

THE RACE CARD: DEALING WITH DOMESTIC VIOLENCE IN THE COURTS

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INTRODUCTION

One of the great ironies of the modern world is the vagary of public consciousness. For centuries, social norms and legal norms worked together to build and patrol a nearly impregnable border between the public and private spheres.¹ Violent assault in the home epitomized the separate treatment of these two worlds.² There were

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1. See Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 18-45 (2000) (analyzing the dichotomies of the private and public spheres, namely the dichotomy between the market and the family, and the dichotomy between the state and civil society, that are deeply embedded in American law); see also Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1520-24 (1983) (describing the legal history of private and public spheres).

2. See Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1262 (1993) ("Under the guise of protecting citizens from state interference in the 'private' family sphere, common law in this country permitted a husband to beat his wife, as long as the beating was

laws that protected men on the streets, in their offices or in the barroom from assault. And these laws were enforced. For women, whose sphere of operation was primarily at home, there was no protection from the kind of assault that was most likely to happen to them. Domestic violence was rendered invisible. Women were unseemly exhibitionists if they talked about family matters in public; police and courts were voyeurs to look behind the closed doors of the home.³

In the last twenty years, much has changed. Violence in the home is now well known in the public's consciousness.⁴ It is exploited in TV shows such as *Cops*, condemned in newspaper editorials, recognized by the courts and even given its own nom de guerre, Domestic Violence—"DV" is the shorthand term used by advocates.⁵ However, this very attention has rendered it invisible again. The sensationalism has normalized violence.⁶ As a media savvy society, we see it but do

not 'excessive.');

not 'excessive.');

); see also Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2178-87 (1996) (examining the private sphere of the home and how law served the patriarchy by defining domestic violence as beyond the reach of law).

3. See *Bradley v. State*, 1 Miss. (1 Walker) 156 (1824) (addressing this policy regarding domestic violence investigations).

However abhorrent to the feelings of every member of the bench must be the exercise of this remnant of feudal authority [wife beating] . . . every principle of public policy and expediency, in reference to the domestic relations, would seem to require the establishment of the rule we have laid down, in order to prevent the deplorable spectacle of the exhibition of similar cases in our courts of justice. Family broils and dissensions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy.

Id.; see also *State v. Rhodes*, 61 N.C. (Phil. Law) 453 (1868) (emphasizing this policy); *State v. Black*, 60 N.C. (Win.) 262 (1864) ("The law will not invade the domestic forum or go behind the curtain.").

4. See, e.g., Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 11, 24 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (indicating that, for example, Buffalo's domestic violence had risen to more than 20,000 domestic violence incidents in 1992, and noting that the term "wife abuse" was resurrected as a "public," rather than "private," problem in the 1970s).

5. See Elizabeth A. Stanko, *Fear of Crime and the Myth of the Safe Home: A Feminist Critique of Criminology*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 75-86 (Kersti Yllö & Michele Bograd eds., 1988) (suggesting that the term "domestic violence" may also trivialize the horror of the reality of a home filled with terror, beatings and rape).

6. See Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901, 915 (1997) ("The stories of women who are traumatized by abuse are suppressed by the normalization of violence toward women and children."). Unfortunately, for many battered women, the extreme media images of battered women prevent them from being identified as battered. See Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 25 (1991); see also BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 87-89 (1989) (focusing on more extreme domestic violence cases allows the public to ignore the more frequent, albeit less extreme, cases of battering).

not feel it. We talk in generalities about individual instances but do not try to understand how they happened and what could be done to stop it. Public consciousness is now blind in a different way.

The Dalton and Schneider book, *Battered Women and the Law*,⁷ is important because it delves into the violence and forces us to a different level of understanding. The book is a textbook that challenges us to look beyond the superficial. By its mere existence, the book is a critique. Why have the legal needs of battered women been traditionally examined in a single class meeting only in criminal law or family law class?⁸ We are battered women, and we have a right to be visible. The history and legal issues dealing with battering are central for a large proportion of the population.⁹

The Dalton and Schneider book offers a clear vision of battering that helps us understand how our society works for the powerless.¹⁰ For example, it is simplistic to think of domestic violence law only through the prism of public or private jurisprudence. The law's regulation of safety and physical danger is a story of drawing lines to protect the privileged parts of our society. Black men, gay men, Chinese men, Mexican American men, and poor men all knew, and know, that their social status as outsiders limited the protection provided by law.¹¹ Likewise, for poor working women, violent assault happened not only in the home, but also in the public world.¹² By

7. CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* (2001).

8. See Nancy Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101, 115 (1988) (noting that women's issues continue to be confined to courses regarding women and the law). "In 1972, the AALS [Association of American Law Schools] urged that the teaching of sex-based discrimination not be confined to special courses but be diffused throughout the whole curriculum." *Id.*

9. See Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, NAT'L INST. OF JUST. iii (Nat'l Inst. of Just. & Ctrs. for Disease Control and Prevention eds., 2000) (finding that approximately 4.8 million intimate partner rapes and physical assaults are perpetrated against women annually in the United States), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm>.

10. See DALTON & SCHNEIDER, *supra* note 7, at 132-207 (explaining carefully the "dimensions" of the battering experience). To understand battering, one must view it in its many contexts, including homosexual relationships, that are marked by race, culture and/or poverty that involve disabled persons. *Id.*

11. See RONALD BARRI FLOWERS, *MINORITIES AND CRIMINALITY* 46-48 (1988) (noting patterns of arrests of minorities for various offenses); CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* 37-44 (1993) (using race as a factor to analyze uniform crime reports); Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23-28 (1994) (addressing concerns of the devastating impact of the justice system on the status of African American males).

