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A Field Trip to Benetton and Beyond: Some Thoughts on Outsider Narrative in a Law School Clinic

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Abstract
This essay explores the process of teaching students—and ourselves—to listen to and accept different versions of reality. Such exploration results in a proposition that is easy to state but difficult to accomplish: that in order to achieve this goal, we must challenge the students' "common sense"—their sense that they "know" how people act—by offering examples of behaviors that differ from that knowledge, without triggering the very "common sense" we are trying to combat. Toward this end, the first section of the essay presents a hypothetical initial interview with a client, and the student interviewer's reactions to her, which reflect the student's "common sense" understanding about the lives of people like his client. The second section compares the student's reactions to criticisms of the broader movement of "outsider narrative", and concludes that the two reactions emanate from the same failure to acknowledge and integrate differences between the storyteller/client and the critic/student. The essay then explores the development of sexual harassment law to demonstrate how outsider narrative can change laws by challenging the entrenched common sense of the fact finder. Finally, the essay returns to the clinic and suggests having students read relevant fiction along with other outsider narrative as a way to reach the students' common sense understanding before it gets in the way of their ability to hear their clients' stories.

Keywords
"Benetton Story", race, privilege, non-traditional families, sexual harassment

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Essay

A FIELD TRIP TO BENETTON . . . AND BEYOND: SOME THOUGHTS ON "OUTSIDER NARRATIVE" IN A LAW SCHOOL CLINIC

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One of the goals of clinicians as teachers is to train law students to listen to, hear and retell their clients' stories.[1] This task is complicated by the fact that the students — who are for the most part white and middle-class, and by definition college-educated[2] — inhabit a world vastly different from — indeed some might say diametrically opposed to — the world inhabited by the clinic's client population, which generally tends to be poor people with a limited education, and for the most part people of color.[3]

Given these differences, students' ability to hear and believe their clients' stories is often inhibited because those stories take place in and present a reality that not only diverges from, but also contradicts the students' own reality. The clinician's first challenge, therefore, is

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[1] *See, e.g.*, Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 486 (1994) ("clinical theory has long grounded narrative in the actual practice of lawyering"). *See also* Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717 (1992); Carrie Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education*, 4 ANTIOCH L.J. 287 (1986); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1748 (1993); Abbe Smith, *Rosie O'Neil Goes to Law School: the Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. REV. 1 (1993); Stephen Wizner & Dennis Curtis, *"Here's What We Do": Some Notes About Clinical Legal Education*, 29 CLEV. ST. L. REV. 673 (1980); Symposium, *The Many Voices of Clinical Legal Education*, 1 CLIN. L. REV. 1 (1994).

[2] Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay in Parallel Universes*, 42 J. LEGAL EDUC. 103 (1992) (in 1991, 85% of all law students were white, while African Americans made up only 6.3% of the law student population, and other minorities made up an even smaller percentage).

[3] *See, e.g.*, Duncan Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 45 (1990).

to train the students to be on the lookout for this dissonance, and, rather than reject the differences, to integrate them into their own understanding of what is true.

This essay explores the process of teaching students — and ourselves — to listen to and accept different versions of reality. Such exploration results in a proposition that is easy to state but difficult to accomplish: that in order to achieve this goal, we must challenge the students' "common sense" — their sense that they "know" how people act — by offering examples of behaviors that differ from that knowledge, without triggering the very "common sense" we are trying to combat.

Toward this end, the first section of the essay presents a hypothetical initial interview with a client, and the student interviewer's reactions to her, which reflect the student's "common sense" understanding about the lives of people like his client. The second section compares the student's reactions to criticisms of the broader movement of "outsider narrative,"[4] and concludes that the two reactions emanate from the same failure to acknowledge and integrate differences between the storyteller/client and the critic/student. The essay then explores the development of sexual harassment law to demonstrate how outsider narrative can change laws by challenging

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[4] I use the terms "outsider narrative" and "outsider jurisprudence" generally to describe a movement in legal literature and academia to incorporate the voices of "outsiders" into mainstream legal dialogue. By "outsider," I mean to describe someone who does not have access to the channels of power and communication in this society. Practically speaking — and for the purposes of this article — this means someone who is female, of color, lesbian, gay, bisexual, un/der educated, low-income, poor, disabled, undocumented, non-English speaking, etc. Conversely, an "insider" is someone who does have access to the channels of power and communication in this society, *i.e.* a straight, white, educated, male American citizen.

A crucial component of the movement is the telling of stories, often in the first person, often quite personal and "unlegal," about the author's life or experiences. *See infra* notes 14-18 and accompanying text. Paul Gewirtz explains the movement — the "turn to narrative" — as "a clear offshoot of the further loss of faith in the idea of objective truth and the widespread embrace of ideas about the social construction of reality." Introduction to LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 13 (Peter Brooks & Paul Gewirtz eds., 1996).

