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A Persistent Critique: Constructing Clients’ Stories

Abstract
Drawing on narrative, post-colonial, clinical and other critical theory, this article explores the role and necessity of critical reflection by lawyers in the construction of clients’ stories in representation. In particular, the piece is framed by the experiences of transgender clients and their student attorneys. The piece begins by examining the “problem of representation” - the challenge of seeing and hearing clients’ stories, particularly when those stories do not fit in to our understanding of how the world works. It moves on to describe first the "official stories" that govern how the legal system treats transgender people and second how those stories are themselves porous, based as they are on assumptions that don't adequately address the particular issues confronting the particular client who has come into contact with the legal system. The third part examines how in particular cases, with critical reflection, law students and lawyers were able to see and hear, and thus represent, their transgender clients. The piece concludes with the suggestion that the representation of transgender clients can be used as a metaphor for all client representation: if we as lawyers notice what we bring to the representation - both our assumptions and our expertise - we are able to hear our client's particular story and work with her to construct a new story that both resonates for the client and can be heard and believed by the legal decisionmaker. In this way, critical reflection is a skill that makes us better lawyers for all our clients.

Keywords
Transgender, Representation, Reflection, Critical, Stories, Lawyering

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A PERSISTENT CRITIQUE: CONSTRUCTING CLIENTS’ STORIES

Carolyn Grose*

Drawing on narrative, post-colonial, clinical and other critical theory, this article explores the role and necessity of critical reflection by lawyers in the construction of clients' stories in representation. In particular, the piece is framed by the experiences of transgender clients and their student attorneys. The piece begins by examining the "problem of representation" — the challenge of seeing and hearing clients' stories, particularly when those stories do not fit in to our understanding of how the world works. It moves on to describe first the "official stories" that govern how the legal system treats transgender people and second how those stories are themselves porous, based as they are on assumptions that don't adequately address the particular issues confronting the particular client who has come into contact with the legal system. The third part examines how in particular cases, with critical reflection, law students and lawyers were able to see and hear, and thus represent, their transgender clients. The piece concludes with the suggestion that the representation of transgender clients can be used as a metaphor for all client representation: if we as lawyers notice what we bring to the representation — both our assumptions and our expertise — we are able to hear our client's particular story and work with her to construct a new story that both resonates for the client and can be heard and believed by the legal decisionmaker. In this way, critical reflection is a skill that makes us better lawyers for all our clients.

INTRODUCTION

Transgender lawyer and activist Dean Spade came to the law school where I was teaching to give a presentation on issues faced by transgender clients in the legal system. He described himself as a female-to-male transgender attorney and talked about his work as founder of the Sylvia Rivera Law Project, a project that serves low-

* Practitioner in Residence, Washington College of Law, American University. I would like to thank the numerous readers and editors who have helped shape this piece: Jane Aiken, Nancy Cook, Nan Hunter, Minna Kotkin, Kate Kruse, Elliott Milstein, Susan Schmeiser, Ann Shalleck, Dean Spade; and the WCL Clinical Scholarship workshop group: Lily Camet, Janie Chuang, Dina Haynes, Margaret Johnson, Sarah Paoletti, Vicki Phillips, Josh Sarnoff and Claire Smearman. Also thanks to my research assistants, Gina Beck, Abbye Needham and Mita Roy.
income transgender, intersex and gender non-conforming clients. In addition to analyzing legal and political issues, he told the story of his own arrest for using a men's room in Grand Central Station. After the presentation, one of my students remarked to me that she had found the presentation very interesting, but said that she just “couldn't take Dean Spade seriously as a man.” I, in fact, had been wondering, “what ever happened to just identifying as a butch lesbian?” But then I realized that Spade’s story wasn’t about being a man or a butch lesbian: it was about being a transgender person. This realization led me to reflect on the disconnect between the story Dean Spade told in his presentation and the stor(ies) the student and I had heard or expected to hear, and also on the fact that both the student and I were able to recognize our inability to hear him.

Lawyers tell stories in their role as “representors” of clients and, in that role, they must tell stories that can be heard and believed by legal decisionmakers. The problem, though, is that lawyers are often themselves unable to hear their clients’ stories, and are therefore unable to represent the clients in a way that doesn’t further silence them. We’ve all heard, and many of us have written, that lawyers are storytellers. More than that, we’ve all heard, and many of us have written, that not all stories are equal in the eyes of the law. Rather, some

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2 A note about pronoun use and terminology: In this article, to the extent possible, I use the pronoun preferred by the person about whom I am writing. In describing the students’ interaction with their clients, I try to track the students’ use of the pronoun, using whichever pronoun they are using. As for the term “transgender,” I use this word to mean anyone who is identified, or identifies, as not fitting into one of the two established gender categories, i.e., male or female. See Dean Spade, Resisting Medicine, Re/Modeling Gender, 18 Berkeley Women’s L.J. 15, n.2 (2003); Susan Stryker, The Transgender Issue: An Introduction, 4 Gender L. Q. 145, 149 (1998) (“I use transgender not to refer to one particular identity or way of being embodied but rather as an umbrella term for a wide variety of bodily effects that disrupt or denaturalize heteronormatively constructed linkages between an individual’s anatomy at birth, a nonconsensually assigned gender category, psychical identifications with sexed body images and/or gendered subject positions and the performance of specifically gendered social, sexual or kinship functions.”).
stories are believed and valued by legal decisionmakers, and thus become a part of the network of stories embodied in the dominant legal discourse. Others are not believed or valued by the legal decisionmakers and thus remain outside that discourse. Scholars and critics have identified these as “outsider narratives” and have suggested that the “official stories” are official only because they are constructed as such: they are told by and about people familiar and similar to the “insiders” who hear the stories, and thus are easily incorporated into the dominant legal discourse. Stories told by or about those unfamiliar to the insiders hearing the stories don’t fit easily into the insiders’ world view, and thus don’t become official stories. The system of official stories thus reinforces both the dominant discourse and the silence of those outside that discourse.

The challenge, therefore, for those of us who teach any kind of lawyering, is to embrace and then impart to our students the ideas that all stories — the official ones, the background ones, the outsider ones, the insider ones — are constructed. Moreover, and perhaps more important, lawyers play a huge — if not the biggest — role in the construction of these stories, and with this role comes enormous power and responsibility. Lawyers can either use this power and responsibility to construct stories based on what has come before, ratifying the official stories, or they can critically reflect on the system of official and unofficial stories, working to identify what makes some stories

5 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. Professor Mari Matsuda, University of Hawaii, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, Keynote Address at the Yale Law School Conference on Women of Color and the Law (Apr. 16, 1988), in 11 WOMEN’S RTS. L. REP. 7 (1989). By “outsider,” I mean someone who does not have access to the channels of power and communication in this society; conversely, an “insider” is someone who does have that access. The “outsider jurisprudence” or “outsider narrative” movement embraces many different theories and theorists, which are beyond the scope of this article. 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).

official and others unofficial and what goes into the construction of these stories. Having so situated themselves in relation to this system of stories, lawyers can work with their clients to construct new stories that both reflect the clients’ own, if constructed, reality, and can be heard by the legal system.

And that brings me back to Dean Spade. The student could identify right away that Spade’s story didn’t make sense to her. Her acknowledgment of that confusion allowed me to notice my own reaction to his story and to question that reaction.7 I realized that representing transgender clients offers the opportunity to examine and challenge our own assumptions about gender and sexual identity because a transgender client’s story is indeterminate, unexpected, unexplainable in the law’s language of gender and sexual identity.

I thus situated (and situate) myself as a learner, along with my students. This location is implicit in the idea of reflective lawyering, which is ultimately what this piece is about: the role (and necessity) of critical reflection in representation. By critical reflection, I mean the process by which we self-consciously locate ourselves within the system in which we are operating and in relation to the other players in that system. Through this process, we are able to identify what assumptions are at work and the effect they are having on us, on the other players, and on the system itself. Having identified those assumptions and how they are operating, we find ourselves with more room to make intentional choices about how to proceed with the representation of our client, and we end up being more effective advocates for them, both because we ourselves make space to hear our clients’ stories, and because we create that space in the legal arena so that the clients’ stories can be heard (and maybe even believed) there. As such, critical reflection is a skill that makes us better lawyers.

In law school clinics, we teach the theory and skill of critical reflection in part by giving students experiences with clients. We hope that such experiences will open up awareness and prompt discussion about the students’ assumptions. The decentering around concepts of gender that takes place when students/lawyers work with transgender clients serves as a metaphor for the necessary decentering that should take place in all lawyer/client communication, in order for the lawyer to be able to represent the client in a way that doesn’t further marginalize her. As teachers, we participate in this process by watching our students grapple with the decentering they experience and

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7 I don’t know through what lens the student was viewing Dean Spade’s story. Since I do identify as a lesbian (itself an identity that some view as contesting hegemonic, official gender stories), however, I recognized that my reaction took place, at least in part, through the lens of my own personal experience and how I choose to represent that experience.
then by reflecting on it with them, encouraging them to explore their feelings of disorientation and to recognize what space opens once they identify their assumptions. As learners along with them, we also push ourselves to be self-conscious about extracting theory — lawyering theory and teaching theory — from this practice, and by framing the practice itself in the theory of critical reflection.

In this article I want to explore the representation of transgender clients to see what lawyering theory we can export to representation of other clients. In the first section, I describe the "problem of representation" — the challenge of seeing and hearing clients' stories, particularly when those stories do not fit in to our understanding of how the world works. In the second part of the article, I describe first the "official stories" that govern how the legal system treats transgender people, and how those stories are themselves porous, based as they are on assumptions that don't adequately account for the particular issues confronting the legal system. In describing these stories, I will examine how they — and the assumptions on which they are based — act to oppress transgender people. I conclude the second part with a description of some "unofficial" stories told by transgender clients in several law school clinics. In the third part, I describe how, with critical reflection, the students who worked with those clients were able to see and hear, and thus represent, them. I conclude with a reflection on what the students learned in the course of the representation of their transgender clients, and what those lessons teach us about the theory of reflective lawyering in representation.