12. See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (describing how women of color have been subject to abuse

examining the complexities and nuances of the battering, beating and raping of women, Dalton and Schneider have given us a vehicle to understand other invisible oppressions—race, sexual orientation and class.¹³

Battered women are also invisible if they are “essentialized.”¹⁴ Our challenge is to understand patterns without missing differences.¹⁵ This is difficult to do, especially for those on the front lines, representing women in the high-pressure reality of protection orders. Sometimes we get it right, but often we do not. This Paper is about an actual case where I supervised a student attorney representing a battered woman.¹⁶ It discusses our successes and our failures. Most importantly, the Paper is about how much we learn from actually working with women who are abused. As an activist lawyer, I was

and violence from outside their home). Generally, physical violence is an extension of the domination of women of color. See BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 124-25 (1984).

[M]any black women feel they must confront a degree of abuse wherever they turn in the society. . . . Black women in professional positions . . . are often the targets of abuse by employers and co-workers who resent their presence. Black women who work in service jobs are daily bombarded with belittling, degrading comments and gestures on the part of the people who have power over them. The vast majority of poor black women in this society find they are continually subjected to abuse in public agencies, stores, etc. These women often feel that abuse will be an element in most of their personal interactions.

Id.

13. See DALTON & SCHNEIDER, *supra* note 7, at 132-33 (using a four factor framework to discuss what differences racial, cultural, religious or socio-economic distinctions make).

14. See Harris, *supra* note 12, at 588, 595 (noting that the feminist voice has been the white feminist voice that purported to speak for all women); see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (arguing that identity politics is problematic in the context of violence against women because the violence that many women experience is often shaped by other dimensions of their identities, such as race and color). See generally Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 56 (1988) (“[F]eminists make the mistake we identify in others—the tendency to treat our own perspective as the single truth—because we share the cultural assumptions about what counts as knowledge, what prevails as a claim, and what kinds of intellectual order we need to make sense of the world.”).

15. See Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 11-12 (1999).

While battering is a phenomenon of gender subordination, it may also be a function of racism, poverty, and conquest. If feminist anti-domestic violence work is to be liberatory, it must recognize the importance of these intersections in women’s lives. Ignoring the importance of these oppressive structures in the lives of battered women results in interventions that ultimately fail the women whose lives are most affected by those structures: poor women and women of color.

Id.

16. See MASS. SUP. JUD. CT. R. 3:03 (1994) (stating that students in Massachusetts, as in most states, may act as a lawyer under the rules of the court).

blinded by superficial understanding, congratulating myself on the “good work” I was doing, and moving on without really looking at the woman I was representing.¹⁷ Despite our mistakes, this paper is a call to continue our work. Representing battered women is an ongoing project from which we continue to learn. The book we are honoring today inspires us to continue the project along many vectors—gender, sexual preference, class, national origin, language and race.

I. VIOLENCE UNMASKED

Many of the women who seek legal help from our clinic suffer from beatings, threats, humiliation and stalking, which all lead to tremendous fear.¹⁸ Our clinic is a branch legal services office.¹⁹ These women come to us with a variety of legal problems, ranging from restraining orders to evictions. I supervise the student attorneys who represent these women, our clients. I work with three other law professors, who are also supervising attorneys, and a full time social worker.

In one instance, I had assigned a student to a case that seemed, from the paperwork, ordinary enough. The client was seeking a one-year restraining order and a divorce. The restraining order statute requires that there be force or threat of force resulting in fear for safety or sexual duress.²⁰

When the client came to our office, she had already been to court and had obtained a temporary restraining order. As is usual, the hearing was “ex parte,” that is, her husband was not present. He would be served with the ex parte order and receive notice that in ten days he should appear and show cause why the temporary order should not be extended for a year. The show cause hearing is usually

17. See Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1609-10 (1989) (arguing that the relationship between lawyers and clients, where lawyers regularly dominate and clients nearly vanish altogether, is a problem that all poverty lawyers need to confront); see also Lori Nessel & Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*, 13 LAW & INEQ. 99, 138 (1994) (explaining how an attorney representing poor clients may see herself as a “rescuer” and discount the client’s intelligence, and ultimately take control of the case).

18. See ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 14, 65, 95-103 (1987) (describing types of violence endured by battered women).

19. Boston College primarily funds the clinic, The Boston College Legal Assistance Bureau (“LAB”). LAB also receives annual grants from the Greater Boston Legal Services Corporation and acts as a branched, legal services office for the communities of Waltham, Watertown and Newton, Massachusetts.

20. See Abuse Prevention Act, MASS. GEN. LAWS ch. 209A, § 1 (1978) (amended 1996); § 2 (amended 1983); § 3 (amended 1990).

called a "10 day" hearing. At the "10 day" hearing, it was likely that the client's husband would be present and would oppose extension of the order. We indicated that we would help her at the "10 day" hearing, asking that the temporary order to be extended for one year.²¹ We would then proceed with representing her in the divorce.²² I usually think of the extension of the restraining order as uncomplicated. In order to obtain the temporary order, the client would have had to complete an affidavit and convince a judge that there was a substantial likelihood that she could meet the standards set out in the statute at the "10 day" hearing. Thus, with a new intake such as this case, I anticipated that all the hard work would be in the divorce case itself.

This case, however, was different from the usual case. We could not get the client to explain to us why she wanted the restraining order. The client said she was very afraid of her husband. And she seemed, in her presentation and affect, very afraid. We asked, "Did he ever push you or shove you? Did he hit you?" We asked a number of different ways about physical force or threat of force.²³ She said she felt threatened but was not able to explain why.

In domestic violence cases, we have carefully created interview protocols that are gender and situationally sensitive.²⁴ I work with my

21. See § 2 (amended 1983) (allowing for a restraining order to be brought in the District Court, Superior Court, Boston Municipal Court, or the Probate and Family Court). The District Court has the power to extend the life of a temporary restraining order after hearing after granting the defendant an opportunity to be heard. See § 4 (amended 1990).

22. See ch. 215, § 3 (emphasizing that Probate Courts have exclusive original jurisdiction over divorce actions). Once the action for divorce is filed, a protective order can be requested pursuant to the divorce action. See ch. 209A, § 4. Filing in the Probate Court provides the advantages of continuing the life of the temporary restraining order during the pendency of the divorce (not having to be renewed as in the District Court), and combining all matters in one action. See MASS. GEN. LAWS ch. 208, § 28A (1994).

