704 (1987/88); Lucie E. White, Mobilizations on the Margins of the Lawsuit: Making Space for Clients to Speak, 16 N.Y.U. Rev. L. & Soc. Change 535, 545–46 (1987/88).

52. Preliminary Reflections on the Establishment of a Mediation Clinic, 2 Clinical L. Rev. 457, 478 (1996).

Goldfarb's second method, storytelling, can be used by clients or lawyers to develop their own perception of events and to change the consciousness of listeners. Other writers have also recognized the role that client storytelling plays in framing the story of a case. Anthony Alfieri proposes practices that a lawyer might use to understand a client's story and to recognize the underlying meanings and the normative values expressed by the story. He labels these practices suspicion, metaphor, collaboration, and redescription.

The lawyer relies upon *suspicion* to see behind the preconceived assumptions that inevitably cloud a lawyer's perception of a client's story. The lawyer uses the practice of *metaphor* to recognize the value statements implicit in a client's story. For instance, Alfieri tells of a single mother's struggle to receive food stamps; she was caring for six foster children in addition to three children of her own. When she tells her story, it consists of a series of events. Her lawyer might hear the story metaphorically as an expression of her commitment to the values of "dignity, caring, community, and rights."[53] *Collaboration* refers to the mutual effort of lawyer and client to create a story for use in legal advocacy—in other words, to frame the story of a case. *Redescription* is the practice of telling publicly the story created by the lawyer-client collaboration.

Goldfarb describes three other methods that lawyers and clients can use to identify creative solutions to legal problems: asking the exclusion question, contextual reasoning, and asking epistemological and ethical questions. Asking exclusion questions is a method of judging whether an institution or policy serves the needs of an excluded group fairly. When used by women, Goldfarb explains, "[a]sking such questions entails asking about the exclusion of various women's needs, perspectives, and experiences from law itself or from other social and political institutions."[54] The insights gained by asking such questions can point to necessary changes in law or can point the way to fairness in decision-making. Contextual reasoning incorporates the insights derived from the other methods of discovering new perspectives into reasoning about the resolution of cases and the meaning of justice. By asking epistemological and ethical questions, persons whose perspectives have been excluded by social institutions can challenge the foundation and the fairness of decisions that affect them.[55]

Taken together, the techniques that Goldfarb describes provide a basis for constructing a strategy that lawyers and their clients can use to frame the story of any case. The resulting strategy necessarily involves willingness to make a critical appraisal of the reality of social relationships and a dedication to pursuing just solutions.

Studies of the process of framing the story of a case provide a detailed examination of interactions between lawyer and client in the early stages of a case. The studies raise questions about the role of lawyer and client in the legal system. Further study is needed to determine whether the practices described

53. Alfieri, *supra* note 23, at 2138.

54. Goldfarb, *supra* note 49, at 1634.

55. *Id.* at 1636–46.

by clinical scholars are applicable to a broad range of cases and areas of law. Many of the examples in clinical scholarship are drawn from litigated cases, but it is also possible that the process of framing a story would enhance the communication between lawyer and client in planning a transaction or drafting a document. Stories that integrate a client's economic, moral, and legal needs can help clients make decisions and explain them to others.

The activities involved in framing the story of a case also raise questions that clinical scholarship must answer. Stories themselves convey unstated information. They can invoke positive or negative stereotypes. They can imply actions that have not been proved. More study is needed of the dangers that stories can pose as well as their benefits.