I. THE PROBLEM OF REPRESENTATION

Lawyers are retained to provide representation to clients in legal proceedings. This kind of representation entails the lawyer standing in for the client in specific and ritualized contexts and pleading the client's case by taking the client's particular factual situation and "representing" it in the language of law. The lawyer's job is to assemble diffuse facts into a medium that renders it recognizable by the law. In order to perform this task effectively, the lawyer — the representor — must first know her subject — the representee. That knowing takes the form initially of seeing and hearing the client, processes that ideally would lead to an understanding of her story. The next step of the act of representation is the one most often thought of as "representing," and that is the actual portrayal of the client, or telling of her

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8 Although this article focuses primarily on the lawyering that takes place in the context of litigation, with its prototypical "storytelling" trope, the usefulness of the storytelling metaphor is not limited to that context. The lawyer hears and tells stories in her other roles as well: as legislative advocate, deal negotiator, judicial clerk, even judge.
Representing a client's story, by the lawyer to a specific audience, is challenging because it demands that the representor be able to hear and see the client in order adequately to re-present her story. Without critical reflection, it is virtually impossible for the lawyer to know — to see, hear, understand — her client, and, therefore, it is virtually impossible to take that next step of portraying her. Too often lawyers unconsciously rely on their knowledge of and familiarity with the tools of the second step — the language and rituals of the law — and skip over the first step — attempting to see and hear their client. The story they tell to the audience outside the relationship, therefore, is at best a distorted version of the client’s story, and at worst, the lawyer’s own version of what he thinks the client’s story is or should be. In neither case is the client herself able to speak and be heard.9

Effective representation depends on the representee’s being able to tell a story that the representor can hear and understand and thus present within the legal system in such a way that the client’s story remains her own, even if the lawyer is the one doing the talking. This challenge deepens for lawyers who seek to represent those who are marginalized from mainstream American society.10 Those clients are oppressed not only by the system in which they are trying to operate, but also by their lawyer’s inability to see and hear them in order adequately to portray them within it. More than just telling a wrong, or an incomplete, story about the client, the lawyer’s attempts to portray the outside voice without critical reflection further marginalizes the client by keeping her voice outside the dominant legal discourse.

In her analysis of the post-colonial intellectual’s attempts to “represent” former colonial subjects,11 Professor Gayatri Spivak concluded that “the subaltern cannot speak.”12 The term “subaltern” has historically been used to refer to those who are “by definition . . . subject to the authority of dominant powers.”13 Spivak, however,

9 There are plenty of examples of clients resisting this kind of silencing. See, e.g., Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 BUFF. L. REV. 1 (1990).
11 Spivak describes “representation” not in a legal context, but rather as the western or westernized intellectual’s attempts to “speak for” and/or “speak as” the former colonial subjects. Id. at 275-79. Susan Schmeiser introduced me to Spivak’s work on representation, and helped me see its connection to the issues I raise in this piece.
12 Id. at 308. I use this analysis, and this term, because, as Spivak uses it, it describes someone with no access to or within the language of the dominant discourse.
goes further, saying that the "[s]ubaltern [is not] just a classy word for oppressed, for Other, for somebody who's not getting a piece of the pie. . . . In postcolonial terms, everything that has limited or no access to the cultural imperialism is subaltern — a space of difference."\(^{14}\) Spivak explains that by "speaking," she was not referring to "the actual fact of giving utterance,"\(^ {15}\) but rather to the "speech act," which consists dialogically of both speaking and hearing.\(^ {16}\) That is, "even when the subaltern makes an effort to the death to speak, she is not able to be heard" by the post-colonial intellectual, and thus is not able to "complete the speech act."\(^ {17}\) Spivak contends that without a "persistent critique" of our practice,\(^ {18}\) attempts by those of us within the dominant system to represent the subaltern, or those without access to the system, are problematic and counter-productive since such attempts "further underscore[ ] the subaltern's political marginality."\(^ {19}\) This is what she calls the "problem of representation."\(^ {20}\)

Spivak's analysis of the problems inherent in attempts to represent the subaltern might be applied to the attempts by lawyers to represent outsiders in the legal system. A particularly dramatic example of this tension is that of the transgender client seeking legal representation. Not only marginalized by gender and sexual norms, and thus economically, politically and socially disadvantaged, the transgender client eludes description by our very language itself. From the insufficiency of pronouns to more general category confusion, attempting to represent a transgender client provides lawyers with an opportunity to confront their complacency in the process of rendering a human life into a legally cognizable story.


\(^{15}\) Gayatri Spivak, *Subaltern Talk: Interview with the Editors*, in *The Spivak Reader* 287, 289 (Donna Landry & Gerald MacLean eds., 1996).

\(^{16}\) Id. at 292.

\(^{17}\) Id. at 292; see also Judith Butler, *Undoing Gender* 69 (2004).


\(^{19}\) Gunewardena, *supra* note 13, at 202; see also Angela Harris, *Bad Subjects: The Practice of Theory and the Constitution of Identity in Legal Culture*, 9 *Cardozo Women’s L.J.* 515, 522 (2003) ("The struggle of subalterns against (and sometimes only within) the double bind of being expected to act as a subject and being treated as incapable of subjecthood has been the law. . . . The law claims to listen to subaltern voices . . . [y]et in practice, projects undertaken in the name of equality and respect silence those voices.").

\(^{20}\) Spivak, *supra* note 18, at 63 ("It is not a solution, the idea of the disenfranchised speaking for themselves, or the radical critics speaking for them; this question of representation, self-representation, representing others, is a problem.").
II. Why the Subaltern Cannot Speak: The System of Official Stories

Why can't those outside mainstream society "complete the speech act"? In short, because those inside mainstream society are not able to hear them. Insiders are able meaningfully to hear only those stories that they have heard before: the "official stories." When an outsider tells a story that doesn't fit in to the insider's understanding of the world, the insider tends either not to believe the outsider, or to recast the outsider's story into language and context that make sense to the insider. In so doing, the insider erases the outsider's story. She silences him.

This silencing is particularly invidious because it acts not only to silence this particular outsider, but also to maintain the system of official stories that causes the silencing in the first place. The power and irony of this system is that as long as the official stories are the only ones that can be heard (believed) and thus retold, even the stories about those outside the system are accessible only through what Spivak calls "texts . . . from the other side," that is, texts written by insiders about the lives of outsiders. This system of "texts from the other side" — which make up the dominant legal discourse, and include legal documents, language, rituals — operates as one of what Foucault called "regimes of truth." These "regimes of truth" serve to "legitimize what can be said, who has the authority to speak, and what is sanctioned as true." Another way to describe hegemony, then, is that the insiders — the dominant group — have so effectively communicated their versions of reality to the rest of society that those stories have become embedded in what can be called "common sense," or "the natural order."

In this way, the oppression of those outside the dominant discourse occurs through "an ongoing system that is mediated by well-intentioned people acting as agents of oppression, usually unconsciously, by simply going about their daily lives." Those outside this system of official stories are oppressed not only by overt acts of discrimination. Rather, oppression works, more insidiously, through simple and routine acceptance by those both within and outside the system that the official stories are in fact the only true and valuable

21 See notes 3 and 4, supra, and sources cited therein.
23 FOUCAULT, 1 THE HISTORY OF SEXUALITY (1980); see also TEACHING FOR DIVERSITY AND SOCIAL JUSTICE 11 (Maurianne Adams, Lee Anne Bell & Pat Griffin, eds., 1997).
24 Id.
25 Id.
26 Id.
stories, and that anything but those stories carry less, if any, legal va-

lidity. The oppression occurs because we don't identify, examine, or
ultimately challenge the assumptions underlying what we have come
to accept as common sense. An examination of the attempts of a
transgender client to navigate the legal system provides a valuable op-
portunity to unpack and challenge the assumptions that drive the “re-
gime of truth” about gender and sexual identity. We’ll see in Section
III that such an examination further reveals that lawyers who operate
as insiders within the legal system, but do so critically and with self-
reflection, are able to maneuver among the “texts from the other
side” and disrupt this “regime of truth,” thus creating the opportunity
for their clients to speak and be heard by those inside the system.

A. Texts from the Other Side: The Official Stories

Courts take one of two paths when confronted with transgender
plaintiffs and/or defendants. They either defer to scientific and medi-
cal definitions and explanations of gender and gender “deviance” or
“non-conformity,” or they describe and adopt notions of “natural
law,” or even creationism, to determine the gender identity of the
transgender individual in their courtroom. In going down either one
of these paths, courts avoid the opportunity actually to decide these
cases based on the facts before them — this plaintiff with this particu-
lar story desiring this particular result — choosing instead to punt ei-
ther to science or to “the natural order.” The law as an independent
basis for adjudication becomes eclipsed by these other “regimes of
truth.” The official legal stories, therefore, are quite tenuous as such,
and vulnerable to manipulation and transformation by the observant
and critical advocate.

In the meantime, however, the official stories hold. They are,
first, that gender is binary — that is, everyone is either a man or a
woman — second, that gender is determinable using specific criteria,
and third, that gender can be changed only under very rare and clearly
identified and identifiable conditions. Underlying these stories are
two non-legal official stories: the medical and scientific community's
definition of “transsexual” and “gender identity disorder,” and the
standards of care for treating these conditions. In this section, I will
examine these official stories first by describing the official story
about gender itself and then by examining the texts that describe and
enforce its rigid binary nature.27 In so doing, I will explore the as-

27 My purpose in reviewing the cases that follow is not to describe the multiple chal-
lenges faced by transgender people trying to operate in the world, but rather to describe
how they are referred to, categorized and defined by those who write and thus perpetuate
the official stories. For analyses of the actual legal hurdles faced by transgender plaintiffs
sumptions underlying these stories, and show how those assumptions work to reinforce the dominant discourse about gender.

1. The Background Stories

Scientists and doctors agree that gender is more than a simple anatomical fact, and that no single criterion determines a person's gender. Indeed, the scientific and medical communities suggest that there are seven traits that make up gender identity: 1) chromosomes; 2) gonads; 3) hormones; 4) internal reproductive organs; 5) external genitalia; 6) secondary sexual characteristics; and 7) self identity. The English legal system first adopted this scientific and medical description of gender in 1970 in *Corbett v. Corbett,* where the court described gender determination as based on "(i) chromosomal factors, (ii) gonadal factors, (iii) genital factors, and (iv) psychological fac-


29 Id.; see also Chang, supra note 28, at 666 (listing the several factors that make up sexual identity as chromosomes, gonads, internal morphology, external morphology, hormones, phenotype, gender of rearing, gender role, and gender identity and mentioning that there is not always perfect harmony between these factors); Darren Rosenblum, supra note 28, at 504.

