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#### CALLING FOR STORIES

Nancy Levit & Allen Rostron\*

#### I. STORYTELLING

Storytelling is a fundamental part of legal practice, teaching, and thought. Telling stories as a method of practicing law reaches back to the days of the classical Greek orators who were lawyers. Before legal education became an academic matter, the apprenticeship system for training lawyers consisted of mentoring and telling "war stories." As the law and literature movement evolved, it sorted itself into three strands: law in literature, law as literature, and storytelling. The storytelling branch blossomed.

Over the last few decades, storytelling became a subject of enormous interest and controversy within the world of legal scholarship.<sup>5</sup> Law review articles appeared in the form of stories.<sup>6</sup> Law professors pointed out that legal decisions were really stories that told a dominant narrative.<sup>7</sup> Critical theorists began to tell counterstories to challenge or critique the traditional canon. Some

White folks tell stories, too. But they don't seem like stories at all, but the truth. So when one of them tells a story... few consider that a story, or ask whether it is authentic, typical, or true. No one asks whether it is adequately tied to legal doctrine, because it and others like it are the very bases by which we evaluate legal doctrine.

Catharine A MacKinnon, Law's Stories as Reality and Politics, in Law's Stories: NARRATIVE AND RHETORIC IN THE LAW 232 (Peter Brooks & Paul Gewirtz eds., 1996) ("Dominant narratives are not called stories. They are called reality.").

<sup>\*</sup> Nancy and Allen are both law professors at the University of Missouri-Kansas City School of Law. Together, they are co-advisors for the *UMKC Law Review*.

<sup>&</sup>lt;sup>1</sup> See THE INSTITUTION ORATORIA OF QUINTILIAN (H.E. Butler, trans., Harv. U. Press 1966).

<sup>&</sup>lt;sup>2</sup> THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 4 (Michael H. Hoeflich ed., 1988).

<sup>&</sup>lt;sup>3</sup> JURISPRUDENCE—CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM 462-63 (Robert L. Hayman, Jr., et al. eds., 2d. ed. 2002) ("Examinations of law *in* literature look at representations of laws, lawyers or legal systems in fiction . . . . Scholars studying law *as* literature explore the possibilities of interpreting legal texts as works of literature.").

<sup>&</sup>lt;sup>4</sup> See, e.g., James Boyd White, The Legal Imagination (1973); Robert M. Cover, Nomos and Narrative, 97 Harv. L. Rev. 4 (1983); Symposium, Legal Storytelling, 87 Mich. L. Rev. 2073 (1989); see also James R. Elkins, Bibliography of Narrative, 40 J. Legal Educ. 203 (1990).

<sup>&</sup>lt;sup>5</sup> Compare Anne M. Coughlin, Regulating the Self: Autobiographical Performances in Outsider Scholarship, 81 Va. L. Rev. 1229 (1995), and Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School, 45 STAN. L. Rev. 807 (1993), with Kathryn Abrams, Hearing the Call of Stories, 79 CAL. L. Rev. 971 (1991), and William N. Eskridge, Jr., Gaylegal Narratives, 46 STAN. L. Rev. 607 (1994).

<sup>&</sup>lt;sup>6</sup> See, e.g., Derrick Bell, The Final Report: Harvard's Affirmative Action Allegory, 87 MICH. L. REV. 2382 (1989); Richard Delgado, Rodrigo's Chronicle, 101 YALE L.J. 1357 (1992).

<sup>&</sup>lt;sup>7</sup> See, e.g., Richard Delgado, The Rodrigo Chronicles 194-95 (1995).

used fictional stories as a method of analytical critique<sup>8</sup>; others told accounts of actual events in ways that gave voice to the experiences of outsiders.9

Storytelling began to make its way into legal education in new ways. For instance, a major textbook publisher developed a new series of books that recount the stories behind landmark cases in specific subject areas, such as Torts or Employment Discrimination, to help students appreciate not only the players in major cases, but also the social context in which cases arise. 10 Meanwhile, Scott Turow, John Grisham, and a legion of other lawyers invaded the realm of popular fiction and conquered the bestseller lists.<sup>11</sup>

Legal theorists began to recognize what historians and practicing lawyers had long known<sup>12</sup> and what cognitive psychologists were just discovering<sup>13</sup>—the extraordinary power of stories. Stories are the way people, including judges and jurors, understand situations. People recall events in story form. Stories are educative; they illuminate different perspectives and evoke empathy. Stories create bonds; their evocative details engage people in ways that sterile legal arguments do not.14

#### II. THE AUTHORS IN THIS INAUGURAL ISSUE

In this initial issue introducing the *UMKC Law Review*'s stories section, we have been fortunate to collect stories from some of the founding parents of the storytelling movement and some of its best contemporary practitioners.

<sup>&</sup>lt;sup>8</sup> See Robert L. Hayman, Jr. & Nancy Levit, The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality, 84 CAL. L. REV. 377, 398 (1996) (suggesting that narratives provoke critical thinking because they force a consideration of context and because they engage in "dialogic, rather than dialectic, discourse").

<sup>&</sup>lt;sup>9</sup> See, e.g., PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987).

<sup>&</sup>lt;sup>10</sup> See, e.g., Joel Wm. Friedman, Introduction: The Story of Ten Employment Discrimination Stories, EMPLOYMENT DISCRIMINATION STORIES 1 (Foundation Press 2006).

<sup>11</sup> See J.D.F. Jones, Thrills from the Courtroom—Scott Turow and a New Genre of Thriller, FINANCIAL TIMES (London), Oct. 16, 1993, at xx.

<sup>&</sup>lt;sup>12</sup> Ariela Gross, Beyond Black and White: Cultural Approaches to Race and Slavery, 101 COLUM. L. REV. 640, 645 (2001).

<sup>&</sup>lt;sup>13</sup> See, e.g., REID HASTIE ET. AL, INSIDE THE JURY 22-23 (1983); see also James W. McElhaney, Just Tell the Story, A.B.A., Oct. 1999, at 68 ("The story is the tool that people have used since before recorded history to grapple with events and try to understand their meaning.").

<sup>&</sup>lt;sup>14</sup> Toni M. Massaro, Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds, 87 MICH. L. REV. 2099, 2104 (1989) (describing how there are "stories that bridge, providing connections between people of different experience, stories that explode (like grenades) certain ways of thinking, stories that mask, devalue, or suppress other stories, [and] stories that consolidate, validate, heal, and fortify (like therapy)").

#### ANTHONY ALFIERI

Anthony Alfieri's work pioneered the school of critical or community lawyering—or, as he calls it, "reconstructive poverty law" which envisions "lawyers work[ing] collaboratively with lower-income, working-class, and of-color clients and communities in joint efforts to make social change." An essential feature of this collaboration is that lawyers must learn to both hear and tell their clients' stories and not to allow their own storytelling to supplant client narratives. Now the Director of the Center for Ethics and Public Service at the University of Miami, Alfieri is joined in his contribution here by Maryanne Stanganelli (the Assistant Director of the Center's Law, Public Policy, and Ethics Program), Wendi Adelson (a Clinical Fellow and Staff Attorney in the Center's Children and Youth Law Clinic), and Jessi Tamayo (Assistant Director of the Center for Ethics and Public Service).

Alfieri, Adelson, Stanganelli, and Tamayo tell the story of building an ethics institute. Their story is not just about the role of a clinical program for students in a law school setting, but a broader endeavor to create a program that teaches ethics beyond the walls of the law school: public interest direct client representation, corporate and professional responsibility training, and street law projects that reach middle and high school students. If you read between the lines of their individual stories, which come together to depict the development of the Center for Ethics, you'll see another story line about cultivating new storytellers in the legal academy. What better story than how to build a program that teaches people to "do good" and to think about how to be good in the world of lawyering?

#### SUSAN BANDES

Susan Bandes is a Distinguished Research Professor of Law at DePaul University College of Law. She writes extensively in the areas of Constitutional Law, Civil Rights, Criminal Procedure, and Federal Courts. More than a decade ago, she began to explore the role of emotions in the legal process and the propriety and impropriety of law's consideration of what are normally regarded as benign or good emotions, such as empathy and caring. Importantly, she argued that no emotion and no narrative is inherently normative.

<sup>&</sup>lt;sup>15</sup> Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 65 (1991).

<sup>&</sup>lt;sup>16</sup> Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541, 544 (2006).

<sup>&</sup>lt;sup>17</sup> See generally Anthony V. Alfieri, Practicing Community, 107 HARV. L. REV. 1747 (1994); Anthony V. Alfieri, Stances, 77 CORNELL L. REV. 1233 (1992); Anthony V. Alfieri, Speaking Out of Turn: The Story of Josephine V., 4 GEO. J. LEGAL ETHICS 619 (1991).

<sup>&</sup>lt;sup>18</sup> See, e.g., Susan Bandes, The Idea of a Case, 42 STAN. L. REV. 227 (1990); Susan Bandes, The Negative Constitution: A Critique, 88 MICH. L. REV. 2271 (1990).

<sup>&</sup>lt;sup>19</sup> Susan Bandes, Empathy, Narrative and Victim Impact Statements, 63 U. CHI. L. REV. 361 (1996).

[In the legal arena] . . . whether a particular narrative ought to be heard, or a particular emotion expressed, depends on the context and the values we seek to advance . . . the difficult questions are *which* emotions to consider in judging, *which* narratives to privilege or silence, and *how* to circumscribe the decision-making contexts in which these devices should be used.<sup>20</sup>

Bandes saw the importance of subversive stories or counter-narratives (bolstered by empirical evidence) in offering cautionary tales to the dominant story that courts tell about such institutional phenomena as police brutality.<sup>21</sup> Several of her latest works have focused on the role of emotion in death penalty litigation.<sup>22</sup> Bandes' groundbreaking anthology, *The Passions of Law*, develops theories of how to navigate emotions in law such as shame, remorse, revenge, disgust and love; questions whether the supposed opposition between emotion and reason is supported by disciplines such as psychology, anthropology, and neurobiology; and more broadly examines the integration of emotion studies in law.<sup>23</sup> Her recent scholarship inquires into the ways lawyering and judging reflect and influence the expectations of popular culture.<sup>24</sup>

In these pages, Bandes tells how early in her career she helped draft the Illinois Freedom of Information Act and secure its passage. Her story captures the passion and strategic decision-making of a young lawyer facing a difficult political issue.

#### RICHARD DELGADO

Richard Delgado is not only one of the founders of critical race theory<sup>25</sup> and one of the earliest pioneers of the storytelling movement,<sup>26</sup> he is also the single most prolific law professor in the nation,<sup>27</sup> and one of America's most respected

<sup>&</sup>lt;sup>20</sup> Id. at 365.

<sup>&</sup>lt;sup>21</sup> Susan Bandes, Patterns of Injustice: Police Brutality in the Courts, 47 Buff. L. Rev. 1275, 1309-17 (2000); see also Susan Bandes, Running Away with the Circus: Untapping the Subversive Potential of Civil Litigation's Narratives, 50 DEPAUL L. Rev. 575 (2000).

<sup>&</sup>lt;sup>22</sup> Susan Bandes, The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty, Stud. (forthcoming 2007); Susan Bandes, Loyalty to One's Convictions: The Prosecutor and Tunnel Vision, 49 Howard L.J. 475 (2006); Susan Bandes, Repression and Denial in Criminal Lawyering. 9 Buffalo Crim. L. Rev. 339 (2006).

<sup>&</sup>lt;sup>23</sup> Susan Bandes, *Introduction*, THE PASSIONS OF LAW 6-7 (Susan A. Bandes ed., 1999).

<sup>&</sup>lt;sup>24</sup> Susan Bandes, We Lost It at the Movies: The Rule of Law Goes from Washington to Hollywood and Back Again, 39 LOYOLA L.A. L. REV. (forthcoming 2007); Susan Bandes, The Lessons of "Capturing the Friedmans": Moral Panic, Institutional Denial, and Due Process, 3 J. L. CULTURE & HUMAN. (forthcoming 2007), available at http://papers.ssrn.com/paper.taf?abstract\_id=781585.

<sup>&</sup>lt;sup>25</sup> See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); THE LATINO/A CONDITION: A READER (Richard Delgado & Jean Stefancic eds., 1998).

<sup>&</sup>lt;sup>26</sup> Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 MICH. L. REV. 2411 (1989).

<sup>&</sup>lt;sup>27</sup> James Lindgren & Daniel Seltzer, *The Most Prolific Law Professors and Faculties*, 71 CHI.-KENT L. REV. 781 (1996).

political and social critics.<sup>28</sup> In his series of Rodrigo chronicles, Delgado endeavors to change the structures of thinking about race in this country.<sup>29</sup> These stories record discussions between his fictional characters, the brilliant black-Italian law student, Rodrigo Crenshaw, and his aging law professor friend. As Rodrigo and the Professor talk about black crime and white fears, the Bell Curve crowd, the suffering of *colonistas*, the treatment of civil rights revolutionaries, and the perils of cosmopolitanism, concepts of race and racism become accessible to readers and thinkers outside the legal academy. Delgado urges racial minorities not to seek remedies for enduring racial injustices in constitutional guarantees, litigation, or empathy from majority group members. What Delgado unleashes is something more powerful than law and more faithful than love: the use of literature to explain the history and philosophy of race relations to popular audiences.

Delgado contributes a story about how a white coach and a young man of color establish a relationship based on mutual respect in an area, sports, in which both share common ground. For Delgado, what began as a tribute to an exceptional mentor, a retrospective, and the answer to a friend's inquiry becomes a provocative question about the future of cross-racial mentoring.

#### ROBERT L. HAYMAN, JR.

Robert L. Hayman, Jr., is a Professor of Law at Widener Law School and was the H. Albert Young Fellow in Constitutional Law. He writes about discrimination based on race, gender, sexual orientation, and particularly disability.<sup>30</sup> Hayman is especially concerned with the genesis of inequality and how it is usually imposed rather than natural, inevitable, or imbedded or intertwined with biology.<sup>31</sup>

Hayman was telling stories in law long before it was fashionable to do so.<sup>32</sup> Many of the stories he tells unpack cultural myths about merit. For example, in *The Smart Culture: Society, Intelligence, and Law*, he explodes myths that

<sup>&</sup>lt;sup>28</sup> He has received eight national book awards and a Pulitzer Prize nomination.

<sup>&</sup>lt;sup>29</sup> RICHARD DELGADO, JUSTICE AT WAR: CIVIL LIBERTIES AND CIVIL RIGHTS DURING TIMES OF CRISIS (2003); RICHARD DELGADO, WHEN EQUALITY ENDS: STORIES ABOUT RACE AND RESISTANCE (1999), RICHARD DELGADO, THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE (1996); RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995).

<sup>&</sup>lt;sup>30</sup> See, e.g., Robert L. Hayman, Jr., Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent, 103 HARV. L. REV. 1201 (1990); Robert L. Hayman, Jr., Beyond Penry: The Remedial Use of the Mentally Retarded Label in Death Penalty Sentencing, 59 UMKC L. REV. 17 (1990).

<sup>&</sup>lt;sup>31</sup> Robert L. Hayman, Jr. & Nancy Levit, *Un-Natural Things: Constructions of Race, Gender, and Disability*, in Crossroads, Directions, and a New Critical Race Theory (Francisco Valdes et al. eds., 2002).

<sup>&</sup>lt;sup>32</sup> Robert L. Hayman, Jr., Re-Cognizing Inequality: Rebellion, Redemption, and the Struggle for Transcendence in the Equal Protection of the Law, 27 HARV. C.R.-C.L. L. REV. 9, 9 (1992) (offering a story of playing kick-the-can).

everyone has come to accept about "intelligence," "merit," and "race." He then shows the ways in which law has been complicit in keeping these myths unexamined. In many of our institutional structures, such as schools and jobs, and our evaluation methods, such as performance reviews or IQ and achievement tests, we have made the assumption that smart people are the ones who succeed. There is a large aspect of complacency to this: some people are smart; some people are not so smart; and that's just the way it is. We think of smartness and merit as some intrinsic qualities of "betterness." Hayman argues this traditional interpretation of meritocracy is close to backwards. The causal relationship doesn't run from smartness to success. Instead, those people who have succeeded—for reasons of race, property-ownership, power—have been the ones who define what smart is. Mini-meritocracies operate in sports (soccer games, football, sandlot games, Wall Ball), in school cliques, in gendered speech patterns, and in cocktail party conversations. They are manufactured. They are dangerous and destructive. And we make them.

Hayman offers Suffering From, a hauntingly beautiful story about Caleb, a child who, unlike other children who are apples and oranges, is a pineapple, and Jake Porter, a high school football player who has chromosomal fragile X syndrome.

#### **GARY MINDA**

Gary Minda is better than just about anyone else at reading texts and subtexts—and combining these readings with revolutionary fervor.<sup>34</sup> He should be. He is one of the early members of Critical Legal Studies who was active in the movement for many years and a former Chair of the American Association of Law Schools (AALS) Section on Law and Interpretation.

