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“DEPORT ALL THE STUDENTS”: LESSONS LEARNED IN AN X-TREME CLINIC

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STORMING THE COURT – HOW A BUNCH OF YALE LAW STUDENTS
SUED THE PRESIDENT AND WON by Brandt Goldstein, Scribner, 2005,
Pp. 371, \$26

When the Lowenstein International Human Rights Clinic at Yale Law School began to represent Haitian refugees detained at Guantánamo no one anticipated that the litigation would span almost two years and involve more than 100 law students. Storming the Court chronicles the cases that took the students, their professors, and many cooperating lawyers to the U.S. District Court, the Circuit Court of Appeals and finally to the Supreme Court. This review examines possible lessons for clinical teachers and students that can be extracted from the experience described in the book and concludes that despite many differences between this litigation and the typical clinic cases, the story is both engaging and instructive.

*Storming the Court*¹ is a multilayered tale in the best tradition of legal storytelling.² It relates the parallel stories of the Haitian refugee crisis and the lawsuits brought by the Allard K. Lowenstein International Human Rights Clinic at Yale Law School.³ One strand of the

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¹ Brandt Goldstein, *STORMING THE COURT – HOW A BUNCH OF YALE LAW STUDENTS SUED THE PRESIDENT AND WON* (2005) [hereinafter *STC*].

² There is something about a well-told law story that appeals to both lawyers and non-lawyers alike. Best-selling and even mediocre true crime stories fill racks in book stores, to say nothing of television and the movies. Consumer appetite for behind-the-scenes details about criminal investigations, trials, and the crime itself seems insatiable. Academic writings also build on this interest. The recent *Stories* series published by Foundation Press tells the stories behind leading cases focusing on the parties, the historical and legal context of the cases, and the impact of the cases in shaping the law. Other scholarly examples of accounts of legal cases include: *LAW STORIES* (Gary Bellow & Martha Minnow, eds. 1996) and *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz, eds. 1996).

³ The clinic was co-taught by Professor, now Dean, Harold Hongju Koh, and attorney Michael Ratner of the Center for Constitutional Rights. Lawyers from Simpson, Thatcher and Bartlett, a major Wall Street law firm, the ACLU Immigrant Rights Project and the San Francisco Lawyers Committee for Civil Rights joined the team. Harold Hongju Koh, *The Haitian Centers Council Case: Reflections on Refoulement and Haitian Centers Council*,

saga contains the human details of the individuals – the students, their professors and their clients – whose lives were transformed by this crisis and the subsequent legal and extra-legal efforts to obtain redress. The other presents a larger tapestry of United States foreign policy, presidential power, and immigration enforcement in the context of international and constitutional law principles.

Any book about a high-profile series of lawsuits has the potential to enrich a classroom. A few examples of this legal non-fiction genre have been widely adopted into law school syllabi.⁴ It is easy to imagine an immigration law teacher recommending this book as an inside glimpse at federal court immigration litigation or a case study of the political dimensions of immigration policy. For a clinical law teacher, *Storming the Court* has the irresistible distinction of featuring a law school clinic *mise-en-scène*. Any clinical teacher will identify with the familiar pressures and vicissitudes that are described – how much responsibility to allow students, when to intervene, how to allocate work, how to balance clinic tasks and other work, how to set boundaries with clients, how to balance education with representation.

Storming the Court is a great read, a law teacher's page-turner, a perfect book for a long-haul airplane ride for the semi-serious reader who might pass up both lightweight mysteries and demanding jurisprudential writings.⁵ Much has been written about U.S. policy and the treatment of Haitian refugees,⁶ and other accounts of this litigation

35 HARV. INT'L L.J. 1, 5-6 (1994). The litigation quickly outgrew its origins as a clinic case to become a massive law school *pro bono* project involving non-clinic students in many aspects of the work. More than 100 students both from the clinic and volunteers were involved during the course of the litigation. Harold Hongju Koh, *Refugees, the Courts, and the New World Order*, 1994 UTAH L. REV. 999, 1003.

⁴ JONATHAN HARR, A CIVIL ACTION (1995) and GERALD M. STERN, *The Buffalo Creek Disaster: How the Survivors of One of the Worst Disasters in Coal-mining History Brought Suit Against the Coal Company—and Won* (1976) have been standards in Civil Procedure courses for years. Other examples of an instructive recounting of a complex case are MELISSA FAY GREENE, *PRAYING FOR SHEETROCK: A WORK OF NONFICTION* (1991) and DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON AND JOHNSON FORTUNE* (1993). Crime-related books are legion but a few, such as STEPHEN J. PHILLIPS, *NO HEROES, NO VILLAINS* (1976) accurately illustrate the legal and personal sides of a prosecution and find an avid readership in Criminal Law classes. See also ALAN M. DERSHOWITZ, *REVERSAL OF FORTUNE: INSIDE THE VON BULOW CASE* (1986). For a comprehensive listing of books in a variety of non-fiction legal genres see Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORD. L. REV. 787, 789 n. 6 (2000).

⁵ A movie is in the works so we can speculate about casting. See <http://www.brandtgoldstein.com/film/>.

⁶ See, e.g., Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 GEO. IMMIGR. L. J. 747 (1993); Carlos Ortiz Miranda, *Haiti and the United States During the 1980s and 1990s: Refugees, Immigration, and Foreign Policy*, 32 SAN DIEGO L. REV. 673 (1995); Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841 (1995).

have been provided by some of the participants.⁷ These academic writings, however, lack the pulsating tell-all vigor of popular non-fiction that exposes the emotions, doubts, and frustrations as well as the triumphs and joys of its characters. Law review articles may describe the legal odyssey and capture the injustice of the plight of the detainees, but they do not reveal the human and personal details that pervade this book.