American courts were quick to follow, and have remained fairly consistent in relying on this definition since then. The official story — legal and otherwise — about gender is thus that there are multiple factors that go into its determination, but that it is determinable and binary: one is either male or female. The only question is which, and that depends on the presence, absence, or extent of the various factors described.

Scientists and doctors have also agreed that for a small number of people “concerns, uncertainties, and questions about gender identity persist during [their] development [and] become so intense as to seem to be the most important aspect of [their] li[ves], or prevent the establishment of a relatively unconflicted gender identity.” When these people “meet specific criteria in one of two official nomenclatures — the International Classifications of Diseases - 10 (ICD-10) or the Diagnostic and Statistical Manual of Mental Disorders — Fourth Edition (DSM-IV)” they are diagnosed as suffering from a form of “gender identity disorder” or GID.

The ICD-10 provides five diagnoses for GID, including transsexualism, which has three criteria: “1. The desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make his or her body as congruent as possible with the preferred sex through surgery and hormone treatment; 2. The transsexual identity has been present persistently for at least two years; 3. The disorder is not a symptom of another mental disorder or a chromosomal abnormality.” For its part, the DSM-IV has three distinct diagnoses for GID, depending on the age of the patient, and other criteria. The basic diagnostic criteria are: “A. A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex) . . . B. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex. . . . C. The disturbance is not concurrent with an inter-

31 Id.
34 Harry Benjamin Int'l Gender Dysphoria Ass'n, Standards of Care for Gender Identity Disorders 2 (6th ed. 2001).
35 Id.
36 Id.
38 Id. at F64.
39 Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV 302.6, 302.85, 302.6 (4th ed. 1994) [hereinafter DSM-IV].
sex condition. . . . D. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.”

The official story about gender thus gives rise inexorably to another official story, this one about gender “deviance,” as defined by these scientific and medical texts. This story includes a description of the symptoms of GID. For example, the DSM-IV describes the childhood play of adult patients: boys with GID “particularly enjoy playing house, drawing pictures of beautiful girls and princesses, and watching television or videos of their favorite female characters. . . . They avoid rough and tumble play and competitive sports and have little interest in cars and trucks.” Girls with GID “prefer boys’ clothing and short hair,” are interested in “contact sports, rough-and-tumble play.” So kids who played with “gender deviant” toys grow up to be “gender deviants.” And the reverse is true too: adults who have GID must have played with “gender deviant” toys.

But what do boys and girls without GID do? Nowhere in any of the medical and scientific texts does there appear a description of the symptoms of someone who doesn’t have GID, i.e., someone who has an “ordered” gender identity. Clearly that’s because we all know what “normal” gender identity looks like: it just is. Obviously, an adult with “normal” gender identity played with “gender appropriate” toys. “Normal” boys play with trucks and girls play with dolls. It’s common sense.

Having identified the condition of “Gender Identity Disorder,” the scientific and medical communities set about developing rules for how to treat it. Beginning in 1979, a group of doctors formed the Harry Benjamin International Gender Dysphoria Association which developed standards of care for “the Hormonal and Surgical Sex Re-assignment of Gender Dysphoric Persons.” Called simply the Harry Benjamin Standards of Care, these have become the protocol for diagnosing and treating those who “suffer” from the conditions described in the DSM and the ICD-10. The standards involve a “triadic treatment sequence” composed of hormone therapy, a real-life experience

40 Id.
41 Id.
42 Id.
43 Spade, supra note 2, at 24.
of living as a member of the opposite sex, and sex reassignment surgery. Patients with gender identity disorder might undergo any of the following five kinds of treatment: diagnostic assessment, psychotherapy, real-life experience, hormone therapy, and surgical therapy.

In order to be eligible for this treatment, the patient must first be diagnosed with gender identity disorder. Such diagnosis takes place along the lines described earlier, and includes inquiry into the person's childhood and history as it relates to his or her gender identity. Following diagnosis, the patient must be assessed by a mental health professional, who then recommends the kind of treatment the patient should undergo. To receive hormone therapy, the patient must have a "documented real-life experience" as the "preferred" gender for at least three months prior to the start of the hormone treatment. In the alternative, the patient must have undergone a period of psychotherapy "of a duration specified by the mental health professional." To have sex reassignment surgery (rather than just hormone replacement therapy and/or psychotherapy), the patient must have had 12 months of hormone therapy and "12 months of successful continuous full time real-life experience. Periods of returning to the original gender may indicate ambivalence about proceeding and generally should not be used to fulfill this criterion."

In other words, someone assigned male at birth who just wants hormones has to live "as" a woman for three months. Someone assigned male at birth who wants to have surgery has to live "as" a woman for a year. In both cases, living "as" the preferred gender has to be "full-time" — no breaks allowed. Breaks would imply that the patient isn’t serious about transitioning, and would result in the professional conclusion that the patient isn’t entitled to the treatment. If as someone assigned male at birth, you can live "as" a woman for a whole year, you must really "be" a woman, and therefore are entitled to change your body accordingly. If you can’t live "as" a woman for a whole year, you must really "be" a man, and therefore are not entitled to the surgery. Underlying these criteria, of course, is the threshold official story about gender: that it is binary. Everyone is either a man

45 See HARRY BENJAMIN INT’L GENDER DYSPHORIA ASS’N, supra note 34, at 17, for an explanation of what this means, and its purpose.
46 Id. at 3.
47 Id.
48 Id. at 2.
49 Id. at 6.
50 Id. at 13.
51 Id.
52 There are exceptions to this requirement, but it is the standard of care. See id. at 20.
53 Id.
or a woman: it's just a matter of figuring out which one.

Not surprisingly, the application of standards in any individual patient's case is heavily dependent on the opinions of doctors and mental health professionals. These medical opinions, in turn, are articulated in terms of official "Standards of Care for Gender Identity Disorders" ("the SOC"). The Fourth Version of the SOC, published in 1990, made a point of warning doctors against being swayed by the patient's own descriptions of his or her condition or wishes. Noting that hormonal and surgical sex reassignment is extreme, Principal 1 of that version states that such treatments "may be requested by persons experiencing short-termed delusions or beliefs which may later be changed and reversed." As a result, Standard 1 of the Fourth Version provides, "Hormonal and/or surgical sex reassignment on demand (i.e., justified simply because patient has requested such procedures) is contraindicated." Rather the doctor or clinical behavioral scientist must make her own "careful evaluation of the patient's reasons for requesting such services and evaluation of the beliefs and attitudes upon which such reasons are based." Such analysis "requires skills not usually associated with the professional training of persons other than clinical behavioral scientist."

Indeed, such scientists "must often rely on possibly unreliable or invalid sources of information (patient's verbal reports or the verbal reports of the patient's families and friends) in making clinical decisions." Therefore, Standard 7 in the Fourth Version is that the clinical behavior scientist must obtain peer review — a second opinion — before the treatment can take place. In other words, because the experiences of the patient himself, and those of the people closest to him, are "unreliable and invalid," only a clinically trained medical professional who has known the patient for at least 3 months, and who is backed up by another clinically trained medical professional who has examined the patient "on at least one occasion" can decide whether the patient is entitled to the treatment requested.

The most recent version of the SOC, the Sixth, published in 2001, continues to rely on medical recommendations and peer review as conditions precedent for receiving treatment. Before getting hormone therapy or breast surgery, the patient must present the prescribing doctor with a "documentation letter" from the mental health profes-

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55 Id.
56 Id.
57 Id. at 8.
58 Id. at 9.
59 Id.
sional who assessed him. The letter must contain seven specifically identified points about the patient, his diagnosis, his relationship and treatment with the mental health professional, how well he has complied with the treatment so far, etc. In order to have genital surgery, the patient must present two "letters of recommendation" from mental health professionals, at least one of whom is a Ph.D. clinical psychologist or psychiatrist. At least one of the letters should be "an extensive report" of the patient. The point of all this documentation is for the medical establishment to confirm that this person actually is a "patient" who suffers from the identifiable and diagnosable disease of "gender identity disorder," and is eligible, therefore, for treatment.

These standards should be understood as "texts from the other side" — narratives by "insiders" about "outsiders." As such, unsurprisingly, they uphold the official story about gender: it is binary and determinable (by scientists and doctors). For those very few people who aren't happy with the gender they were assigned at birth, there is a medical diagnosis and treatment — again, by scientists and doctors — to help them either resolve their issues with that gender, or to transition them to the other gender. Which direction the treatment goes is also to be determined by the scientists and doctors. These stories became official because they are built on assumptions and stereotypes about gender roles, childhood development, adult sexual behavior, self-presentation and identity that are deeply embedded in the "common sense" understandings about men and women. As such, the conclusions are very difficult to rebut without unpacking and dismantling the entire framework — "regime of truth" — about gender and sexual identity.

2. The Law's Stories

The legal system has for the most part adopted this official story, incorporating into case law both the DSM descriptions of the conditions, and the Harry Benjamin Standards of Care for their treatment. A minority of jurisdictions, however, have either rejected or ignored these official stories in favor of another official story about gender as "God given" and thus both eminently determinable and ultimately unchangeable. In this section I will examine how the law — as embodied by appellate judges in three specific cases from within the last ten years — has treated transgender people in the legal sys-

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60 HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N, supra note 34, at 7.
61 Id. at 8.
63 See e.g., Kosilek, 221 F. Supp.2d at 156.
tem, and show both the rigidity and the fragility of official stories about gender. These three cases illustrate the dominant legal analysis and approach to stories about gender, the background that the law students described *infra* had to account for in their representation.

In 2003, in *In the Matter of Robert Wright Heilig*, the Maryland Court of Appeals held *inter alia* that “the Circuit Court had jurisdiction to determine and declare that a person had changed from one gender to another.” The lower court had refused to enter an order changing the plaintiff’s gender identity from male to female, holding that “gender had physical manifestations that were not subject to modification.” The Court of Appeals overturned the order and remanded the case back to the Circuit Court to allow petitioner the opportunity to “offer further proof . . . that he had sufficiently effected that change to be entitled to such a determination and declaration.”