Minda's writings have comprehensively surveyed the panorama of jurisprudential theories,<sup>35</sup> and they usually have an exceptionally good backbeat.<sup>36</sup> He often draws on linguistic theory and cognitive psychology to understand the formation of law in American society.<sup>37</sup> He is not just concerned with employees' rights (and protections of workers for whistleblowing and

<sup>&</sup>lt;sup>33</sup> See, e.g., SPORTS AND INEQUALITY (Michael J. Cozzillio & Robert L. Hayman, Jr., eds., 2005).

<sup>&</sup>lt;sup>34</sup> See, e.g., Gary Minda, Denial: Not Just a River in Egypt, 22 CARDOZO L. REV. 901 (2001); Gary Minda, The Law and Metaphor of Boycott, 41 Buff. L. Rev. 807 (1993).

<sup>&</sup>lt;sup>35</sup> See Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century's End (1995); Gary Minda, One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag, 28 Ind. L. Rev. 353 (1995); Gary Minda, The Jurisprudential Movements of the 1980s, 50 Ohio St. L.J. 599 (1989).

<sup>&</sup>lt;sup>36</sup> See, e.g., Gary Minda, Cool Jazz But Not So Hot Literary Text in Lawyerland: James Boyd White's Improvisations of Law as Literature, 13 CARDOZO STUD. L. & LIT. 157 (2001); Gary Minda, Phenomenology, Tina Turner and the Law, 16 N.M. L. Rev. 479 (1986).

<sup>&</sup>lt;sup>37</sup> See, e.g., Gary Minda, Boycott in America: How Imagination and Ideology Shape the Legal Mind (1999).

against unjust dismissals), but more broadly with the effects of a market economy on the power relations in the workplace.<sup>38</sup>

A professor of law at Brooklyn Law School since 1978, Minda has been a Distinguished Visiting Professor of Law at West Virginia University College of Law, and a Visiting Professor at Stetson University College of Law, Cardozo School of Law, St. John's University School of Law, and the University of Miami School of Law. He is presently at work on a history of Irish Revolutionary leader Michael Davitt.

Minda offers an engaging slice of revolutionary history, told with great affection. He recounts the story of one part of the genesis of the critical legal studies movement: the production of the underground CLS newspaper, *The Lizard*, distributed at the AALS meeting in 1984.

#### **MARGARET E. MONTOYA**

Margaret Montoya could share a wealth of stories.<sup>39</sup> Before she ever came to law, she was involved in the women's, Chicano, and anti-war movements. After graduation from Harvard Law School, she later practiced corporate law and served as Associate University Counsel for the University of New Mexico before joining its law faculty.

As the former Interim Director of the Southwest Hispanic Research Institute,<sup>40</sup> Montoya has long been concerned with interdisciplinary explorations, scholarship, and development. As a scholar, she is not only doing heavy theoretical lifting, but also working with community activists to do things like teaching "linguistic and cultural competence" in medical schools.<sup>41</sup> An important innovation in Montoya's scholarship is that she introduces "taboo" linguistics and information into law reviews—she is the first to use Spanish liberally in her

<sup>&</sup>lt;sup>38</sup> See Kenneth M. Casebeer & Gary Minda, Work Law in American Society (2005); Gary Minda, Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment, 48 Hastings L.J. 511 (1997); Gary Minda, Aging Workers in the Postindustrial Era, 26 Stetson L. Rev. 561 (1996); Gary Minda & Katie Raab, Time for an Unjust Dismissal Statute in New York, 54 Brook. L. Rev. 1137 (1989).

<sup>&</sup>lt;sup>39</sup> Much of Montoya's work either involves storytelling or addresses the use of narrative. See, e.g., Margaret E. Montoya, Defending the Future Voices of Critical Race Feminism, 39 U.C. DAVIS L. REV. 1305 (2006); Margaret E. Montoya, Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse, 33 U. MICH. J.L. REFORM 263 (2000); Margaret E. Montoya, Law and Language(s): Image, Integration and Innovation, 7 LA RAZA L.J. 147 (1994).

<sup>&</sup>lt;sup>40</sup> Southwest Hispanic Research Institute, at http://www.unm.edu/~shri/ (last visited Apr. 10, 2007) ("SHRI's mission is to promote scholarly discourse, conduct teaching and research, and disseminate information concerning historical, contemporary, and emerging issues that impact Hispano people and communities.").

<sup>&</sup>lt;sup>41</sup> Margaret Montoya, Defending the Future Voices of Critical Race Feminism, 39 U.C. DAVIS L. REV. 1305, 1316-17 (2006).

stories and to discuss female knowledge about such things as childbirth.<sup>42</sup> She is extraordinary at using first person autobiographical stories to bring readers into the lives of cultural and racial outsiders.<sup>43</sup>

Her works often touch on the lessons that cannot be learned in the classroom. 44 Montoya is exceptional at forging links between the academy and communities—bringing law to people and bringing fledgling lawyers into communities. Drawing on the classics and considering the larger political messages they offer for the future—that is the story she tells here.

#### **JEREMY PAUL**

Jeremy Paul is the newly minted Dean at the University of Connecticut School of Law, where he was formerly the Associate Dean for Research and before that the Associate Dean for Academic Affairs. He has also taught at the University of Miami School of Law and Boston College Law School and served as a Professor-in-Residence on the Appellate Staff of the Civil Division of the U.S. Department of Justice. A professor of Constitutional Law, Jurisprudence, and Property, Paul's scholarship spans these areas, while focusing on legal reasoning, the value of rules, the process of carving exceptions, and the truly human endeavor of trying to create fair categories.<sup>45</sup>

He reserves a portion of his seemingly boundless energy<sup>46</sup> and intellectual attention for issues of legal pedagogy. In his exceptional book for law students, *Getting to Maybe: How to Excel on Law School Exams*, Paul and co-author Michael Fischl do much more than offer a handbook on methods for success on law school tests.<sup>47</sup> Fischl and Paul encourage law students to recognize and accept the uncertainty that is a part of deliberative thoughtfulness. In the story he contributes here, *Reel to Real*, Paul circles back to a story he told some time ago, about how the process of legal reasoning mirrors the process of reasoning about decisions in everyday life.<sup>48</sup>

<sup>&</sup>lt;sup>42</sup> Margaret E. Montoya, Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse, 17 HARV. WOMEN'S L.J. 185 (1994).

<sup>&</sup>lt;sup>43</sup> David M. Engel, Making Connections: Law and Society Researchers and Their Subjects, 33 LAW & Soc'y Rev. 3 (1999), available at http://www.lawsite.ca/51501/Engel/engel.html.

<sup>&</sup>lt;sup>44</sup> Margaret E. Montoya, A Brief History of Chicana/o School Segregation: One Rationale for Affirmative Action, 12 BERKELEY LA RAZA L.J. 159, 160 (2001); Margaret E. Montoya, Class in LatCrit: Theory and Praxis in a World of Economic Inequality, 78 DENV. U. L. REV. 467, 475 (2001).

<sup>&</sup>lt;sup>45</sup> See, e.g., Jeremy Paul, Felix Cohen's Brand of Legal Realism 38 CONN. L. REV. 593 (2006); Jeremy Paul, Beyond Reason and Interest, 57 U. MIAMI L. REV. 593 (2003); Jeremy Paul, Changing the Subject: Cognitive Theory and the Teaching of Law, 67 BROOK. L. REV. 987 (2002); Jeremy Paul, CLS 2001, 22 CARDOZO L. REV. 701 (2001).

<sup>&</sup>lt;sup>46</sup> Readers are encouraged to check the number of articles by other authors in which Jeremy Paul is thanked in the first footnote for his contributions to their works.

<sup>&</sup>lt;sup>47</sup> RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS (1999).

<sup>48</sup> See Jeremy Paul, A Bedtime Story, 74 VA. L. REV. 915 (1988).

#### **RUTHANN ROBSON**

Ruthann Robson is one of the founders and contemporary leading figures of lesbian legal theory. <sup>49</sup> Prolific is too mild a word to describe the rich outpouring of her scholarship. <sup>50</sup> Although law is her home discipline, Robson realizes that the transformation of societal reactions to sexual minorities will neither begin nor end in the legal academy. Her novels, such as A/K/A and Another Mother, <sup>51</sup> and her numerous periodical articles make lesbian theorizing accessible to a popular readership. Her stories make concepts about lesbian theory come alive for a popular audience. She writes deliciously about lesbian sexuality. She is a meticulous observer of not only humans, but the human condition. Her characters are people you would like to meet.

In these pages, Robson offers Footnotes: A Story of Seduction. She may attract you to the world of footnotes, and the stories—and the power—you can find there. Her revolution begins from the ground up.

#### III. YOUR STORIES

The UMKC Law Review has decided to invite stories onto its pages and plans to devote a section of one issue each year to them. The Law Review is interested in publishing stories about personal experiences or lessons learned in legal practice, unique clients or enlightening client interactions, or enlightening episodes in legal education. This list is certainly not exclusive, and the Law Review welcomes creative submissions that use stories to illuminate legal theory in unexpected or unconventional ways.

The UMKC School of Law is a fitting home for this endeavor. Recent chapters in its rich tradition of legal storytelling include Professor Doug Linder's "Famous Trials" website, now garnering over six million hits per month, 52 and the back-to-back victories earned by two faculty members, Barbara Glesner Fines

<sup>&</sup>lt;sup>49</sup> See, e.g., Ruthann Robson, Sappho Goes to Law School (1998); Gay Men, Lesbians, and the Law (1997); Lesbian (Out)Law: Survival Under the Rule of Law (1992); Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory, 20 Golden Gate U. L. Rev. 567 (1990).

<sup>&</sup>lt;sup>50</sup> Professor Robson has published four books on legal theory, six books in literature, and a book of poetry. She has also written more than thirty law review articles, more than twenty articles in periodicals, more than fifty short stories, and more than one hundred poems, as well as 112 book reviews, nine works of creative nonfiction, seven articles in anthologies, five encyclopedia entries, and three articles on fiction theory. This count does not include her columns, essays, computer-assisted legal instruction lessons, or audio and video recordings. See Symposium to Honor the Work of Professor Ruthann Robson, 8 N.Y. CITY L. REV. 311 (2005).

<sup>&</sup>lt;sup>51</sup> RUTHANN ROBSON, A/K/A: A NOVEL (1997); RUTHANN ROBSON, ANOTHER MOTHER: A NOVEL (1995).

<sup>&</sup>lt;sup>52</sup> See Douglas O. Linder, Famous Trials, at http://www.law.umkc.edu/faculty/projects/ftrials/ftrials.htm (last visited Feb. 10, 2007).

and Sean O'Brien, in the American Bar Association's annual Ross Essay Contest.<sup>53</sup>

We are seeking stories, in the range of 1,000-4,000 words, that make a point. We are particularly interested in narratives from people with slightly unusual or different perspectives about the law.

Tell us your stories.

Send story submissions to Nancy Levit and Allen Rostron, UMKC School of Law, 500 E. 52nd, Kansas City, MO 64110, or to levitn@umkc.edu and rostrona@umkc.edu.

<sup>&</sup>lt;sup>53</sup> See Barbara Glesner Fines, Clients as Teachers, A.B.A., Aug. 2005, at 54; Sean O'Brien, Finding Redemption: How Picking Up the Phone Can Change a Lawyer's Life, A.B.A., Aug. 2006, at 59. The topic of the Ross Essay contest in 2006 was "Your life in the law. As a lawyer, you have an important impact on the lives and fortunes of your clients. But the law affects lawyers, too. Tell us about how practicing law has changed you as a person—for better or worse." How to Win \$5,000 and Get Your Picture in the ABA Journal, A.B.A., Dec. 2005, at 75.

#### **CLINICAL GENESIS IN MIAMI**

Anthony V. Alfieri<sup>1</sup>

#### I. INTRODUCTION

Four years ago, Jessi Tamayo, then a third-year law student in the Stein Scholars Program at Fordham University Law School's Center for Law and Ethics marched into my campus office and announced her intention to work at the Center for Ethics and Public Service ("the Center") housed for a decade here at the University of Miami School of Law. Now the Assistant Director of the Center, Jessi exemplifies the boldness of the next generation of leaders in legal ethics education. Three years ago, Wendi Adelson, then a second-year student here at the Law School, strode into my office and declared her aim of starting up an immigration law clinic to represent underserved segments of the South Florida undocumented, indigent population. Now a Clinical Fellow and a Staff Attorney in our Children and Youth Law Clinic litigating immigration-related cases on behalf of indigent children and juveniles in federal and state court proceedings, Wendi epitomizes the *commitment* of the next generation of leaders in clinical legal education. Last year, Maryanne Stanganelli, then a young associate in a thriving litigation practice at a large law firm in New York City, stepped into my house off-campus and over a boisterous family lunch expressed her aspiration of developing an interdisciplinary educational program on law and public policy with the faculty and students of the Law School, College of Arts and Sciences. and graduate schools at the University of Miami. Now the Assistant Director of the Center's Joint Program on Law, Public Policy, & Ethics, Maryanne embodies the creativity of the next generation of leaders in multidisciplinary graduate and undergraduate education.

The collective boldness, commitment, and creativity demonstrated in the work of young legal academics like Jessi, Wendi, and Maryanne vividly captures the ethos of the Center for Ethics and Public Service. Founded in 1996, the Center is an interdisciplinary clinical program devoted to the values of ethical judgment, professional responsibility, and public service in law and society. The Center's in-house clinics and educational programs provide legal representation to low-income communities in the fields of children's rights, public health entitlements, and nonprofit economic development, as well as legal ethics education and professional training to the Law School, University, and Florida business, civic, and legal communities. The Center observes three guiding principles: interdisciplinary collaboration, public-private partnership, and student mentoring and leadership training. Our goal is to educate law students to serve their communities as *citizen lawyers*.

<sup>&</sup>lt;sup>1</sup> Professor of Law and Director, Center for Ethics and Public Service, University of Miami School of Law. I am grateful to Wendi Adelson, Adrian Barker, Ellen Grant, Amelia Hope, Nancy Levit, Cindy McKenzie, JoNel Newman, Bernie Perlmutter, Maryanne Stanganelli, Jessi Tamayo, Karen Throckmorton, and Kele Williams for their comments and support. This Essay is dedicated to the clinical faculty at the University of Miami School of Law's Center for Ethics & Public Service.

<sup>&</sup>lt;sup>2</sup> The Stein Scholars Program prepares students for the practice of law in the public interest. *See* Fordham University Law School Louis Stein Center Law and Ethics, http://law.fordham.edu/ihtml/st-2scho.ihtml?id=291 (last visited May 24, 2007).

Staffed by graduate and undergraduate student fellows and interns under the direction of Law School and University faculty, the Center operates three inhouse clinics and three educational programs in the fields of ethics education, professional training, and community service. Jessi's Corporate and Professional Responsibility Program offers ethics, professional liability, and compliance training to bar associations, courts, law firms, corporations, government agencies, and nonprofit groups. Wendi's Children and Youth Law Clinic supplies legal services to children in the foster care system and advances law reform initiatives on behalf of low-income children and families in cooperation with the School of Medicine's Department of Psychiatry. Maryanne's Joint Program on Law, Public Policy, and Ethics sponsors interdisciplinary colloquia and clinical internships in partnership with the College of Arts & Sciences and University graduate schools. Moreover, the Center's Street Law Program teaches law, public policy, and ethics to students and faculty in Miami-Dade County's public and private schools, and teaches freshman and upper-level honors seminars in the College of Arts & Sciences. Additionally, the Center's Community Health Rights Education Clinic furnishes legal advice and advocacy to vulnerable lowincome populations in the areas of health rights, public benefits, immigration, and permanency planning in cooperation with the Schools of Nursing and Medicine. Lastly, the Center's Community Economic Development and Design Clinic supplies legal rights education, self-help advocacy training, and economic development assistance to low-income groups in cooperation with Florida Legal Services and the School of Architecture.

The story of the Center and its first decade of evolution is the story of young people—undergraduate students, graduate students, and clinical faculty—learning to become and becoming advocates, mentors, and public citizens. It is a story of academic engagement and civic leadership. It is a story of, by, and for the best of the next generation. We hope it inspires you to join them.

## II. THE NEWCOMER: A QUICK LESSON IN THE CENTER'S FUNCTION AND FORM

### Maryanne Stanganelli<sup>3</sup>

I arrived at the Center in August of 2006. It was a Tuesday, and the Center's nine staff members were preparing for their weekly status meeting. Weekly meetings were a mainstay at the law firm in which I had closed out my caseload only five days prior. However, at this meeting, I had no idea what to expect.

While I was confident that I was ready for the academic, creative, and activist environment of the Center, as I sat in the conference room waiting for the meeting to begin, I felt completely unprepared. My work as a litigator suddenly seemed irrelevant. I would soon realize that this was not the case, but the initial

<sup>&</sup>lt;sup>3</sup> Maryanne Stanganelli is the Assistant Director of the Center's Law, Public Policy & Ethics Program.

thought left me feeling like a voyeur, rather than a participant, in the meeting. At least as a voyeur I was able to observe as a true outsider, and in this fashion I discovered a great many things during the hour-long meeting. Among them, that the Center's staff consists of an amalgam of academics and practitioners who come together with the group dynamics of a family, the passion of a non-profit organization, and the optimism of a start-up corporation.