The "outsider jurisprudence" or "outsider narrative" movement embraces many different theories and theorists, which it is beyond the scope of this essay to describe in great detail. For more analysis and exploration, *see, e.g.,* Arthur Austin, *A Primer on Deconstruction's "Rhapsody of Word-Plays,"* 71 N.C. L. REV. 201, 230-31 (1992) (Critical Legal Studies' argument that political and class interests govern judicial decisionmaking). *See also* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 1-12 (1992); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 127-28 (1987) (all three Critical Race theorists using "outsider narrative" to expose how the law and society reinforce prejudice and discrimination).

the entrenched common sense of the fact-finder. Finally, the essay returns to the clinic and suggests having students read relevant fiction along with other outsider narrative as a way to reach the students' common sense understanding before it gets in the way of their ability to hear their clients' stories.

"Marci's" Story

Part of my job as a legal services attorney involves supervising law students who are participating in a Legal Services Clinic in our office. One of my tasks in this capacity is to discuss and analyze with the students their interviews of clients or potential clients. The following is a hypothetical discussion with a student about a new client. It is hypothetical in that this client *per se* does not exist. Rather, the description of "Marci" represents an amalgamation of many clients the students in the Legal Services Clinic had interviewed and represented. The student, on the other hand, did really exist. Like the majority of his law school peers, he was a white, middle class straight man in his mid-twenties.[5] His participation in the legal services clinic grew out of a personal and professional background of progressive politics, and a commitment to pursuing a career in public interest law.

All we knew about this client before she came in was that she was a woman who needed help in a custody battle. The student prepared by going over the state custody, divorce and child support statutes, and by reading recent family law cases dealing with custody. Based on what he gleaned from these resources, he wrote out a list of areas he wanted to explore in the course of the interview, such as the relationship between the child and the father; whether there was a history of substance abuse on either side; whether there were suggestions of sexual or physical abuse on either side; what the child was like; what the child wanted; etc.

In addition, the student read over the Binder, Bergman & Price[6] chapters on interviewing, and reminded himself to ask open-ended questions and let the client tell her own story before he jumped in. After some quick generic role-playing with me, the student went off to interview the client.

About an hour later, he came into my office, visibly disturbed. I

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[5] *See supra* note 2 (describing the statistical make-up of a law school student body).

[6] DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991). This textbook is commonly used in law school clinics to help students develop the practical skills of representing clients who are, for the most part, low-income or otherwise "outsiders." *See, e.g.,* Robert D. Dinerstein, *Critical Texts and Contexts*, 39 UCLA L. REV. 697 (1992) (book review essay of BINDER, BERGMAN & PRICE, *supra*, and ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990)).

could tell the interview had not gone as he had expected. "What happened?" I asked.

"Well, the client, Marci, is a lesbian who claims she was battered by her lesbian lover, Pam, who is now in jail for attempted murder. Marci herself was acquitted of criminal negligence for having allowed Pam's five year old son, Clint, fall out a second story window, supposedly because Marci was protecting him from Pam. Clint is fine, but Pam's parents are now suing for custody of Clint, who is currently in foster care, and whom Marci refers to as 'my son.' She came here because she wants us to represent her in the custody case."

"And?" I asked.

"Well, I'm having trouble putting the story together in a way that makes sense. I mean I like her. And I definitely feel bad for her, she's been through a horrible ordeal. But I don't know legally what we can or should do for her. I can't make sense of her story.

First, I can't really digest the idea of a woman beating up her own son and female lover. Second, Clint isn't Marci's child. She had no biological or legal connection to him. She and Pam didn't even have a formal agreement between them — no signed document or contract that could show the intent of the parties that Marci be considered the other parent. I don't know. I tend to think that either the dad — depending on who he is in the equation — or Pam's parents have more of a claim here than Marci.

Not to mention the whole question of unfitness — what person who considered herself a caring maternal figure would let a five year old — no, *put* a five year old — on a window sill without regard to whether or not he would fall out and probably die? I'll grant that maybe she didn't do it intentionally, but the fact that she did it at all makes me think either that she really doesn't care about Clint the way she says she does, or that, if she does, she is nonetheless not fit to be a parent."

"So," I asked, "are you uncomfortable with Marci because you don't believe her, or because you don't believe in her? You don't feel her to be a 'worthy' — for lack of a better word — client?"

"I guess both. First, I don't believe parts of her story. But you're right. Even if I did believe her completely, I don't know if I would think she was someone we should represent. Forget about whether or not we would win — and I don't think we would stand a chance — what message would we be sending? That legal services defends lesbians with no biological connection to a child, and who let that child fall out a third story window, in custody battles against that child's own maternal grandparents? And what lessons am I learning by representing such a client?"

The student couldn't accept Marci's version of events. And he further couldn't make sense of trying to accept her version of events. He could draw no redeeming normative conclusions from her case, either for society as a whole or for his own growth as a law student or lawyer. He wanted no part of Marci's case.

I, on the other hand, trusted Marci and believed her story. I thought her situation was an interesting and difficult one with great ramifications for non-biological mothers and for women in violent relationships with other women. But then, I was a lesbian who had experience both with non-biological mothers and with lesbians in violent relationships. I knew about these things from my life. In contrast, the student — the straight white middle-class male student — had not had experience with lesbians as mothers, let alone in violent relationships. He did not have the same background resources that I did to help him identify with and understand this client.