The litigation described in this book overwhelmed Yale Law School and was a life-altering experience for everyone involved. As the cases grew more complex and demanding and as the students responded, the now legendary clinical experience inflated into Brobdingnagian proportions.⁸ The students were so determined, driven and dogged that at one point the lead government lawyer is quoted as joking to the Attorney General, "Why don't we just bring in the Haitians and deport all the students?"⁹ The students' idealism and zeal were exhausting him. As opposing counsel to a group of tenacious students and their equally committed professors, this lawyer was on the receiving end of the passionate advocacy of clinical law programs where students always throw their hearts and souls into achieving justice for their clients.

In law schools all over the world, clinical students and their professors reading this book will nod their heads in recognition of the

⁷ A collective from the Lowenstein Clinic consisting of the principal student lawyers and their faculty supervisors, Professor (now Dean) Harold Hongju Koh and attorney Michael Ratner of the Center for Constitutional Rights, published a mid-litigation article describing the cases thus far. The Lowenstein International Human Rights Clinic, *Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary*, 6 HARV. HUM. RTS. J. 1 (1993). Another group of students co-authored an article recounting their multifaceted legal and extra-legal strategies, as well as assessing what they learned. Victoria Clawson, Elizabeth Detweiler & Laura Ho, *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 YALE L. J. 2337 (1994). Michael Ratner described the cases in an essay that considers the gains and losses of the litigation. *How We Closed the Guantánamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187 (1998). In a series of essays and articles, Professor Koh reflects on the litigation itself, the morality of the laws involved, and legacy of the cases. Harold Hongju Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT'L LAW 483 (1993); Harold Hongju Koh, *Reflections on Refoulement and Haitians Centers Council*, *supra* note 3; Harold Hongju Koh, *The Haitian Refugee Litigation: A Case Study in Transnational Public Law*, 18 MD. J. INT'L LAW & TRADE 1 (1994); Harold Hongju Koh, *Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crisis*, 48 S.M.U. L. REV. 189 (1994). Stepping back from the fray, he reinterprets the litigation into a "cautionary tale" to generalize about international human rights issues and policy. Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L. J. 2391, 2392 (1994); *see also* Harold Hongju Koh, *Refugees, the Courts, and the New World Order*, *supra* note 3.

⁸ JONATHAN SWIFT, *GULLIVER'S TRAVELS, Part II: A Voyage to Brobdingnag* (1726). Brobdingnag is a mythical land inhabited by giants. Thus the adjective "brobdingnagian" describes something of colossal size. <http://en.wikipedia.org/wiki/Brobdingnag>.

⁹ STC at 157.

level of energy and engagement so characteristic of the live-client clinical experience. Yet, the author clearly is not writing for the narrow community of clinical teachers, but aims for a popular audience. Nor does he ever step off the timeline of the litigation story to offer any insight or analysis of how the International Human Rights Clinic worked or whether and how it may have achieved its pedagogical goals. This review, therefore, focuses on whether *Storming the Court* offers any lessons or sends any messages about clinical legal education to clinical teachers and their students.

I. BACKGROUND OF THE CLINIC AND THE CASES

The complex litigation on behalf of the Haitian refugees ran on two express tracks over the course of these extremely hectic years of non-stop activity. The initial stage started as a challenge to the asylum procedures adopted for Haitians intercepted and confined on Guantánamo after they had satisfied the credible fear standard at an initial screening interview. Unlike the practice that had been in effect for the past ten years, these Haitians were not brought to the United States for a final determination of their asylum claim, but were held at Guantánamo in foul and unhygienic conditions awaiting an asylum adjudication without any legal representation. After several hearings and appeals, injunctive relief granted the detainees access to counsel. That case then morphed into a challenge to the continued detention of HIV positive asylum seekers and the conditions under which they were being held.

Midway through the original case, another lawsuit was filed attacking on statutory and international law grounds a Presidential Order issued by President George Bush and retained by President Bill Clinton after his election authorizing interdiction and immediate repatriation of Haitians seized on the high seas without any opportunity to claim asylum. The former case ended in a trial in the United States District Court for the Eastern District of New York at which the judge ordered that the HIV positive detainees receive adequate medical treatment, which resulted in their admission into the United States.¹⁰ The latter ended in the Supreme Court decision declining to interpret the Refugee Convention¹¹ or the Refugee Act¹² to apply to high seas

¹⁰ Haitian Ctrs. Council v. McNary, 789 F. Supp. 541 (E.D.N.Y. 1992) (TRO granted); 823 F. Supp 1028 (E.D.N.Y. 1993) (declaratory and injunctive relief granted after hearing).

¹¹ Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 and U.N. Protocol Relating to the Status of Refugees, art. 33, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577.

¹² Section 242 (h) of the Immigration and Nationality Act of 1952, as amended by Section 203 (e) of the Refugee Act of 1980, Pub.L. 96-212, 94 Stat. 107.

interdictions.¹³

The combined cases lasted 18 months and took the law students and lawyers to the United States Supreme Court five times, the United States Court of Appeals for the Second Circuit five times, and the United States District Court numerous times for both provisional and permanent relief.¹⁴ During the course of the litigation, advocacy activities moved outside the courtroom and the classroom as public figures, politicians and celebrities campaigned on behalf of the Haitians, and students orchestrated hunger strikes and other consciousness-raising events at Yale and on other campuses.¹⁵

The book's sections alternate between the Haitians and the legal team, and moves between Guantánamo, New Haven, Brooklyn, Miami, and Washington. The reader learns about the politics and violence behind desperate escapes from Haiti on unsafe boats. The conditions of the detention camp are described vividly as are various dramatic events such as a hunger strike and episodes of resistance to repression by the U.S. troops running the camp. Several detainees are featured but the narrative centerpiece is a valiant Haitian woman who is a recurring character at Guantánamo. Having left behind her activist husband, her children and her mother, she never stops worrying about their safety. She is the morally centered protagonist who represents the plight of the entire Haitian community there.