23. See MASS. GEN. LAWS ch. 209A, § 1 (1996) (including violence or the threat of violence or sex under duress in the definition of abuse). The law does not address emotional and/or psychological control and abuse. *Id.* Many of our clients indicate that suffering from mental torture is worse than being beaten. Batterers create mental anguish through various activities, such as disconnecting the telephone, refusing to give any information about where they work or how much they make, videotaping the client whenever she goes out, refusing to let her leave the house alone, disabling the car, and insulting and harassing any of the client's friends. There are no remedies in law for our clients for these behaviors. This is especially true when the behaviors are not accompanied by physical violence or the threat of violence that gives rise to a genuine fear for their physical safety. *But see* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 869-73 (1993) (noting a few states, thirteen in all, provide some level of protective relief from emotional abuse).

24. See LENORE E. WALKER, *A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 223, 223-24 (1986) (noting that "there is a fundamental

students to develop questions and understand client reactions.²⁵ We consult with Lynn Barenberg, our social worker, to think through what might be happening with the client and how to approach our questioning. We know that if you ask a client, “Were you abused? Did your husband beat you?”, the response will often be “No.” However, the response may be different if we ask, “When you and your husband had disagreements, what happened?”, allowing the client to explain. We might follow up with specific questions, such as, “Did he push you, shove you or throw things at you? Did he hit you—with an open hand or closed fist?” When we ask these questions, we also explain why it is important to have a detailed explanation of what happened. We then ask if we can share this information with the court—and we let the client know that their batterer will be present.

As an office, we recognize that because some things are so difficult, a client will not discuss the event or situation unless we provide an opener. Here, we met again with the client seeking an extension of her restraining order. The student and I tried every opener we knew, but we were not able to help the client explain why she was afraid. We were worried that the judge would not extend the order. The client’s husband was represented by counsel, and we were certain that he would oppose the one-year order.

We knew we were missing crucial information. So we tried something else. I sent the student attorney to the court to look at the affidavit that the client submitted with the original order. It was hand written, and the court had not given the client a copy of it when she received the temporary restraining order. Reading the affidavit, it became clear that the client was hinting at sexual abuse. It must have been the judge’s ability at the original hearing to sense this that motivated her to grant the temporary order. It also seemed that it was easier for the client to write about the incidents rather than to speak about them.

The student attorney worked to develop a careful, but direct approach to ask the client about her fear of her husband. In developing the plan, the student and I felt that it was important not

difference between the way women tell of their battering experiences and what is permitted under the male-identified rules of evidence”). Women tend to tell events by integrating patterns and emotions in the context of how the events happened. *Id.* at 224. We now recognize that the narrow confines of a legal argument will usually constrain the ability of a battered woman to explain what happened. *Id.*

25. See, e.g., LENORE E. WALKER, *THE BATTERED WOMAN* 31-35, 174 (1979) (documenting that battered women often suffer serious emotional and psychological injury).

to assume what we thought we were reading between the lines. In our next meeting with the client, the student brought a copy of the restraining order statute.²⁶ The student went over the bases for granting restraining orders. The statute's definition of abuse includes forcing sexual relations. The client now responded that this was the behavior which she mostly feared. The statute opened the door for the client to explain the basis for her real sense of terror regarding her husband.

The client was still uncomfortable discussing the situation with us. We asked her, if it was more comfortable, to write what had happened. She said she would be more comfortable writing her thoughts. The next day, the client brought to the student attorney a ten-page history of her relationship with her husband and the specifics of his reign of terror. He was a martial arts expert and would use disabling martial arts techniques to force her to perform degrading sexual acts. These would leave no physical bruises, and he assured her that no one would ever believe her story that he forced her to do anything.

Our office has worked hard to better communicate with and to represent all of our clients. We have a special domestic violence training program.²⁷ Our goal is to expose our students to a variety of techniques to communicate with their clients. We try to emphasize that it is important not to generalize. We tell them, beware of the trap of assuming your client will communicate in a particular way. Every domestic violence client is different, and yet there are common threads. Which thread will be common to any given client is not clear until you meet with them and explore their communication needs. In this case, we "got it." We facilitated the client's ability to protect herself and to explain herself to the court. However, other communication issues can be equally troubling.

26. See MASS. GEN. LAWS ch. 209A, § 1 (1996) (defining abuse as "the occurrence of one or more of the following acts between family or household members: (a) attempting to cause or causing physical harm; (b) placing another in fear of imminent serious physical harm; (c) causing another to engage involuntarily in sexual relations by force, threat or duress").

27. The Women's Bar Foundation of the Women's Bar Association of Massachusetts ("The Foundation") provides pro bono representation for battered women. The Foundation makes referrals, where appropriate, to our clinic and conducts a training session for our students at the beginning of the semester. We also provide materials on domestic violence to our students when they begin the clinic.

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THE RACE CARD

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II. RACE MASKED

A. *Why Can't We Talk about Race?*

Last April, I traveled down to Mexico to visit the little town where my Nana²⁸—mi Abuela, my Grandmother—was raised. My sister and my two adult cousins, Ettie and Maya, were also on this mission. This was a time when we were bonding, reconnecting to our roots, and connecting with the persons we are now. The days were blissful, almost magical, and then we started to talk about race.

My sister, Elise, told a story. By way of background, my sister and her family live on an island north of Seattle. Her thirteen year old son, Noah, goes to boarding school in Canada. Noah loves basketball. My sister told us that Noah was very excited that the school hired a new—and wonderful—basketball coach. Noah was practicing basketball and emailing my sister. Some weeks passed and my sister traveled up to Canada to see Noah's game. As the team came out on the court, she saw the new basketball coach for the first time. He is Black. Noah had not mentioned his race to my sister.