How could I impart to him my sense that Marci was telling the truth, that her version of events was not only possible but probable, that her case was a worthy one? I couldn't do it without sounding hysterical or preachy or both. And anyway, the point was for students to come to these conclusions themselves, not to have me lecture them until they got it.

We agreed that he would do some research into custody disputes involving women in prison, and non-biological parents. But I wasn't satisfied. The student wasn't going to find answers to his concerns in one or two family law decisions. His concerns went much deeper than whether or not Marci's behavior was covered by a particular case or statute. He was concerned because he had been unable to *hear* Marci's story. He had done all the right things in preparation. He had been open-minded from the outset. He had let her tell the story. The interview had been a perfect exercise in client-centered interviewing.[7]

And yet, he did not feel comfortable representing Marci because her story didn't ring true, it didn't make sense to him, he couldn't integrate it into his own views of the world. Without being able to hear Marci's story on some deeper level, not just as a string of facts, he felt unable to mold it into a viable case theory[8] and prepare to present that theory to a judge or jury. What's more, Marci's story

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[7] For discussions of the importance of "client-centeredness," *see generally* BASTRESS & HARBAUGH, *supra* note 6; BINDER, BERGMAN & PRICE, *supra* note 6; Miller, *supra* note 1, at 503-13.

[8] For discussion of the central role of case theory in the preparation and presentation of the client's "legal story" to a decisionmaker, *see, e.g.*, RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS § 3.2 (2d ed. 1995). *See also* Miller, *supra* note 1, at 490-529 (describing different approaches to building case theory).

confirmed his own privileged understanding of the world — a world in which lesbian relationships are outside the norm and women with no biological connection to kids have no stake in taking care of them. He felt unable to represent her because on some level he didn't believe she deserved to be represented.

Outsider Narrative and its Critics

As I floundered around, trying to find the magic formula that would crack Marci's code for this student, I suddenly realized the parallels between my interactions with the student and the scholarly debates over "outsider narrative."[9] The student's rejection of Marci's story mirrored the rejection of Patricia Williams' "Benetton Story"[10] by critics like Daniel A. Farber and Suzanna Sherry[11] and Kathryn Abrams.[12] My student was a critic of outsider narrative.[13] The key, then, to getting him to understand Marci would be to deconstruct his criticism of Marci's story in the same way that defenders of outsider narrative deconstruct their critics.

Susan Estrich begins a law review article on rape with a brutal description of her own violation.[14] Marie Ashe takes readers through four births, several miscarriages and an abortion to bring her point home about the need for reform in reproductive health laws.[15] Patricia Williams recounts how it feels to be discriminated against by describing a routine Christmas shopping expedition gone awry.[16] These are the voices of outsiders, telling their stories.[17]

In particular, I thought of the debates generated by Patricia Williams' "Benetton Story."[18] In the story, Patricia Williams describes

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[9] *See supra* note 4 (defining "outsider narrative" and "outsider jurisprudence").

[10] *See infra* notes 18-21 and accompanying text.

[11] Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

[12] Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

[13] *See infra* note 17 and sources cited therein.

[14] Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

[15] Marie Ashe, *Zig Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law, in* NARRATIVE AND LEGAL DISCOURSE 262-87 (David R. Papke, ed., 1991).

[16] *See infra* notes 18-21 and accompanying text.

[17] It is beyond the scope of this article to give an exhaustive recitation or analysis of the body of "outsider narrative" or its critics. *See, e.g.,* Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475 (1993); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994); and sources cited *supra* notes 4, 11-16 and accompanying text, and *infra* notes 18, 27, 29, 33, 47 and accompanying text.

[18] PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44-51 (1991) ("The Death of the Profane: a commentary on the genre of legal writing") (hereafter "the Benetton story").

going Christmas shopping for her mother. She sees a sweater she thinks will be perfect in the window of a Benetton store. She sees several white shoppers inside the store, so rings the buzzer to be let in, pressing her "round brown face" against the window while she does so. The young, white salesclerk, blowing a bubble with his gum, shakes his head "no," and indicates that the store is closed. He will not let her in. She writes of this experience and sends the article in to be published in a law review, where it undergoes various radical transformations,[19] which she also describes in the final essay.

Critics responded to the Benetton story by asking if Williams was "not using the store window as a 'metaphorical fence' against the potential of [the salesman's] explanation in order to represent [her] side as 'authentic'";[20] and by wondering how she could be sure she was right. In classrooms, the discussion of the Benetton story often focuses not on what the story tells us about racism or the experience of being an African American woman, but on whether what Williams described "really happened."[21] Indeed, a concern common to most critics of "outsider narrative" is exactly the same concern as that expressed by the student, an insider, about the story that Marci, an outsider, told: Why should we believe this story?[22]

The student's other major concern was also one present in much criticism of outsider narrative scholarship, which is the question of authority: Why are these stories important enough for us to take seriously?[23] Or, as the student asked, what message do we send, what

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[19] *See, e.g., id.* at 57 (describing a conversation Williams had with one of her law review editors).

[20] *Id.* at 51.