The bulk of the Court’s opinion is spent describing the medical and scientific literature on “transsexualism” and its treatment. Apologizing for producing what sounds like a medical text, the Court explains that “some of the concepts that underlie the views espoused by transsexuals who seek recognition of gender change [e.g., the plaintiff in this case] are the subject of debate, in both the medical and legal communities.” This language harkens back to the Standard of Care’s “possibly unreliable or invalid sources of information” — i.e., those stories told by and about people who fall outside the confines of gender’s binarism. The Court goes on to explain that because of the contentiousness of those “views” (i.e., the stories of the actual plaintiff and others like him), “unguided by expert [i.e., medical and scientific] testimony, there is no way that we could evaluate [the concepts] properly.”

The Court then describes the question before it thus: under what circumstances may a court “declare one’s gender to be other than what is officially recorded and [what] criteria [must] be used in making any such declaration[?]” To answer, the Court defers to another field and its experts:

> [W]hether and how gender can be changed is [a question] where the law depends upon and, to a large extent, must follow medical [including psychological] facts. Any reasoned legal conclusion respecting an asserted change in one’s gender must therefore be based on

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64 *Heilig*, 816 A.2d at 68.
65 *Id.* at 69.
66 *Id.* at 70.
67 *Id.* at 72.
68 See *Harry Benjamin Int’l Gender Dysphoria Ass’n*, *supra* note 54.
69 *Heilig*, 816 A.2d at 72.
70 *Id.* at 79.
admissible evidence of medical fact.\textsuperscript{71}

Noting that "surgery seems to be a requirement for recognition of gender change" in multiple contexts,\textsuperscript{72} the Court concludes that the petitioner has the burden of showing "sufficient medical evidence of both the relevant criteria for determining gender and of the fact that, applying those criteria, he has completed a permanent and irreversible change from male to female."\textsuperscript{73}

In other words, the court punts. It finds the determination of gender beyond its area of expertise because there are too many factors involved, so defers entirely to those who know about such things, i.e. the medical and scientific communities. If the plaintiff can come back with "admissible evidence of medical fact" which has been determined by the medical and scientific communities to lead to the conclusion that gender has been changed, the court will go along with that conclusion. Short of such evidence, there can be no legal determination. If the plaintiff's own story doesn't contain the medical evidence, it is inherently suspect because it challenges the official story that gender is binary and determinable by specific criteria. Therefore, it cannot be heard in a legally significant way: it is not "admissible evidence."

Three years earlier, in \textit{In the Matter of the Estate of Marshall G. Gardiner}, the Court of Appeals of Kansas considered the question of whether a marriage "between a post-operative male-to-female transsexual and a male" was prohibited under Kansas' prohibition against same-sex marriage.\textsuperscript{74} To answer the question, the Court remanded the case to the District Court to determine whether the "transsexual was a female at the time she obtained [the] marriage license."\textsuperscript{75} The \textit{Gardiner} case was brought by the son of Marshall Gardiner. Marshall Gardiner died intestate; the applicable state laws of intestate succession instructed that his estate go to his wife, a post-operative male-to-female transsexual named J'Noel. Marshall's son claimed that the marriage was void and that he was thus the sole heir to his father's estate. The record showed that J'Noel's transition from male to female had been completed before she met Marshall and that he (Marshall) knew about her sex reassignment. The record showed further that the two met in May, 1998, and were married in Septem-

\textsuperscript{71} \textit{Id.} at 87.
\textsuperscript{72} \textit{Id.} at 86.
\textsuperscript{73} \textit{Id.} at 87.
\textsuperscript{74} \textit{Gardiner} 22 P.3d at 1092. The Supreme Court of Kansas eventually reversed this decision, holding that a person's sex could not be changed in the eyes of the law, regardless of what the medical and scientific evidence showed. \textit{In re Gardiner}, 42 P.3d 120 (Kan. 2002).
\textsuperscript{75} \textit{Gardiner} 22 P.3d at 1086.
ber, 1998, after they had been sexually intimate, and after J'Noel had told Marshall about her "prior history as a male." Marshall died in August, 1999, after a relationship that the court noted "appears stable and compatible." Noting prosaically that "on occasion, issues or individuals come before a court which do not fit into a bilateral set of classifications," the court nevertheless endeavors to fit J'Noel Gardiner into one side of the bilateral set of gender classifications. To do so, the Court reviews the "relevant" scientific and medical literature on gender, homosexuality, hormonal disorders and gender disorders. It also details J'Noel's extensive "journey from perceiving herself as one sex to the sex her brain suggests she was," a journey that began in 1991, entailed multiple surgeries of all kinds, and culminated in 1995, although she continues to take hormones.

Despite all this evidence, including J'Noel's testimony that she was born with a "‘birth defect’ — a penis and testicles" and had always "viewed herself as a girl but had a penis and testicles," however, the Court cannot answer the question of whether J'Noel was female at the time she obtained the marriage license. It remands the case to the District Court to "consider factors in addition to chromosome makeup, including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity." The Court cautions, however, that this list "should not preclude the consideration of other criteria as science advances."

Again, we see the court deferring to the medical and scientific "determination" of gender and its binarism in order to come to a legal conclusion about the transgender person standing before it. As with the Heilig case, the court doesn’t consider in a legally significant way the evidence provided by the transgender witness herself, because her story challenges the court’s understanding of the "regime of truth" about gender: that it is binary, and determinable according to set medical and scientific criteria. As in the Heilig case, the transgender person before this court presents a narrative that doesn’t contain

76 Id. at 1091.
77 Id. at 1110.
78 Id. at 1090.
79 Id. at 1091.
80 This recitation leads the Court to remark admiringly that "regardless of whether one agrees with the concept of sex reassignment, one must be impressed with the resolve of... any human being who undergoes such a demanding set of procedures." Id. at 1092.
81 Id. at 1091.
82 Id. at 1110.
83 Id.
sufficient medical evidence, and therefore it cannot be heard.\textsuperscript{84}

Two years earlier, a court in Texas, faced with a similar question, upheld one official story about gender — that it is binary — by rejecting the other — that it can be changed. Far from punting to the medical and scientific communities, the Texas court relied on "common sense" and the "natural order" to reach its conclusions. In \textit{Littleton v. Prange}, the Court of Appeals of Texas held that the ceremonial marriage between a man and "a transsexual born as a man, but surgically and chemically altered to have the physical characteristics of a woman," was not valid under Texas law.\textsuperscript{85}

The Court notes that Christie Lee Littleton, the plaintiff, had gone through surgical and hormonal treatment to become a woman, and had legally changed her name and her birth certificate. "She has made every conceivable effort to make herself a female, including a surgery that would make most males pale and perspire to contemplate."\textsuperscript{86} And yet, the Court still had to consider the question of "whether the law will take note of these changes and treat her as if she had been born a female?"\textsuperscript{87} In other words, can the Court see and hear this particular plaintiff standing before it, having undergone this series of physical, mental, and psychological changes, and telling the story of her life as a woman? And the answer, very simply, is no.

Written in a folksy tone, purporting to appeal to the basic understanding every Texan has about the facts of life, the opinion notes that "every schoolchild, even of tender years, is confident he or she can tell the difference [between a man and a woman], especially if the person is wearing no clothes. These are observations that each of us makes early in life[.]")\textsuperscript{88} In other words, it's common sense: everyone knows who's a boy and who's a girl.

\textsuperscript{84} See also Stone, supra note 44, at 11 ("As with genetic women, transsexuals are infantilized, considered too illogical or irresponsible to achieve true subjectivity, or clinically erased by diagnostic criteria."). Unlike a traditional tort case where the trial and appeals courts must hear sufficient "medical" evidence in order to rule on the legal question, these are cases where the court opts for a medical analogy — relying on the official medical/scientific story about gender — while the plaintiff him or herself argues that medical and scientific evidence is only a small part of his or her story. See, e.g., Goins v. West Group, 635 N.W.2d 717 (Minn. 2001) (Plaintiff argued, unsuccessfully, that gender designations should be based on self-image of gender, not biology.).

\textsuperscript{85} Littleton v. Prange, 9 S.W.3d 223 (Tex. Ct. App. 1999); see also In the Matter of the Application for a Marriage License for Jacob B. Nash and Erin A. Barr, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio App. 11 Dist. Dec. 31, 2003); In re Ladrach, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (Ohio Probate Ct. 1987) (up to the legislature to change the law). In the Kansas Supreme Court's reversal of \textit{Gardiner}, the Court cited with approval the \textit{Littleton} case. \textit{Gardiner}, 42 P.3d at 120.

\textsuperscript{86} Littleton, 9 S.W.3d at 230-31.

\textsuperscript{87} Id. at 226.

\textsuperscript{88} Id. at 223-24.
The Court goes on to explain that the plaintiff, Christie Lee Littleton, is "medically termed a transsexual," noting with something close to apology that this is "a term not often heard on the streets of Texas, nor in its courtrooms." The court concludes, with a down home shrug of the shoulders, that "courts are wise not to wander too far into the misty fields of sociological philosophy," and cautions, with a conspiratorial wink at its audience of pale and perspiring real men and their real wives, that "there are some things we cannot will into being. They just are." Clearly, in Texas at least, men are men, a fact evident to every schoolchild, if not to every doctor.

What this case shows, however, is that as much as the Texas Court of Appeals would like it to be true that gender simply "is" and that it can be determined by a discrete set of criteria, the official story about gender's binarism is actually quite fragile. In all of the cases described, courts either punt to the medical and scientific communities or rely on the knowledge of "every schoolchild" in order to come to some clear answer about whether the person standing before them is a man or a woman. One story views gender as complex and elusive except to the scientifically trained mind, the other as elementary beyond debate, but both rely on the same fundamental assumption: that gender is binary and decidable. In so doing, they seem to maintain the official story about gender.

But the act of coming to these conclusions and the effect the texts have on other insiders in the legal system is actually quite destabilizing to the very system the appellate courts claim to be upholding. The fact that courts have to consider these questions at all undermines the notion that the answers are easily ascertainable: if the outcomes were obvious, why have a lawsuit at all? An obvious manifestation of this destabilization is the courts' struggle with the question of how to refer to the transgender people involved in the cases before them. The Kosilek case, for example, involves a plaintiff who "suffers from a severe form of a rare, medically recognized, major mental illness — gender identity disorder," but who had not received "any of the forms of treatment described in the [Harry Benjamin] Standards of Care."