The law school story also has its hero: Harold Koh, the well-known, highly regarded law professor and human rights lawyer. Despite a slight hagiographic tendency, the book pays appropriate homage to his brilliance and dedication. It also exposes his imperfections. By the end of the book his sleep habits, his anxieties, his family history, and his attitudes about the students, opposing counsel, his own legal work, and the Supreme Court are out in the open. The students also are portrayed with considerable nuance as principled, committed, motivated, outraged, creative, caring and self-sacrificing on the one hand, and argumentative, overbearing, unrelenting, arrogant, and even cultish on the other. Some are described fully while others are given more supporting roles. The law story is told in somewhat more detail than the Haitian story for the obvious reason that the book is intended to be a tribute to the courageous and irrepressible legal team.

The parallel stories originate from different sources. The mistreatment and suffering of the Haitians was a very real physical and psychological trauma to each person stranded on Guantánamo. The

¹³ *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993).

¹⁴ Harold Hongju Koh, *The Human Face*, *supra* note 7, at 483.

¹⁵ See STC at 240-41; Ratner, *supra* note 7, at 210-217

students, comfortable in New Haven, initially were motivated by an intangible sense of injustice and anger at the political motivations of the U.S. government. Their outrage was not shaped or informed by any personal contact with the reality of the Haitians' circumstances. For them, using the legal system was a familiar solution to obtain redress or right a wrong. Indeed, for a long time, the lawyers and clients never meet or communicate precisely because the government had refused to give lawyers access to the camp. The initial lawsuit argued that the Haitians, locked away in isolation, had the right to confer with and be represented by a lawyer. After access was allowed, the advocates eventually forged connections with the clients many of whom had suffered grievously in Haiti and were now HIV positive and ailing in Guantánamo. The motivation and the stakes became personal and concrete for the students.

Once the two story lines intersect, the law students are in perpetual motion – flying to Cuba and Florida, racing from New Haven to Brooklyn to file papers or to appear in court, dashing into their command post at Simpson, Thatcher and Bartlett, their law firm co-counsel, or orchestrating demonstrations. The large number of students working on the case over time, the constant sense of crisis and of spinning out of control, and the many threads of the litigation convey the impression of a school-wide free-for-all. The litigation was characterized by emergencies – TROs, injunctions, stays, appeals, remands. Fax machines spewed paper. Documents were ripped from printers minutes before a filing deadline. Students traveled at a moment's notice, their school work ignored.

A clinical teacher reading this book probably will have some trouble recognizing the forest of clinical education for the trees of the massive litigation. Familiar themes about lawyer-client relations, the adversary process, case theory development, fact investigation, and the courtroom spectacle eventually emerge. But this constant forward propulsion left little time for thorough supervision and consideration of lawyering role, and no room for beginners' mistakes. The pace and pressure made reflective teaching, the mantra of modern clinical teaching, virtually impossible. Any clinical teacher reading this book, or contemplating assigning it to the class, inevitably will ask whether the experience described with such admiration offers anything relevant to them or their students. Despite the uniqueness of this litigation, and the book that chronicles it, *Storming the Court* does contain some lessons for clinical teachers and students.

II. LESSONS FOR CLINICAL TEACHERS

Storming the Court was not written to impress clinical law teachers or students. Nor is it intended to instruct about how to teach, design or administer a program. The Yale students were certainly more than capable of reflecting independently on their experiences after-the-fact.¹⁶ Naturally they believe they learned a great deal. But in hindsight does this “compelling human rights story and an inspirational tale of dedicated people who refused to accept the status quo,”¹⁷ as one reviewer put it, really add up to a good clinical education experience? During the hectic litigation how much ongoing supervision was taking place? Did the students ever receive individualized feedback or did they have to learn by observation, osmosis, or even by accident? Regardless of the immense gratification of the experience, ultimately does the Haitian litigation present a viable model of clinical teaching?

A. *Even Without Much Structure, Good Students Will Take Advantage of the Responsibilities They are Given and Learn A Lot*

When Harold Koh was deciding whether the International Human Rights Clinic should get involved with the Haitians detained on Guantánamo, he was uncertain about the case for several reasons having to do with its merits. But he also questioned what role the students would play in what potentially could turn into a major case. The students who proposed the project wanted to be very involved. This troubled, even shocked, their professor. “Adding to the delusional quality of the proposal was. . . [the] suggestion that law students would be doing much of the work.”¹⁸ As it turned out, the Yale law students did play critical roles, although perhaps not for the same reasons as would likely be the case in a more typical clinic where student “ownership” of the case is part of the pedagogy.¹⁹ With the exception

¹⁶ Clawson, *et al.*, *surpa* note 7.

¹⁷ See <http://www.brandtgoldstein.com/praise>.

¹⁸ STC at 34. The students claim that they “were intimately involved in every aspect of the litigation. . . .” Clawson, *et al.*, *surpa* note 7, at 2339. But they were denied the glory of a Supreme Court argument and apparently only one student actually examined a witness during the trial.