[21] Indeed, part of the story itself is Williams' description of a conversation she had with one of her law review editors:

> I received the second edit. All reference to Benetton had been deleted because, according to the editors and the faculty advisor, it was defamatory; they feared harassment and liability; they said printing it would be irresponsible. I called them and offered to supply a footnote attesting to this as my personal experience at one particular location and of a buzzer system not limited to Benetton's; the editors told me that they were not in the habit of publishing things that were unverifiable. I could not but wonder, in this refusal even to let me file an affidavit, what it would take to make my experience verifiable.

Id. at 57.

[22] *See, e.g.,* Farber & Sherry, *supra* note 11; Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992). *See* Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994) for a critique of these articles.

[23] *See* Farber & Sherry, *supra* note 11, at 824-27, 831-40. Kathryn Abrams complains that often in these outsider narratives,

> Despite the professed intentions of [the] authors, [the story] does not help [readers] think about ameliorative legal reforms. . . . The experience conveyed by the narrative does not seem to translate automatically into a new rule; and the narrative scholarship seems to provide no "normative framework" for achieving that translation.

lesson do we teach, if we accept this story as true? Both are unable to make the leap from the story itself — a description of something that happened to someone — to an action.[24]

Williams describes her experience with the publication of her Benetton story:

> Two days *after* the piece was sent to press, I received copies of the final page proofs. All reference to my race had been eliminated because it was against "editorial policy" to permit descriptions of physiognomy . . . . In a telephone conversation to them, I ranted wildly about the significance of such an omission. "It's irrelevant," another editor explained. . . . "It's nice and poetic," but it doesn't "advance the discussion of any principle. . . . This is a law review, after all."[25]

The editors could not make the leap from Williams' description of her "round brown face" pressed up against the store window, to a broader discussion of the racism underlying the buzzer security systems in New York. So too, the student could not make the leap from Marci's description of mothering Clint while Pam drank and battered to a broader discussion of alternative family and domestic violence.

The criticism of "outsider narrative" and the student's rejection of Marci's story share two basic flaws. First, they rely on definitions of legal norms and values that fail to reflect the reality of outsiders' lives, the exact norms and values these stories challenge. Second, the supposedly objective standard of truth on which the criticisms rely is in fact just one — albeit the dominant — point of view, so is no more inherently valuable than the storyteller's point of view. In short, these criticisms ignore the fact that outsider narratives grow out of a context of their own, that is by definition different from insiders' reality.[26]

Critics suggest that these narrative, highly personalized and specific stories do not fit in to the legal framework of verifiable truths that creates new legal principles. In other words, these stories describe events and people that don't necessarily have a place "inside" mainstream legal discourse, using language and structure that lead to no normative legal conclusions. However, as Jane E. Baron points out,

> the notion that storytellers must justify departures from "the rules" of mainstream scholarship "as they exist," as well as from the "ordi-

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Abrams, *supra* note 12, at 978.

[24] *See, e.g.,* Tushnet, *supra* note 22, at 252-60 (expressing concern that outsider narrative, focusing as it does on the individual's experience, doesn't relate well enough to general legal principles).

[25] WILLIAMS, *supra* note 18, at 47.

[26] Fajer, *supra* note 22, at 1845 (these critics "fail to consider that outsider narratives do not take place in a vacuum").

> nary understanding" or the "conventional standard" of truth . . . [is] precisely what many storytellers dispute, namely, that mainstream, ordinary, and conventional standards are just "there" and themselves already justified.[27]

Put more simply, by Gertrude Stein, "there is no there there."[28] The "there" is the power of the insiders to have their stories believed by others like themselves, and thus transformed into official stories.

Insiders have created and perpetuated their own reality, from which outsiders are, by definition, excluded, leaving, as Kim Lane Scheppele describes, "those whose stories are not believed [to] live in a legally sanctioned 'reality' that does not match their perceptions."[29] The law review editor's reality — a world where race is nothing more than a "description[ ] of physiognomy" — has nothing to do with Williams' reality as an African American woman denied access to the insider — of a Benetton store, of the world of legal scholarship — because of her race. So too, the student's reality in which biology determines relationships, and women don't let kids fall out windows has nothing to do with the reality of a battered lesbian desperately trying to protect her son from their batterer.

These divergent realities are most explicitly reflected by the criticisms that the stories provide no tools with which to leap from their descriptive narratives to a legal principle or conclusion. Probing slightly deeper into these stories reveals not that they express no normative values, but rather that they describe and represent normative values that are different from the insider's.

Critics ask: Did Williams correctly interpret the salesclerk's refusal to let her in as racism? Is this the inference that I, as an insider, would have drawn? The student asked: Would I have stayed with a partner who beat me? Would I have put Clint on the windowsill? The answer to these questions is generally no, because the insiders asking these questions live in a world that is totally different from the world in which the outsiders live. Why, then, should those realities — the ones that are legally sanctioned by others who share them — determine the value of descriptions of the other realities — the ones rejected and distrusted by those who do not share them?

Insiders respond that their realities are legally sanctioned not because they are believed by other insiders, but because they represent an objective, neutral expression of truth. The stories of outsiders, on the other hand, represent a particular point of view — whether of a

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[27] Jane E. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 256 (1994).