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89 Littleton, 9 S.W.3d at 225.
90 Id.
91 Id. at 231.
92 Id.
93 The Kansas Supreme Court relies on the dictionary to make its point about the obviousness of gender: "The words "sex," "male," and "female" in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of "persons of the opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria." Gardiner, 42 P.3d at 120.
94 Kosilek 221 F.Sup.2d at 159.
95 Id.
Before describing in great detail the various protocols of the Standards of Care, as well as quoting extensively from the DSM, the court addresses, in a footnote, the question of how to refer to the plaintiff. Recognizing "that it is painful for Kosilek to be referred to as 'he,'" the court nevertheless "finds that referring to Kosilek by the male pronoun is necessary to make this Memorandum as clear as possible." In other words, because the plaintiff was assigned male at birth and had not yet been treated by the protocols established by the Standards of Care, "he" was "still" male, and therefore the rules of clarity dictated that the male pronoun be used.

Similarly, in the Heilig case, the Court used the masculine pronoun "because of our conclusion that petitioner has not yet established an entitlement to a determination that his gender has been effectively changed from male to female." The Court goes on to explain that it chose to do this "not to disparage petitioner's undoubtedly sincere belief that his transition is, indeed, complete, but simply to be consistent with our conclusion that he has yet to offer sufficient evidence to warrant that determination as a legal matter."

A similar analysis takes place in those cases where the court uses the pronoun associated with the transgender person's "new" gender. In most cases where courts choose to use the "new" pronoun, they do so based on the presence of one or more of the criteria set out in the medical and scientific literature: e.g. the transgender person has undergone surgery, or has been diagnosed with gender identity disorder. In a few cases, courts will use the "new" pronoun based on the

96 Id. at 159, 166-68. The Standards of Care are actually an exhibit to the record.
97 Id. at 163.
98 Id. at 163, n.1.
99 Never mind also that the court does refer to the plaintiff by "his" chosen feminine name of Michelle. How does this affect the court's desire for clarity? See also People v. Olsen, No. 210555, 2001 WL 1342664 *1 (Cal.App.6 Dist. Nov. 1, 2001) (Defendant describes himself as "preoperative transgender." He hasn't had surgery or hormone therapy. Despite parties' and witnesses' use of feminine pronoun, court notes that it will "use the masculine gender throughout this opinion."); Long v. Nix, 877 F.Supp. 1358 (Iowa Dist. Ct. 1995) (noting that plaintiff "claiming to be transsexual" would "like to be referred to as a female," the court refers to plaintiff as a male "to avoid confusion.").
100 Heilig, 816 A.2d at 71, n.1 (emphasis added).
101 Id.
102 See Sanders v. May Dept. Stores Co., 315 F.3d 940 (8th Cir. 2003); State v. Nelson, 173 N.J. 417, 803 A.2d 1, 11 n.1 (N.J. 2002) (court refers to defendant as "him" "in the period before his sexual reassignment operation, and to 'her' in the period after the operation.").
103 See Doe v. Yunits, No.2000-J-638, 2000 WL 33162199, n.4 (Mass. Sup. Ct. Nov. 30, 2000) ("This court will use female pronouns to refer to plaintiff: a practice which is consistent with plaintiff's gender identity and which is common among mental health and other professionals who work with transgender clients.").
transgender person’s legal name change,\textsuperscript{104} though in those cases there has also been a diagnosis of gender identity disorder. In only a very few cases have courts chosen which pronoun to use based only on the transgender person’s stated or apparent preference.\textsuperscript{105}

These cases clearly adopt and uphold the medical and scientific diagnoses and treatments that both derive from and drive the binary system of gender. The courts almost uniformly reject the self-presentation and identification of the transgender people before them, rendering them invisible and silent to the eyes and ears of the law. But in so doing, these decisions also reveal the complexity of the questions presented. In being forced to think about which pronoun to use, and then to explain their choices, judges are also forced to recognize and acknowledge this complexity. If gender determination is such a matter of common sense or scientific certainty, why do you have to drop a footnote about why you’re using “he” instead of “she?” These “texts from the other side” then — both the non-legal Standards of Care and the legal cases which rely on them — begin to reveal the porousness of the official stories about gender’s binarism.

\section*{B. Their Effects}

As we have seen, the law’s system of official stories creates and perpetuates the “regime of truth” that gender is binary and determinable by specific medical and scientific criteria or common sense. That is the dominant discourse around gender, and anyone who identifies or is identified as not clearly within one of gender’s two binary poles falls squarely outside that dominant discourse. Because their stories don’t translate into one of the official texts, they can’t be heard. In Spivak’s terms, those outside the dominant discourse about gender thus cannot complete the speech act: they cannot engage in a true transaction between speaker and listener.

Perhaps most importantly, the official stories told by the ICD-10, the DSM-IV, and the Harry Benjamin Standards of Care force people to “rigidly conform . . . to medical providers’ opinions about what ‘real


masculinity' and 'real femininity' mean.” These medical stories have two important silencing effects, both of which negate the experiences and often the existence of the transgender individuals attempting to tell their stories. First, the stories require that transgender people conform to a specific narrative of their experience of gender. Second, the dominant discourse demands a particular “living as” the “opposite” gender. Both of these imperatives can serve to erase the transgender person’s own truth or experience.

First, the diagnosis and treatment of gender identity disorder contained in these texts describe conditions that are often unrelated to the lived experiences of those actually seeking the treatment. Because those conditions are requirements of eligibility for the treatment, those seeking the treatment are forced to deny their own lived realities and make up narratives — “construct a plausible history” — that render them eligible to receive whatever treatment they are seeking. In order to get hormone or surgical treatment, Dean Spade writes, “the scripted transsexual childhood narrative must be performed, and the GID diagnosis accepted.”

He describes his early efforts to get a surgery authorization letter: the mental health professional he met with asked when he first knew he was different. Spade responded that he had grown up poor and on welfare, and not Christian, and with a single mother, and later as a foster child, and a feminist, and that all those things had always made him feel that he was different. The counselor’s “facial expression tells me this isn’t what he wanted to hear, but why should I engage a narrative in which my gender performance has been my most important difference in my life? It hasn’t . . . Does this mean I’m not real enough for surgery?”

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106 Stone, supra note 44, at 12.
107 Id.
108 Spade, supra note 2, at 19; see also Stone, supra note 44, at 12; Stryker, supra note 2, at 150.
109 Spade, supra note 2, at 25; see also Stone, supra note 44, at 13 (“Suppose you could be a man [or woman] in every way except for your genitals; would you be content? There are several possible answers, but only one is clinically correct.”); RIKI ANNE WILCHINS, READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER 63 (1997) (containing the following dialogue:

“How do you know you want rhinoplasty, a nose job?” He inquires, fixing me with a penetrating stare.

“Because, I reply, suddenly unable to raise my eyes above his brown wingtips, “I’ve always felt like a small-nosed woman trapped in a large-nosed body.”

“And how long have you felt this way?” He leans forward, sounding as if he knows the answer and needs only to hear the words.

“Oh, since I was five or six, doctor, practically all my life.”

“Then you have rhino-identity disorder,” the shoetops state flatly. My body sags in relief. “But first,” he goes on, “we want you to get letters from two psychiatrists and live as a small-nosed woman for three years . . . just to be sure.”).

110 Spade, supra note 2, at 19-20.
goes on to ask “how do I decide whether to look back on my life through the tranny childhood lens, tell the stories about being a boy for Halloween, about not playing with dolls? What are the costs of participation in this selective recitation?”

The second way the official stories silence and distort the lived experiences of those seeking treatment emerges from the Standard of Care’s requirement of “successful real-life experience:” proof that the person seeking treatment can “inhabit and perform the new gender category ‘successfully.’” As we saw earlier, assessment of whether a “patient” is or should be eligible for hormone or surgical treatment includes a determination by the mental health professional of how well he or she can live “as” a member of the preferred gender, rather than stand out as a “transsexual.” In other words, transgender women must “succeed” as women, rather than as drag queens; and transgender men must “succeed” as men, rather than as butch dykes. Indeed, as Sandy Stone points out, “the highest purpose of the transsexual is to erase h/erself, to fade into the ‘normal’ population as soon as possible.” Thus, the binary system is maintained by absorbing those who fit within its terms and rejecting those who don’t.

These official stories thus render invisible all those who did not play with stereotypically inappropriate gender toys as children and who don’t “make it” as members of the “preferred” gender. They privilege only those who fit squarely into the “regime of truth” about gender as binary by being so clearly “wrong” “as” the gender they were born into. Those people are very likely to be “successful” as the other gender, because it is the “right” one for them. This is the traditional and stereotypical idea of a transsexual: someone born into the wrong body, who struggles to escape that mistake his or her whole life, and is finally “reborn” into the “right” body after surgery.

But that experience does not describe the lives of all transgender people who seek medical intervention. And its requirement that it is the only “real” experience silences all the stories of those who do not share it, because only with that silence — or worse, the invented “plausible histories” — will they gain access to the treatment they seek. Sandy Stone describes how “[e]mergent polyvocalities of lived experience, never represented in the discourse but present at least in

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111 Id. at 20.
112 Id. at 25.
114 Stone, supra note 44, at 12.
115 See BUTLER, supra note 17, at 67.
potential, disappear; the berdache and the stripper, the tweedy housewife and the mujerado, the mah' u and the rock star, are still the same story after all, if we only try hard enough."

All the other lived experiences become eclipsed by the "same story," the one that supports "the old constructed positions" of gender’s binary poles. Stone describes this eclipsing as "expensive, and profoundly disempowering."

C. The Unofficial Stories

So what stories counter the official one? They are the stories that maintain that gender is fluid, mutable, personal, and "unhooked from genitals." Transgender as a genre provides a location for challenging gender norms and the binary gender system, "the potential to map the refigured body onto conventional gender discourse and thereby disrupt it, to take advantage of the dissonances created by such a juxtaposition to fragment and reconstitute the elements of gender in new and unexpected geometries." Being transgender, though, can mean any number of things. Each transgender person embodies his or her gender identity according to his or her own lived experience. Some of those individual stories might be very much about the binary system, and might sound very much like the official stories about that system: a man trapped in a woman's body, a woman who wants to "become" a man. For those, the state of "being" transgender is a transitional phase, and may remain only an incidental part of the person's identity once the transformation has taken place. For others, though, "being" transgender is the whole story. For them, the whole point is not to transform into

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117 Id. at 10-11. "Berdache" has two meanings: one is European, meaning originally a passive homosexual, but more commonly a "'pretty' or feminine young boy." The other is a generic term in many north and south American indigenous cultures to refer to someone who "holds" both genders at once. "Mah'u" is the Polynesian term for "berdache." http://www.nu-woman.com/berdache.htm (last visited 2/21/06).