My sister was moved by this experience. There are only a handful of African Americans on the island where Noah grew up. She felt the sweetness, the innocence, of her son being able to relate to his new coach outside the racial labels of our culture. Noah saw a person, not a race.

This story, the story of my beloved, most Super-Nephew Noah, drove me wild. I could not see or think about any of the individuals involved. I only saw a "ruse" for institutional colorblindness. "Well," said I, "I wonder if the coach noticed he was Black." I went on, "In that lily white area of Canada, in that basically lily white school, how can you kid yourself that it is *not* racist to *not* notice. The coach's life is defined by his race every hour of every day of his life. It is only white privilege at work that allows some of us to notice race when we want to and to not notice it if we don't want to. And here we are in Mexico, visiting the town of our Nana, who never spoke English, who was excluded and oppressed for being Mexican American. She never had the privilege of not noticing she was Mexican."

By now my sister was nearly screaming at me. She had to, because I was ranting and she wanted my attention. "How dare you impose your theories onto people's lives. You don't know what Noah

28. See Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POL'Y & L. 23 (1994) [hereinafter Espinoza, *Multi-Identity*] (acknowledging the influence my grandmother has had on my identity).

thought or noticed. He only talked to me about what he saw as important about his basketball team. And you don't know anything about the coach and his life. You haven't even been to visit the school. You don't know what kind of racial mix there is. But furthermore, what if Noah had said that his new coach is Black? Would that make him racist or nonracist—and who is judging? Are you the judge?"

It is hard to talk about race.²⁹ Race is not a vague theoretical construct. It is a reality in all of our lives. It is deeply personal and psychological.³⁰ How do you understand the interaction between my sister and me? Does it make a difference if you are a mother and have tried to raise children to "do the right thing"? Does it matter if you are Black or white? Does it matter that my sister is dark and looks Mexican, and I am fair and no one ever thinks I am Mexican? Does it matter that my sister chose to live in the country and to be an at-home mother, and that I chose to be an academic and to think and write about race all the time?

Racism is also social and political.³¹ We know it is pervasive.³² We know it defines a world of haves and have nots. But it is almost impossible to define.³³ How do we know a person's race? It is about color, but not only about color; it is about language and history and culture, but not only about language, history and culture. There is a hard truth and an impenetrable vagueness about race.

29. See Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill isn't Enough*, 32 CONN. L. REV. 1, 20 (1999) (providing an insightful and poignant description of the difficulties of acknowledging race). White goodwill is a barrier in the sense that

[whites] are most comfortable not talking about race and succeed in avoiding such discussions so long as the world operates under their view of color-blindness. Correspondingly, they are less reluctant to talk about race in instances where they believe the color-blind principle is violated, as they think it is in affirmative action. . . . As most of White society relaxes in the easy chair of denial, most of Black society is increasingly agitated about the persistent inequality.

Id.

30. See Espinoza, *Multi-Identity*, *supra* note 28, at 23 (arguing that "American society forces individuals to label themselves by race and gender").

31. See *id.* (discussing the social and political ramifications that result from the categorization of race and gender that correlate to power).

32. See, e.g., ROBERT STAPLES, INTRODUCTION TO BLACK SOCIOLOGY 250 (1976) (pointing out that "[b]eing Black or White affects every element of individual existence including access to jobs, education, housing, food, and even life or death."); CORNEL WEST, RACE MATTERS 2-3 (1993) (explaining that race cannot be seen as something that detracts from American life, but rather as an element that constitutes a part of American life).

33. See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 3 (1994) (explaining that "[e]veryone 'knows' what race is, though everyone has a different opinion as to how many racial groups there are, what they are called, and who belongs in what specific racial categories").

B. The Need to Talk about Race

Should we talk about race? Is it an exercise of privilege to ignore it?³⁴ Is it an exercise of bias to acknowledge race?³⁵ These are difficult questions in our personal lives. They are questions that should not be avoided in our professional lives. Lawyers, clients, judges, court clerks, police, witnesses and defendants are all “raced.” To different degrees they notice their own and other’s races.³⁶ With that noticing, they incorporate their own knowledge, experience, beliefs and suspicions into their work.³⁷

It is important for lawyers to learn to talk about race.³⁸ I want to propose an approach to race conscious lawyering structured around developing narrative lawyering skills. The peril of “color-blind”

34. See Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 973-74 (1993). Flagg states:

[W]hites rely on primarily white referents in formulating the norms and expectations that become criteria of decision for white decisionmakers. Given whites’ tendency not to be aware of whiteness, it’s unlikely that white decisionmakers do not similarly misidentify as race-neutral personal characteristics, traits, and behaviors that are in fact closely associated with whiteness.

Id.; see also STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 5 (1996) (observing that society should focus on privilege, and not just discrimination, when discussing racism and hierarchy because even though it is pervasive, unlike racial distinctions, privilege goes unacknowledged and thus allows the status quo to continue).

35. See, e.g., *Adarand Constructors v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part).

To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Id.

36. See OMI & WINANT, *supra* note 33, at 59.

One of the first things we notice about people when we meet them (along with their sex) is their race. We utilize race to provide clues about *who* a person is. . . . Our ability to interpret racial meanings depends on preconceived notions of a racialized social structure. Comments such as, ‘Funny, you don’t look black,’ betray an underlying image of what black should be.

Id.

37. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987) (recounting experiences in which the author was reminded of his race and felt prejudiced because each reminder held racial implications even though the intended spirit was one of the shared humanity).