The collaboration of lawyer and client in framing the story of a case also raises questions about the allocation of power between them. The process allows a client to participate in shaping a concept of justice to present to a court or an adversary. It requires a reconception of the role of the lawyer. The lawyer needs to be aware that she might bring to the process her own moral values, her knowledge of the moral values of judges and communities, and the concept of justice embodied in existing law. In a diverse society, framing the story of a case might require reconciling conflicting visions of justice, fairness, and morality. The process requires a lawyer to evaluate strategies and, if it is clear that a story framed by the client will not achieve the desired objectives, to advise the client not to use it. (But, as the hearing of Mrs. G. illustrates, lawyers are not always better strategists than their clients.) The decision of what weight to give to a client's concept of justice is not an easy one. If a client proposes a story that distorts the truth or advances values unacceptable to the lawyer, then the lawyer must decide what course of action to take. If the process of framing the story of a case, in collaboration with a client, is a part of the lawyer's role, then clinical scholarship must also ask what limitations need to be placed on the process to protect the integrity of the legal system. Legal education should prepare lawyers for the practical and ethical decisions they will have to make.

III. Telling the Story of a Case

Telling the story of a case is an essential task of advocacy. Lawyers and clients tell the story of a case over and over again in the course of fact investigation, negotiation, alternative dispute resolution proceedings, hearings, trials, and appeals. It is a process that raises questions about the lawyer's relationship to the tribunal deciding a case, to opposing counsel and adverse parties, and to witnesses and the public. It also raises questions about the role of public opinion in resolving disputes and the lawyer's responsibility when telling the story of a case to the public. Rules of evidence, rules of civil and criminal procedure, and rules of ethics place limits on how lawyers and clients tell the story of a case. The tension between the power of a story and the restraints imposed by rules and customs can create a dilemma for lawyers and clients. Herbert Eastman illustrates the dilemma by looking back at complaints he wrote as a civil rights lawyer.

Eastman makes a plea for more persuasive storytelling in written pleadings. He compares a complaint that he drafted for a voting rights case to accounts of the same events written by a journalist. He concludes that the complaint failed to capture the context of the problem or the heroic efforts of his clients.

In a number of cases Eastman represented clients who had suffered outrages that "cried out to heaven." When he reviewed the complaints he had written, the outrages were scarcely visible. "I could barely see over the chasm separating what those clients told me about their lives and what I wrote to the Court as factual allegations in the complaint—sterile recitations of dates and events that lost so much in translation."[56] Like many lawyers, Eastman put off telling the story of the case until the trial and the closing argument—an occasion that often never comes. Many civil rights cases end after years of discovery and negotiation with a consent decree that must be approved and enforced by a judge. The complaint might be the only opportunity to communicate the client's story to the judge. Even if a case goes to trial, Eastman observes, "[t]he complaint may color the judge's perception throughout the trial and beyond—from motions, discovery disputes, and settlement conferences, through postdecree enforcement proceedings."[57] Furthermore, the complaint might also be the primary way of communicating the essence of a case to the media and to the public. A compelling story can mobilize their support behind a case.

A journalist writing about the outrages suffered by Eastman's clients would not have to contend with the restraints Eastman faced as a lawyer. Rules of civil procedure require that factual contentions made in a complaint and at trial have evidentiary support. Courts decide whether evidence is relevant. Claims must be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[58] Ethical rules limit the statements a lawyer may make to the press. Scholarship about the role of stories in the lawyering process is laying the basis for critical evaluation of such rules of procedure and rules of ethics. It is helping to define the responsibilities of lawyers to their clients, to courts, and to the public.

Anthony Amsterdam illustrates the critical importance of storytelling in appellate advocacy through an analysis of how Thurgood Marshall and John W. Davis used rival stories to persuade the U.S. Supreme Court to adopt their clients' respective positions in *Brown v. Board of Education*.[59] Marshall, representing the African-American children, and Davis, representing South Carolina, faced each other in a contest over the fundamental principles of the law of the land. They were asking the Court to decide whether the Fourteenth Amendment prohibited racially segregated public schools. Both lawyers wove their statements of fact and their interpretation of legal doctrine into stories that called for action by the Court.

56. Herbert A. Eastman, Speaking Truth to Power: the Language of Civil Rights Litigators, 104 Yale L.J. 763, 766 (1995).

57. *Id.* at 770.