118 Stone, supra note 44, at 12.


120 Spade, supra note 2.

121 Stone, supra note 44, at 12.

122 See, e.g., Spade, supra note 2, at 22 ("Some have a self-narrative resembling the medical model of transsexuality, some do not.").

123 See, e.g., Spade, supra note 2, Stryker, supra note 2.
one of the binary gender categories and thus disappear.\textsuperscript{124}

And this multiplicity, this "chaos of lived, gendered experience,"\textsuperscript{125} provides the ultimate challenge to the official story about the binary gender system. As with so many other movements against oppression, individual members of the oppressed group counter the dominant discourse by simply living their lives — and talking about it.\textsuperscript{126} As Holly Boswell points out, "this new paradigm of gender is coming from, and finally being articulated by, the very people who are living it."\textsuperscript{127} The stories told by three transgender clients, in different contexts and situations, illustrate the complexity and richness of the lived experience described by these theorists.\textsuperscript{128} As such they provide vivid counter stories to those told by the appellate courts described above about gender's rigid and binary nature.\textsuperscript{129}

A client in a domestic violence clinic, Sheila identified as a man, and described herself as "a boy trapped in a woman's body." She came to the clinic both to obtain a civil protection order against her wife, and to defend against the civil protection order her wife had filed against her. She told the students they could use female pronouns to describe and refer to her because everyone else in her life does. Her kids call her "Papi", she married her female partner in a ceremony that described and consecrated the union between a husband and wife. Yet she uses the women's bathroom. She uses the same name — which is clearly feminine — for all purposes. She never refers to herself as gay or lesbian, but talks about being part of the gay and drag communities. When Sheila came into the front office for her first meeting with the students, the administrative assistant called the students and said, "I think your client is here. He says his name is Sheila." Indeed, the students say Sheila looks like "a teenage boy."

For her, identification as a boy was a big part of her defense

\textsuperscript{124} Spade, \textit{supra} note 2, at 22 ("[P]eople I've met share with me what my counselors do not: a commitment to gender self-determination and respect for all expressions of gender. Certainly not all trans people would identify with this principle, but I think it makes better sense as a basis for identity than the ability to pass "full-time" or the amount of cross-dressing one did as a child.").

\textsuperscript{125} Stone, \textit{supra} note 44, at 11.

\textsuperscript{126} See, e.g., \textsc{Catherine MacKinnon}, \textit{Feminism Unmodified} 103 (1987) (reflecting on sexual harassment as a legal claim).

\textsuperscript{127} Holly Boswell, \textit{supra} note 119, at 56.

\textsuperscript{128} I describe these clients' stories here, but hold off on any analysis of the students' reactions and actions until the third section.

\textsuperscript{129} I compiled these stories from interviews with many students in a variety of clinics. Unless otherwise indicated, when phrases appear in quotation marks, the source of the quote is the student not the client, as neither I nor the direct supervisors in these cases had direct access to the clients. Needless to say — but certainly material for another piece — this third-hand reporting adds layers of complexity to the analysis, as well as further opportunity for reinterpretation and even silencing on the part of the students.
against the petition for a civil protection order that her wife had filed: "A boy would never hit a girl; I was raised that a boy should never raise his hand to a girl. I would never hit my wife." She was committed to her marriage as the husband, complete with the gendered construction of a husband's role within a marriage. It was her responsibility to "take care of" her wife and children, and it was a personal and private responsibility that she took very seriously and which she would never betray by harming any of them.

The other part of her story was that a husband would not go to court to seek protection from his wife. Men don't get hit by their wives, and if they do, they certainly don't drag it out in public and ask for the court's protection. She felt humiliated and emasculated by the idea of going in front of a judge and saying, "my wife hit me and I need protection." Moreover, she felt that her wife knew this and had betrayed her by bringing the action against her and forcing her to come into court to defend herself. More than anything, though, she felt insulted and indignant that her wife had brought their family life into the public arena. "I can't believe this is happening, I can't believe we're dealing with this in a courtroom." Her wife had betrayed her more by bringing the legal action than by using violence against her.

One the one hand, Sheila's story could be seen as one that thoroughly reinforces the official story about gender, given her patriarchal views about gender roles within marriage and in society at large. But Sheila is biologically and genetically female: she has undergone no hormone or surgical treatment, and has never been diagnosed as having GID. She does not identify as a lesbian or as transgender. She is simply living her life, as someone assigned female at birth, who is playing traditionally male social and cultural roles. And she describes no contradiction or conflict in this. How does this fit in to the "regime of truth" about gender's binarism? What does this story do to the common sense understanding of gender as something that can be determined easily, either by schoolchildren and/or by medical and scientific criteria?

MS, a client in an asylum clinic, presented initially as a gay man seeking asylum based on past persecution as an effeminate man or based on his homosexuality. The students knew from the intake documents that "there was a transgender issue." Dressed in "feminine" "men's" clothes — tight jeans and a brown flowered shirt — the client introduced himself as Mario Santiago, saying "this is the name I use." He worked at a fast food restaurant during the day, and participated actively at the local gay/lesbian/bisexual/transgender community center, particularly in their drag beauty pageants. He referred to himself using male pronouns, as did the existing court documents. So the
students did as well.

During the course of the representation, the client’s presentation shifted. In the second or third interview, the client said, “I am Maria Santos.” A few sessions later, one of the students was writing in her date book, “meeting with Mario,” and he corrected her: “No, write down Maria.” Though still dressed in “men’s” clothes, the client began presenting as a woman, referring to himself using female pronouns and by his female name. After those first couple of meetings, he never talked about his identity as a gay man. Rather, the client raved about being a woman. He showed them pictures of himself in the beauty pageants: “I love being a woman,” he would say. “I look so beautiful.” He described living his life in two spheres, public and private. In the public sphere, which included the legal system and, initially, his lawyers as well, he was “Mario Santiago, effeminate gay man who worked at a fast food restaurant and wore a brown uniform.” In the private sphere, which included his work at the community center, he was “Maria Santos, beauty queen.”

The students struggled with this idea. One asked if he felt like a woman trapped in a man’s body. The client responded, “I don’t feel like I’m trapped. I just feel like a woman.” It was hard for them to call him Maria and to use feminine pronouns because they always saw him “dressed as a man.” They asked him to come to one of their meetings dressed as a woman. He did not seem comfortable with the idea, so they didn’t push it. However, he invited them with much excitement to attend the Christmas party at the community center. In that space, he presented as Maria, in full dress. He didn’t look like a woman to them, though, but like a man in drag, complete with the flamboyant gestures and exaggerated expressions. The students were stunned: their client was completely transformed. They would not have recognized him on the street.

Where does MS fall between gender’s binary poles? What does Mario’s story tell us about the medical and scientific communities’ determination of gender? What does Maria’s story reveal about what makes a woman “real”? As was Sheila’s, MS’ story is one about self-presentation and self-identification as someone who doesn’t fit within the medical and scientific and legal stories about gender. As such, it pushes back against those “texts from the other side,” and the “regime of truth” they support.

Jennifer Miles presented to her lawyer as a female client seeking legal representation in a sexual harassment case against her male professor. Her lawyer didn’t find out that she was transgender until

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130 Jennifer Miles’ case was not handled by a clinic, but by a lawyer who was a recent clinic graduate.
the discovery process, when the defendants requested psychiatric records, which revealed that the plaintiff had been assigned male at birth. Her story never changed, though. She was a woman who had been sexually harassed by her male professor. Her lawyer initially had some concern that the fact that she was assigned male at birth might affect her status as a plaintiff, but upon further research determined that it didn’t. Sexual harassment law states quite clearly that the relevant inquiry is the defendant’s perception of the plaintiff. In the face of the defendant’s attempts to dismiss the case based on this revelation, Miles’ lawyer was defiant: the fact that Miles was assigned male at birth should not and did not change her legal claim. The harasser perceived her as female, and harassed her based on that perception. Case law was in her favor. End of story.

These stories portray individual people who didn’t conform to the “regime of truth” about gender and sexuality. These clients couldn’t be placed by their lawyers into one of the medical or scientific categories the law has adopted. They didn’t talk about themselves as “transsexual” or “transgender” or suffering from “gender identity disorder.” And law students and lawyers struggled with that, often falling back on what they “knew” to be true about how boys looked, and how women acted, and what case law said about what was relevant. They looked to these official stories — common sense, the natural order — in order to ground themselves as these clients’ lawyers. But those stories didn’t offer much grounding in the face of the actual stories these clients were telling.

III. CONSTRUCTING THE NEW STORIES

To represent transgender clients whose personal stories do not conform to the official stories of gender, lawyers must attend to their clients’ different reality. The lawyer’s goal, though, is not to get to some submerged, alternate reality, but rather to create the space for the client to speak by examining whatever is inhibiting the lawyer from hearing. The most important element in representation isn’t portraying the “other” with verisimilitude (what really happened, what her story really is, finding out and telling the “truth”), but rather recognizing what Spivak calls “the problem of representation,”131 and engaging in critical reflection to undertake a collaborative process with the client to construct a narrative that rings true to her experience and meets her goals. In this section, I will return to the stories of MS and Sheila as clinic clients and examine what I call the two “stages of self-location” in the act of representation. Analysis of how these

131 See supra notes 15-20 and accompanying text.
students and lawyers were able to engage in both stages and, therefore, effectively represent their transgender clients reveals lessons overall about representation and official stories.