I also learned that this was a critical year in the Center's development. I already knew that the Center was embarking on yet another adventure with its formalization of its sixth program, the "Law, Public Policy, and Ethics" program ("LPPE"), because I had been hired to develop it. What I did not know was that the Center was also celebrating its ten-year anniversary.

A chronology appeared in my mind, and the Center's circuitous evolution suddenly seemed quite logical, methodical, and almost scientific. The Center began by reaching out to the community with its live-client clinics, then grew to include educational programs alongside advocacy, and was now looking inward, focusing on the university at large.

Indeed, like similar programs elsewhere,<sup>4</sup> the objective of LPPE is to engage the undergraduate community and create interdisciplinary collaborations for the benefit of all University students, as well as the local community. At first, this objective seemed overwhelmingly broad. I turned to LPPE's first law student and undergraduate participants to inform my decisions and to help narrow the focus of the program in its initial year. The students were as excited as I was about the prospect of creating something new and collaborative. Together, we began to dream up ideas for educational seminars for specific undergraduate classes taught by LPPE students as well as ideas for larger colloquia in which the students would invite experts and community members to speak to the academic and local community on topics of law, public policy, and ethics.

The students' ideas were reason enough to consider the program a success—they were thinking as civic-minded individuals, addressing topics of importance in all communities, not just the legal community, and learning how to translate their legal education into a language comprehensible by citizens who may have never read a judicial opinion. Stripped of legalese, informed by other disciplines, the students and I began to see legal problems in a more global sense.<sup>5</sup>

<sup>&</sup>lt;sup>4</sup> For exemplars of college based programs addressing law, public policy, and ethics, see those listed on the Consortium for Undergraduate Law and Justice Programs website, *available at* http://www.culip.org/index.shtml (last visited May 24, 2007).

<sup>&</sup>lt;sup>5</sup> For example, LPPE assembled a program entitled "Global Warming: Towards a Legal Solution," in which two LPPE law students and one LPPE undergraduate student addressed global warming's legal implications, potential solutions, and challenges to those solutions during a visit to a sophomore seminar course on environmental issues. The presentation also provided information on how students can get involved in shaping public policy on global warming on international, national, and local levels. The law students learned a great deal in having to break down, explain, and expand upon the concepts and substantive laws they studied in environmental law or independently researched. Likewise, the undergraduate students gained a greater understanding of

As the LPPE program is now fully underway and expanding, I have begun to feel a special connection with the Center. The advocacy, mentoring and counseling skills developed in my earlier career as a litigator are now the building blocks in the development of the LPPE program. I am extremely lucky to be a part of the Center's development. It is not just a place where students gain invaluable professional experience; it is a "center" in every sense of the word. It is a place where ideas, big and small, radical or quixotic, are always welcomed and given the support to grow to fruition. For the Center's staff, the result of this kind of encouragement is the feeling of true empowerment; that one can truly make a difference in the local and academic communities without being bound by conventional notions of a law school clinic. For the students, who are welcomed into, and indeed drawn in by the Center's centripetal forces, they feel—and are—integral to the Center's development.

## III. A ROAD LESS TRAVELED THROUGH LAW SCHOOL AND BEYOND

### Jessi Tamayo<sup>6</sup>

In my first week of law school, during the initial meeting of my legal research and writing class at Fordham University School of Law, I was asked what I wanted to do after law school. My answer was simple. I wanted to do something "alternative." I remember the snickers and looks from my classmates as they mentally checked me off the list of potential competitors. For a brief moment, it occurred to me that maybe I should not have allowed that weakness to reveal itself among such an aggressive group of people. Instead, I quickly reminded myself that I had a goal for my post-law school life, and that it did not fit neatly into the typical law graduate's aspirations.

As I walked out of the classroom, wondering what I was doing at this big New York City school, a fellow 1L approached me. In his solemn manner, which I would soon grow to respect tremendously, he said, "You know, I really appreciate what you said in there. You are different and we can all see that, but it is a good thing. I am not sure that this whole law school culture is for me either, but I think I have to see if there is something that I can do while I am here, or after I graduate, which will fulfill me." I did not know it at the time, but he was a fellow Stein Scholar at Fordham.

the legal and political processes at play in the global warming controversy than they otherwise might not have encountered in a science seminar course.

<sup>&</sup>lt;sup>6</sup> Jessi Tamayo is the Assistant Director of the Center for Ethics & Public Service and the Corporate and Professional Responsibility Program at the University of Miami School of Law.

<sup>&</sup>lt;sup>7</sup> The Stein Scholars Program is a comprehensive three-year educational program for selected students who seek training and experience in the area of public interest law. The Stein Scholars are students with diverse backgrounds and interests, many of whom enter law school after having engaged in substantial activities in public interest settings and the government. See Fordham Law School, Louis Stein Center for Law & Ethics, http://law.fordham.edu/stein.htm (last visited May 24, 2007).

The Stein Scholars program saved me. I knew I wanted to be a "Stein" as soon as I got the acceptance brochure to Fordham. I will never forget the day a package arrived telling me that I had been accepted at Fordham, and that I was welcome to submit an application to the Stein Scholars Program in Law and Ethics. It was just the assurance that I needed to make me realize that I had alternatives. My dreams of changing the world with a law degree were not too far off. I was idealistic and rebellious in my own pseudo-conservative Latin way, shunning the notion of law as a bottom-line oriented, unethical profession, and determined to find the goodness in it. My idealism, which some might call naiveté, soon garnered me a few law school friends who seemed to appreciate the unique approach I took to graduate school, and what was waiting for us after graduation.

The Stein Scholars program was the best opportunity available, in my opinion, to Fordham law students. It allowed me to use an academic setting to familiarize myself with the work and scholarship of other lawyers who wanted to make a difference in the world. The program enabled me to spend my summers working in a public interest setting, and helped me receive the institutional support to work in Geneva for an NGO, where I wrote about the crimes committed against women and children in Sudan. In addition, through the Stein program I realized how important it is to treat law students holistically, and the commitment necessary on the part of law schools to attend to all law students, both the corporate-minded and the nonprofit-driven. It provided an innovative approach to an age-old profession.

I am now fortunate enough to be contributing to the development of similarly idealistic and rebellious law students at the University of Miami School of Law, where I run a clinical program called the Corporate & Professional Responsibility Program, providing continuing legal education ethics training and materials to the Greater Miami legal community. Students author and present, in conjunction with and under the supervision of Center faculty, ethics training to legal services organizations, bar associations, judicial clerks, nonprofit agencies and law firms. It is an opportunity for the students to take the ethical dilemmas of an organization, frame them into a training seminar, and assist the organization in dealing with or addressing such issues in their day-to-day practice. The director of Legal Services of Greater Miami has said that, in observing the law students conduct their ethics training, she found that she had a renewed sense of confidence in the next generation of lawyers. It is this kind of program which allows students to provide a public service in an unconventional, yet highly beneficial way. The Center enables law students to discover themselves as problem-solvers and empathic members of society, while negotiating the formative, and often intimidating, law school years.

I consider the opportunity to join a public interest center an invaluable tool for a law student, who has chosen to enter a graduate program of unparalleled competition, to live out what may be a life-long dream of contributing to the

<sup>&</sup>lt;sup>8</sup> For additional information on the Corporate & Professional Responsibility Program, see http://www.law.miami.edu/ceps/media\_more.html (last visited May 24, 2007).

public good. I was fortunate enough that, not only did the Stein Scholars program lead me to many wonderful experiences at Fordham, but it also guided me to my current position as the assistant director of the Center, and is allowing me to "pay it forward" to the years of law students who come after me in their quest to satisfy an urge to help others, and pave their own way in the law.

## IV. COMING FULL CIRCLE: LAW AS A TOOL FOR SOCIAL AND PERSONAL CHANGE

#### Wendi Adelson<sup>9</sup>

I had just finished my first semester. Like so many others, I was feeling lost in law school. But I soon found my compass.

At an information session about the Center for Ethics and Public Service, I found everything that had been missing in my law school experience: a community committed to creating "citizen lawyers" and attorneys who would go out and change the world, case by case, step by step. I wanted to be part of this team of forward-thinking individuals keen for public service. I knew, instantly, that membership in this special organization could give me direction, and change my life through helping others.

A few weeks after that initial session, I began as an intern with the Community Health Rights Education Clinic ("CHRE"). My responsibilities involved accompanying 2Ls and 3Ls as they went to Jackson Memorial Hospital and represented clients with a wide range of medical and legal issues. I translated for the Spanish-speaking clients, helped navigate the public health system for recent immigrants afflicted with HIV, and tried to ensure that certain public benefits were not wrongly taken away from those youths who were growing too old for the foster care system. I saw problems I had not seen before. I was becoming a "rebellious" law student.<sup>10</sup>

Later in law school I had the chance to secure asylum for an Iraqi Shi'a imam, to help a young non-citizen find funding for college tuition, and to help meet the needs of countless people turning to the Center for solutions to their multifaceted problems. If after hearing about the Center's mission I was intrigued, then by the end of law school, I was committed. I felt compelled to this kind of service; the Center recognized my conviction and hired me.

My current work as a staff attorney and clinical instructor with the Center's Children & Youth Law Clinic ("CYLC") and CHRE combines several different kinds of advocacy: direct service, teaching and law reform. Along with my colleagues, we teach through a model of holistic lawyering, treating not only the

<sup>&</sup>lt;sup>9</sup> Wendi Adelson is a clinical fellow and staff attorney with the Children & Youth Law Clinic and the Community Health Rights Clinic at the University of Miami School of Law.

<sup>&</sup>lt;sup>10</sup> See, e.g., Paul R. Tremblay, Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy, 43 HASTINGS LJ. 947 (1992).

whole client, but searching for both legal and non-legal solutions to the multitude of different issues that arise in the lives of our clients.<sup>11</sup>

Primarily, I represent children in dependency proceedings with immigration issues and supervise CYLC students as they bring special immigrant juvenile visa cases through dependency and immigration court. I love their sense of outrage. "Kids aren't entitled to lawyers?" my student stared at me, simultaneously asking a question and demanding that it not be true—"How can that be?" The clinic students refuse to accept things as they are, and we help train them to perfect the art of imaging the law and the world as it ought to be and fighting to enact that vision.

To my mind, the Center's work is the perfect marriage of advocacy and education, combining an interest in changing both domestic policy and the international forces that perpetuate poverty and compel migration. A great deal of work still needs doing, and we feel proud to be part of a legal team that sees problems and takes time to envision solutions for treating the client, the family, and the community in a comprehensive fashion.<sup>12</sup> The self-congratulation ends here, though, since our work is far from done. The challenges we face as a Center revolve around teaching and molding the next generation of lawyers. How do we mentor law students so that they have the desire, the tenacity, and the drive to become catalysts for social justice? How do we successfully inculcate confidence and enthusiasm for making a difference through the law? struggle with these questions daily. As yet, we have not uncovered easy answers or fast solutions to these probing questions. However, the mere fact that I am here, back at the Center, counseling, advising and encouraging our students to pursue careers in the public interest, is a large step in the right direction. For now, we at the Center for Ethics and Public Service lead by example, and inspire the next generation of lawyer-activists to follow.

<sup>&</sup>lt;sup>11</sup> Indeed, the need for client-centered lawyering comes about unexpectedly and urgently. Recently, I was interviewing a client who brought along her aunt and her five year old cousin. The student I was supervising and I tried to interview our client alongside this chatty little boy and his beeping video game. Halfway through, the little guy declared his pressing need for the bathroom and my student offered to take him. Regardless of the fact that the boy ended up relieving himself in his pants on the way there, the student learned an important lesson in holistic lawyering: sometimes treating the whole client involves taking care of the client's family and their immediate needs. Even when it appears clients are seeking legal help, their other needs can be equally, if not more, urgent.

<sup>&</sup>lt;sup>12</sup> See, e.g., The Center for Law and Renewal, Holistic Lawyering Movement, www.healingandthelaw.org/MovementSummary.aspx?ID=2 (last visited May 24, 2007).

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# WHEN FREEDOM OF INFORMATION CAME TO ILLINOIS

#### Susan A. Bandes\*

I consider myself lucky beyond measure that throughout my legal career, I have been able to do work I love. Law's highest and best use, for me, is as a weapon for combating governmental abuse and overreaching. At the Illinois State Appellate Defender's Office my colleagues and I pursued this goal one client at a time. At the ACLU of Illinois, where I was staff counsel, there was an array of opportunities to change policy more broadly. Many of these opportunities involved impact litigation, but a surprising number did not.

I worked at the ACLU in the early 1980's. It was, though we were just beginning to realize it, the end of the era in which the federal courts were a reliable place to file suit to protect minority civil rights. It was the time when the composition of the federal courts began a noticeable shift; when it was slowly dawning on us that the courts might not always be the ACLU's staunchest ally.

This was a frightening realization for all the obvious reasons having to do with our deeply held belief that the federal courts were the best and sometimes only protector of minority rights. But there was something else I began to understand. The federal courts offered order and predictability. Not that we would always prevail, by any means, but, essentially, we knew how to conduct ourselves and what to expect. There were rules in place, and people took them seriously. Process, or at least the appearance of process, was both comforting and empowering. We were suing the government for abusing its power, we were protecting those it had abused, we wielded the powerful instrument of the law, and we were in a forum where law was accorded respect.

If the federal courts provided a familiar, even comfortable milieu, the Illinois legislature was a whole different story. Perhaps I can set the stage with a brief anecdote. When I accepted the position of staff counsel to the ACLU, I had lived in Chicago for only four years. I was a New Yorker to the bone, still rooting for the Yankees, still thinking the New Yorker map of the world was basically accurate. The ACLU office wasn't very large at the time, and my new job required me to do state legislative work as well as litigation. Two days before I began the job, I turned on the television to see all the members of the Illinois legislature marching through the aisles of that august body, wearing funny hats, beating toy drums, and celebrating, if memory serves, the fried foods of Southern Illinois.

It was at the ACLU that I began learning in earnest how to talk to all kinds of people about the law. And when I say "the law," I am mostly referring to the unpopular stands the ACLU takes on so many issues. Sometimes we were litigating these issues, but sometimes we were trying to educate and persuade. I was talking to chapters in Kankakee, rotary groups in Danville, fragile single issue coalitions, radio and television audiences, and much of the time I was talking about abortion and free speech for Nazis and keeping nativity scenes out of city hall and suing the police. And I was talking to legislators from all over

<sup>\*</sup> Distinguished Research Professor, DePaul University College of Law. Visiting Professor, University of Chicago Law School, 2007-2008.

Illinois. I was asking legislators from rural districts to vote against bills giving more power to law enforcement or prohibiting indecency. I learned things about persuasion—and about listening—that I doubt I would have picked up in federal court.

In retrospect, though, it was working for passage of the Illinois Freedom of Information Act (FOIA)—the most challenging, maddening experience of my legal career, and the one for which my education had prepared me least—that taught me so much of what I needed to know about law—the skills it requires, and the limits of its influence.

FOIA presented a unique challenge. Illinois shared with Mississippi the distinction of having no statewide FOIA (actually, Mississippi passed a FOIA while we were mounting our campaign). I worked with two law professors, Erwin Chemerinsky (now at Duke Law School) and Jeffrey Shaman (now my colleague at DePaul) to draft a FOIA bill. (As an aside, this collaboration strongly influenced my decision to teach; it was a powerful reminder that academics have much to contribute to the non-academic world). Drafting the bill was delightful. Drafting called on skills we possessed, and we had total control over what went into our fantasy law. But from that point on, my legal training had little to offer me as we worked toward passage of the bill.

We were negotiating for passage of a crucial law, with no real leverage except our arguments for better government. We needed to find common ground with the Municipal League, which opposed FOIA based on misgivings both legitimate (worries about expense), exaggerated (the fear that chaos would ensue), and anachronistic (for example, the objection that small town mayors would no longer be able to keep the town records in their basements or garages). We needed to hammer out compromises with a myriad of legislators and interest groups with concerns (most legitimate, some rather fanciful) about privacy and about chilling governmental deliberation. With the support of a hearteningly large group of legislators concerned about government accountability (and especially the bill's sponsor, the outstanding state legislator Barbara Flynn Currie), a hardworking coalition of like-minded groups, and a constellation of other factors too numerous to mention and perhaps too miraculous to be repeated, the bill passed both houses of the Illinois legislature.

At that point, we faced an additional and unexpected challenge. Governor Jim Thompson used his amendatory veto power (granted under the Illinois Constitution to permit a governor to correct small errors in a bill rather than veto it) to substantially weaken the bill, rewriting substantial portions of it. He added and expanded exemptions; he deleted penalties for non-compliance. He took many of our laboriously negotiated compromises and revised them, or scuttled them entirely. House majority leader Mike Madigan wanted us to use FOIA as a test case challenging the abuse of the amendatory veto power. It was a good test case—an important issue, an excellent vehicle. But it was a risk we couldn't afford to take. If we lost the case, the bill would die. Our choices were to bet everything on winning in court, to attempt a veto override (requiring a three-fifths vote of both houses) or to accept the bill as rewritten by the governor. We concluded, with great reluctance, that we couldn't jeopardize our year of painful uphill battles, our fragile consensus.