38. See Sue Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 38-48 (2001) (explaining that it is important to teach racial awareness to law students so that when they become lawyers, they will be able to understand cultural differences and better relate to their clients, who may come from different cultural backgrounds).

lawyering—pretending that race and racism do not exist—is the lack of justice for the objects of racism.³⁹ Whites have the privilege to pretend that racism does not exist;⁴⁰ people marked by race know the price for the insolence of pretending they are white.⁴¹ On the other hand, the danger of race conscious lawyering is that we perpetuate, indeed embody, racism. Is it possible to develop a way to lawyer with nonracist, racial acknowledgement?⁴²

I believe that lawyering can be conducted in a way that creates space for understanding outsider perspectives. Lawyers need to develop cultural and race competencies. Other professions, such as psychology and medicine, recognize the need to train professionals to develop these skills.⁴³ The challenge is to keep cultural understanding from becoming narrow-minded stereotyping.⁴⁴ What

39. See T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1078 (1991) (claiming that colorblindness will not end the perpetuation of racism, rather it will make it less alterable). In addition, colorblindness will impede the progress of creating new cultural narratives that would lead to the achievement of racial justice. *Id.*; see also Jodi David Armour, *Color-Consciousness in the Courtroom*, 28 SW. U. L. REV. 281, 287 (1999) (examining research that indicates that the way to combat stereotypical responses is to develop “conscious self-regulation”).

40. See Aleinikoff, *supra* note 39, at 1079-80 (discussing how colorblindness perpetuates racism, and arguing for color-consciousness).

41. See *id.* at 1062 (arguing that “in order to make progress in ending racial oppression and racism, our political and moral discourse must move from colorblindness to color-consciousness”).

42. See Leslie Espinoza & Angela Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 Cal. L. Rev. 1585, 1606-07 (1997) (using the metaphor “Tar Baby” to capture the frustration of trying to free oneself from the Tar Baby, but finding oneself only getting stuck further). A pessimistic view of racial hierarchies might highlight that the more we struggle, the worse it gets; however, for those with an eschatology for change, resistance may be, in and of itself, the solution. See generally ALICE WALKER, *POSSESSING THE SECRET OF JOY* (1992).

43. See, e.g., WOODROW M. PARKER, *CONSCIOUSNESS-RAISING: A PRIMER ON MULTICULTURAL COUNSELING* 1-4 (2d ed. 1998) (suggesting counselors acknowledge different cultural backgrounds so that they can meet the needs of those when they counsel, regardless of their race, since the long held belief that traditional counseling methods are sufficient for all persons is not accurate); Paul P. Pederson, *The Cultural Inclusiveness of Counseling*, in *COUNSELING ACROSS CULTURES* 24 (Paul B. Pedersen et al. eds., 1981) (assuming that mental health psychiatry literature regarding cultural-bound disorders are made valuable and relevant to counseling because of the cultural factors that formulate the basic form and structure of problems); *HANDBOOK OF MULTICULTURAL COUNSELING* 609-13 app.1 (Joseph G. Ponterotto et al. eds., 1995) (providing psychologists guidelines in working with ethnic, linguistic and culturally diverse populations); see also Clemmont E. Vontress, *Racial and Ethnic Barriers in Counseling*, in *COUNSELING ACROSS CULTURES* 42-64 (Paul Pedersen et al. eds., 1976) (recognizing the need to overcome psychosocial barriers in therapeutic interactions with racial and ethnic minorities to achieve effective counseling); *UNDERSTANDING AND COUNSELING ETHNIC MINORITIES* 19-25 (George Henderson ed., 1979) (indicating that counselors should encourage personal and intellectual growth, while assuming responsibility of the psychological welfare, for their minority counsees by observing and analyzing their history and culture).

44. See Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 378 (2002).

do we as lawyers and teachers do with our newly acquired cultural, racial or ethnic sensitivity? How does it or might it affect our practice?

So why should lawyers care about cultural competence? I believe it helps us to better serve our clients.⁴⁵ Think about the things lawyers do with clients: information gathering, counseling and decision making.⁴⁶ Communication is necessary to effectuate any of these lawyering goals. For example, there is much written about the pattern of linguistics and how much communication differs between women and men.⁴⁷ When a lawyer understands that women may need room to develop ideas and may need to have a relationship to know how to express themselves, lawyers can be trained to better interview their clients.

The same principles apply to culturally conscious lawyering.⁴⁸ For example, in some cultures it is essential to avoid eye contact;⁴⁹ in our

The task here is to appreciate and respect the differences [between you and] your clients, but without resorting to stereotypes or stubborn myths about race, sex, ethnicity and culture. To ignore likely differences in culture is an invitation to malpractice in counseling; to presume you know what those differences will be once you know your client's race or sex or cultural background is an invitation to dehumanize or reify your client, and to assume generalizations that may not apply to him.

Id.

45. See DERALD WING SUE & DAVID SUE, *COUNSELING THE CULTURALLY DIFFERENT* 7 (2d ed. 1990) (hypothesizing that one of the reasons minority group individuals so rarely seek help is because services offered are usually antagonistic or inappropriate to the life experiences of a minority group individual). Consequently, being conscious of cultural differences will help professionals alter their counseling methods to tailor them to the needs of minority group individuals. *Id.* at 8.

46. See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 25-30 (1991) (providing an overview of the methods and techniques of client-centered interviewing and counseling); see generally ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING & NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 4 (1990). Due to growing public concerns regarding lawyers' skills, this text purports to help lawyers develop their interviewing, counseling, and negotiation skills so that they may effectively represent their clients. *Id.*

47. See, e.g., Espinoza, *Multi-Identity*, *supra* note 28, at 31 (examining the work of Robin Laykoff on gender differences in communication). Demonstrating a need for an array of communication styles, Laykoff analyzes the ways that women view themselves and that others view women in American culture. *Id.*

48. See Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 *GOLDEN GATE U. L. REV.* 345 (1997) (developing a model for taking advantage of interdisciplinary work to expand the teaching of effective interviewing and counseling skills, and noting the significance of culture on client-counselor interactions); Lucie E. White, *The Transformative Potential of Clinical Legal Education*, 35 *OSGOODE HALL L.J.* 603, 605 (1997) (explaining that a generic approach to teaching legal skills with "its purported blindness to race and class subordination, worked to reinforce, rather than reduce, race and class privilege").