A. Locating Ourselves, Step One: "Creating The Space For Her To Speak"\textsuperscript{132}

In seeking to explain the argument she first elaborated in "Can the Subaltern Speak?" Spivak proclaimed, "I don't think there is a non-institutional environment,"\textsuperscript{133} meaning there is no "truth" or "reality" that exists outside the context of its particular "regime of truth." Put another way, the "speech act" necessarily takes place "against a backdrop of hidden, contestable assumptions without which we could never function, but which necessarily predetermine in large measure the results reached."\textsuperscript{134} This backdrop of assumptions has also been called "stereotypes," "background stories," "pre-understanding," and, the most frequently but uncritically used term, "common sense."\textsuperscript{135}

We all pass stories through our own pre-existing screen of "knowledge" about how people act. Because the stories of those outside hegemonic discourse 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 recast the outsider's story into terms and language that make it consistent with the insider's understanding of reality.\textsuperscript{136} The problem of representation, then, as we have seen, is that our assumptions about people and how they act, who they are, what they need, etc. prevent

\textsuperscript{132} Gunewardena, supra note 13, at 203-4 ("In order to enable her voice to be heard, our task should be to create the space for her to speak.").

\textsuperscript{133} Colonial Discourse and Post-Colonial Theory, A Reader 11 (Patrick Williams & Laura Chrisman eds., 1994); Spivak, supra note 18, at 12. Note that this quote recalls Derrida's famous "il n'y a pas de hors-texte," or, roughly translated: there is nothing outside of the text.


\textsuperscript{135} Fajer, Authority, Credibility, and Pre-Understanding, supra note 135, at 1856 ("Faced with a conflict between deep-seated beliefs and a contradicting story, some people may adjust their beliefs, but others are likely to reject the story as untrue."); see also Baron, supra note 134, 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).
us from being able to hear the actual person standing before us. Moreover, our attempts to "translate" a person's story into language that we can hear further silence her because those attempts too take place against this backdrop of pre-understanding and assumption.

The answer to this problem, though, is not to become paralyzed or complacent, but rather to be constantly aware "of the location of the individual and the circumstances of knowledge production." Or, put more simply, "it is necessary to learn how to attend. And you make mistakes. Big deal." Indeed, as Spivak notes with some optimism, with this kind of "persistent critique of what one is up to . . . I think there is some hope." It has long been understood that one of the ways to challenge hegemony and the resulting oppression is "to make visible and vocal the underlying assumptions that produce and reproduce structures of domination." Specifically, much of critical theory — feminist, race, queer — has focused on identifying and critiquing the process of defining and categorizing "the other," whatever that "other" might be.

So in order to create space for the "other" to engage fully in and thus complete the speech act, we need to be consciously and vigilantly aware of what we bring to our representation of clients. We need to engage in critical reflection in order to uncover the assumptions through which we tend to pass all information that comes our way, including how we define and categorize people seeking our legal assistance. In this context, critical reflection means the process of asking questions: how will the judge apply the statute to my client's situation, and why? How will the jury react to my client's appearance on the stand? Why isn't my client calling me back? Why am I having such a hard time connecting with my client? This could be called strategic planning or knowledge of precedent, or even familiarity with the various personalities involved, but on deeper level, this kind of critical reflection provides an opportunity to deconstruct what we know about facts, about law, about client identity, and about how all those elements interact with one another.

Clinicians and other legal academics and scholars have long real-

137 Colonial Discourse and Post-Colonial Theory, A Reader, supra note 133.
139 Spivak, supra note 18, at 63.
140 Teaching for Diversity and Social Justice, supra note 23, at 11 (citing Young and Freire); see also id. at xvii ("Our goal in social justice education is to enable students to become conscious of their operating world view and to be able to examine critically alternative ways of understanding the world and social relations.").
141 Harris, supra note 19, at 524.
142 See Aiken, supra note 135, at 298 ("Critical reflection has at its root an attempt to tease out or hunt down assumptions.").
ized that this kind of critical reflection is a powerful and necessary tool to engage in the kind of intentional lawyering described in this article.143 Through critical reflection, the lawyer self-consciously situates herself within the particular context in which she is operating. Specifically, she situates herself in relation to the system and its rules. She also situates herself in relation to the other characters involved both in the system in general and in the particular interaction she is a part of. Those other characters could be the other people — the judge, the other lawyers, the witnesses, the government agency, the opposing party, the client. But the other characters are also the relevant rules, rituals, and practices of the particular system.

Through critical reflection, the lawyer is able to identify her ability to operate among these characters, as well as the limitations on that ability, noticing what prevents her from moving freely among the various pieces of the system. She is also able to identify the ability of the other characters — particularly the people — to move freely within the system, and the impediments on their ability to do so. By noticing these things, the lawyer can further identify the available choices about how to operate within the system in which she is situated. She can then identify the impact those choices have on her position and on the position of the other characters in the system, and on the system itself. In this way, therefore, critical reflection is the means for the lawyer to identify the shifting nature of her position within the particular context in which she is situated, the shifting nature of all the other characters situated in that context, and the shifting nature of the

context itself.

When lawyers work on cases that decenter them in ways that force them to identify and overcome their own assumptions, they are forced, too, to engage in this kind of critical reflection.\textsuperscript{144} Cases involving transgender clients provide a rich example of this kind of decentering, and the resulting critical reflection that must take place. Mirroring the case law described earlier, the two sets of students who represented Sheila and MS found themselves confronted immediately with the question of what to call and how to refer to their clients, as well as how to describe and define them. With these questions, they began the process of critical reflection that led them to be able to attend to their clients.

In preparation for their first meeting with Sheila, the students knew that the case involved cross petitions for temporary protection, that both petitions had been granted, and that Sheila was seeking representation for the subsequent civil protection order proceedings. They learned from the intake materials filled out by the domestic violence clerk at the courthouse that Sheila was transgender and identified as a man. Sheila was in a relationship with a woman who had filed a petition for a civil protection order, and against whom Sheila sought a civil protection order.

Before meeting with the client, the students wondered how the client's apparent lesbianism might end up playing a role in the case. So they did research on domestic violence in gay and lesbian relationships, including downloading fact sheets from the local police department's gay and lesbian unit. They also read the relevant local rules on filing civil protection orders, hoping to find guidance in there on how to determine a petitioner's gender. They wondered if "you have to go by biology, or are there other ways?" They did what all those appellate judges had done — looked for the answers in the "texts from the other side." And like those appellate judges before them, they did not find the answers in those texts.

As they confronted the basic question of what to call their client, though, they parted ways with the appellate judges. They did not punt either to the medical or scientific communities, or to their understanding of the natural order of things. Instead, they talked about it with their supervisor, who helped them realize that they couldn't figure it out on their own, either in supervision or by doing research.\textsuperscript{145} They

\textsuperscript{144} Aiken, \textit{supra} note 135, at 293, describing her students' experience with a transgender client.

\textsuperscript{145} It is beyond the scope of this article to explore fully the role of the supervisor in the students' reflective process, but helping students move from their rigid understandings about things like gender, race, class, is often one of the supervisor's greatest (and most
needed their client. They decided that when they met with Sheila for the first time, they would ask what pronoun to use. And that's what they did, asking, "would like us to refer to you as 'he' or 'she' in the court documents and in conversation?"\(^{146}\)

The students who represented MS initially felt confused by this person who presented so clearly as what they thought of as a man — albeit an effeminate one — but who got to a point where she wanted to be called "Maria." One of them asked MS early on in the case, "I mean, what are you?" Even when the client explained that she felt like a woman, "not trapped, just a woman," the students persisted in seeing the client as a man who identified as a woman.

Gradually, though, the lens through which the students were seeing MS started to shift. Because they knew it was what their client wanted, they forced themselves to call her Maria and to use feminine pronouns. At first it seemed strange to them, because the client still looked very much like Mario. At one point, the client came in to the clinic with her partner. For the first time, they saw their client in the broader context of her life: in a relationship with someone who thought of her as a girlfriend. This was an important part of what the students described as the "cementing process" for them. They came to be able to see their client the way she wanted to — as a woman, not an effeminate gay man or a woman trapped in a man’s body, but a woman — by paying attention to her and following her leads: by calling her Maria, and by using feminine pronouns, and by seeing her interact with her lover, not by seeing her dressed in woman’s clothes. And they both noticed that once they started to attend to her in this way, the relationship deepened, and they became much closer to their client. By the end of the case, they said, the three of them would just sit around and "talk like three girls."

In grappling with these cases, these students came face to face with their pre-understanding about gender: that it just "was." They assumed that someone is either "him" or "her" and that such a determination is easy to make, something that "every schoolchild, even of tender years"\(^{147}\) can figure out. When pushed by their supervisors to explore those assumptions more closely, to engage in critical reflection, they realized that these official stories did not help with their representation of their particular clients.

And this is the exciting part: stripped of their assumptions about how gender works, the students had the opportunity to attend to their rewarding) challenges. \textit{See, e.g.}, Valdes, \textit{supra} note 143.

\(^{146}\) As described earlier, Sheila told the students they could use female pronouns to describe and refer to her. \textit{See supra} note 129 and accompanying text.

\(^{147}\) \textit{See supra} note 88 and accompanying text.
client, to this client, sitting before them. The students located themselves within the interaction between the client and them by noticing the assumptions they had about gender and sexual identity and pushing them aside, uncomfortable as that may have been. In the space left behind, the clients could tell their own stories. Thus, the students were able to complete the first step of the process of representation: they were able to see and hear their clients and to begin to understand their stories, part and parcel as they were of the “chaos of lived, gendered experience.”

B. Locating Ourselves, Step Two: A Collaborative Enterprise

As we saw earlier, the second step of representation is the telling of the client’s story in a legal setting or framework. Like that framework, though, these stories—whether those within the hegemonic discourse, or those outside that discourse—are constructed. The challenge for the representor once again is to locate herself in the process of that construction, by being intentional and reflective about what internal and external forces are shaping the story and by engaging in collaboration with the client.

This means, as we’ve seen, that the lawyer must attend to the client carefully and with an open mind to be able really to hear her story. And it means that the lawyer must participate actively in the relationship with the client. The lawyer is an expert in the rules that govern the particular legal system in which the representation is taking place, and she must bring that expertise to the relationship and add it to the mix of things that goes into constructing the new story.