¹⁹ One of the central tenets of clinical education is role assumption, putting students in the position of the lawyer responsible for performing the tasks, making the decisions, and accepting the responsibility for the representation of clients. See Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L. J. 227, 283-292; Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185, 189-193 (1989). Every live-client clinic operates on this level and so do simulation courses, although with hypothetical clients. Externships also allow students to perform some of the work of a lawyer. Thus, to one extent or another most clinic students inter-

of the courtroom work – the hearings and the trial in the district court, and the Supreme Court argument – the students were responsible for developing and researching most of the central legal arguments. They also wrote or edited many of the papers and briefs filed in court to support these claims. They located and interviewed witnesses, then drafted their affidavits. They traveled to Guantánamo to meet, interview, and counsel their clients. They attended court proceedings to provide backup for the lawyers. At the trial, one student did question a witness thanks to a generous student practice rule.²⁰

The book does not examine the delegation of responsibility to students or any educational imperatives that could have been addressed by the instructors. Perhaps there was some behind-the-scenes debate, but the impression given by the book is that the students worked very hard and very creatively but that the lion's share of writing and oral advocacy was conducted by the professionals. If clinical teachers have trouble ceding responsibility to students, practitioners rarely even make the effort since they have no obligation to help them develop as lawyers. Thus, the extent of the students' involvement came as quite a surprise to the lawyers at Simpson, Thatcher and Bartlett who had joined the case as co-counsel. At first one of them thought, "Given the stakes of the case Yale was contemplating, [I did] not expect much from the students."²¹ Up to this point, Harold Koh and his students had been working independently, with the professor taking the lead and bearing the burden although he was an inexperienced litigator himself. But at a high pressure time in the early stages of the litigation, Harold Koh very reluctantly surrendered control over finishing a set of papers. To his "great relief" the students "pulled it all together."²² He only surrendered out of exhaustion, clearly not expecting the students to work effectively. But they rose to the occasion with *élan* and earned his trust thereafter.

Despite sketchy oversight and the potential for chaos, the students organized themselves. They also often capably tackled tasks

view and counsel clients, negotiate with adversaries, appear in court, draft documents, and develop and support case theories with brainstorming and fact investigation. All clinical programs, particularly live-client clinics, ask students to be creative, imaginative problem solvers by pushing them into positions of responsibility and autonomy. Their teachers feel successful as they watch their students over their time in the clinic, and often are bowled over by how well the students succeed.

²⁰ STC at 243, 251-53. He is described as "exhilarated and relieved" after his direct exam, but his inability to cope with the cross-examination was a "nightmare." STC at 253. Both this student *and* Harold Koh conducted their first-ever cross-examinations at this trial. *Id.* at 261

²¹ *Id.* at 53. He realized to his consternation that, "Someone other than Simpson was indeed running the case. But it wasn't other lawyers. It was a bunch of students." *Id.* at 54

²² *Id.* at 76.

without specific direction from the lawyers. This track record led to their insistence on being given even more personal responsibility which, when coupled with the enormity of the litigation, basically made it impossible to avoid delegating to them important and substantial chunks of work. Either on their own or as a team, they interviewed witnesses, drafted affidavits, conducted depositions, and researched, wrote and edited large portions of briefs and other court submissions. On a regular basis the students were proving their competence, creativity, and resolve, an outcome that all clinical teachers know is the inevitable consequence of trusting and effective delegation.

B. Problems Can Arise Even Among the Most Progressive Students and the Most Dedicated Teachers

In *Storming the Court*, Professor Koh is mentor and occasional tormentor as the work load and exigencies of the case persist and accelerate over the course of more than one academic year. Years later the experiences of students, lawyers and teachers still seem unique in the clinical education world. Harold Koh describes the litigation as personally “career-transforming.”²³ Many of the students highlighted now have public interest careers, some in clinical teaching.²⁴ The students, Harold Koh, Michael Ratner, and the other lawyers formed a mutual admiration society. In their respective writings, adjectives like gifted, talented, and superb, and qualities like courage and inexhaustibility are used to describe everyone involved.

There were a few bumps in the road, however. Ironically, in light of the progressive orientation of all of the participants, one point of conflict involved gender issues. After they had visited the prison camp, the clinic students began to serve as the detainees’ source of basic needs for material goods and information. They dubbed this component of their work the “Guantánamo Client Services.”

The expanding service component surfaced some simmering tensions among the students. One refused to go shopping for flip-flops,

²³ Koh, *Democracy and Human Rights*, *supra* note 9, at 192.

²⁴ Michael Wishnie, prominently featured in STC, taught an immigrants’ rights clinic at New York University Law School and recently moved to Yale. Other students who worked on the case now teach at the law schools of Villanova, Michigan, and Fordham universities. Sarah Cleveland, a professor at the University of Texas, directs an international human rights clinic. Many of the other students work in the public interest sector at such organizations as the ACLU, the Brennan Center for Justice at NYU and public defender offices. Another student, Ray Brescia of the Urban Justice Center, recently was profiled in the New York Times. Anthony Ramirez, *Big Cases, Small Pay, and a Lawyer Happy With Both*, N.Y. TIMES, May 5, 2006, at B2.

while others purchased toiletries, batteries and other supplies.²⁵ Some students observed a gender divide between the students who undertook the client services and those who worked on developing the legal arguments and evidence. Women tended to perform the service duties, and more mundane clerical work like coordinating amicus briefs, while men seemed to be assigned the heftier, more meaningful research and writing responsibilities.²⁶ Frustration about gender bias blossomed into vocal complaints. A female student questioned, "I don't think this is fair. Why do the men get all the hard-core legal work?" At least one female student is quoted as dropping out of the case, tired of "feeling like a 'trained chimpanzee.'"²⁷

Harold Koh's response was simple and direct: he stormed out the door refusing to deal with the situation.²⁸ Once again, the students were left to their own devices to figure out what to do. The students had heated discussions at which one male student is reported as being disgusted at "Yale at its worst – political-correctness prosecutors hurling charges of sexism, racism, or some other 'ism,' where anyone with a bit of common sense wouldn't have seen a problem."²⁹ According to *Storming the Court*, Harold Koh rejected any charges of sexism. He did allow for the criticism that he had not "geared the clinic enough toward teaching the students," and remembering his educational mission, he admonished himself that ". . . he wasn't [just] running a law firm."³⁰ He made a few adjustments of assignments, but not as a concession to correct gender imbalance but to enhance the learning experience. Unfortunately, this resolution usually was undermined by the exigencies of the litigation and a tendency for everyone to be too busy for introspection and deliberation about clinical teaching methods.