[28] GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 289 (1937) (describing her hometown of Oakland, California).

[29] Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2079 (1989).

lesbian, or of a non-biological mother, or of a victim of domestic abuse, or of an African-American woman. As such, they are inherently less reliable than the neutral, objective theory of truth.

But again, where is the "there"? Really, the insider's "neutral, objective" account of what happened is only one version of many possible accounts, each representative of the teller's own point of view, which in this case is that of a white straight upper-middle class progressive law student. This begs the question, posed here by Kim Scheppele, "if the objectivist account is one point of view among many (and not the point-of-viewless as against other point-of-viewful accounts), why . . . should [it] be privileged?"[30] Clearly, it shouldn't. Rather, it should be measured for what it is: one of several possible points of view, not inherently more, not inherently less valuable than any other point of view.

So having deconstructed the official reasons for dismissing outsiders' stories both from the realm of "serious legal scholarship" and the realm of "what really happened," we must now ask, what is really going on? Insiders refuse to hear and/or believe outsiders' stories[31] because they often conflict with the insider's understanding of the outsider. The essential message these storytellers send is "not that judgment and evaluation [of the stories] are impossible, but that these processes take place against a backdrop of hidden, contestable assumptions without which we could never function, but which necessarily predetermine in large measure, the results reached."[32]

This backdrop of assumptions has also been called "stereotypes," "background stories," and the term that I will use for now, "pre-understanding."[33] Basically, pre-understanding means that the readers or listeners who are insiders pass the outsiders' stories through a pre-existing screen of "knowledge" about how such outsiders act. Because the outsiders' stories often conflict with that pre-existing "knowledge," a tension arises between what the insiders "know" about the outsiders and what the outsiders' stories are describing. Confronted with this tension, insiders often choose not to question their own version of reality — what they "know" is "true" — but rather to reject the conflicting story as inherently false.[34]

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[30] *Id.* at 2091.

[31] *Id.* at 2079 (describing how outsider narratives are "officially distrusted, rejected, found to be untrue, or perhaps not heard at all").

[32] Baron, *supra* note 27, at 257.

[33] *See, e.g.*, Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2123-24 (1991); Fajer, *supra* note 22, at 1845; Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992).

[34] Fajer, *supra* note 22, at 1856 ("Faced with a conflict between deep-seated beliefs and

The white salesman in the Benetton store couldn't imagine that Williams wanted to come in to buy because his pre-understanding about African Americans was that they came in to steal. The law review editors couldn't see this as racism because it was done "with a smile, a handshake, and a shrug," and their pre-understanding of racism was that it was done with firehoses and police dogs. The student couldn't believe that Pam really beat up Marci because his pre-understanding of relationships was that people leave when they are being hurt; nor could he believe that Marci was Clint's mother because she had no biological connection to him and my student's pre-understanding was that blood is thicker than water.

Overcoming Pre-understanding: Some Success Stories

Pre-understanding is problematic not only because it prevents insiders from appreciating the stories of outsiders on an intellectual level, but also because "the pre-understanding of judges and lawyers can infect the legal process and build incorrect or overbroad assumptions into the structure of laws and legal decisions."[35] In other words, not only do readers reject these stories, but judges and juries and, as I saw, students being trained as legal services attorneys do too.

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

In order to overcome the pre-understanding of the fact-finder when representing an "outsider," lawyers must work to integrate the outsider stories into the common sense of insiders. This process requires a delicate balance. The attorney must identify what pre-under-

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a contradicting story, some people may adjust their beliefs, but others are likely to reject the story as untrue."). *See also* Baron, *supra* note 27, at 263 ("Background assumptions determine, in great measure, whether a particular account will be heard as a . . . persuasive or believable story"); Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313, 323 (1992).

35 Fajer, *supra* note 22, at 1847. *See also* Scheppele, *supra* note 29, at 2098 ("Courts can exacerbate and reinforce the differences and disagreements that invariably exist in a pluralistic society by clinging to the views that there is only one true version of a story and that there is only one right way to tell it.").

standing exists and offer an alternative to that pre-understanding, without losing the fact-finder by challenging his or her common sense to such an extent as to trigger the "I don't believe you" impulse.

Generally, the best way to do this is by telling counterstories about an individual member of the "outsider" group. As Marc Fajer explains, "stories about individuals are a particularly useful way to combat pre-understanding. . . . Because pre-understanding often consists of gross over-generalizations, it may be effectively combatted or mediated through counterexamples."[36]

An example of how this works is the now well-established cause of action for sexual harassment. Before Catharine MacKinnon convinced everyone that sexual harassment was gender discrimination, "the facts that amount to sexual harassment did not amount to sexual harassment."[37] The common sense understanding of the behavior that came to be known as sexual harassment — the teasing and flirting and dirty joke telling — was that "boys will be boys," that this behavior was biological, and that men couldn't help doing it.[38]

By the same token, women who complained about this "natural male" behavior were dismissed as humorless, rigid, and oversensitive. "Not that the acts did not occur, but rather that it was unreasonable to experience them as harmful. Such a harm would be based not on sex but on individual hysteria."[39]