Law students often struggle with this aspect of representation. Jane Aiken, who has written about the stages of learning to be a critical thinker, notes that while the first step is for students “to see that law is constructed rather than discovered,” the next, and often much harder, step is for the student to recognize herself as a source of knowledge and thus power, as a player within the legal system. This realization leads to the student’s awareness that she is not merely a mouthpiece for the client, nor a rigid narrator of official stories, but “can play an active role in exposing the inherent biases in

\[148\] Stone, supra note 44, at 11.

\[149\] Spivak has remarked that “Finding the subaltern is not so hard, but actually entering into a responsibility structure with the subaltern, with responses flowing both ways: learning to learn without this quick-fix frenzy of doing good with an implicit assumption of cultural supremacy which is legitimized by unexamined romanticization, that’s the hard part.” Spivak, supra note 15 at 293.

\[150\] Aiken, supra note 135, at 290 (“The law does not exist ‘out there’ to be found; rather it is a reflection of a complex interplay of information, expertise, and value choice.”)

\[151\] Id.
One of the ways to do that is to create space within the legal context — in the telling of the client’s legal story — for the client herself to tell her story. Lawyers have to set up the conditions, however, that will allow that story to be heard.

We saw earlier how the law governing the issues raised by the cases involving transgender clients is eclipsed by other official stories — whether scientific or quasi-religious (“nature”). This absence of a solid legal foundation provides creative and critical lawyers valuable opportunities to step in and give the court an independent basis for adjudicating the particular dispute before it, rather than punting to one of the two official stories prior courts have relied on. That means maneuvering among and through the gaps in the curtains we saw earlier in the appellate cases, poking at, undermining, and sometimes outright challenging the assumptions on which the system of official stories about gender is built.

Jennifer Miles described herself as a woman who had been sexually harassed by her male professor. Her lawyer determined that the relevant case law provided support for an argument that the defendant’s perception of the plaintiff was the relevant inquiry and was able to defeat the defendant’s motion for summary judgment based on that argument. It became clear in preparing for trial, though, that Miles’ main goal for this case was to tell the story of herself as a woman, not just the story of the defendant’s perception of her.

So the story told at trial — both by her appearance in the courtroom as a woman, and by the testimony elicited from witnesses by her lawyer — was that, despite her biological makeup, she had a “core gender identity” as a woman. The jury was asked two questions: was she sexually harassed, and did the defendant corporation have sufficient notice to be held liable? The jury answered the first question “yes” and the second question “no,” meaning that Miles was unable to recover any damages. She felt, however, that the jury had found that she was a woman and thus that she had won her case. She had been able to complete “the speech act” by telling her story and having it heard and believed by the jury.

Sheila’s case was complicated by the fact that she was both defending against a petition for a civil protection order and seeking to get one as well. Her story, therefore, was both that she did not hit her wife, and that, in fact, her wife had hit her. The students came to understand how Sheila’s gender identity as a man played a role in both aspects of this story. She felt pride and defiance in asserting her defense that she was the husband and a husband would never hit his

\[152\,\text{Id.}\]
wife. And she felt humiliated and vulnerable asking for the court's intervention because a husband shouldn't need and doesn't ask for protection from his wife. In putting together their legal case, the students had to consider how, if at all, to incorporate these aspects of the client's story.

We saw how the students began their representation of Sheila by looking to "texts from the other side" — police department policies, fact sheets on violence in gay and lesbian relationships, local rules and statutes on filing petitions for civil protection orders — for answers to their questions about the client's gender identity. Although those official stories did not provide the answers they were looking for initially, the students were able to bring what they had learned from those and other sources back into the representation and use it in putting together the story they and their client ultimately told in court. Their research on how courts handle cross petitions for civil protection and petitions filed by women against men led them to conclude that the case was going to hinge on credibility and that the plaintiff's gender identity might play a role in whether the judge believed her story. They were afraid that the judge might say, "If Sheila is the male, isn't it more likely that she was the aggressor?" They were also afraid that the cross-petitioner would play up her role as the "injured wife" and appear very sympathetic to the judge, further undercutting Sheila's defense and claim for protection.

Based on their understanding of the client's story, though, they knew that the gender element — Sheila's identification as a man — was significant to her. So they decided to "let it be there, but not articulated." Because Sheila's vision of herself as "the man" in the relationship was not necessary to achieve her legal goal of defending against the petition and gaining the court's protection — and in fact could have hurt both her defense and her claim — the students decided not to argue the client's gender identity, nor to bring it out explicitly through their examination of witnesses. But Sheila came to court dressed in a men's suit, presenting as a man, and the students called her to the stand and elicited her story, knowing as they did so that the only story Sheila would be comfortable telling was the story she had told the students: that she was a loyal and devoted husband who would never hit her wife; and that she felt pain and humiliation, as the husband, at having to come seeking the court's protection against her wife.

The students had been worried that Sheila's gender identity would undercut her credibility and make it harder for her to prevail on her claim. But they acknowledged afterwards that Sheila was "great on the stand." She was "straightforward and incredibly sympa-
thetic, and the way she told her story was very compelling.” The judge granted her petition for a civil protection order and dismissed the claim against her.

The students who represented MS had come to understand that despite how she initially presented, MS’ story was that she was a woman, not a gay man who identified as a woman, or a man trapped in a woman’s body, but a woman. They also had come to understand that she felt that she lived in two worlds, public and private, and could and did adjust her gender presentation to accommodate those two worlds. She could and did present as a man in the public sphere and as a woman in the private sphere.

The challenge for the students, then, was to figure out how to tell this story in such a way as to gain asylum for their client. They knew from their work on other asylum cases, and on their extensive research in “texts from the other side” that courts distinguished between transvestites and those they perceived as having “gender identity conflicts,” and tended to grant asylum to the latter more readily than to the former. They also knew that courts had granted asylum if the plaintiff had suffered past persecution for his homosexuality.

They were concerned that MS’ story about her two worlds would undercut her claim for asylum because the asylum officer might see her as more analogous to a transvestite than to someone with a “gender identity conflict.” “If you can hide your ‘female identity’ here because you’re afraid of persecution,” the officer might ask, “why can’t you hide it in El Salvador?” So the students decided to use the term “transgender” as an umbrella term to cover both a “transsexual” and a gay man with female sexual identity. Their theory was that MS was seeking asylum due to past persecution on the basis of being transgender as a gay man with a female identity.

The students also came to realize that the decision whether or not to grant asylum to any individual client depended much more on the particular asylum officer’s perceptions during the asylum interview than on the governing legal texts. They realized that in order to win MS’ case, in the course of that interview, they would have to make the asylum officer “realize what it took us months to realize”: that MS was telling the truth, even though her story didn’t fit in to the “regime of truth” that governed this particular legal arena, and that it was okay to grant asylum based on her story.

In preparing for the interview, the students once again confronted the pronoun and name issues. They acknowledged that, by that point in their relationship with their client, it felt awkward and wrong to call her Mario or Mr. Santiago, or to refer to her using male pronouns. But they decided as part of their strategy to tell a story
about transgender identity, that they would present their client to the asylum officer as Mario Santiago, but thereafter call and refer to her as “Maria.” They also decided they would use male pronouns in the petition and all supporting documents, but use female pronouns during the interview.

They also knew that they had to anticipate negative stereotypes the asylum officer might hold, and they had to avoid playing into those assumptions. A big issue was how the client would appear for the asylum interview. They went back and forth with the client about this. Initially they thought she should dress as a woman. She seemed reluctant to do so since the interview would take place in a context she thought of as the public sphere, but she also seemed excited at the opportunity to show off how beautiful she was as a woman. However, once the students saw her dressed as a woman—at the community center Christmas party—they determined that it would be “too distracting” for the asylum officer and would play into his stereotypes of drag queens and flamboyant gay men. So they suggested to the client that she wear what she had worn to the initial interview with them—tight pants and a brown flowered shirt—and explained that it was consistent with their legal story to have her dress as an effeminate man.

Maria appeared at the interview as a man, but she was “a little feminine.” She had on mascara and wore high, feminine boots, and tight pants. The overall impression she gave was of a “very vulnerable person with gender identity conflicts.” The students remarked on the risk Maria had taken in exposing her femininity to the asylum officer because she is normally protective of that identity when she is in the public sphere. They believed she had made a strategic choice based on their counseling her about their legal theory that ended up being very effective. Maria was granted asylum.

In representing their transgender clients, the lawyers and law students described in this piece did both things required of effective representation: they were able to attend to the clients and elicit their particular stories, and they were able to locate themselves as experts in the particular legal arenas in which their clients’ stories unfolded and create an atmosphere within that arena in which the clients’ voices could be heard. They collaborated with their clients to construct stories that felt consistent with the clients’ own lived realities and that served the clients’ needs within the legal system.

**Conclusion: Lessons learned**

Several months after my initial contacts with the students who represented these clients, I followed up with questions about what
they learned from working on the cases. What I heard back were two basic points. First, the students learned that in order to gain client trust, lawyers have to be able to really see the client: "Even though Maria looks like a man to us, we have accepted her as a woman, refer to her by her female name, and have learned to make that transition that is so effective in building a strong relationship with the client. That step was essential for her to be 'herself' around us — to bring us into that small, private circle of people who accept her as a woman."

The second point that the students came to understand was that stories are complicated and require time and energy to construct: "We . . . learned that it can take a while to get a story out — that it can take many, many sessions. Sometimes, we just asked the wrong questions and didn't think to follow up . . . . With our next client, we were able to learn to let the story come out over several visits and to keep listening and following up to get out the entire story."

At least in these cases, then, the decentering worked: these students — and I, over their shoulders — learned about confronting and challenging assumptions through critical reflection. What looks like a man isn't necessarily a man; what seem like the right questions aren't always the right questions; what appears to be the whole story ends up being only a small portion; what seems to be a solid legal foundation actually has cracks and crevices.

But what does that teach us about critical reflection in representation in general? We must attend carefully to what the client is asking of us. Accept what she tells us as her truth, even if it doesn't make sense with what we know as our truth. Notice what is getting in our way. Representation that facilitates the client's completion of the speech act depends on critical reflection that allows the lawyer to make space for the multiplicity of clients' stories.

And this isn't just with transgender clients: by being open to hearing and seeing the "chaos of lived gendered experience," we learn to be open to hearing and seeing the chaos of lived experience in general. Representation of transgender clients forces an awareness that we all operate with certain assumptions and understandings of world, and that those assumptions might get in our way as we try to be persuasive advocates for our clients. We can use the experience of these students — and the representation of transgender clients in general — as a metaphor: if we notice what we bring to the representation — both our assumptions and our expertise — we are able to hear our client's particular story and work with her to construct a new story that both rings true for her and can be heard and believed by the legal decisionmaker. In this way, critical reflection is a skill that makes us better lawyers for all our clients.
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