An effective clinical instructor ordinarily would be more active in trying to resolve or manage discontent and resentment. Given the force of the charges, a serious intervention would be warranted to try to set the students back on track and to save the esprit de corps of the clinic. Probably, a conflict like this would become a "teaching moment" that allows the instructor to mine the issues to raise the self-consciousness of the students about underlying assumptions, biases, and behaviors.

This is a dramatic example of how the demands of the cases over-

²⁵ STC at 172-173.

²⁶ *Id.* at 173. Three women students who wrote about the case also describe this fissure. Clawson, *supra* note 7, at 2388.

²⁷ STC at 186.

²⁸ *Id.* at 185-186.

²⁹ *Id.* at 186.

³⁰ *Id.* at 187.

whelmed many traditional clinical teaching goals. Most supervisors pay close attention to the division of assignments so that students have comparable work loads. Supervisors also try to diversify assignments so that individual students are challenged by new tasks while their strengths and innate abilities are reinforced. Pedagogical objectives and efforts to make assessment of student work fair drive the allocation of assignments. Some supervisors may be more *laissez-faire* than others, but all clinicians carefully track work assignments in order to be fair and responsible teachers.

At Yale very little structured supervision actually took place and apparently little or no time was spent analyzing the collaboration and relationships between students. Miraculously, the work got done and the students were proud of their accomplishments. The moral here actually may be that time-intensive contemplative supervision that is the current norm in clinical teaching may not be the *sine qua non* of a satisfactory learning experience for students.

C. *With Enough Financial and Human Resources, It is Possible for a Clinic to Make a Broad Impact Without Imploding and Manage to Teach A Lot of Skills and Values Along the Way*

The scale and the potential impact of the Haitian cases exemplify the kind of litigation that few clinics undertake today. In the 1970s, many clinics did handle large impact cases as a means for advancing civil rights and social justice.³¹ Today, however, the “teaching model” dominates clinical programs. Most clinical teachers do not seriously question that individual case and client work is a preferable instructional model. Large-scale litigation is too protracted, disjointed and sequential to provide a reliable or uniform learning experience. Students see only pieces of a case and the teacher, involved for the long haul, is less likely to delegate responsibility to each new batch of students.³² Moreover, the litigation can be so fast-paced and demanding,

³¹ George Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 178 (1974). The survey conducted for this article about early clinical programs found that “disenchantment with service-oriented programs has led many law schools to abandon routine legal-aid cases as vehicles of clinical teaching and turn instead to carefully selected test cases with potential for accomplishing major reform in the law. . . . The format of law-reform programs generally involves in-house clinics.” A good example of such a clinic was the program run by Justice Ruth Bader Ginsburg at Rutgers School of Law-Newark in the early 1970s litigating early women’s rights cases. *Id.*

³² Some clinics whose original mission at the time of their founding in the 1970s was to engage in law reform remain committed to large-scale or “big” cases involving long term lawyer-client relationships, generations of students, and complex legal issues. A few examples of programs dedicated to impact litigation with broad public importance are the Institute for Public Representation at Georgetown University Law Center,

as it was here, that students have no time to reflect in the flurry of activity. The cost of impact litigation also is a daunting deterrent even at Yale where expenses fortunately were subsidized by a major law firm.³³

Because clinical resources are precious, any program must consider seriously how best to deploy them. Most clinics have a mission that is primarily educational. Program design usually tries to advance skills training by providing opportunities for reflective law practice on cases where students can handle the level of work, act independently but with appropriate supervision, and turn the work into some kind of meaningful lawyering performance. That vision is usually informed by what has been called a "social justice" agenda so that clinics generally represent individuals with limited access to legal systems, such as poor people or underserved groups or entities.³⁴ Sometimes to advance educational objectives, the social justice agenda is subordinated, and thus choices of clinic design, case selection, and forum may appear to squander law school resources on a narrow set of clients rather than tackling larger social issues.

For a variety of pedagogical and practical reasons, most clinical programs today serve individual clients on limited-issue matters such as landlord-tenant, consumer, criminal, and government benefits problems.³⁵ In these cases, the issues can be complex but are usually

georgetown.edu/clinics/ipr/index.html and the Constitutional Litigation Clinic at Rutgers School of Law-Newark, http://law.newark.rutgers.edu/clinics_constitution.html. See Frank Askin, *A Law School Where Students Don't Just Learn the Law: They Help Make the Law*, 51 RUTGERS L. REV. 855 (1999). Some clinicians argue that the rewards of large cases justify adding at least a component to a clinic. See, e.g., Nancy M. Maurer, *Handling Big Cases in Law School Clinics, or Lessons from My Clinic Sabbatical*, 9 CLIN. L. REV. 879, 900 (2003) (offering suggestions for enabling clinics to handle big cases).

³³ Although the book does not discuss this, it is possible that the clinic might not have been able to sustain the considerable expenses of this litigation without this deep pocket even at a school as well-endowed as Yale.

³⁴ In general terms, this is understood to be the deliberate decision to handle certain types of cases that advance particular goals for disempowered individuals or groups with emphasis on a value system that will inculcate a service commitment in students. See, e.g., Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 S.M.U. L. REV. 1461, 1475 (1998); Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 50 U. PA. L. REV. 173 (2001); Louise Trubeck, *Embedded Practice: Lawyers Clients and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996); Stephen Wizner, *Beyond Skills Training*, 7 CLIN. L. REV. 327, 329-331 (2001); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORD. L. REV. 1929, 1935-37 (2002); Stephen Wizner & Jane Aiken *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORD. L. REV. 997, 1006-1007 (2004).