One judge in an early case held that the defendant's attempts to "go out" with the plaintiff, and his repeated questions along the lines of "what am I going to get for this?" were "capable of innocent interpretation,"[40] despite the plaintiff's testimony that such behavior was "hateful, dangerous and damaging."[41] Another early case before the EEOC held that if a victim was sexually harassed without a corroborating witness, proof was inadequate as a matter of law.[42] This woman's story was legally not enough to overcome what the judge

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[36] Fajer, *supra* note 22, at 1847. In addition, counterstories are important to show the kinds of stereotypes and pre-understanding that exist:

> we can tell stories about ourselves, not so much to show how we are representative of our group, but how the society makes essentializing assumptions about us because of the groups to which we belong. These stories do not purport to show that all members of the group behave a certain way. Instead, they demonstrate that people commonly believe members of a group conform to the stereotype or at least that the relationship between the stereotype and reality is complex.

Id. at 1854.

[37] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 106 (1987).

[38] *Id.* at 108.

[39] *Id.*

[40] Scott v. Sears & Roebuck, 605 F.Supp. 1047, 1051, 1055 (N.D. Ill. 1985).

[41] MACKINNON, *supra* note 37, at 109.

[42] EEOC Decision 82-13, 29 FEP Cases 1855 (1982).

"knew" to be true about sexual harassment — *i.e.* that it doesn't happen.

But beginning with her groundbreaking work, *Sexual Harassment of Working Women*,[43] MacKinnon told story after story about how this behavior made women feel, how it affected their productivity, how it played into their understanding of themselves in the workplace.[44] By presenting stories about individuals, MacKinnon exposed the gross generalizations inherent in the rationalizations for why the behavior that has come to be called sexual harassment was perfectly acceptable. In so doing, she appealed to the fact-finders' common sense by asking "are all men really animals with uncontrollable biological urges?" "Are all women who complain about those biological urges really uptight prudes?"

Fact-finders began questioning their pre-understanding of what was acceptable male behavior; their common sense began to change. The first cases establishing sexual harassment as a cause of action under Title VII quoted extensively from MacKinnon's work, particularly her descriptions of the harm the "boys will be boys" behavior caused to women.[45]

Not only that, but, as MacKinnon declared triumphantly ten years after the first case was litigated, "once it became possible to do something about sexual harassment, it became possible to know more about it, because it became possible for its victims to speak about it."[46] More stories could be told because they were now being heard. And they were being heard because the smokescreen of pre-understanding, stereotype, "common sense" had been, if not cleared away, at least punctured.[47]

The "Disorienting Moments"

It is not necessary, however, to wait until a case or client gets to a judge or jury to start challenging the "fact-finder's" pre-understand-

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[43] CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

[44] *Id.* at 25-55.

[45] *See, e.g.*, Vinson v. Taylor, 753 F.2d 141, 146 n.37 (D.C. Cir.) *aff'd & remanded sub nom.* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986); Henson v. City of Dundee, 682 F.2d 897, 908 n.18 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 945-46 (D.C. Cir. 1981); Mitchell v. OsAIR, Inc., 629 F.Supp. 636, 643 (N.D. Ohio 1986).

[46] MacKinnon, *supra* note 37, at 106.

[47] In a recent essay, MacKinnon wrote:

> I have no idea why 85 percent of federal workers can be known to be sexually harassed for a decade, but not until one of them embodies the experience on national television does sexual harassment in the federal work force become real in some sense.

Catharine MacKinnon, *Law's Story as Reality and Politics*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 4, at 237.

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

So the counterstory-telling must begin at the beginning. A perfect place for such counterstories is in a law school clinic. As clinicians and practitioners of poverty law we strive for those times when our students or our colleagues or we ourselves are able to identify and challenge a stereotype and thereby more fully understand a broader scheme of injustice or inequity. In her piece in this issue, Jane Aiken describes these times as "disorienting moments," which Fran Quigley defines as moments

> "when the learner confronts an experience that is disorienting or even disturbing because the experience cannot be easily explained by reference to the learner's prior understanding . . . of how the world works."[48]

But how do we do get to these moments, to what Aiken describes as opportunities for "major transformation?"[49] How do we challenge the "common sense" of the students — who are "insiders" — so they can be effective advocates for their clients — who are "outsiders?"

Aiken suggests that a law school clinic where students deal with real clients provides a perfect opportunity for these disorienting moments to occur. In a clinic, students come face to face with their privilege and their client's lack thereof.[50] It is within the disorienting moments created by this stark contrast that the student's common sense is challenged and she comes to "understand" the different reality her client is describing.[51]

Marci's story brought the conscientious and well-intentioned straight white male law student face to face with his common sense about family violence and familial relationships. He had lived much of his life taking for granted not only that biology *did* govern the rules of family interaction, but that biology *should* do so. He was forced, after hearing Marci's story, to acknowledge at the very least that she

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[48] Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 CLIN. L. REV. 1, 24 (1997) (quoting Fran Quigley, *Seizing the Disorienting Moment*, 2 CLIN. L. REV. 37, 51 (1995)).