49. See SUE & SUE, *supra* note 45, at 56 (describing stylistic differences in the way Whites and Blacks communicate with others). Blacks tend not to make eye contact

culture, to do so casts doubt on the veracity of the speaker.⁵⁰ Often the social role of deference is very important in a culture.⁵¹ It is unacceptable to challenge a professional and a client will not disagree or correct information. Other clients may come from cultures that fear authority and bureaucracy.⁵²

At times, the whole mode of communication is different. For example, we had a Haitian client we were representing in an eviction case. The client was a Creole speaker, and we were using an interpreter. The student explained to the interpreter that he wanted to have a direct translation. He wanted everything that he said directly related to the client and then the client's exact words back to him. Nevertheless, every time the student would ask a question, such as, "Do you want to stay in the apartment?", he would hear the interpreter and the client speak back and forth, with great animation, for several minutes. Then the interpreter would turn to him and say, "No." The student attorney did not know what to do. He felt that he was not understanding the client at all and he was worried that the client was not getting information from him.

The student decided to do some cultural exploration. He did some research on different patterns of communication, spoke with folks in the community, and learned that in Haitian culture, it was impolite to directly ask or answer a question.⁵³ The pattern of discourse, he learned is that generally one should tell a story that has a point, and then the listener responds with another story that is layered onto the first story, and back and forth until there is understanding. What the interpreter was doing was literally

to indicate that they are listening, but Whites do. *Id.*; see also Tremblay, *supra* note 44, at 394 (observing that in some Asian cultures avoiding eye contact is a sign of respect).

50. See Tremblay, *supra* note 44, at 393 ("Those in the dominant culture understand a strong, unwavering gaze to indicate honesty, self-assurance, and comfort.").

51. See WANDA M. L. LEE, AN INTRODUCTION TO MULTICULTURAL COUNSELING 104-13 (1999) (describing the respect for authority in Asian American culture).

52. See, e.g., Jacobs, *supra* note 48, at 384-91 (noting how Black clients may be reticent because of their distrust of white professionals' ability to understand their problems or to even help them); see also Steven Weller et al., *Fostering Culturally Responsive Courts: The Case of Family Dispute Resolution for Latinos*, 39 FAM. CT. REV. 185 (2001) (discussing how Latino families have developed different ways of dealing and interacting with government authority).

53. See generally Jessie M. Colin & Ghislaine Paperwalla, *Haitian-Americans* (last visited Feb. 25, 2003) (explaining that although Haitians express themselves emotionally as a pattern of cultural communication, "uneducated Haitians generally hide their lack of knowledge to non-Haitians by keeping to themselves, avoiding conflict, and sometimes projecting a timid air or attitude"), available at <http://www.unix.oit.umass.edu/~efhayes/haitian.htm>.

interpreting. He would take the student's pointed question and turn it into a story, hear out the client's story, and then interpret the story back to the student attorney as a "yes" or "no." With this information, the student tried to change his way of approaching information gathering by using more narrative, open ended questions. The student was also able to work more effectively with the interpreter to explain what his needs were in order to prepare the case for court.⁵⁴

In addition, decision making has significant cultural components.⁵⁵ In certain cultures, who decides a question is crucial. It may be necessary to obtain involvement of the family.⁵⁶ Or it may be crucial to defer to a male family member regarding decisions.⁵⁷ It is important to remember that in some cultures there is a huge risk to women if they disturb the cultural pattern that the husband makes all the decisions. To try to shift this pattern would perhaps put her relationship in jeopardy.⁵⁸ Battered women are often still in a battering relationship when we are providing them with other kinds of legal assistance. It is crucial to appreciate their culture. We may want to empower them by turning to them to make decisions, when in fact, we are making it impossible for them to obtain assistance.

Cultural knowledge is also central to developing a legal and advocacy strategy for a case.⁵⁹ It may be unacceptable for some clients

54. See Amy Bibb & Georges J. Casimir, *Haitian Families*, in *ETHNICITY AND FAMILY THERAPY* 97, 105 (Monica McGoldrick et al. eds., 2d ed. 1996) (describing the family dynamic, particularly how it reflects a collectivist world view).

55. See, e.g., ANNE FADIMAN, *THE SPIRIT CATCHES YOU AND YOU FALL DOWN: A HMONG CHILD, HER AMERICAN DOCTORS, AND THE COLLISION OF TWO CULTURES* 65 (1997) (describing the dynamics between the medical establishment and Hmong immigrants in a case involving a child with epilepsy).

And there were so many ways to err! When doctors conferred with a Hmong family, it was tempting to address the reassuringly Americanized teenaged girl who wore lipstick and spoke English rather than the old man who squatted silently in the corner. Yet failing to work within the traditional Hmong hierarchy, in which males ranked higher than females and old people higher than young ones, not only insulted the entire family but also yielded confused results, since the crucial questions had not been directed toward those who had the power to make the decisions.

Id.

56. See Weller et al., *supra* note 52, at 191 (noting the importance of collective decision making because it encourages individuals to overlook their differences and personal goals in an effort to promote a group's goals).

57. See FADIMAN, *supra* note 55, at 65 (identifying a culture where males hold the decision-making power).

58. See SUE & SUE, *supra* note 45, at 97-102 (noting the ineffectiveness of therapy where individuals fail to recognize differences in cultural assimilation).

59. See Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 *CLINICAL L. REV.* 65, 66 (1997) (arguing that law students need to be taught to explore a diverse range of viewpoints rather than focusing solely on options that

to be depicted to the court in certain ways, or to have certain matters discussed publicly.⁶⁰ For example, we have found that the imperative of not shaming the family may be more important to some of our Asian clients than their own safety.⁶¹ Lawyers must work with clients to develop plans that reach desired outcomes in culturally acceptable ways. Again, lawyers should not assume certain cultural themes. However, if a lawyer has cultural awareness, he or she can explore to see if it is relevant in this case. We can do this exploration by developing a narrative understanding of our clients.