I had been out of law school for about five years. What I was seeing bore little resemblance to any legislative or executive process we'd discussed in law school, much less in high school civics. Most of the skills I needed I was learning on the job. The ability to craft and defend coherent legal arguments was helpful on occasion; the ability to sound confident was frequently useful. But the sense that the right argument would carry the day, that process would be observed, that if all else failed we could sue the bastards—I missed those certainties. I missed that sense of comfort and empowerment. But the compensations were considerable. I learned, of course, how skewed the New Yorker map of the world really was. And I learned to talk to, and even help persuade, a whole lot of people, in Chicago, in East St. Louis, and deep in the heart of Illinois, of their right to know about the way their government worked.

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#### MEMORIES OF BRUTUS HAMILTON

#### Richard Delgado\*

I wrote the following in response to a query from a colleague whose son, a promising high school runner, was considering UC-Berkeley. She asked about the school's running program, political and intellectual atmosphere, and the legacy of 1960's-era track coach and Dean of Students Brutus Hamilton, after whom the track stadium is named.

Dear Nancy,

Like the other college you are considering, Berkeley is liberal too, and the running there is grand, with fine weather year-round. Your son would be about the same distance from home at either school, no? And if he wants good competition, the Pac-10 has always featured good middle-distance runners, mainly at Berkeley, UCLA, and the two Oregon schools. Would he have to walk on at Berkeley, or are they offering him a scholarship?

Yes, I did run for Brutus, but not as a member of the team. I was a long-haired, 22-year old, politically radical, anti-authoritarian graduate student running on my own. I had been training in the hills by myself with no coach and just starting to run intervals and enter local road races, usually finishing second or third and starting to attract attention. Encouraged by one or two of the team runners I ran into at the student union and while running on the Strawberry Canyon Trail above the campus, I wandered down to the track one day and met Brutus, who was standing there in a neat overcoat, feeding the pigeons while timing his runners with a stop watch. He impressed me because he gave me his complete attention—a nobody runner he had never heard of who could not possibly (because, as a graduate student, I had no eligibility) do anything for his program. He was the first coach I had ever spoken with.

I could then run about 9:35 for the two mile and 30:50 for six—promising, but not great. Still, he talked with me about theories of training, asked what I had been doing in the way of workouts, and showed such warmth and interest in me that I ended up coming around to the track a few times a week and letting him time me for my intervals. Within a few years, I got to be fairly good, with best times of 28:52 for six miles and 14:31 for 5K, ranking tenth among American men in the former event. This was before rubber tracks and fancy shoes, much less blood doping, altitude training, and other artificial enhancements. I don't think my improvement was really due to him so much as to the general running atmosphere at Berkeley, with a lot of smart nonconformist runners, lefty sociologists of sport like Jack Scott and Harry Edwards, and interesting runners to talk with about ideas and politics during long, hard runs in the hills.

Brutus was quietly at the center of all this. We adored him, in part because he let us come to him while not forcing his own ideas or methods on us. But when we did ask him for advice about training, human physiology, or an

<sup>\*</sup> University Distinguished Professor of Law & Derrick Bell Fellow, University of Pittsburgh School of Law.

injury, his answer was always spot on. He also tolerated a lot of brainy undergraduates whose running was stalled and not going anywhere and let them remain members of the team, wear the uniform, and come down to the track every day. One or two of them became national figures, but not in track.

A memorable man. Dave Maggard, the Olympic shot putter, succeeded him, followed by a succession of intelligent, humanistic coaches. None replaced Brutus, however, in the memory of his athletes. You can go to a certain fire road leading up to the top of 2700-foot high Mount Vaca, north of Berkeley, and see the faded inscription "Brutus Lives" written in neat white paint on a rock beside the trail. No runner has the slightest doubt what it means and every one who sees it smiles.

Best,

Richard

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Years later, I wondered, why does this sort of thing happen so rarely in law? I think it is fair to say that over my thirty-plus years of law teaching, I have rarely had a mentor of a race different from my own, and never one who was white. This is not because I have turned them down; not a single one has offered. I have been lucky enough to have many good friends, most of them black or Latino, to whom I have been be able to turn for advice or criticism (of a manuscript, for example) from time to time. And of course I have done the same for many younger scholars of color and a handful who were white.

But not a single white colleague, at my school or elsewhere, has ever offered to mentor or help me along in my career. On two or three occasions, I telephoned a former dean at the law school I attended (Berkeley) or one at which I had taught to ask for advice, such as concerning a career move I was contemplating. Each responded with the kind of formal correctness—short answers, lack of affect—that indicated that I had better not push it; one tenminute phone call exhausted their supply of free advice. And not one of them called back to ask which direction I had taken.

Even while I was in law school, where I was an excellent student and probably the first Mexican American to become an editor of the law review, not a single faculty member asked me about my career plans. Not one suggested I consider clerking, much less a career in law teaching. By the time I graduated, I had published three articles in my own law review, including a Note and a Comment, and two others in respected outside reviews (Washington University Law Quarterly, as it was then called, and Hastings Law Journal). It would not have taken a trained eye to detect a student with some aptitude for legal writing. But not a single one of the twenty-five or so professors from whom I took class during my three years at Boalt Hall suggested I drop in and get acquainted.

I doubt that my case is unique; I do not know of a single law professor of color who admits to having received sustained mentorship from a white colleague or professor. If I am right that white-on black and white-on-brown mentoring is rare, why should this be so? It is not so in sports. Why should that arena be different from the legal one?

I can think of a handful of reasons. Athletic coaches come into close, daily contact with athletes of color and come to know them and their families well. This daily contact fulfills the requirements of the "social contact" hypothesis, which posits that the best way to counter racism and prejudice is to bring people of different types together in pursuit of common ends. By the same token, sports, like the military, is a highly formalized setting, with little room for subjectivity. (One can either run a four-minute mile or shoot a bulls-eye at 400 meters or not). It therefore fulfills the requirements of a second theory of how to abate racism, the "fairness and formality" hypothesis, sometimes called the confrontation theory.

Law professors are generally liberals, while most track coaches are apolitical or conservative. As such, law professors may feel they have little to prove. Since they write briefs for the ACLU or perform pro bono work for the NAACP, they consider themselves beyond reproach. So, they may end up making fewer efforts than they otherwise might to break out of their patterns, including the artfully crafted letter of recommendation on behalf of a favorite student (invariably white) while ignoring the brown or black student in the back row who shows flashes of real talent.

I realize that this essay, which compares the legal professoriate unfavorably with track coaches, may strike many readers of this symposium as unfair. I therefore propose a self test: If you are an Anglo law professor, compile a list of students whom you have taken under your wing in a time-intensive sense. I don't mean simply saying hello in the halls or asking in the cafeteria line how their semester is going, but the kind of years-long relationship that launches and sustains careers and that includes phone calls and career advice extending years after graduation. Then, jot down how many of these are students of color. The percentage ought to be 20 or 30 percent, depending on the makeup of your student body.

But many of the minorities are at the bottom of their class, you say. Perhaps, but not all. Say a half of them make grades good enough to consider teaching one day, perhaps after serving a judicial clerkship or earning an LL.M. degree from a top school. Then, the percentage of your protégés ought to be 10 or 15.

Is it? I'll sit here quietly while you search your memories. The answers will be due at the end of the period.



#### SUFFERING FROM

Robert L. Hayman, Jr.\*

Miss Nancy's pre-school class went outside for recess on every day that the weather allowed. To begin each recess, the class "leader" for the day—an honor that rotated among all the students—rang a bell at Miss Nancy's command, and assumed a position by the classroom door. The rest of the class lined up behind the leader, and waited for Miss Nancy's determination that they were sufficiently quiet and still to be permitted outside. Miss Nancy thereupon opened the door, and the kids filed out to the playground. After twenty minutes, Miss Nancy would instruct the leader to ring the bell, and the entire process would be repeated in reverse. This was the routine, and Miss Nancy had followed it faithfully for more than thirty years.

Caleb's mom was visiting the school on one of the relatively rare days that her son was selected to be the leader. Caleb's parents were aware of the fact that he was leader less often than other kids; they didn't know whether that was merely coincidence, or whether it reflected Miss Nancy's assessment of Caleb's leadership skills. This latter possibility disturbed them—it seemed harsh to judge a four-year-old that way, especially *their* four year-old—but they didn't raise it with Miss Nancy because, frankly, Miss Nancy terrified them. On this score, they were not alone: Miss Nancy scared all the parents, way more than she scared the kids.

And especially way more than she scared Caleb. This became evident on the day Caleb's mom watched her little leader from a second floor window of the school. The kids wandered about the playground kicking around a ball, or playing pretend people, or in the case of her son, searching for bugs on the asphalt's perimeter. Caleb's mom saw Miss Nancy summon Caleb, and hand him the bell, and his mom watched Caleb walk dutifully to the entrance door to the school. He must have rung the bell—his mom could see him, but not hear him—because the other kids lined up behind him, under Miss Nancy's watchful eye. Caleb's mom felt proud.

She was confused a bit when Caleb started swinging his arm wildly. Soon, the bell was ringing loud enough that she could hear it from inside, and the look on Miss Nancy's face confirmed that this was not part of the plan. And it certainly was not part of the plan when Caleb began running around the playground, grinning from ear to ear, all the while ringing the bell with manic delight. Most of the kids were following him, laughing hysterically; a handful stayed in their spots, staring wide-eyed at their classmates, or looking to Miss Nancy for guidance. Caleb's mom covered her mouth as she watched the line of kids snake around the playground with Caleb at the head; she didn't know whether to laugh or cry.

The rebellion ended quickly. Miss Nancy called for the bell, and Caleb surrendered it with a smile. The kids filed back into the school.

It was not out of character for Caleb. People progress through stages of moral development, and kids generally pass through their own distinct stages of

<sup>\*</sup> Professor of Law, Widener University School of Law. Thanks to Nancy for inviting and encouraging me; thanks to Dr. Borin, Ms. Casey, Aunt Michal and everyone else who saw the joy and the promise; and thanks—and all my love—to Alice and Caleb.

development with respect to rules. Or so it is said. Caleb's parents had learned otherwise; in their experience, kids didn't generally pass through distinct stages of development, because kids didn't generally do anything at all; wasn't that, after all, one of the truly wonderful things about kids? In Caleb's case, his own unique approach to moral progression—at least as it related to the subject of rules—was to limit himself to a single stage—call it the "what? me worry?" stage. He decided early on that people should be nice to other people, and not be nasty to other people, but he didn't imagine this to be a rule, "golden" or otherwise. Because rules, for him, genuinely were made to be broken, which is to say that rules had absolutely no good reason for being, beyond the joy that resulted from their occasional disregard. And so, from an early age, he would ignore inconvenient rules, which tended to be, after all, indeterminate, manipulable, incoherent, and repressive, or, as he was apt to put it, "dumb."

Caleb's parents had learned to accept this of their son. Miss Nancy, alas, was unlikely to be so accommodating. And so it was with genuine trepidation that Caleb's mom went to the classroom to pick him up at the end of the school day. Miss Nancy greeted her at the door.

"I was watching recess," Caleb's mom said.

Miss Nancy smiled, and tried to stifle a gentle laugh. "Did you see our Pied Piper?," she asked.

"I did," Caleb's mom replied, and both women smiled down at the little rebel, who was oblivious to their conversation, probably lost in daydreams of new shenanigans.

"I'll see you tomorrow," Miss Nancy said, and Caleb's mom knew clearly why everyone who was scared of Miss Nancy, also loved her at the same time.

But this is not the "happily ever after" ending to the story. A year later, at the same school, Caleb's parents were meeting with his kindergarten teacher, and at the same time with his "support team," and they were all urging an "educational assessment" of the boy, because, they thought, he was too distractible, and made too many bad choices, and really was not performing the way that he should. His parents were oblivious to the writing on the wall, so they engaged the educational psychologist recommended by the school, and the educational psychologist gathered reports from Caleb's teachers and his parents, and administered three hours of tests to the just-turned-six year-old boy, and a week later, the parents were meeting with the psychologist, who duly informed them of his findings. Caleb had done well on some parts of the test—his sensitivity to social situations, as measured by his "social vocabulary," was in the ninety-ninth percentile—but on other parts he really struggled, and it was an effort at times to keep him engaged, and so what they were looking at, he thought, was an attention deficit, and hyperactivity, and some social phobia, and also, it seemed, Caleb was suffering from some quite irrational anxieties. Therapy was in order, and some social skills training, and a medical evaluation to see if Caleb was a good candidate for medication. As for the best educational program for him—the point, his parents had foolishly thought, of the whole ordeal—well, that was a bit hard to say.

The meeting was a surreal experience for Caleb's parents, with multiple layers of dissonance. The biggest disconnect was in this image of their son: he

was a sweet, sensitive, bright kid, with an incredible sense of humor and a nearly omnipresent smile. He had always seemed, in a word, happy, and it was hard to believe that he was really "suffering from" anything. But maybe they were just in denial; maybe they just couldn't see. For the rest of that day the two of them went over it—and over and over it—separately and together, as they would for many months to come.

That night, Caleb couldn't sleep. He didn't want to go to school the next morning, and after school, he seemed irritable. More sleepless nights followed, for Caleb and his parents. And his parents began to notice how often Caleb seemed distracted, and how often they had to repeat things, and had he always been this rambunctious? and this loud? and this, well, annoying?

\* \* \* \* \*

As a kid, I am told, I was "painfully shy" (now I have matured; I am now "pathologically shy"). I was eleven when my mom got remarried, and we moved to the suburbs and I went to a new school. At my new school, they grouped kids through what I now know as "academic tracking": the smart kids were in put Section A, the less smart kids in Section B, and on through sections C and D. I was assigned to Section B, and I did not like it. In Section B we did current events, and mostly that meant discussing current events, and that required talking, and I could not talk. During the discussions I would sit quietly, usually drawing, and when I was called on, I would stare at my desk, and draw faster or harder. I had lots of meetings with teachers and principals, and the conversations were mostly the same: "yes I knew it was important to participate," "no I didn't want to be rude," and at one meeting I recall one principal-type person asking another principal-type person if I was "retarded." I knew that word—in my old neighborhood we used it freely as an insult—but its actual meaning was a mystery, and it was jarring to hear it coming from the mouth of an adult.

After one of these meetings I was transferred to Section C, which I think maybe was supposed to be a punishment, but I loved Section C. In section C all we had to do was draw-in history we drew historical figures, in science we drew planets, in math we turned numbers into animals—and we never had to actually know anything, and best of all we never had to talk. In a class just before Thanksgiving our assignment was to draw a picture of Pocahontas, and I knew Pocohontas from my old school, but none of the boys at my table—in section C we didn't have individual desks, we sat at sex-segregated tables—none of the boys at my table knew Pocohontas, and they drew pictures of a very fierce and very male Indian warrior, which certainly would have made Captain John Smith's story a more interesting one, but is, as far as I know, unsupported by the historical record. But my mom didn't want me in Section C, and I guess she complained a lot, and after a little while I got moved to Section A. In Section A we had individual desks, and we also had teaching assistants, including one named Miss Zavishlok, on whom I very much had a crush, and she helped me to talk and I started to do okay in school.

At some point I learned the meaning of "retarded," and I would wonder from time to time what would have happened if one of the principals had decided that I was retarded, and I was always comforted by the knowledge that eventually they would have taken me to a doctor or something, and seen that I was not.

I started to learn better—that is, learn more about "retarded"—about fifteen years later. I was working as a Legal Aid attorney in St. Joseph, Missouri, and I got a case involving a young couple whose little boy was taken from them by the state when he was just four days old—still in the hospital with his mother, when the local juvenile officer physically seized him and put him in foster care. His parents, James and Louise, were mentally retarded, and everyone assumed that mentally retarded people can't take care of children. It's hard to disprove that assumption in four days—it's hard to disprove that assumption in a lifetime—and so James and Louise, loving, caring parents, lost their little boy. I have a son of my own now, and I can more fully appreciate the agony they must have endured: I'd much sooner lose my life than my son. But back then, all I knew was what I saw: that they were a little angry, and a little scared, but mostly they were really sad

I got the petition from the juvenile office a week later; the sole allegation was that the parents were "suffering from mental retardation." What a phrase—"suffering from mental retardation"—and perfectly apt, though not at all in the way its authors intended. The juvenile officer imagined that James and Louise were afflicted with some disorder or disease; that they had come to us—from God, from nature—stamped "defective." And at the start, I thought the same sort of thing, too. The same conceit that allowed me to believe that I was demonstrably not "retarded" led me to acknowledge that maybe James and Louise were. And so when I first got that petition, and started working on their case, the only way to win, I thought, was to prove that James and Louise demonstrably were not retarded. And then I got to know them. And I learned that wasn't what it was about at all.