[49] *Id.* at 23.

[50] *See supra* notes 2, 3, 5 and accompanying text (describing race and class differences between law students and their clients).

[51] Aiken, *supra* note at 48, at 26.

presented a reality different from his, and one that he had probably never considered possible. This was the start of the disorienting moment.

The key, however, is the next step — what he will choose to do with the clash of realities. For Aiken acknowledges that these "disorienting moments" can also become "confirming moments,"[52] where the student's pre-understanding of his or her client — the pre-understanding that comes with the student's privilege — becomes confirmed by the client's story.[53] As we saw in both the student's reaction to Marci and the critics' reaction to Patricia Williams, "stories challenging the pre-understandings of the dominant culture will frequently raise credibility questions."[54] They will, in other words, trigger, rather than challenge the "I don't believe you" reflex.

Aiken finds that disorienting moments become confirming moments when the student remains detached from the client, unwilling to identify with her, and when, therefore, there remains a distinct power differential between the client and student.[55] Aiken finds it difficult to prevent these confirming moments from happening because her attempts to get students to examine their privilege are viewed "as high-handed and 'politically correct,'"[56] and might serve only to entrench the students' already entrenched notions of how people (should) act.

This was my concern exactly as I tried to figure out how to get my student through what threatened to become a confirming experience to the disorienting experience I felt his exploration of Marci's story would offer. I needed a tool to ease my student's learning curve, a way to challenge his pre-understanding without further entrenching it.

How can clinicians provide students with the tools to prepare for an interview with someone whose story is so different from their own that it won't appear on their radar screen? How do we provide them the opportunity to hear their clients' stories before they hear directly from their clients, thereby allowing discussion and analysis of the sto-

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[52] *Id.* at 27.

[53] Jane Aiken describes her worst fears realized by students who lack compassion for their clients because those clients' stories merely reinforce the students' stereotypes about poor people and people of color:

> In the clinic, we hear: "He's malingering . . . ." "She's always late or misses the appointment. She must not think of this as important . . . ." "She doesn't know how to raise her children." "I told him to keep all of his records but he just doesn't listen." "She doesn't deserve . . . ." "I'm not sure if he did this, but he did other things. Prison would be good for him." "Those people just don't know how to take care of their homes."

Id.

[54] Fajer, *supra* note 22, at 1863.

[55] Aiken, *supra* note 48, at 27-28.

[56] *Id.* at 27 & n.97 (citing Robert Condlin, *"Tastes Great, Less Filling": The Law School Clinic and Political Critique*, 35 J. LEGAL EDUC. 45 (1986)).

ries and the students' reactions to them, before the actual client gets rejected?

Having students read outsider narrative might be a way. As we saw earlier, critics of these narratives had the same response to the stories that my student did to Marci's. Both narratives triggered the insiders' "I don't believe you" impulse which leads to an inability or refusal to hear the narratives. If they read these stories before hearing a real live client tell her story, the students would have the opportunity both to experience the disbelief and also to examine the pre-understanding that causes the disbelief.

For example, students in a Civil Rights Clinic could read the Benetton Story and spend an entire class discussing whether Williams' story was "true" and why. The clinician could guide the discussion so that students on their own would come to identify the backdrop of privilege and stereotype that prevented them from believing Williams' story. In this way, the clinician could control against confirming moments and help the students themselves transform these occasions into the disorienting moments that lead to understanding and compassion. Then, when a real live client complaining of discriminatory treatment comes in, the students would be prepared with a new filter to hear her story.

But outsider narrative is not confined to the nonfiction pieces that are starting to pepper legal academic journals. Indeed, a much more common form of outsider narrative appears outside the academy and outside the law: It is called fiction.

When we read fiction, we suspend our disbelief. We understand that the people who are acting so differently from how we in these situations would act are fictional characters, so we are able to feel compassion for them. We are able to see their world and hear their stories without rejecting it and them as implausible.

The student didn't believe that a woman would beat up her own child and female lover. In *Another Mother*, by Ruthann Robson, the protagonist, a lesbian attorney, represents lesbians who are accused of killing their children.[57]

The student was unwilling to view Marci as Clint's mother because she had no biological connection to him. As such, he felt that Pam's parents, who were Clint's biological grandparents, would be better caretakers. In the novel *Mothers*, by Jax Peters Lowell,[58] two women have a baby together, using the brother of the non-biological mother as the sperm donor. The parents of the non-biological mother — who, through their son, are the biological grandparents of the child

[57] RUTHANN ROBSON, ANOTHER MOTHER (1995).
[58] JAX PETERS LOWELL, MOTHERS (1995).

— sue for custody of the child because of the biological mother's lesbianism.

The student didn't believe a mother would let her child fall out of a window in order to protect him from being battered. The central and brutal scene in Toni Morrison's *Beloved* describes how Sethe, a former slave, cut her infant daughter's throat when she knew that white men were coming to take her and her children into slavery.[59]

These are examples relevant to Marci's particular case, but outsider voices in modern and not so modern literature reflect the lives of most if not all legal services clients.