³⁵ Two clinical education pioneers who have been in a position to observe the evolution of clinical programs for more than 30 years recently noted

[B]ecause of the clash . . . between the enormous scope of national law reform projects and the limited duration of any student's clinic term, only a few clinics have attempted to change bureaucratic institutions of rules of law. Most haed contented

contained within a circumscribed body of law that students can master within their time in the clinic. Some clinics operate on a middle ground between the small case and the massive lawsuit. They try to function in ways that will have a greater impact than the outcome of a single case, without being overwhelmed by the demands of class action litigation. For example, consumer clinics now handle predatory lending cases and immigration clinics challenge federal statutes or work on behalf of immigrant groups with the goal of having a broader societal effect. Other clinics do projects with communities or non-profit entities to address issues that can affect large numbers of people or organizations.³⁶ Some clinics use their resources on a range of both legal and non-legal levels to draw attention to pressing social issues such as wrongful convictions, environmental injustice, or workers' rights.

The amount of student responsibility and engagement that actually occurred in the Haitian litigation is remarkable in light of its duration, complexity and intensity. The students acquired competence in a long list of basic practical litigation skills as well as the non-litigation skills needed to mount a multi-pronged advocacy effort on political and media fronts. They learned how to function as lawyers with clients and to manage large-scale litigation. They used the knowledge about politics and foreign relations gleaned from the case to generate a broader critique of the U.S. government and connected that critique to enhance their classroom education.³⁷

While the Haitian litigation may have been a dubious clinical *teaching* vehicle, by all accounts it was a profound *learning* opportunity. The book chronicles the students' work, their emotions and their

themselves with ameliorating the situations of indigent clients. So, with few exceptions, clinics have not systematically altered the legal landscape.

PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION 314 (1998). They note that the Yale-Haitian cases were a prominent exception to this trend. *Id.* at 316 n.4.

Of course, this is a matter of program design that takes into account multiple pedagogical and practical factors. See Susan Bryant & Maria Arias, *A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-solving Vision of Lawyering that Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207 (1992); Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J.L. REFORM 1 (1997); Philip G. Schrag, *Constructing a Clinic*, 3 CLIN. L. REV. 175 (1996); Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31 (1993).

³⁶ See, e.g., Margaret Martin Barry, *A Question of Mission: Catholic Law School's Domestic Violence Clinic*, 38 HOW. L.J. 135 (1994); Susan D. Bennett, *On Long-Haul Lawyering*, 25 FORD. URB. L.J. 771 (1998); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLIN. L. REV. 195 (1997); Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 WASH. U. J.L. & POL'Y 195 (2003).

³⁷ The students' own account offers a thoughtful and tempered inventory of their learning experience. Clawson *et al.*, *supra* note 7, at 2337-2339.

resourcefulness in lively terms and shows clearly how their perseverance and grit propped up the case at critical moments and provided much of its momentum. Perhaps the risk of swamping a clinic with the demands of such a case would deter most programs from such a massive undertaking but clearly for those students the rewards justified the choice. Perhaps there actually was no choice at all because the pull of the injustice was so powerful and the resources and talents of the clinic so unique that to pass up the opportunity would have taught the wrong lesson. Many of the orthodoxies of clinical teaching and supervision were clearly sacrificed to achieve the greater goal, a risky choice that nevertheless paid off for the Yale students and their clients.

D. Clinical Cases Translate into Clinical Scholarship

During the course of the litigation, one student jokingly observed, "Even if the Justices never read [our] brief, it would still make a good law review article."³⁸ This is a familiar sentiment to clinical teachers, and one which has been amply deonstrated.³⁹ Even cases much less fervently litigated can inspire clinical and doctrinal scholarship that makes connections between the legal and personal stories of actual clients and larger issues about the law and lawyering. This student's prediction was borne out by the numerous articles written by the people involved in the cases. One of the most extraordinary aspects of this litigation is the level of engagement of all of the participants, and most notably Harold Koh, a traditional classroom teacher and scholar. His writings describing his experiences with the case, the clients, the students, and the legal system are prodigious.⁴⁰ He also weaves the case into more theoretical writings demonstrating that it is not necessary to detach scholarship from practice to raise important issues of policy and theory. The fact that real life inspires the development of ideas that push the limits of traditional scholarship or theories, the principal argument for clinical scholarship, is powerfully demonstrated by this output.⁴¹

³⁸ STC at 187.

³⁹ J.P. Ogilvy with Karen Czapanskiy, *Online Annotated Bibliography of Clinical Legal Education*, available at <http://faculty.cua.edu/ogilvy/Index1.htm>.

⁴⁰ See articles collected *supra* note 7. The respondent's brief to the Supreme Court is excerpted in Harold Hongju Koh, *The Haitian Centers Council Case*, *supra* note 7, at 19.

⁴¹ Stephen Ellman, Isabelle R. Gunning & Randy Hertz, *Why Not a Clinical Lawyer-Journal?* 1 CLIN. L. REV. 1 (1994). See also Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187 (1992); Robert D. Dinnerstein, *Clinical Scholarship and the Justice Mission*, 40 CLEV. ST. L. REV. 469 (1992); Peter A. Joy, *Clinical Scholarship: Improving the Practice of Law*, 2 CLIN. L. REV. 385 (1996); Stephen H. Leileiko, *Clinical Education, Empirical Student, and Legal Scholarship*, 30 J. LEGAL EDUC. 149 (1979); Gary Palm, *Reconceptualizing Clinical Scholarship as Clinical Instruc-*

III. LESSONS FOR CLINICAL STUDENTS

Storming the Court gives the impression that the Haitian litigation captured Yale Law School. It was such a highly visible endeavor, including, at one point, a hunger strike on campus when students imprisoned themselves inside a symbolic recreation of the Guantánamo camp.⁴² With hundreds of students making some form of contribution, with all sorts of activities taking place and a lot of campus space being occupied by the operations of the litigation, was anyone going to class? How were students working in the other more prosaic clinics, to say nothing of students without any clinic connection, feeling at the time? Was this a healthy atmosphere for the law school?