58. Fed. R. Civ. P. 11(b)(2).

59. 347 U.S. 483 (1954).

The characters in Marshall's story are the segregating legislatures, the children, and federal judges as guardians of the Constitution. The main characters in Davis's story are government officials, each with a realm of authority and a duty to the public.

The plot of Marshall's story is about what the segregating states have done to the children and how the Court can save them. Amsterdam analyzes the story structure:

> The macrostructure of Marshall's argument constitutes a half-finished tale that requires judicial action to conclude it. His opening words put the action in the Court's arena and his closing words leave the action there. Despite heavy questioning by the Justices, Marshall's movement from beginning to end is relentlessly direct, its dramatic urgency unremitting:
>
> > We are rightly in this Court. We claim that South Carolina has declared a ban coercing children to be put apart whom Nature made the same. Ever has the lore of this Court run: No law can stand unbased on reason. Yet unreasoningly are our children ravished of their birthright and undone. We indict these acts. The segregating states retort that they are higher than the law of the land, cocksure the Court will share their scorn of Blacks. So. We await an answer from the Court.[60]

The plot of South Carolina's story emphasized how the state had conscientiously complied with existing law and the orders of the Court at great expense, but the insatiable recipients of the state's services always wanted more.

Amsterdam's analysis of the transcript of the oral argument demonstrates how the linguistic components of each lawyer's oral argument create a portrayal of the parties to the case as either benefactors or oppressors, sympathetic or unsympathetic, important or negligible. In Marshall's picture the excluded children are intelligent, feeling individuals.

> The things that African-Americans possess in Marshall's evidentiary passages also include *personalities* and *minds* and *development* and *self-respect.* But here African-Americans have other and more rights-based attributes as well: they are given "humiliation" and "a badge of inferiority," and they are subjected to the deprivation of *"equal status* in the school community."[61]

In contrast, Amsterdam observes, Davis's language personalizes the governmental actors.

> Davis nowhere uses the term *rights* or anything like it in connection with African-Americans; he does use *rights* once in connection with "the people" at large; he speaks often of the *right* and *power* of governments. His nouns of possession, like his verbs, endow governments and their officials with the vital powers of living beings: they have *minds;* they act *in good faith;* they are moved by a *"surge* for educational reform and improvement"; they have "strength and fiber."[62]

60. Anthony G. Amsterdam, Telling Stories and Stories About Them, 1 Clinical L. Rev. 9, 20 (1994) (citations omitted).

61. *Id.* at 31 (citations omitted).

62. *Id.* at 31–32 (citations omitted).

Both lawyers must also contend with plausibility problems that are inherent in the stories they choose to tell. Marshall's portrayal of the African-American children as victims risks turning them into objects of pity rather than agents of change. Davis's attempt to remove the children from the story runs the risk of undermining the credibility of his entire argument.

Amsterdam shows how both lawyers used storytelling to influence the Court's choice of legal doctrine as well as to persuade the Court to accept a particular way of looking at the facts of the case. He shows how skill in the use of plot, structure, and language contribute to effective appellate advocacy. The interplay of narrative and legal doctrine described by Amsterdam occurs in various forms at all levels of advocacy.

Isabelle R. Gunning describes that interplay in mediation. She argues "that defining and redefining core values is an essential aspect of American political and legal life." She urges mediators to counteract the power of "negative cultural myths" by encouraging parties to identify shared stories that support equality and other positive values.[63]

Literature about mediation recognizes that telling the story of a case is important in the settlement of disputes. James Stark describes how a skillful mediator gives each party an opportunity to tell the story of the dispute as she sees it. The mediator who takes an active role in framing issues for discussion "must frequently negotiate between contesting 'images of reality'—conflicts between parties in their agendas, their views of the relevant historical facts, and/or their fundamental values."[64] The stories that emerge can help parties identify shared interests and values that might lead to a negotiated settlement.