Of course, what the juvenile officer didn't see—what I hadn't seen—was that James and Louise were "mentally retarded" because we called them that, and the great bulk of the obstacles and limitations they encountered, and all the oppression, was the result of *our* decisions. The classes they could not attend, the jobs they could not hold, the places they could not live, the son they could not raise—we did that. And so I finally saw that the real issue in this case was not whether we had some reason—good, bad, or indifferent—for calling these parents "mentally retarded," the real issue was whether these parents, because of what we chose to call them, should be made to suffer. Why, that is, must they "suffer from" this mental retardation?

I have learned to be wary of this phrase—"suffering from"—of what it generally connotes, and frequently portends.

A couple years ago, I came across the story of Jake Porter, a seventeen year old member of the Northwest High football team in McDermott, Ohio. Although he practiced with the team every day for three years, he had made only one brief appearance on the field during a game, until October 2002.

Jake Porter has chromosomal fragile X syndrome, a disorder that is a common cause of mental retardation. Jake has significant cognitive limitations: he cannot read, or write, and only recently learned how to tie his shoes (the captain of the 2001 team taught him how). Those limitations have not affected

his love for football, or his determination to help his team. And so for three years, Jake Porter practiced the game he loved, and worked for the team he adored.

On a Friday night in October, Northwest was enduring a 42-0 beating at the hands of Waverly High School. In the closing seconds of the game, Northwest coach Dave Frantz sent Jake into the huddle; the call was for Jake to receive a handoff and immediately kneel down—a play that Jake and the team had practiced repeatedly. Acting out of an abundance of caution, Frantz called a timeout to explain the play to the opposing coach, Waverly's Derek Dewitt. An animated conversation followed; it was clear that the coaches were not in agreement. The discussion ended, the two coaches met briefly with their respective huddles, and returned to the sidelines.

When play resumed, the Northwest quarterback handed the ball off to Jake Porter. Jake started to take a knee, just as he had in practice so many times. But his teammates stopped him; they pointed toward the opposing end zone and urged him to run. The Waverly defenders cleared a path; some joined in pointing the way. Jake Porter hugged the ball, and raced for the end zone.

For forty-nine yards he ran. Players on both teams ran behind him, cheering him on. In the stands, many parents and classmates roared their approval; many others cried; some did both.

Jake Porter scored a touchdown. The final score was 42-6. Interviewed after the game, a beaming Jake Porter said, "We won."

Jake Porter's touchdown may illustrate several different propositions. On a cynical reading, it may show the willingness of folks to accommodate people with disabilities when it does not entail much cost. On a more sanguine reading, one I choose to embrace, it may illustrate the triumph of community, and of inclusive and integrative ideals. But there's a really harsh reading in circulation

In the red-cheeked glee afterward, Jake's mom, Liz, a single parent and a waitress at a coffee shop, ran up to the 295-pound Dewitt to thank him. But she was so emotional, no words would come.

Turns out that before the play Dewitt had called his defense over and said, "They're going to give the ball to number 45. Do not touch him! Open up a hole and let him score! Understand?"

It's not the kind of thing you expect to come out of a football coach's mouth, but then Derek Dewitt is not your typical coach. Originally from the Los Angeles area, he's the first black coach in the 57-year history of a conference made up of schools along the Ohio-Kentucky border. He'd already heard the *n* word at two road games this season, once through the windows of a locker room. Yet he was willing to give up his first shutout for a white kid he'd met only two hours earlier.

"I told Derek before the play, 'This is the young man we talked about on the phone," Frantz recalled. "'He's just going to get the ball and take a knee.' But Derek kept saying, 'No, I want him to score.' I couldn't talk him out of it!"

"I met Jake before the game, and I was so impressed," Dewitt said. "All my players knew him from track. So, when the time came, touching the ball just didn't seem good enough." (By the way, Dewitt and his team got their shutout the next week, 7-0 against Cincinnati Mariemont.)

<sup>&</sup>lt;sup>1</sup> Columnist Rick Reilly, writing in Sports Illustrated:

too, harsh explicitly in its judgment of the coaches and the other players, and harsh—really harsh—implicitly in its judgment of Jake Porter. "Northwest didn't win" the game, columnist Phil DiPirro felt obliged to remind us; "Jake didn't either, and although he doesn't know it, he was embarrassed." How so? "Because all those years, when Jake was treated as if he was a normal member of the football team, as if his Fragile X didn't exist, were washed away in the waning seconds of an already-decided contest." You see, Jake was treated as if he was a "normal" member of the team, but of course he was not, he had Fragile X; and once you stopped pretending that Jake's Fragile X didn't exist, you had to acknowledge that he really wasn't normal, which of course embarrassed him, even though he didn't know it. Or something like that.

But why, you might ask, couldn't Jake be a "normal" member of the football team, with Fragile X? That is not an option, because, you see, Jake is—how shall we put it?—"special": Jake "is special, a teenager who has overcome his mental retardation to become a three-sports varsity athlete and a beloved member of his community." "Jake," DiPirro advises, "has strived to be normal—to attend every practice like everyone else, to attend school each day like everyone else, for his entire high school career. By working so hard, Jake hoped that people would forget that he had such a horrible disease."

I won't claim to know what Jake Porter hoped for from people, but I would bet that whatever it was—a sense of belonging, a connection, friendship, love—he felt plenty of it the night he scored his touchdown. And I would bet too that

[I]t became bigger than football. Since it happened, people in the two towns just seem to be treating one another better. Kids in the two schools walk around beaming.

"I have this bully in one of my [phys-ed] classes," says Dewitt. "He's a rough, out-for-himself type kid. The other day I saw him helping a couple of special-needs kids play basketball. I about fell over."

Rick Reilly, The Play of the Year, SPORTS ILLUSTRATED, Vol. 97, No. 20 at 108 (Nov. 18, 2002).

"The importance of stories like this," says Jeffrey Cohen, of the National Fragile X Foundation, "is that everyone has value. There are unique characteristics in the way that they learn, and creating a school and a community where everyone is involved is important."

"I think this has done a lot for parents of kids with disabilities, and to me that means more than anything in the world," said Northwest Coach Dave Frantz. "We're all here for the kids, and if this helps people keep a positive outlook for those kids, then I will be thrilled."

Northwest Superintendent of Schools Bob Ralstin concurred: "It gives our kids a sense of being thankful for what they have."

And Liz Porter, Jake's mother, said this about her two sons with Fragile X: "They're really not any different than any other kids. They want to belong and they want to contribute."

Dana Erickson, Special Play Drawn for Special Player, COLUMBUS DISPATCH, Oct. 24, 2002, at 1A

<sup>&</sup>lt;sup>2</sup>Phil DiPirro, *His TD Isn't What's Impressive*, US SPORTSPAGES.COM, Nov. 16, 2002, at http://www.sportspages.com/ blog/ index.php?p=102&more=1.

 $<sup>\</sup>frac{3}{4}$  Id.

<sup>&</sup>lt;sup>4</sup> *Id*.

<sup>&</sup>lt;sup>5</sup> *Id*.

neither Jake Porter, nor the people who know and care about him, feel any need to forget about his "horrible disease." Because what is really horrible is to insist that Jake's "disease" *must be* horrible, so horrible that we must pretend that it does not exist, while at the same time yielding to its undeniable power to render its victims something other—something less—than "normal."

DiPirro introduced the tragedy of Jake Porter this way: "Because he suffers from Fragile X Sydrome, Jake is mentally retarded." And so shame on those who would challenge the natural order of things, and allow Jake Porter a touchdown; Jake Porter, after all, must "suffer from" Fragile X.

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Caleb's parents had some decisions to make as first grade approached. The most important was the choice in school. Caleb was welcome to stay at his old school—a private Montessori school that included all the elementary grades—and that really was Caleb's preference, but it now seemed to his parents a bad match. There were a few "special" schools in the area, but these were expensive, and hard to get into, and his parents really didn't want to see him segregated, unless it was really necessary. They opted for the local public school, which had been their intent all along, before they had learned that their son was suffering from so many disorders. Caleb's pediatrician approved of the decision. "Children are apples and oranges," he had once observed, "and Caleb is a pineapple." And in the public schools, Caleb would be in a more generous mix of fruits.

Caleb began his first day of school with minimal fuss and no apparent anxiety; the drop-off at school really could not have gone better. Not so the pick-up that afternoon.

Caleb was despondent.

"What's wrong, honey?"

"Nothing."

"Oh, come on; something's wrong. I'll bet you feel better if you talk about it."

"Well, I got 'called"—"called" meaning, his parents deduced, "called upon, or "called out" or scolded.

"What did you get 'called' for?"

"Which time?" Uh oh.

"How many times did you get 'called'?"

"Twelve, probably, but one shouldn't count, because it was for the same thing as another one."

It was what his parents had feared. And worse than what they had feared, the new school had lots of rules—specific, concrete, and inflexible rules, enforced without exception, indeed, with a vengeance.

"You just need to learn the rules, honey. You'll be fine." But his parents really didn't believe it.

The bubble burst the next day.

Caleb was crying as he left the school, quiet tears of genuine hurt that, in the course of the ride home, gradually gave way to chest-heaving sobs. His teacher, it evolved, like all the other teachers at the school, rewards the well-behaved kids at the end of each school day with a little slip of paper, a note to parents or guardians that reads "Give me a hug. I had a great day at school today." The little notes are called "Happy Grams," and several kids in Caleb's class got one, but Caleb did not, even though he only had two "calls." And he was devastated. "But I try so hard," he cried, and there was no doubting his sincerity.

Caleb's parents knew that their son might never earn a "Happy Gram," but they chose not to share that insight with him. Instead, they encouraged him to keep trying, because trying was the most important thing. And whether or not he ever got a happy gram, it was important for him to know that his mommy and daddy were very proud of him, because he was a sweet, wonderful, loving boy, and mommy and daddy loved him very much.

And the thing is, all that was true, and his parents meant every word of it, which in some way crystallized things for them. And he knew it was true too, and he was still sad that he didn't get a happy gram, but it seemed now to matter much less.

"Did I earn a surprise for trying?"

"Sure, honey."

1160

And at the end of the third day of school, he danced out of the building, waving a little yellow piece of paper. He had earned a "Happy Gram."

His parents suspected that his teacher felt sorry for him. He'd had three "calls" that day—one more than the day before—so it was hard to see how he had earned his "Happy Gram." But there would be no looking this gift horse in the mouth.

The first parent-teacher conference came at the end of the first semester. Caleb does daydream a bit, the teacher reported, but he's generally very engaged, and he's easy to refocus. He does sometimes have a hard time finishing his work, but a lot of kids do, and she can see improvement. "He's doing just fine," she said, and obviously meant it, which only stood to reason, seeing as how he had received forty-two straight "Happy Grams."

A few weeks later, Caleb received the "Citizen of the Month" award for his classroom behavior. His report card was somewhere in the good-to-excellent range, his math skills really blossomed, and his aptitude—and appetite—for reading seemed to improve exponentially. And above all, it could again be said, unequivocally, that he was a very happy child.

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There's no predicting the tenor or content of the next chapter of Caleb's life. But this much is certain: that his best chance for happiness rests with people who will resist the tendency to turn his differences into disorders, who will fight to ensure that his disorders are not disabling, and who will struggle against those forces that would cause him to "suffer from" his disabilities. There are many such people in the world; I pray that he always finds them.

### REMEMBERING THE EIGHTIES: THE *LIZARD* GOES TO THE AALS

Gary Minda\*

You may find yourself behind a big desk in a small office.
You may find yourself in a beautiful law school.
You may find yourself in the pages of a wonderful law review.
You may find yourself in a pen striped suit with a red tie.
You may ask yourself: Well, how did I get here?

I can still recall the feeling and the sounds of what it was like being there when I arrived at the American Association Law School Conference in San Francisco in January of 1984. There was a buzz of conversations about Critical Legal Studies (CLS) having some sort of counter-event on the politics of legal education, covering institutional reform, clinical issues and law and economics issues. It was exciting knowing that something different and perhaps dangerous was about to happen. I soon found what I was looking for—a small group of Crits, what members of the Conference of Critical Legal Studies (CCLS) were warmly called, who were in the process of putting together an underground newspaper called the *Lizard*. Before I knew it I was enmeshed in helping to bring the infamous *Lizard* to the AALS.

According to the disclaimer published in each issue, the *Lizard* represented the views of a small faction within CLS, who prided in calling themselves the "True Left." The *Lizard* did not represent the views of the CCLS which were said to be "far more responsible and boring than anything we would be interested in printing." The disclaimer emphasized that "since most CLS people would dislike this paper were they to become familiar with it, it would be gross guilt by association to treat them as co-conspirators." Of course, it was all hogwash. That disclaimer was probably something the FTC would regard as a classic example of bait and switch false advertising; the truth being that if you came and got involved you would be guilty by association, your guilt would be shared by all members of the CCLS, and if you didn't have tenure—well, start packing.

On the other hand, the *Lizard* was absolutely truthful in proclaiming: "If there is a warm, supportive community to be found anywhere in academia, it is in critical legal studies." One must remember that it was the decade of greed and *me-ism* and Reaganism; alienation reigned high in legal education as it does today and it was easy to go into denial about what was happening in the dean's office at most law schools. Disco was still popular and Wall Street was becoming a force in the law school, but for a few of us who stumbled into Critical Legal Studies it was also strangely like the sixties. One could find the feeling of community of Left politics at CLS gatherings—CCLS conferences and summer camps—that brought people together under the banner of resistance to the structures of unjustified hierarchy. Going to a CCLS summer camp meeting was sort of like going to a Grateful Dead concert and finding the counterculture of the sixties alive and still kicking, even if you knew that when the concert was over you would be returning to the culture of Ronald Reagan. Strange is the only word that comes close to describing what it was really like.

<sup>\*</sup> Professor of Law, Brooklyn Law School.

For many of us a moment of truth would be faced sooner or later—you either go into self-denial and hope you forget what you know to be true and become another Dworkin pod or maybe an eco-techno head or you remain silent and hope nobody would notice. A lot depended on your identity and where you came from. If you were a woman, person of color, or a white man who grew up in the inner city of Detroit or had Duncan Kennedy during your first year at Harvard, chances are you would gravitate toward critical legal studies. I was one of them, but in some ways I was no different than you today. I had found myself behind a big desk in a small office and I wondered if I would become just another pod—or maybe just a pea. I was longing for community and I hoped that I might find one by looking for people who I could agree with and feel that I was part of something greater than my tenure and personal successes (or failure). I really didn't have a clue about how to go exactly except I knew I felt at home with CLS folks. My feelings of longing were always especially acute when I attended AALS meetings where it seems that people are more interested in your name tag and the identity of your school than getting to know you as a person. And the conversation was really interesting. For the first time I felt that the ideal of academia was really alive with people debating and arguing about all kinds of things. Habermas would have felt that communicative action had finally reached America; or maybe he would have boycotted the group for fear of getting tainted by the communicative action.

1162

I have to admit that I had moments when I thought that maybe I could use CLS for gaining fame and success. But when I came to my senses I knew that I was deluded by those fleeting thoughts. I was way too pedestrian, too non-Ivy league, and my association with CLS would be like getting bird flu. No, fame and success was never in the cards. If you didn't have the right resume and the right people anointing then you needed a different strategy and that too was probably what brought me to CLS. Sure, you could stay outside and regard yourself as just a "fellow traveler," but if you came to CLS meetings and hung out and got involved you soon found that you were "in" and whether you liked it or not your colleagues back home would start looking at you as if you were reptilian.

"Oh my God, it's alive!" read the story line on page two of the first edition of the Lizard heading up a story on the incredible debates about theory within CLS. On the front page was a picture of a frog and lots of large bold words like OOPS, FREE GARBAGE and IS SUPERKID JUST A MURDERING BRAT?—printed on an angle between the columns of a story entitled: "36 Ways to Qualify for a Job You Want!" Page 3 featured a column called "Astounding Revelations" and a letter to Ann Slanders from Mr. Nice Guy who had accepted a teaching job at a very conservative law school and who was having a difficult time trying to fit in by hiding his true politics. (Ann Slanders wrote a long, supportive letter giving Mr. Nice Guy some opposition existence advice—go ahead if necessary and conform to survive, but find an ally and get involved with people of the same mind at other schools and support your students who identify with your views etc. etc.)

You would have had to be there to get the full experience of the *Lizard*. To be there standing in the halls of the conference hotel handing out copies of the *Lizard* to attendees captured for me at least for a brief moment the heat of the eighties in legal education. I am not saying that the earth moved or that real truth was revealed—no, nothing like that; rather it was a feeling that you had when all of

sudden you knew that you could never go back and replay the tape and become a Dworkin wanna-be. Zap—you were one of them and whether you liked it or not you would be forever Crit in the eyes of your conservative friends who would now look the other way when you passed each other in the halls of conference meetings. Academic freedom only goes so far in our business. What made it all worthwhile was the feeling of unity and community, even if it was with a bunch of people that your colleagues back home would call the "crazies." It was a real trip; not unlike the experience of walking down the street in Moody Texas in 1968 with long hair and bell bottom jeans. It felt cool but you knew at any moment someone might take off your head.