Storming the Court makes no effort to answer these interesting questions or to measure the impact of the litigation on the rest of the law school. It seems to assume that this environment was activism at its most thrilling, stimulating, and inspiring. Indeed, this portrayal might be quite deserved since it is truly rare that a clinic case would so dominate a school and displace more characteristic law student concerns about course work or future employment. There are, however, other issues about lawyering that the surface during the course of the litigation, but the book does not attempt to identify any possible moral for other students.

A. Cases and Lawyers Need Clients to Fuel Them

There definitely were occasional rough patches. Certainly, in any clinic difficulties can arise as a result of personal and learning differences among the students so that some conflict is anticipated. But the intensity of the demands of these cases created more stress than might the equally unwelcome, but surely predictable, stumbles in the typical clinic.

This lawsuit epitomized a shift away from an individual client, small case, poverty law orientation to a version of more attenuated representation of classes, groups, entities and even treaties, where the identity of the client is less ascertainable or not within the students' immediate grasp.⁴³ Basic client relations were strained by distance

tion, 1 CLIN. L. REV. 127 (1994).

⁴² STC at 240-41. The strike spread to many campuses around the country.

⁴³ International human rights clinics, fledgling at the moment, are expanding rapidly but not without facing some skepticism about how they fit into conventional goals and designs of clinical programs. For descriptions and defenses of such programs see, e.g., Johanna Bond, *The Global Classroom: International Human Rights Fact-Finding as Clinical Method*, 28 WM. MITCHELL L. REV. 317 (2001); Arturo J. Carillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527 (2004); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505 (2003)

and many months of difficult communication. One of the main student characters, Michael Wishnie, now a clinical law teacher, is described in *Storming the Court* as dubious about getting involved in a case that was so "remote" from reality.⁴⁴ His initial feeling that the lawsuit was disconnected from clients to whom no one had even spoken derived from his earlier classical client-centered clinical training in other clinics. His reaction was prescient since the road to establishing trusting and productive attorney-client relations was indeed rocky.

Attorney-client relationships only began after the judge ruled that the Haitians would be allowed legal representation. Having won the right to confer with their clients, a group from Yale went to Guantánamo. But even after the students went to Guantánamo to meet clients who actually never had sought their services, they found no guarantees of confidence or trust. At the prison camp, the Haitians had their own concerns and reservations.

In any clinic students eagerly and nervously await their first client. They spend time worrying about ice breakers and details like how to arrange seating, whether to take notes on a computer, how to work effectively with an interpreter or how to explain their role. The client meetings at Guantánamo did not resemble the traditional initial interview. As the students acknowledged, "Having represented the refugees for seven months, we felt a special bond with them, but since we had never met them, we knew that many of them would be reluctant to trust us."⁴⁵ The legal team had no opportunity to establish rapport through carefully prepared ice-breakers and repeated meetings to develop a trusting relationship over time. Quite the opposite; the conditions were inimical to the kind of relationship-building process described in classic interviewing texts.⁴⁶

In *Storming the Court*, this difference manifests itself quite dramatically. The book touchingly describes the bittersweetness of this long-sought meeting. One of the most committed and unwavering students, working on the case even after her graduation, was con-

(appendix listing human rights clinical programs at 549-550).

⁴⁴ He also apparently prefers his clinical professors to be bearded guys with plaid shirts. STC at 93. Is this clothing preference a heuristic for "poverty lawyer?" What is the female fashion equivalent? Do clinicians who appear in housing, family and criminal courts wear overalls? In any case, the reference does illustrate the growing phenomenon that clinical professors come from all sorts of backgrounds, even law firms and stand-up classrooms.

⁴⁵ Clawson, *supra* note 7, at 2365.

⁴⁶ See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 482-92 (1990); DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH 80-112 (2d ed. 2004); STEPHAN H. KREIGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 79-94 (2d ed. 2003).

fronted with hostility by the Haitians when a team of lawyers and students travelled to Guantánamo to discuss a possible settlement offer. “*You’re not getting paid? You must be terrible lawyers if you can’t make money. . . . No wonder we’re still here!*” charged one of the Haitians.⁴⁷ This accusation reduced the student to tears of frustration. “*I’ve been killing myself for these people and they don’t even give a damn.*” Only after they saw her tears did the Haitians relent, somewhat moved by her emotion to trust her.⁴⁸

Under the circumstances, her frustration and even her tears are understandable. But such outbursts are unusual in most clinics where the overall experience is simply much less intense. Certainly, clinic students do worry whether their clients will have confidence in their nascent abilities. Sometimes, their inexperience does cause problems and inconvenience for the client who may have to participate in more interviews or respond to repetitious questions.

Most clients, like the Haitians, quickly learn to trust and respect the extra effort, devotion and energy students bring to clinic cases. Eventually, these clients were no exception and came to appreciate and value their student lawyers. And the feelings were reciprocated as the students were motivated by real people whose faces, voices and conditions they now could visualize.

B. Client Relationships Can Be Difficult But If Students Persevere They Ultimately Benefit

The potential tension between the legal goals of the client and the educational goals of the clinic is a story as old as clinical education itself. There is an inherent paradox in clinical education that requires hard choices between the students’ education and the clients’ best interests. The clients’ goals and decisions prevail, but sometimes at the expense of an over-prepared and disappointed student. That might mean accepting a settlement rather than conducting the trial in which the student had invested months of hard work, or counseling the client to *not* file a claim.