Dorothy Allison's novel and stories on the lives of impoverished southern families would go far in dispelling the stereotypes of law students working in a rural poverty law clinic, or in a family law clinic dealing with the victims of domestic and/or child abuse.[60]

Paul Monette's and Larry Kramer's descriptions of gay life beginning in the early days of the AIDS epidemic up to today would be a useful addition to the curriculum of an HIV/AIDS law clinic, where the common sense of students might be that all gay men now (should) use condoms and practice safe sex.[61]

The poignant climax of Gloria Naylor's "Mattie Michael" in *Women of Brewster Place* involves an African American mother's decision to put her house — her only asset — up for bail so that her only son can get out of jail.[62] Understanding the protagonist's motivation in making this decision, which results in disaster, would be essential for students in a criminal defense clinic. Though typically such students would be representing the son in jail, not the mother, any kind of "client-centered" lawyering, particularly in the criminal context, would have to take into account the needs and experience of the client's family.

These books are novels. The readers implicitly agree to withhold judgment, and are drawn into the horror and tragedy of the custody fight, slavery, child abuse. If the authors do their jobs, the readers come out on the side of the protagonist. The point of fiction is not to convince the reader that the actions of the characters are necessarily right and must be defended at all costs. Rather, the point is to shed light on the characters' motivation, and thus to challenge the reader's assumptions about and understanding of what makes people do what

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[59] TONI MORRISON, BELOVED 148-53 (1988).

[60] *See, e.g.*, DOROTHY ALLISON, BASTARD OUT OF CAROLINA (1992); DOROTHY ALLISON, TRASH (1988).

[61] *See, e.g.*, PAUL MONETTE, HALFWAY HOME (1991); PAUL MONETTE, AFTERLIFE (1990); LARRY KRAMER, THE NORMAL HEART (1985).

[62] GLORIA NAYLOR, THE WOMEN OF BREWSTER PLACE, A NOVEL IN SEVEN STORIES 7-54 (1980)

they do.

Had the student read these works before meeting with Marci, he might have been prepared to hear — and believe — her despair about losing Clint. He might have been prepared to question the right of Pam's parents to sue for custody. He might have had some insight into why Marci put Clint on the windowsill. He might not have been so quick to reject her story as impossible. And he might have seen that the lesson to be learned — the normative conclusion to be reached — from representing a client like Marci, from telling Marci's story to a judge, was not that lesbians who try to kill their lover's child deserve custody of that child, but rather that the notion of family is evolving and complicated, and that laws must accommodate that evolution.

Jane Aiken describes a "successful" disorienting moment that results from a student's experience with a gay HIV-positive male client who reminds the student of her uncle, who is straight.[63] Short of having Marci remind the student of his aunt or sister or mother, it seems that these fictional stories provide the greatest tool for overcoming the student's inability to hear Marci's story.

Being a lawyer is about representing people: asking questions that elicit stories that we can hear and understand and retell. To be able to ask those questions and hear and retell those stories, we must learn to understand human motivation that is different from our own. By having law students read fiction — in conjunction with their case books and their Binder, Bergman and Price and their journal articles — we remind them that different realities result in and from different motivations, and we remind them to be compassionate in the face of that difference.

Conclusion

In response to an early draft of this paper, someone asked me, "do you really think that Justice Kennedy wrote the *Romer v. Evans*[64] opinion as a result of having read modern gay fiction?" While this is certainly a nice image to contemplate, it is an oversimplification.

Fact-finders on all levels — whether they be law students or juries or judges — are influenced by what they see and hear in their own

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[63] *See* Aiken, *supra* note 48, at 39.

[64] 116 S. Ct. 1620 (1996). The Supreme Court in this case upheld an injunction entered by the Denver, Colorado District Court, and upheld by the Colorado Supreme Court, enjoining enforcement of an amendment to the Colorado Constitution ("Amendment 2") prohibiting all legislative, executive or judicial action designed to protect homosexual persons from discrimination. In what was hailed as a landmark case for gay rights, Justice Kennedy wrote the opinion holding that Amendment 2 violated the U.S. Constitution's Equal Protection Clause.

lives. Part of what they see and hear is fiction: movies, television, novels, plays. The more present the stories of outsiders are in the fiction that fact-finders see and hear, the more likely those fact-finders are to accept the outsiders' stories when they see and hear those in real life.

I don't know why Justice Kennedy wrote the *Romer* opinion the way he did, any more than I know why Justice White wrote the *Hardwick* opinion the way he did.[65] However, I don't think it's a stretch to say that the change in society's views about homosexuality over the ten years that elapsed between the two opinions played a role. I further don't think it's a stretch to say that a catalyst to those changing societal views about homosexuality is the increased presence of gay themes in fiction. So, in a manner of speaking, you could say that at least part of the reason Justice Kennedy wrote the *Romer* opinion the way he did is that he read modern gay fiction. Or at least his law clerk had.

[65] Bowers v. Hardwick, 478 U.S. 186 (1986), the case in which the Supreme Court held that the U.S. Constitution's guarantee to the right of privacy did not encompass "homosexual sodomy."