I am not sure who had the idea to bring the Lizard to the AALS conference but as I recall the organizing force behind the idea was a small ragtag group of crits inspired by the usual suspects, mostly from Harvard. Morton (Morty) Horowitz, a famous CLS heavy from Harvard, was at the conference, but he was definitely against the idea and was not happy that we were doing it. Horowitz was concerned that CLS was already getting a bad name in the profession and that trashing the holy conference of the AALS would be grounds for further repression at the law schools where young crits were coming up for tenure. He was right to be concerned. By 1984 a backlash against CLS was mounting and it was becoming harder for people associated with CLS to get jobs. On the other hand, there was at this time a lot of interest in CLS and it seemed like a good idea to do something at the AALS conference and there was this saying in CLS circles about letting the proverbial kettle boil on the stove (whatever that meant). Anyway, it would be a lot of fun to try to open up the AALS audience to the possibility of self-governance and to begin a discourse about the politics of legal education. Can't fault CLS for wanting that, right?

We met in a conference hotel room and we worked into the wee hours of night. One of the heavies from Harvard did a lot of the editing but everyone who participated in the project wrote for the newspaper. All submissions were accepted and published! The paper was printed on legal size paper and was six or seven pages in length containing single spaced columns with print on each side of the page—placed between pictures omit brought from the Cambridge press called AFAR. The basic idea was to pattern the *Lizard* after a supermarket gossip tabloid like the National Enquirer or one of the lesser known gossip rags with lots of pictures situated on angles and advertising slogans like "Weight-Loss!" and "Guaranteed." There was a lot of give and take about each of the pieces published and everything was polished before publication. The copy was reprinted locally at a college for distribution. The next morning we all met in the conference hotel and handed out the Lizard. I can still recall the quizzical expression of those I personally handed a copy of the Lizard. There I stood, sleep deprived, slightly hung over, smiling and looking self-satisfied in the hotel conference hall, handing a copy of the Lizard to the likes of Paul Carrington. Not a very great career move, and I am definitely saying that you should not do this if you do not have tenure or if you have any hopes of becoming a famous legal philosopher or maybe just get a job at Cardozo.

I'm not sure who had the idea of calling the paper *Lizard*, though it probably had something to do with the complaint that CLS was constantly changing its position much like the changing color of a chameleon. No one had a picture of a chameleon or a lizard so a picture of a frog was used, and it became the pictorial symbol of the *Lizard* distributed at the AALS. There were three editions published on three consecutive days. No names were used to identify authors and to this day no one can say for sure who wrote what. But everyone did write something. There were a number of "reporters" who were supposed to write stories on the various section meetings at the conference along with a number of essays on critical legal studies, law and economics, and legal education.

There was a particularly controversial letter to Ann Slanders involving an exchange on sexual relations between a male law teacher and female students. The romance piece stirred up some internal debate about whether it should be published but the decision was reached that on balance it would be better to "open up the issue in a flawed way than to permit it to remain submerged." The letter was entitled "Forbidden Love" and it was written by a male law professor who identified himself only as "Unfamiliar Longings." Unfamiliar Longings explained that he was in the midst of breaking up with his wife and that he had had several "crushes" with female law students over his career and was now "falling in love" with one of his current objects of desire. Unfamiliar asked Slanders for her help. What to do? Ann Slanders first explained that her name was misleading because she was really a man and therefore he would not be able to give help in "in thinking about the feminist dimension of your problem from what a feminist woman Slanders might have been able to give." Slanders also admitted that he too was a law teacher, divorced, and that he had had two affairs with students, "one of which ended disastrously for us both (though not publicly, thank God)." Getting that straight, Slanders approached Unfamiliar's situation "abstractly" (as male crits typically did back then), to see what "critical legal studies has to say about this situation."

Slanders first waxed and waned about the public/private dichotomy, a favorite CLS topic, reaching the conclusion that "workplace politics are real politics" and "workplace politics are oedipal/erotic politics." Having explained this important CLS point, Slanders concluded that it was quite clear accordingly that Unfamiliar should reject the absolutist position that says that "a male teacher should never sleep with a female student, period." That would be too rational and it had to be trashed. But Slanders then surprisingly advised caution; the student "might be intimidated by your status as a law professor at a 'good' school but then your student might see you as the semi-competent plodder you really are, and love you anyway." Slanders was especially alarmed by the fact that Unfamiliar Longings was thinking of beginning an affair while in the middle of a break up with his wife. "Men I've known," Slanders said, "have tended to be pretty crazy during this phase of things, capable of doing a lot of damage before they catch up with their However, in keeping with CLS methodology, Slanders ended with straight-out CLS phenomenological wisdom: "... real trust and warmth and mutual confirmation just appear unpredictably in relationships. Maybe that's about to happen to you, and if so may your good fortune be lasting." (After reading that story before it went to print some of us began to wonder if we should have joined Morty and boycotted the *Lizard*. But then we realized that it would be no good, we were in this to the bitter end.)

There were a number of follow up letters addressed to Ann Slanders about the Forbidden Love column written on stationery from the San Francisco Hilton & Tower (the official AALS hotel) and reprinted in the *Lizard*. One sympathetic but disappointed responder complained about the insufficiency of Slander's advice, stating that Slanders should have downplayed his "male point of view"—just "one more in a million conversations in which men puzzle about what they are allowed to do to." The letter also strongly chastised Slanders for failing to condemn the affair, arguing that it would have been better if Slanders had stated that "it would be dangerous and very likely immoral for him to proceed further into the affair, and that he shouldn't do it." Finally, the letter ended by raising the obviously correct question: "Would the victim of Unfamiliar Longings receive less or just another kind of education than he would have gotten had he directed his longings somewhere else." The letter was signed, Sincerely Disappointed.

Another response letter to Ann Slanders, also written on the AALS hotel stationery and reprinted in the *Lizard*, was from a male law professor who was concerned about process. The letter went on to point out that law teaching creates a dynamic whereby students may be influenced by charismatic teachers and that the power to grade gives us teachers real power over them. The letter admonished that even friendship relationships between student and faculty are likely to be tainted by the student/teacher process and that teachers can never hope to become true equals and friends with their students. The author signed the letter "Concerned About Process," and ended with advice that Unfamiliar should "stay away" from his students. All in all, one is left wondering about the dynamics of the pro and con argument and it was clear to this reader that the Ann Slanders column had made a major contribution to what was an extremely sensitive and indeterminate issue and it was worth printing, even though it was unfortunate that some feminists within CLS stopped talking to the responsible males.

One story about the Professional Responsibility Section noted how the discussion was "beautifully balanced shadow play . . . nobody knew the rules, let alone obeyed them." The reporter went on to explain: "There seems to be 3 reasons for this state of suspended disbelief: 1) Everybody really knows that ethics is not about rules which affect behavior; 2) People are just using the rules to proselytize for, and justify, a particular picture of lawyers—but 3) It would be embarrassing to admit it." The reporter then ended with the following observation: "It would have been even more embarrassing to admit another 3 things: 1) 70% of the population don't receive adequate legal services; this is one manifestation of a pretty excremental society; 2) Law teachers are playing at being reformers by marginal adjustments to irrelevant, incoherent rules confidentiality; 3) By doing this, among other things, we bear a substantial moral responsibility for a twisted social order which lawyers do much to maintain. Come to think of it, no wonder it was a shadow-play." You have to admit that this one It was also something that yells out for respect. Except for the "excremental society" reference, this story was something that might find its way into a mid-level law review starving for copy. Who can say for sure?

Indeed there were a number of first-rate scholarly submissions published in the pages of the Lizard. A story in the Lizard No. 1, entitled "Debates About Theory Within Critical Legal Studies" contained a revealing exposition about the recurring CLS debates between the instrumentals and irrationalists—or the Northerners and Southerners, as Duncan Kennedy named the two positions for some irrational reason. I will stick with the names used in the Lizard article. The instrumentalist camp sees power in society exercised in the domination of specific groups over others (say, capitalists over workers), and reflected in the distribution of wealth and decision making authority. Legal rules are said to be "instruments" of this domination structured by race, class and gender. The irrationalist, on the other hand, finds legal rules too be much too marginal in their effect and too indeterminate and incoherent in their content to be instrumentally necessary for any particular social reform. What got the instrumentalists mad was the irrationalists' insistent demands that "there is no ultimately rational way to think about or organize the world, there is no ultimate irrationalist program, no attempt to substitute 'truth' for 'ideology." When instrumentalists asked how it was that irrationalists could speak rationally about irrationalism, the irrationalist would say that the instrumentalist must cease and desist from all rational critiques; it just was not the irrationalist way. On and on it went, in exquisite scholarly detail, each thrust matched by equally effective parry. I am absolutely confident that the great Legal Realist father Llewellyn would have enjoyed reading that one.

There was, of course, another reason for bringing out the *Lizard* at the AALS conference. It was to publicize a counter-event—an alternative three-part panel on the "Politics of Legal Education," that would be organized by the Stanford crits at a hotel within walking distance from the AALS hotel. Refreshments were to be served. Each edition of the *Lizard* had the notice of the counter-event on the front page in large bold capital letters: CHECK IT OUT, with directions for getting to the event. The notice promised a three-part panel on the "Politics of Legal Education," covering institutional reform, clinical issues, and law and economics issues.

The event was held on January 6, 1984, at the Bellevue Hotel and it was attended by several hundred law teachers, practitioners and fellow travelers. Keeping with the Lizard practice of covering all AALS related events. Lizard reporters were in attendance and wrote an article entitled, "Trashers Trashed: Audience Rebels Against CLS Panel" reprinted in the last edition of the AALS Lizard (No. 3). As reported in the Lizard, about 250 people attended the event but the audience trashed the entire affair. It is true, as the Lizard article noted, that at one point, "widespread applause greeted the somewhat plaintive remark of one audience member, 'No matter how bad this is, it's still better than anything going on at the AALS." Nonetheless, as reported in the Lizard, the audience rebelled against the "counter-event" with several audience members stating for the record that "the CLS event was every bit as pompous and vacuous as the Lizard claims the AALS panels are." I have to say that I was there and I also attended several AALS section meetings and I can say without hesitation that the counter-event sponsored by the Stanford crits was not as bad as the AALS panels I attended! I am not saying it was great, but no way was it as bad as the AALS.

I do agree with the *Lizard's* criticism that the CLS panel sort of resembled the "reified, hierarchical AALS model." Peter Gabel, recognized as a white male Heavy, gave a talk about reification and it did seem that he was lecturing at one point (he even called upon members of the audience to participate). But there was absolutely no grounds for saying that Peter's lecture resembled in any way the reified, hierarchical AALS model. (I really like Peter and I know that what he was doing was attempting to get the "kettle boiling"—CLS slang for getting people off there knees.) If you followed what he and the other crit speakers on the panel were saying and if you ignored the fact that they were white males from Stanford (except Peter, of course, who was from New College) then you would see that they were all saying something really important that needed to be heard even if I cannot remember what it was. It was too bad that there were a lot of people talking and some even were getting up and probably heading for Mill Valley. The weather was nice, and I have heard that the wine is really good there.

The negative audience reaction to the CLS counter-event at the Bellevue Hotel was so unruly and unprofessional that it broke up the meeting, forcing everyone to break out of the lecture hall meeting and reconvene in small groups. Efforts to reconvene the meeting met with failure. As the *Lizard* reported, "several panel members fled the podium and tried to blend into the audience." distinguished audience member who remained unnamed, and who had been studying CLS for years, was reported to have said: "The event demonstrated conclusively that CLS has nothing to offer beside a lot of childish prattle." In response, a CLS insider disagreed, stating: "The audience enactment of the destruction of hierarchy had a cathartic effect that is pre-requisite to serious discussion of the politics of law schools." When asked to comment on this statement, the distinguished mainstream professor dismissed the remark as "typical CLS mystification." On the last day of the conference, after the last Lizard had been distributed, the ragtag band of CLS conspirators who regarded themselves as the "True Left" disbanded and headed for the hills. It was quite anticlimactic, as most endings are at AALS conferences. You go with high hopes of linking up with lots of law professor friends, but when you arrive you discover everyone is nervously searching for recognition and nothing ever really happens. Proverbial ships in the night, glancing at each other's name tag and hoping that they will be recognized by that special hierarchically name-tagged person. The True Left just left, leaving those who still believed in the law school meritocracy game to continue to hope that they would be noticed by the right person wearing a Harvard or Yale name tag and that their colleagues back home would see it. The Lizard, left strewn on the floors of the conference hall, had its brief moment of recognition at the AALS. It was back to business as usual.

When I returned home, not a word—not one single word—was ever mentioned about the *Lizard*. It was like it never happened. That nothing was said was not really a surprise. Crits have always been invisible and the truth is they would not want it any other way so long as the crit backlash continues in stride. I must admit that I felt both relieved and proud. Relieved because the police were not called and no one went to jail. Proud because for once I had fun at the AALS and I think it helped to get people thinking. It taught me one can take risks and get off the hierarchical ladder that is erected each year at the AALS. Why not just

trash it and do something more meaningful with our professional organization. AALS official keep sending out emails for ideas about what to do at the next meeting. Did the AALS organization ever take a political stand on anything? It's not like we don't have issues to pursue. Bush v. Gore? The War in Iraq? Suspension of habeas corpus? You can insert your favorite hot political issue that has legal and ethical consequences here. Doesn't the legal academy have any shame for its silence and reticence in these times? Is it just all about name tag recognition and the pecking order? We talk about lap tops in the law school class room instead of the political manipulation of United States Attorney Office. No wonder students are surfing the web in class. How sad and utterly depressing to see the hopelessness of professional spectacle we all help to create year after year at the AALS while Rome burns.

But for a brief few days in January 1984 when the *Lizard* came to the AALS there was a little fresh air, fun, anti-hierarchical thinking, and the possibility of self-governance. The fact that it didn't work doesn't mean it wasn't worthwhile. It did demonstrate that there is real power in negation. You can always vote with your feet, but why not take the initiative and refuse to play out the same old social themes and try something really different and see what happens. True, CCLS is now kaput, and the movement is no longer in existence, but the story is not over yet. The possibility always remains that people will once again come to question the normal science and recover courage and find inspiration to not just interpret their world but change it. You can always still go for a tour of the vineyards if it doesn't work out.

Was it worth it? You bet your suspenders it was worth it. Just think about this one undeniable fact—the 1984 conference was one of the few times that the AALS met in San Francisco and law professors actually stuck around for at least a little while before checking out the vineyards. I concede that some things never really change; the AALS today is as it was then, most people continue to head for the hills soon after checking into their conference hotels, and civility continues to be ugly. Is it twenty years too late to continue the project and reject cooption?

Same as it ever was?

**POSTSCRIPT** 

The Lizard continued to be published by a group of critical legal studies law professors at Buffalo but it was never the same. The publication had become a pamphlet or small book and much of the edginess of the paper had been lost. I believe the last edition of the Lizard was the memorial issue published in honor of the late Mary Joe Frug in November 1991. To my knowledge, the official administration that runs the AALS has never acknowledged the Lizard at the 1984 conference though I am willing to bet copies of the Lizard made their way to the national headquarters in Washington, D.C., probably even to the White House. Finally, for those readers who might be inclined to call this story glorification of juvenile crap I can also say in defense of the True Left in CLS—Grow up!!

It is true that we are all much older now—shockingly old—and no one that I know would ever engage in acts of rebellion or even understand what the *Lizard* was really about. One of the editors of this piece said: "Although I did not understand quite a few of your references, I enjoyed sensing the mood of the convention through it." Well, maybe you can't go back home. We are all respectable now. Some like me sit back and yearn for the good old days of the Eighties. The problem is that we lost our sense of irony and we all have become way too serious. We get old and tired and we think that maybe we should just tune out and have a life. As for me, I'll put on another cut from the Taking Heads and remember the Eighties when we were younger then and willing to call a spade a space.



# ANTÍGONA: A VOICE REBUKING POWER

Margaret E. Montoya\*

Travel to Ciudad Juarez on the U.S.-Mexico border and you will find a city of contrasts—in the people, activity, noise, and visual stimuli. We are arriving by air at the El Paso airport and will cross the border in a van provided by the university, becoming part of two rivers of people that flow continuously—into Mexico on one side and back into the United States on the other. The border was once an imaginary line drawn by the Rio Grande demarcating the boundaries of the two countries; today it is a heavily policed and barricaded two-way funnel that permits the border guardians to scrutinize each individual border crossing. It may just be me, but as our van approaches the toll booth with its armed guards, mechanized gates and ubiquitous cameras, my heart rate increases and as I become conscious of my heart beat, my autonomic responses seem to be signaling some possible danger. We pay a fee according to the vehicle's number of axles and wheels and Mexico's border guards wave us into another universe. Ciudad Juarez lies just four hours away from our law school in Albuquerque, but it is much farther psychically, politically, economically, socially, and legally.