In a series of articles Anthony V. Alfieri explores the lawyer's responsibility to communities and the public, as well as to courts and clients, when telling the story of a case. He examines the implications of conscious references to race and other identifying characteristics in the stories that lawyers tell. He studies the trials in a series of criminal prosecutions in which racial identity was a crucial contextual factor but was not a necessary element of the crime charged.[65] He asks whether defense lawyers have a duty to use racial narratives or an obligation to avoid them,[66] and whether prosecutors should be color-conscious or colorblind in the stories they tell.[67] He criticizes defense strategies that rely on narratives of racial inferiority and suggests that lawyers have a duty to engage their clients in moral discourse about the harm such stories

63. Diversity Issues in Mediation: Controlling Negative Cultural Myths, 1995 J. Disp. Resol. 55.

64. Stark, *supra* note 52, at 481 (quoting Christopher Moore, The Mediation Process 168–69 (San Francisco, 1986)).

65. See Prosecuting Violence / Reconstructing Community, 52 Stan. L. Rev. 809, 811 (2000) [hereinafter Prosecuting Violence]; Prosecuting Race, 48 Duke L.J. 1157, 1160 (1999); Race Trials, 76 Tex. L. Rev. 1293 (1998); Representing Race: Lynching Ethics: Toward a Theory of Racialized Defenses, 95 Mich. L. Rev. 1063, 1063–65 (1997) [hereinafter Representing Race]; Defending Racial Violence, 95 Colum. L. Rev. 1301 (1995).

66. See Alfieri, Representing Race, *supra* note 65, at 1096; Alfieri, Defending Racial Violence, *supra* note 65, at 1302–03.

67. See Alfieri, Prosecuting Violence, *supra* note 65, at 813; Alfieri, Prosecuting Race, *supra* note 65, at 1159.

can do.[68] He advances a model of "race-conscious, community-oriented" prosecutorial discretion for cases of racially motivated violence.[69] Alfieri's extensive study of how stories are used in litigation, and his examination of the ethical and moral choices that lawyers and clients confront when telling stories, exemplify the theoretical questions raised by the study of what lawyers do.

Clinical scholarship can help prepare lawyers for practice by exploring the practical and ethical implications of using narrative in litigation. For a lawyer, telling the story of a case requires balancing responsibilities to a client, to the public, and to the legal system. The lawyer's decisions affect the client's ability to present ideas and grievances to adversaries and to courts, and thus affect the client's access to the legal system. The decision of lawyer and client to tell one story or another can be healing or harmful to a community and the public. Telling the story of a case can also help a court understand the context and the significance of the decisions it is called on to make.

There is a tension between the roles of a lawyer in framing the story of a case and telling the story of a case. In framing the story, lawyers are encouraged to listen to a client's vision of justice and morality and to explore ways to communicate the client's values to others. In telling the story, they are reminded that they have responsibilities to courts, communities, and the public, as well as to clients. To the extent that a lawyer gives weight to the values of the client's community, the public, or the legal system, the lawyer places limits on the loyalty afforded a client. As the series of articles by Anthony Alfieri demonstrates, the tensions are real, and they have practical consequences. Clinical scholarship, especially when grounded in the experience of practice, can make a substantial contribution to the debate over the extent and limits of a lawyer's responsibility when framing and telling stories.

IV. Implications for Legal Education and the Legal Profession

Clinical scholarship is developing an analysis of the lawyer's role in building a case that can enhance the competence of lawyers and foster critical evaluation of rules governing the practice of law. Through attempts to resolve dilemmas that lawyers and law students have encountered in actual practice, clinical scholars have identified three processes that lawyers can use in constructing a case—transcending differences, framing the story of the case, and telling the story of the case. The emerging recognition of the importance of these activities has implications for legal education and for the legal system.