C. *Using Narrative to be Better Lawyers*

1. *What is Narrative?*

It is intellectually fascinating to shift perspectives and attempt to walk in the mindset of someone else. It is even more challenging when the other is unlike yourself. Of course, we do this all the time. We watch movies and imagine ourselves as starship warriors, Cleopatra Queen of the Nile, Priscilla Queen of the Desert, The Last Emperor, the First Astronaut and even a 1L. We read books and feel the agony of the last few hundred feet to the top of Everest or the deceptive simplicity of farm life on 1000 acres. In this way, we are all familiar with the ability of narrative to bring understanding. Most of us believe this makes each of us a better person. We have a richer understanding of the world, a better basis for empathy, and an opportunity to see how we might change and expand our own actual experience.

Narrative understanding is different than observation or study. It is based on identification with character and story that forces the listener to put aside their own points of identity.⁶² One experiences the narrative by getting caught up in the story. By putting aside our consciousness of self, we may be able to understand people who perceive the world very differently than we do. Arguably, narrative

seem to make sense from the students' own worldview).

60. See SUE & SUE, *supra* note 45, at 39-40 (emphasizing that some cultures discourage self-disclosure).

61. See LEE, *supra* note 51, at 104 (explaining that as part of their cultural norm of respecting authority, Asian Americans have more of a societal group focus, which de-emphasizes the importance of individual freedom of choice and expression).

62. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 982-1012 (1991) (discussing the ways in which feminist narrative can be useful in the legal context and addressing criticisms of that approach); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 695-96 (1992) (noting that the voice of disempowered groups often expresses itself through narratives and stories that expose oppression, which is overlooked by the mainstream society).

may be one of the only ways that we can move beyond the unconscious bonds that dictate the way we perceive the world.⁶³ For example, without “Boys Don’t Cry” I would not have an inkling of the complicated reality of a transgendered boy. It didn’t matter that I taught gender studies, that I write about outsiders, or that I try to be multi-culturally sensitive and in tune. It is an experience so different, so unexplored by me, that I needed narrative to begin understanding.

On the other hand, we are aware of the limitations of understanding and knowledge through narrative. No, I do not know what it *really* feels like to be caught in a blizzard in the Himalayas, to be a transgendered teenager in the Midwest, to be a boy in the hood, or to be a Master of the Universe. And each narrative is only what it is; it is the experience of one particular individual that may not represent the experiences of another in a similar situation. For example, the experience of one particular immigrant coming to El Norte will not be the experience of all immigrants.

The stories we hear from our clients indicate two things. First, these stories demonstrate the power of narrative to yield contextual, cultural, and racial understanding. Second, they indicate the complicated nature of contextual, cultural, and racial understanding. The narrative requires that we hold onto the individual story, with all its unique characteristics, and simultaneously embrace the cultural context and metamessage of the story. As we lawyer in a way that is always about our personal, cultural and social history, so too does the client present a legal situation that is set in a personal context and a cultural reality.⁶⁴

2. *Why Narrative?*

Developing a factual understanding of a case is always in one sense

63. See Richard Delgado, *Colloquy: Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1874 (1990) (“These representations help us explain and deal with the unfamiliar and troubling by likening them to that which we know.”); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1988) (observing that storytelling, “can open new windows into reality, showing us that there are possibilities for life other than the ones we live”).

64. See, e.g., JANINE ROBERTS, *TALES AND TRANSFORMATIONS: STORIES IN FAMILIES AND FAMILY THERAPY* 129 (1994) (“It is important to have the possibility of resonance between personal stories and cultural stories—resonance that allows people to see how their particular experience is intertwined with the political and social history of their society.”). See generally Vincent Fish, *Poststructuralism in Family Therapy: Interrogating the Narrative/Conversational Mode*, 19 J. MARITAL & FAM. THERAPY 221 (1993) (arguing that therapists must be attentive to historical, political and social context when developing a narrative mode).

developing a narrative of that piece of the client's life.⁶⁵ The lawyer's job is to understand the facts relevant to the legal issue at hand. This is straightforward when the lawyer is familiar with the legal issues and his or her clients.

When clients are presented as "others," as those who are outside the dominant social discourse, developing a narrative is more challenging. Their stories are often different than the usual legal narrative. They are tentative, dangerous and imbedded with the perspective of outsiders to power. In order to serve disempowered clients, we must foster and listen to these stories.⁶⁶

Most of us are both insiders and outsiders. We are both privileged and oppressed in various aspects of our lives. For example, clinicians are "outsiders" to traditional law teaching. This is not the kind of outsidersness I am addressing. The oppression I am addressing is the overarching, historical and current, deeply ingrained, economic and social power division in our society. The division is reflected in the direct coercion and repression visited on outsiders to keep them down. The incidence of torture, slavery, internment, immigration exclusion or detention, beating, lynching, murder, rape, police brutality, imprisonment, incest, institutionalization and genocide demonstrate this direct coercion and repression. It is also manifest in the indirect control imposed through social rules and mindset, through fear and a sense of self as inferior.⁶⁷

Stories allow lawyers and clients to communicate about outsider experience. When our work is in the mainstream, the usual direct ways of knowing are available. Our language captures, names and empowers the dominant experience. For outsiders, stories access outsider experience using the dominant language. There is an understanding around the words, allowing the meaning to seep into our consciousness, that are used.

65. See Clark D. Cunningham, *A Tale of Two Clients: Thinking about Law as Language*, 87 MICH. L. REV. 2459, 2461 (1989) ("What the lawyer says is admittedly a story, shaped and crafted, but it is still true."); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 576 (1994) (concluding that "lawyer and client narratives must come together to capture the best of both client and lawyer experience").

66. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-26 (1987) (arguing that victims of racial discrimination have distinct normative insights); Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 210-15 (1994) (noting that for disempowered people, storytelling is a discursive technique for resisting cultural and linguistic domination through personal and collective redefinition).

67. See generally Espinoza & Harris, *supra* note 42, at 1610 (discussing the creation of a social hierarchy through racism, capitalism, sexism, colonialism, misogyny, homophobia, poverty, and other systems of oppression).