Over several semesters we have been building a faculty and student collaboration with Lic. Gustavo de la Rosa Hickerson, a professor of labor law at the law school of the Autonomous University of Ciudad Juárez (UACJ). I am traveling with a group of nine law students from my employment discrimination class, my oldest daughter who plans to apply to law school, two visiting professors from Madrid, Spain, and another faculty colleague. Officially, we are here to explore the possibility of a collaboration among three U.S./Spanish/Mexican law schools; unofficially I am here to have the students experience the intellectual and social energy of the borderlands. I hope to redirect their attention, even for a short while, southward and outward.

Our plans are to check in to a hotel, clean up, and eat a quick lunch before heading to the law school. We will have a short introductory meeting with UACJ's Rector and other officials, tour the law school, and have dinner at a local favorite restaurant featuring Mexico's varied cuisine. The students plan to attend a baile folklórico and visit the club scene as they get to know their Mexican hosts.<sup>1</sup> The next day will include another round of administrative meetings before we head back to Albuquerque.

Our visit will begin with Professor de la Rosa's students staging a reading of *Antigona*, the Spanish language version of *Antigone*. The University of New Mexico (UNM) students and I briefly discuss our blurred memories of Sophocles' play. We don't remember too much more than that Antigone was the daughter of Oedipus; mostly we recall the fateful tale of a son who kills his father and marries his mother. We drive towards the law school and I wonder whether this reading will hold the attention of the students. *Antigone* seems abstract,

<sup>\*</sup> Professor of Law, University of New Mexico School of Law. My heartfelt thanks go to Professor Gustavo de la Rosa Hickerson (Universidad Autónoma de Ciudad Juárez, Facultad de Derecho) and his students for expanding my understanding and appreciation of legal education and pedagogy. Please send any comments to montoya@law.unm.edu.

<sup>&</sup>lt;sup>1</sup> See, e.g., Ballet Folklorico Alma de Mexico, http://members.aol.com/NinoCanela/ (last visited Jan. 23, 2007).

remote, literary, and it's being delivered in Spanish, a language that is not spoken well by most of the students.

We mill around a courtyard surrounded by one and two-story buildings with backpack-laden students hurrying in and out of doorways. I notice that most of the students look like younger versions of myself—dark hair, dark eyes, with shorter and slighter physical builds. In this setting I feel average, neither tall nor short, neither dark nor light-skinned.

We are shown into an auditorium and we take our seats; we the faculty members take the seats at the front of the room. There is a raised platform and the performing students begin filling the stage. They are young; as in other civil law countries, Mexican students study law as part of an undergraduate program and finish with a degree called a *Licenciatura en Derecho*. As professionals, they will use the *Lic*. abbreviation, a title of great respect in a country marked by social inequalities (like the United States) and one that is overtly hierarchical (unlike the United States). The performers are dressed in black with a few touches of red which I assume designate specific characters.

Quiet falls in the room and we hear a woman's voice: "Hermana de mi misma sangre, Ismene querida, tú que conoces las desgracias de la casa de Edipo . . . ." Antigone is answered by her sister Ismene and then a narrator enters; later comes the voice of a senator, and then King Creon. One doesn't have to understand Spanish to notice that the voices are clear and commanding; each speaker carefully enunciates the words, punctuates and emphasizes them with pauses, inflection, and volume, delivering the complex passages with emotion and meaning. We are witnessing a practiced and perfected performance.

Some of the Spanish washes over me. Even though I am comfortable in Spanish, I know that I am missing whole phrases. But I understand that Antigone's and Ismene's two brothers have died in combat. King Creon orders, on pain of death, that Polynices, his rebellious nephew, is to be left unburied and unmourned. Antigone tries to persuade her sister to disobey the order. Ismene answers: "No, hay que aceptar los hechos: que somos dos mujeres, incapaces de luchar contra hombres que tienen el poder, los que dan órdenes, y hay que obedecerlas—éstas y todavía otras más dolorosas. . . . "3

[We must remember we are women born, Unapt to cope with men; and, being ruled By mightier than ourselves, we have to hear These things—and worse. For my part, I will ask Pardon of those beneath, for what perforce I needs must do, but yield obedience To them that walk in power; to exceed Is madness, and not wisdom.]

<sup>&</sup>lt;sup>2</sup> Taken from an adaptation of *Antigona* by Sófocles prepared by Gustavo de la Rosa Hickerson for a Seminar on Juridical Culture given at the Universidad Autónoma de Ciudad Juárez in November 2006, at p. 1 (hereinafter "De la Rosa adaptation") (copy on file with author).

<sup>&</sup>lt;sup>4</sup> SOPHOCLES, ANTIGONE 3 (Dover Publ'n, Sir George Young, trans.) [hereinafter "Dover version"].

Prof. de la Rosa interrupts to provide a context for the reading: he describes his pedagogical objectives and exposes the jurisprudential background of the play. He asserts that the spoken word is the lawyer's tool, especially when used to advance social justice; therefore, the voice is an instrument to be trained and mastered. Prof. de la Rosa points out that many UACJ students come from humble backgrounds and are unaccustomed to hearing their voices in public space; they arrive for their studies hushed and socially timid; so, using the classics like Sophocles, he creates an environment in which the students can train their voices and begin to form their public identities. He goes on to explain that Creon's order that Polynices' corpse is not to be buried has been lawfully promulgated. Specifically, it is a decree or edict that has been issued by an authorized official with the necessary formalities and publicized in the required manner. No other law supercedes it; the sanction of death has been ordered for transgressions, and the responsible agents have been ordered to guard the body and punish those who would disobey the order. Consequently, we have a law that is formally valid and obligatory.

One of the UNM students and I stand and translate for the non-Spanish speakers. I am at pains to have the students understand both the text and the subtext of this reading. Sophocles provides an interrogation for us of the legal versus the moral. He questions the moral right of the king to enforce his laws. Imperial power with its formalities and requisites may be legitimate, he posits, but is it consistent with the unwritten law of the gods? Sophocles simultaneously promotes the equality of women as political subjects using rhetoric that is resonant of contemporary feminist analyses. Prof. de la Rosa provides a pedagogical subtext as he asks us to listen to the voices along with the words. This skills exercise to train young lawyers to speak on behalf of justice has a poignancy to it given our location in the borderlands, a site in which privilege and privation slip and slide one against the other. Speaking truth to power, as Antigone does, is a tall order in the borderlands. It would take the genius of a Sophocles to discern the parameters of justice where the structural nature of social inequality in both the United States and Mexico is masked by hegemonic narratives about such classic concerns as democracy, the common good, and honor as a necessary trait for those who would govern.

The readings continue and Sophocles extends the theme of the legality of the laws. There are the laws of the gods, laws that are superior to those of men. Antigona speaks: "Y no creia yo que tus decretos tuvieran tanta fuerza como para permitir que solo un hombre pueda saltar por encima de las leyes no escritas, inmutables, de los dioses. . . ."<sup>5</sup>

[...nor did I deem Your ordinance of so much binding force, As that a mortal man could overbear The unchangeable unwritten code of Heaven;]<sup>6</sup>

<sup>&</sup>lt;sup>5</sup> De la Rosa adaptation, supra note 2, at 12.

<sup>&</sup>lt;sup>6</sup> Dover version, supra note 4, at 17.

Prof. de la Rosa importunes his students to think about the executive exercising his power in violation of natural law as well as the poet exercising his power to illuminate these legal issues with a story told in the distant past. I translate this for the U.S. students but as I am contrasting the law of the king with those of the gods, I am struck by another connection.

The narrative ends with the gods extracting their revenge on Creon through his son and his wife. Upon finding the hanging corpse of Antigone, his betrothed, his son Haemon kills himself with his sword as he faces his father. Creon, hoping to find solace with his consort Eurydice, carries Haemon to the palace only to find that, once word has reached her of her son's death, she has killed herself with a blow to her heart. Creon exits.

The chorus intones: "Con mucho, la prudencia es la base de la felicidad. Y, en lo debido a los dioses, no hay que cometer ni un desliz. No. Las palabras hinchadas por el orgullo comportan, para los orgullosos, los mayores golpes; ellas con la vejez, enseñan a tener prudencia."

[Wisdom first for a man's well-being Maketh, of all things. Heaven's insistence Nothing allows of man's irreverence; And great blows great speeches avenging, Dealt on a boaster,

Teach men wisdom in age, at last.]8

Allow me a looser translation of the Spanish: "In many things, prudence is the basis for happiness. And not even a small slip is allowed in what is owed to the gods. No. Words swollen with arrogance will mean the worst blows for boasters; and these words with age teach men to have prudence."

With the extraordinary talents of his students, Professor de la Rosa gave us a demonstration about voice in legal story-telling and story-listening. We traveled to Ciudad Juarez to experience the border, to view the exotic, and to learn about the exploited. While those aspects are always there, we saw something more. Antigone turned our gaze back on ourselves. Antigone is not an abstraction, and Sophocles' words are not remote and dated. Antigone speaks to the current reality being lived—specifically in the United States (and perhaps also in Mexico with its contested presidential election and charges of electoral fraud). In the United States, a president with his minions has constructed himself as king-like, with few restraints on power, blatantly disregarding congressional mandates, and flagrantly violating international norms. I urge the students to see that in Sophocles' words we have an indictment of Bush's expansion of executive power. Some questions are for the courts: Is torture constitutional?

<sup>&</sup>lt;sup>7</sup> De la Rosa adaptation, *supra* note 2, at 37.

<sup>&</sup>lt;sup>8</sup> Dover version, supra note 4, at 52.

<sup>&</sup>lt;sup>9</sup> Nicholas D. Kristof of the New York Times editorial page also chooses Antigone as a classic that is pertinent to President Bush. He writes:

So Mr. Bush should resolve that for every hour he spends with Mr. Cheney, he will spend another curled up with classical authors like Sophocles. "Antigone," for

Are detentions and renderings of the so-called enemy combatants legal? Antigone prods us that some questions are for all of us: whether legal or illegal, are these laws and enactments *moral*?

The U.S.-Mexico border is undergoing abrupt and convulsive changes so there is something unexpected about traveling to Ciudad Juarez to hear Greek classics. The border with its own dynamics of inequality seems an odd vantage point for considering power within the imperial center, but the border actually brings the questions about executive power into greater relief. Antigone's rebuke of Creon's power rebukes us too for our silence and thus our complicity in the concentration of executive power that today is exercised in the name of the people of the United States.

example, tells of King Creon, a good man who wants the best for his people—and yet ignores public opinion, refuses to admit error, goes double or nothing with his bets, and is slow to adapt to changing circumstance. Creon's son pleads with his father to be less rigid. The trees that bend survive the seasons, he notes, while those that are inflexible are blown over and destroyed. Americans today yearn for the same kind of wise leadership that the ancient Greeks did: someone with the wisdom to adjust course, to acknowledge error, to listen to critics, to show compassion as well as strength, to discern moral nuance as well as moral clarity. Alexander the Great used to sleep with the "Iliad" under his pillow; maybe Mr. Bush should try "Antigone."

Nicholas D. Kristof, Under Bush's Pillow, N.Y. TIMES, Feb. 4, 2007, at 4-17.



# **REEL TO REAL**

# Jeremy Paul\*

I have long believed that many of the most important aspects of so-called legal reasoning can best be conveyed through use of everyday examples that illustrate how all of us reason as lawyers just to get through the day. Here's another story in that vein.

Imagine you are a concerned parent worried about your child's exposure to too much sex and violence in contemporary films. You wish your life were organized so that you could either pre-screen each movie before allowing your child to watch or at least so that you and your child could sit down and view films together. Alas, however, you must work for a living, so you have no choice but to resort to a crude approach. Knowing that your judgments won't always agree with those of the Motion Picture Association of America, you nonetheless adopt a rule that your child may see no movie with an R rating. This might mean that some of your favorite films, *Bull Durham* and *The Big Easy*, are off limits at this point. But your daughter is only twelve and she'll have plenty of time to check these out in later years. This you find a small price to pay to avoid case-by-case discussion of the many films in the *Friday the 13th* series or those spawned by the horror film *Texas Chainsaw Massacre*. For the most part, your daughter knows you are serious about this rule, and she seldom kicks up a fuss.

During her seventh grade year, however, just after she turns thirteen, your daughter comes to you with a request. Her history class is doing a unit on the Holocaust. She has been assigned to write a report on non-Jews who played a key role in saving those who might otherwise have fallen victim to Nazi destruction. To help with her research for this project, she asks if she might see Steven Spielberg's classic film, Schindler's List, a movie that unsurprisingly has an R rating.

You have at least three options. You could note the rating, apply your longstanding rule and simply say no. Or, you might conclude that your daughter having turned thirteen is grounds for abandoning past practice and either letting her see whatever she wants or opting for case-by-case determination. You find none of these approaches appealing. You don't want to open the floodgates to movie trash, but you are quite reluctant to stand in the way of what seems a valid educational experience. What you need then is a way to say yes that ultimately doesn't really change things going forward. In short, you want to grant an exception. And, for the first time in a long while, you must pause and ask yourself exactly what it is about *Schindler's List* that leaves you willing to let your daughter watch even though it is one of the most upsetting movies ever screened.

You realize, of course, even as you are asking yourself your precise reasons for saying yes, that you already have two ways to go down your chosen path. You could try "Ok, honey, as long as we watch together you can, just this once, see an R rated film." Or you could be more ambitious and try to add "just this

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<sup>\*</sup> Dean and Thomas F. Gallivan, Jr. Professor of Real Property Law, University of Connecticut School of Law.

<sup>&</sup>lt;sup>1</sup> For an early example, see Jeremy Paul, A Bedtime Story, 74 VA. L. REV. 915 (1988).

once because this film is . . . [fill in blanks here with "high quality, or educational, or connected to a school paper"] we will let you see it." The former approach seems risky because you know you'll never be able to stick to "just this once" when faced with an upset daughter who comes back at you with "what about when I saw Schindler's List." Yet the latter is equally risky since whatever formulation you try will be subject to later debate about whether a subsequent film can be shoe-horned within it. As you ponder your first parental encounter with the idea of precedent, a crisis arises at work, and you have no choice but simply to say yes, honey, it's ok this time and move on.

Sure enough it's as early as that summer, while your daughter remains thirteen, that she invites several of her girl friends to spend the night. They are all sleeping in your basement where you have the large screen T.V. One of your daughter's friends suggests they watch the Demi Moore film, G.I. Jane, which happens to be available on premium cable that night. This film about an intrepid young woman's extraordinary efforts to become a Navy Seal also has an R rating, and includes some rather brutal scenes. You are excited by the idea that this group of almost adolescent girls wishes to learn more about a woman's efforts to traverse an important social barrier. But your next reaction is that if you permit this, you'll have no standing ever to say no again. So you say no. Surprisingly, your daughter lets it be. Years later you'll ask her why.

In the meantime, it's not long until your daughter is back at you again. During the fall of eighth grade, her American History teacher assigns her a paper on the reasons for the resignation of President Nixon. Once again, she suggests a film as a source of research. This time it is Oliver Stone's rather tawdry, over-dramatized production *Nixon*, which at least has the redeeming feature of starring Anthony Hopkins in the title role. Now you are in a quandary. At first glance it seems that all the same ingredients for saying yes to *Schindler's List* are present here as well. It's a historical film. There's another school paper. And the foul language and other offensive aspects are true to life, not thrown in to titillate the audience.

Moreover, you are certain that if you say no to *Nixon*, your daughter will be quick to label you a hypocrite. There's no earthly basis, she'll point out, on which to argue that *Nixon* is more violent, more upsetting or less appropriate for children than *Schindler's List*. Hence, if you say no to *Nixon* your daughter will accuse you of having all along been trying to censor her movies for quality rather than trying to protect her from things she's not yet old enough to see. You have potential counterarguments. Evaluation of the films can be done on a sliding scale weighing high quality against potentially inappropriate content. But this is going to be awfully hard to explain to an eighth grader trying to get a leg up on her classroom competition. "Ok, honey" seem to be your favorite words of the year.

Spring of eighth grade comes quickly and your daughter, now fourteen, has another request. Her term paper for the second semester is on the assassination of President Kennedy. Once again she wants to turn to Oliver Stone for help. She can't see any way that having said yes to *Nixon* you can now tell her she's not permitted to watch *JFK*. Unfortunately, neither can you. You find the *JFK* movie a travesty. Although it may be a gripping story and fun to watch, it strikes

you as phony history, rumor upon speculation. You are appalled that your daughter should be seeking guidance in Hollywood film when so many serious scholars have written on the subject. But what are you going to do now? It's another historical film, another research paper and it's not any more offensive than the previous two films. So you say yes again, although this time the word "honey" doesn't pass so easily through your lips.