Efforts by legal education to implement the recommendations of the MacCrate Report have revealed the need for a deeper analysis of the practice of law. The dilemmas described by Nancy Cook, Lucie White, and Herbert Eastman were not due to deficiencies in skills of communication, legal reasoning, or litigation. They arose from conflicting interpretations of the roles of

68. See Alfieri, (Er) Race-ing an Ethic of Justice, 51 Stan. L. Rev. 935, 942 (1999); Alfieri, Representing Race, *supra* note 65; Alfieri, Race-ing Legal Ethics, 96 Colum. L. Rev. 800 (1996); Alfieri, Defending Racial Violence, *supra* note 65.

69. See Alfieri, Prosecuting Race, *supra* note 65, at 1161.

lawyer and client, the nature of the legal system, and the roles of lawyers and their clients in the legal system. The skills and values named in the MacCrate Report do not account for many of the judgments a lawyer must make in building a case from the universe of facts and law.

The issues emerging from clinical scholarship are pointing the way to a more comprehensive analysis of what lawyers do. Clinical legal education can improve the preparation of students for the practice of law by including in the curriculum of clinical courses analysis of the lawyer's role in building a case. Clinical courses can focus attention on the challenge of integrating facts and law by considering approaches to transcending differences, framing the story of a case, and telling the story of a case.

Clinical scholarship should continue to describe dilemmas occurring in actual practice and to suggest alternative approaches to the practice of law. Much of clinical scholarship has been concerned with problems that arise when law students and their faculty supervisors represent low-income clients. But the insights gained from reflection on their experiences need not be confined to poverty law issues. On the contrary, the challenge of representing persons who have endured discrimination, exclusion, or poverty is likely to generate models of practice that can benefit the entire legal profession.

Identification of the activities necessary for the construction of a case also lays the basis for critical evaluation of rules governing the practice of law. For instance, ethical rules concerning confidentiality and loyalty can be judged by how well they serve the need for communication between lawyers and clients about the context and history that influence a client's perspective.[70] Rules restricting multidisciplinary practice can be evaluated more effectively by identifying the essential steps in the construction of a case and the skills required to perform them.[71] Rules of procedure and rules of evidence can be measured against a standard that takes into account the role of narrative in advocacy.[72]

* * * * *

Clinical scholarship is analyzing the practice of law from new perspectives. It is identifying processes that cut across traditional categories of interviewing, counseling, negotiation, fact investigation, trial advocacy, and appellate advocacy. In describing three of these processes—transcending differences, framing the story of a case, and telling the story of a case—clinical scholarship is

70. See, e.g., Paula Galowitz, Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship, 67 Fordham L. Rev. 2123 (1999); Jacqueline St. Joan, Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality, 7 Clinical L. Rev. 403 (2001).

71. See, e.g., Bruce A. Green, The Future of the Profession: A Symposium on Multidisciplinary Practice; The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate, 84 Minn. L. Rev. 1115, 1148–55 (2000); Alex J. Hurder, Nonlawyer Legal Assistance and Access to Justice, 67 Fordham L. Rev. 2241, 2264–65 (1999).

72. See, e.g., Douglas A. Blaze, Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation, 31 Wm. & Mary L. Rev. 935 (1990).

exploring the roles of lawyers and clients in defining a case, constructing a case, and resolving a case. It is investigating how lawyers and clients organize facts to build cases that advance the cause of justice. The developing analysis of the practice of law will enable lawyers, courts, and the bar to refine and improve ethical rules, procedural rules, and the laws governing lawyers.

Through inquiry into the process of transcending differences, writers are seeking answers to questions about the lawyer-client relationship and a lawyer's responsibility to learn about social forces that affect the client because of the client's identifying characteristics. Through study of the process of framing the story of a case, writers are exploring the role of a lawyer and client in planning case strategy. Through attention to the process of telling the story of a case, writers are examining the relationship of lawyers and their clients to courts and other decision-makers, to opposing counsel and adverse parties, to witnesses and the public. The new directions in scholarship about the practice of law can lead to both a deeper understanding of the lawyering process and improvement in the quality of practice.