Why do we need stories to understand? For the oppressed, there is danger in speaking their experience. For example, battered women often cannot speak for fear of their batterer. But their fear is larger than the immediate situation. There is an implicit understanding that to speak is to threaten the larger social order. Our society may sensationalize domestic assault, but it does not want to acknowledge that interpersonal relationships are structured along power lines. Women are subservient and are often kept in that condition by brute force. For the privileged, there is danger in hearing the experience of the oppressed. Once we “see,” feel and understand oppression, once we feel it, once we know it, we are confronted with the moral question of what we are going to do about it. It is difficult to hear the voices of pain and still feel self-congratulatory about our “good” work.

3. *Using Narrative to Break Stereotypes*

Earlier I wrote of a case in which we were representing a woman who was seeking extension of a restraining order. The years of abuse she experienced were not easy for her to discuss with us. We worked to find other ways for her to be comfortable communicating with us. We were thinking of the gender communication issues and her experience as a woman trying to develop a language to talk about her horrendous experiences.

We did not think or speak about race. Race did not seem to be impacting our communication, so we did not address it in any context.⁶⁸ Did I mention that our client is African American? When I spoke of the client before, did you see her as White, Latina, Black, or Asian? Does it matter? Now that you know she is Black, would race be relevant if you were lawyering this case? Exactly how did we know she is African American, that she is Black?⁶⁹ Is it more important to

68. See BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* 63-65 (1996) (discussing the importance of awareness of race in working with battered women of color); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 242-51 (1994) (addressing issues in domestic violence enforcement strategies facing Latinas). See generally Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991) (discussing ways that culture can justify violence against women).

69. See Neil Gotanda, *A Critique of “Our Constitution In Color-Blind,”* 44 STAN. L. REV. 2, 24 (1991) (explaining the “one drop of blood” rule in American racial classification).

American racial classifications follow two formal rules: 1) Rule of recognition: Any person whose Black-African ancestry is visible is Black. 2) Rule of descent: (a) Any person with a known trace of African ancestry is Black, notwithstanding that person’s visual appearance; or, stated differently,

explore race if a client has unambiguous racial markers—such as skin color, hair texture, accent, eye shape, syntax, or cultural style?⁷⁰ Like the discussion about my nephew's basketball coach, it was hard not to "notice" race, but hard to know what to do about race.

Nevertheless, I thought I understood this case, as did the student attorney. There were videotapes in our heads. We had a prepackaged story about women and the men who batter them. We now needed to cast our client as one of the "worthy" characters in our formulaic story. The completed "story" worked to give us a theory of the case, to help us to present the right "videotape" to the judge. The judge, of course, would have a videotape running in his head, too.

The day we went to court to extend the restraining order, we met our client's husband. He is white. Does it make a difference? I think so. After the hearing, the student attorney and I discussed the issue of race in the case. I had to raise it because I had to acknowledge my own racism before we could have an open discussion. The student is white, I am Latina. We both assumed our client's husband would be African American. We both noticed how the otherwise busy and bored courtroom became suddenly focused when our case was called—and the interracial couple was before the court. We both had to acknowledge that we were shaken that her husband was white. Without even being conscious of it, we both had assumed that the judge would be more likely to restrain a black man than a white man. Without even thinking about it,⁷¹ we had structured the cultural stereotype of the violent, over-sexed black man into our vision of the case.⁷² We were using racism for strategic advantage.⁷³

(b) the offspring of a Black and a white is Black.

Id.

70. See generally Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000) (arguing that skin-tone discrimination constitutes a form of race discrimination).

71. See Armour, *supra* note 39, at 283-85 ("[I]t is important to understand the ubiquitous tendency of fact finders and other decisionmakers to unconsciously discriminate against members of stereotyped groups. . . . Understanding the cognitive underpinnings of habits sheds light on the mechanism by which well-intentioned people may routinely discriminate against blacks and members of other stereotyped groups.").

72. See generally Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997) (noting the importance of violent and sexualized, racist imagery to whites); W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930* 5 (August Meier & John H. Bracey eds., 1993) (1959) (providing a historical perspective on the way Black men have been debased); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983) (critiquing the myth of Black men raping White women).

73. See Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1074-84 (1997) (examining the criminal defense "stories"

CONCLUSION

The question remains: should we have asked our client about her husband's race? Should we ask all clients about race? You don't have to practice long in the court systems to know that it matters.⁷⁴ Clients of color are more often seen as welfare moms, drug users or violent individuals. I do not believe there is a universal answer. I think we work with stories of other cultures to learn more about their styles of communication, values and structures. We also work with our own stories of lawyering for clients from culturally diverse populations.

What I do think is clear is that when we limit narrative, we are at risk of missing important information and understanding our client. More importantly, when we limit narrative we miss important information about ourselves. We may find that we have foreclosed discourse.⁷⁵ We may find that we have done so because we, the lawyers, are unconsciously seeking litigation advantage by operating from a base and morally reprehensible posture of power. The power of narrative is that it allows for a different kind of knowledge. It invites us to see the world in a way that is not comfortable, but that is honest.

utilized in white-on-black racially incited violence, and demonstrating their concordance with the historical oppression of blacks).

74. See HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 34 (James Alan Fox & Joseph Weis eds., 1993) (" [L]egal and judicial structures continuously reproduce, maintain, and perpetuate the subordination of racial and ethnic minorities."); see, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679-80 (1995) (stating that the criminal justice system is so racially biased that it should be dismantled, arguing that African-Americans ought to be punished by African-American juries, and that racially based jury nullification is sometimes a good thing). See generally Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988) (discussing the failure of the criminal justice system to consider the effects of unconscious racism).

75. See Jodi David Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 772 (1995) (noting how our unguarded responses tend to be prejudiced against Blacks and other minority groups, but how through a "deeper understanding of the habitual nature of our responses to stereotyped groups," we can develop "strategies for helping people inhibit their habitual and activate their endorsed responses to these groups").