Summer comes and you can't wait for a chance to put the R rated genie back in the bottle. Sure enough, your daughter provides an early opportunity. This year's sleepover crowd checks out the pay cable offerings and finds Guy Ritchie's recent version of Swept Away, starring Madonna and Bruce Greenwood. Your daughter knows what buttons to push with you. She points out how often she's heard you talking about your admiration for Lina Wertmuller's original version starring Giancarlo Giannini and Mariangela Melato. It's one of the few movies that really explores the material basis of class relations, she's heard you say on more than one occasion. "So if it's so good for you, why can't I see it?" she inquires. What you want to say is that the new version bears no resemblance to the old and is little more than one more excuse (as if she needed one) for Madonna to parade around on screen in a bathing suit. But you are trying to disengage rather than move to case-by-case movie adjudication. So you point out that this is not a historical film, it has no connection to school, and you just don't want to talk about it any more. "Could I see it, if I use the movie as the basis for one of my summer essays for English?" she tries in a last gasp. No, you reply, and she gives up, but this time with a rather distinct huff suggesting that you may now be on record as ogre parent of the year.

Time marches on and for her fifteenth birthday her boyfriend (can you believe she has a boyfriend at fifteen?) buys her the DVD version of *The Godfather*. He's seventeen (naturally) and it's his all time favorite flick. The two of them plan to watch the movie together before, miraculously, going out to dinner with you to celebrate the occasion. Your misery deepens. You concede that *The Godfather* is one of the most impressive movies ever made. But it's also one of the most violent and the scene with the severed horse head in the bed is enough to give most adults nightmares. You know, however, that you have been set up so that if you say no, your daughter will be embarrassed and made to look like a little kid in front of her older boyfriend. So you say yes again, hoping that you can limit the damage to a birthday exception and certain that you'll sit down with your daughter and explain to her how disappointed in her you are that she put you in this position. Fortunately, she loved the film and seems entirely untroubled by watching the murder and mayhem.

Spring break rolls around (she's in tenth grade now) and there's a George Clooney film festival downtown. You thought maybe she'd go see one of the Batman extravaganzas, but, no, her boyfriend wants to take her to see *Three Kings*. This all too realistic portrayal of war in the Persian Gulf earned widespread critical acclaim, but it's just the kind of graphic violence from which you hoped your daughter would be spared until she was older. So reaching back to earlier days, you say no once again. "But I loved *The Godfather*," she complains. "Everyone loves *The Godfather*," you reply. And you leave it at that.

1180

Alas, however, your goose has pretty much been cooked. By summertime, the downtown film festival is featuring Kevin Costner flicks. Strolling in, with an unmistakable gleam in her eye, your daughter asks to borrow some cash so that she might go with her girlfriends to see *Bull Durham*. I've got an idea, she adds quickly. You can come along too, as long as you sit way in the back as far away from us as possible. You know where this is headed, so you don't even put up a fuss. As you sit in the dark, munching popcorn, you begin to wonder if you made any mistakes along the path that got you to this point. Should you at the outset have avoided the rule based approach that used R rated films as proxy for case by case judgment? Did you set a bad precedent when you said yes to *Schindler's List*? Did you misread the precedent set by *Schindler's List* when you said yes to *Nixon*? The list could go on and on, but the lights dim and soon you are wondering once again whether Crash Davis can break the minor league record for home runs.

When you get home, you call your sister, who happens to be a lawyer, and tell her the whole story. Your experience isn't surprising, you learn; indeed, it reflects something very similar to what you might have learned about precedent had you gone to law school. Karl Llwellyn's *Bramble Bush*, for example, teaches fledging lawyers that a precedent such as *Schindler's List* may be seen by one side (your daughter) as welcome while the other side (you) might find it unwelcome. Worse still the same precedent can be viewed broadly (historical movies are ok) or narrowly (very good historical movies tied directly to school projects are ok) depending on one's point of view. Indeed, there's very little about the best law school writing about precedent that isn't already pretty well incorporated into your struggles over your daughter's movie choices. If you don't believe me, "you could look it up."

# FOOTNOTES: A STORY OF SEDUCTION

Ruthann Robson\*

#### I. INTRODUCTION

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The use of the word "lesbian" to name us is a quadrifold evasion, a laminated euphemism. To name us, one goes by way of a reference to the Island of Lesbos, which in turn is an indirect reference to the poet Sappho (who used to live there, they say), which in turn is an indirect reference to what fragments of her poetry have survived a few millennia of patriarchy, and this in turn (if we have not lost you by now) is a prophylactic avoidance of direct mention of the sort of creature who would write such poems or to whom such poems would be written . . . assuming you happen to know what is in those poems written in a dialect of Greek over two thousand five hundred years ago on a small island somewhere in the wine dark Aegean Sea.

MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 160 (1983) (ellipses in original).

In naming this work "lesbian," I invoke a lesbian context. And for this reason I choose not to define the term. To define "lesbian" is, in my opinion, to succumb to a context of heterosexualism.

SARAH HOAGLAND, LESBIAN ETHICS: TOWARD NEW VALUE 8 (1988).

The lesbian is a woman ablaze who is reborn from the essential of what she knows (she) is. The lesbian is an initiator, an instigator. . . . The lesbian is a threatening reality for reality. She is the impossible reality realized which reincarnates all fiction, chanting and enchanting what we are or would like to be.

NICOLE BROSSARD, THE AERIAL LETTER 121 (1988) (translation by Marlene Wildeman).

<sup>\*</sup> Professor of Law, City University of New York School of Law.

<sup>&</sup>lt;sup>1</sup> When I first started writing legal scholarship about lesbians, law review editors wanted an explanatory footnote of the term "lesbian." I balked. I argued. I capitulated. And then I found some favorites:

## II. THEORETICAL BACKGROUND

Like the high whine of the dentist's drill, the low rumble of the footnote on the . . . page reassures: the tedium it inflicts, like the pain inflicted by the drill, is not random but directed, part of the cost that the benefits of modern science and technology exact.

As this analogy suggests, the footnote is bound up, in modern life, with the ideology and practices of a profession.

ANTHONY GRAFTON, THE FOOTNOTE: A CURIOUS HISTORY 5 (1997) (specifically discussing the theory of footnotes in the profession of history).

<sup>5</sup> My practice of footnotes started out as a physical rather than theoretical attraction. I'm in law school, in the ages before the advent of the personal computer. I have a white legal pad and a yellow legal pad, side-by-side: a couple, a dyad, a pairing. On the white legal pad, I write, in pencil, the text of the draft of my first law review article. On the yellow legal pad—as you've already guessed—I write, in pencil, the footnotes of the draft of my first law review article. There is something seductive in this, and not only because there is a lesbian chanting and enchanting in those penciled pages. Most people don't notice her. But I do. See People v. Lovercamp, 118 Cal. Rptr. 110 (Cal. Ct. App. 1974).

To see her. Her. See!

The confusion about the "see" signal was resolved by the seventeenth edition of The Bluebook, which provided that [no signal] is used when the "[c]ited authority (i) directly states the proposition" (ii) identifies the source of a quotation, or (iii) identifies an authority referred to in the text," while the signal "see" should be used when the cited authority "clearly supports the proposition" as when the "proposition is not directly stated by the cited authority but obviously follows from it; there is an inferential step between the authority cited and the proposition it supports." Rule 1.2, The Bluebook: A Uniform System of Citation 22-23 (Columbia Law Review Ass'n et al. eds, 17th ed. 2000). The sixteenth edition, published four years earlier had omitted the category of "directly states the proposition" from the [no signal] designation and had provided that "see" should be used when the cited authority "directly states or clearly supports the proposition." Rule 1.2, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 22 (Columbia Law Review Ass'n et al. eds, 16th ed. 1996). This was a departure from previous Bluebook formulations which provided that "see" as a signal was an indication that there was some inference that was required. E.g., Rule 1.2, The BLUEBOOK: A UNIFORM SYSTEM OF CITATION 6 (Columbia Law Review Ass'n et al. eds, 12th ed. 1976) ("See: cited authority constitutes basic source material that supports the proposition. 'See' is used instead of '[no signal]' when the proposition is not stated by the cited authority but follows from it.").

<sup>&</sup>lt;sup>2</sup> I would like to "chant and enchant," to "reincarnate all fiction." I mean, who wouldn't? Discrimination would seem rather irrelevant if one is a "threatening reality for reality." Although perhaps that's the motivation for the discrimination? There must be a theory of discrimination as retaliation.

<sup>&</sup>lt;sup>3</sup> There are theories of everything. I have been seduced by theory, I am not ashamed to tell you. And I like to think I have seduced it in return, although that may be brash on my part.

<sup>&</sup>lt;sup>4</sup> Here is a theory of footnotes:

<sup>6</sup> See! Physical because writing, like seduction, is both mental and physical. Listen to this: Contact between the point of a pen and a sheet of paper is the locus of the realization of a physical relationship that finds its basis in a desire to transmit a message, and in the recognition of the formal conventions of writing as a means of communication. The point of a pen carries out actions which are grounded in the desire to elaborate a visual thought, and it turns itself into an instrument for an initial and theoretical understanding of something which is attempting to take shape in the mind, of something that seeks its structure in the real experience [of] a place, and in various sensations, motivations, and circumstances that necessarily have a bearing on the artist's—the sculptor's—"professional" activities.

MAURO STACCIOLI, SCULPTURA 11 (1990).

There's that term "professional" again. Only this time, it's not dentistry or history or even law, but sculpture.

<sup>7</sup> No. I am not a sculptor. Although I have been a "resident artist" at the Djerassi Resident Artists Program in mountains overlooking the Pacific Ocean, where I first saw the sculptures of Mauro Staccioli embedded in a California live oak grove, next to a redwood grove, next to a meadow. See http://www.djerassi.org (last visited Nov. 16, 2006). There are six sculptures, huge concrete-seeming forms in stark shapes that play against the landscape. They impose upon it, like footnotes. Footnotes are not supposed to impose. "What footnotes should be used for, however, is citations. If the reader knows this is all they contain, the reader is not even apt to glance at them unless a specific verification need arises." Thomas Haggard, In Defense of the Lowly Footnote, 10 S.C. Law. 12 (Apr. 1999); cf. K.K. DeCivier, The Footnote: An Interruption, 26 Colo. Law. 47 (May 1997) (arguing that footnotes may be helpful to supplement statements in the text with extensive quotes or string cites and may a good way to respond to peripheral points by opposing counsel). But cf. J.M. Balkin, The Footnote, 83 Nw. U. L. Rev. 275 (1989) ("Perhaps the footnote might state the real point of the article in a highly economical way.").

<sup>9</sup> Contra Robert A. Destro, Federalism, Human Rights, and the Realpolitik of Footnote Four, 12 WIDENER L.J. 373 (2003); Felix Gilman, The Famous Footnote Four: A History of the Carolene Products Footnote 4, 6 S. Tex. L. Rev. 163 (2004); Peter Linzer, The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone, 12 Const. Comment. 277 (1995); Louis Lusky, Footnote Redux: A Carolene Products Reminiscence, 82 Colum. L. Rev. 1093 (1982); Matthew Perry, Justice Stone and Footnote 4, 6 Geo. Mason U. Civ. Rts. L.J. 35 (1996); L.A. Powe, Jr., Does Footnote Four Describe?, 11 Const. Comment. 197 (1994); Elizabeth J. Wallmeyer, Filled Milk, Footnote Four & The First Amendment: An Analysis of the Preferred Position of Speech After the Carolene Products Decision, 13 Ford. Intell. Prop. Media & Ent. L.J. 1019 (2003).

<sup>10</sup> This most famous footnote in American jurisprudence provides:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. [citation omitted].

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see [citations omitted]; on restraints upon the dissemination of information, see [citations omitted]; on interferences with political organizations, see [citations omitted]; as to prohibition of peaceable assembly, see [citation omitted].

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, [citation omitted] or national [citations omitted], or racial minorities [citations omitted]; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare [citations omitted].

United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

<sup>11</sup> I am not embarrassed to admit that when I first heard about footnote four, in law school it must have been, when I was drafting my own footnotes on those yellow legal pads, a lesbian chanting and enchanting in the pencil marks, I thought it a mighty fine and perhaps even helpful footnote. Certainly there was lots of "prejudice" and I'd bet my bottom dollar that dykes were a "discrete and insular minority," though it had recently been mentioned to me that I was not nearly discrete enough. I might add that this was the time of Anita Bryant, both of us living in the Sunshine State. No, we were not former lovers! Though I did think once or twice that she must have been "seduced and abandoned" to be so angry and involved with the "queer" issue. See Anita Bryant, The Anita Bryant Story: The Survival of Our Nation's Families and the Threat of Millitant Homosexuality (1977).

<sup>12</sup> The courts were not kind. Maybe not always as consistently mean-spirited, paranoid, and Bible-quoting as Ms. Bryant (although sometimes, indeed, they were) [citations omitted]. But not kind.
<sup>13</sup> And I kind of expected better from some legal theorists.

<sup>14</sup> See e.g., Jeremy Waldron, The Core of the Case Against Judicial Review, 115 YALE L.J. 1346, 1404 n.141 (2006) ("It is important also to distinguish between prejudices and views held strongly on religious or ethical grounds. We should not regard the views of pro-life advocates as prejudices simply because we do not share the religious convictions that support them. Almost all views about rights—including pro-choice views—are deeply felt and rest in the final analysis on firm and deep-seated convictions of value).

## III. THIS IS THE BODY OF THIS "ARTICLE"

<sup>&</sup>lt;sup>15</sup> So, here's the thing: When someone is screaming at me that I am a child molester and pervert and freak and should be jailed or burn in hell, I'm not really impressed that the source of their violence is a religious conviction. I'm fifteen or sixteen or eighteen or twenty or twenty-two and already writing footnotes. I'm going into a bar, a women's coffee house, a fucking bookstore, and they are screaming and throwing bottles and carrying signs. I'm not going to admit to you that I am scared, because I'm going to tell you I never was, not once was I ever scared, not once.

<sup>&</sup>lt;sup>16</sup> Footnotes are your friends, I tell my students. You can be called names on the street (indulge me in my use of the passive voice, dear editors, dear readers; I have my political reasons for resorting to it), but you can fight back with footnotes.

<sup>&</sup>lt;sup>17</sup> Each footnote I have ever written is a little shield.

<sup>&</sup>lt;sup>18</sup> Yes, I am a pacifist. But some things are non-negotiable.

<sup>&</sup>lt;sup>19</sup> My body.

<sup>&</sup>lt;sup>20</sup> Her body.

<sup>&</sup>lt;sup>21</sup> Our bodies together.

<sup>&</sup>lt;sup>22</sup> That is the story I have to tell, to tell over and over and over and over in as many ways as possible. It is the story that seduced me. The story that I seduced out of nothing with only my passion.

passion.

23 Things are different now, they say. Better, don't you think? I mean, there are lesbians on television for goodness sakes. And the law has "evolved." I mean, you two could go to Massachusetts and marry each other! Or to South Africa, probably. And there are civil unions and civil partnerships and domestic partnerships and all sorts of things were you can bind yourselves to each other and to the state—a sort of cute little threesome, don't you think? Do you know the term "ménage à trois"? In Goodridge v. Department of Pub. Health, 798 N.E.2d 941 (Mass. 2003), the controversial same-sex marriage opinion by the Massachusetts Supreme Judicial Court, the court articulated it so clearly: marriage is a relationship amongst "three partners": "two willing spouses and an approving State." Id. at 954. I kind of find that scary. Not that I don't like Massachusetts. But still. I have never been seduced by a state. I've never been passionate about a state. Though of course, I have put many states in many footnotes over the years. And traveled in my body to many states. Including Massachusetts. I've a fondness for Massachusetts, actually, for that's where my life was saved. But that's another story, although certainly a story about the body, see Ruthann Robson, Notes from a Difficult Case, 21 CREATIVE NONFICTION 6 (2003), reprinted in IN FACT: THE BEST OF CREATIVE NONFICTION (Lee Gutkind ed., 2005).

#### IV. CONCLUSION

<sup>&</sup>lt;sup>24</sup> I and my lover could now be included in this statement: Pennsylvania Judge (and later Dickinson Law School Dean) Laub once said, "Anyone who reads a footnote in a judicial opinion would answer a knock at his hotel door on his wedding night." Gerald Lebovits, *The Bottom Line on Footnotes and Endnotes*, 75 N.Y. St. B. J. 64 & n.3 (Jan. 2003) (citing RUGGERO J. ALDISERT, OPINION WRITING 177 (1990) (quoting Burton S. Laub)).

<sup>&</sup>lt;sup>25</sup> But I had wanted a revolution and thought that it might blossom on a yellow legal pad, with carefully written text, punctuated by numbers, as if it were a sculpture. Art, I thought, had potential. As did law. Dentistry I was not so sure about and never considered it as a profession. History, yes. There was history. But I have always loved the future. A future with her.

<sup>&</sup>lt;sup>26</sup> As Nicole Brossard has written, "a lesbian who does not reinvent the world is a lesbian in the process of disappearing." BROSSARD, *supra* note 1, at 136. Similarly, Monique Wittig's famous instruction in *Les Guérillerès* is "Make an effort to remember. Or, failing that, invent." MONIQUE WITTIG, LES GUÉRILLERÈS 89 (David LeVay trans., 1969).

<sup>&</sup>lt;sup>27</sup> We must seduce our revolution.