At Guantánamo, this tension surfaced in an unusual way. The detainees questioned the student’s motives. Were they doing this as some kind of experiment to learn something at the expense of powerless clients? “*You’re just doing this for yourself. . . . This is for your own advantage. Look how young you are – this is for the experience or something. But it’s not for us.*”⁴⁹ Allegations along these lines sometimes are leveled at students, although rarely by their own cli-

⁴⁷ STC at 164.

⁴⁸ *Id.* at 165.

⁴⁹ *Id.* at 164-165.

ents. More often students are chastised for not following the conventions of practice in a particular setting. Adversaries or judges are piqued when students push beyond conventional limits for their clients. This raising the bar occurs because the case may be the student's first and only case. Quite naturally, this fosters the highest level of preparation and competence as well as considerable zeal. Student work often is so much more skillful than many attorneys that it might lead a judge or opposing counsel, anxious to avoid dealing with the single-minded student, to make a remark like "deport all the students."

This scene involved one of the most dedicated students working on the case. Her disappointment and rejection were very moving. Probably, she was embarrassed also at her unprofessional show of feelings. No clinic student would try to earn a client's respect by crying. But the build-up of emotional anticipation about finally meeting the Haitians and the anxiety of going to Guantánamo burst her control. This is the kind of episode that would be analyzed and unpacked during the regular course of clinical supervision. But not at Guantánamo and not even back at Yale. The students did not even engage in the familiar post-mortem that often occurs on the car ride home from court. Somehow, without any introspection or concerted effort to analyze what had happened, the incongruity was corrected. Somehow the situation was salvaged but not due to the guidance of the clinical teacher. This is another example of how this litigation turned the traditional behavior in clinical programs inside-out.

C. Client-Centered Decision Making Values Survive Even in the Most Hellish of Settings

Attorney-client relations were so distorted that for a long time one of the canons of clinical teaching, client-centered decision making, was functionally impossible. Decisions about strategy and case theory started out as intellectual exercises in the absence of client input. Once the detainees' interests and opinions were directly considered the lawyers respected and were guided by their clients beliefs and goals.⁵⁰

This is another fundamental aspect of clinical legal education about which *Storming the Court* offers no explicit insights. For that matter, in all of the articles written about the cases, only Michael Ratner, the veteran attorney, seriously addresses the lawyer-client relationship in building a case. He questions whether the cases would

⁵⁰ *Id.* at 204.

have developed differently if the clients had been involved earlier.⁵¹ “Our clients are the actors who drive the strategy. They have their own reality. . . . Our clients know more about their own lives and bring their own power to the case. . . . Ultimately, they will and should decide.”⁵² He credits the contributions that the clients’ actions made to the case even while supposedly powerless in Guantánamo. He attributes the “outside strategy” of political agitation, campus demonstrations, and media campaigns to the catalytic effect of the detainees’ hunger strike.⁵³ As someone with years of experience representing clients with compelling underdog claims, his meditations are particularly informative and credible. He can step back from the courtroom victories and attitude of moral superiority the students tended to affect to be self-critical about the balance between attorneys and clients. In contrast, the book seldom stops its narrative momentum to ponder such lawyering questions.

D. The Demands of a Clinical Case Can Displace Everything Else, But It’s Usually Worth It

Clinic students expect to work very hard, but almost never realize just how hard until they actually throw themselves into their work. Years after graduation, they readily recall their cases, clients and supervisors as their most memorable and meaningful law school experience. The Yale students multiplied this truism exponentially. The excitement and momentum of the entire experience is so compelling as to be enviable. Every lawyer, let alone law student, should be so fortunate as to have such an unforgettable legal experience. Even more impressive is the lasting drama of the litigation whose recounting still telegraphs urgency and electricity more than ten years after its conclusion.

Storming the Court describes the students’ lives as consumed by the Haitian cases at the expense of other studies, health, and personal lives. They traveled, organized, researched and stayed awake for long stretches. While some students dropped out of the case, and some graduated and moved on, others stayed involved for the duration, even past graduation. Students were more than committed; they were devoted. In the book, some are even portrayed as obsessed.

The privilege of working on this litigation seems to have been all the nourishment and reward most of the students required. The level of their dedication is especially exceptional because it was motivated for so long by abstract principles and morality rather than any connec-

⁵¹ Ratner, *supra* note 7, at 203-204.

⁵² *Id.* at 221-222.

⁵³ *Id.* at 210-211.

tion with actual clients and their circumstances. Of course, the district court ruling opening the door to the detention camp added a dose of reality. The expectations of actual clients helped to boost morale but also ratcheted up the workload.

Clinical teachers should consider assigning *Storming the Court* to their students if only to make the point that it is always possible to work harder and do more. What these students did and accomplished is probably unimaginable even to the most ardent public interest student today. After reading the book, the most dedicated clinic student will be inspired to say, "I can do even more work!"

IV. LESSONS FOR LAWYERS ABOUT LEGAL STORYTELLING

Some clinical and other legal scholars argue that the power of stories adds to and explains much about how law works or how it should work.⁵⁴ Others have explored the role of storytelling at trials⁵⁵ or in the development of case theory.⁵⁶ Narrative theory asserts that stories and storytelling make law more understandable by analyzing legal events as a narrative that gives a chronological and psychological account of events. *Storming the Courts* has a classical narrative structure. It takes the generally accepted ingredients of plot and character, sets them in the legal arena, adds the tension and momentum of con-

⁵⁴ See note 2 *supra*; see also articles collected in *NARRATIVE AND LEGAL DISCOURSE*, Parts II & IV (David R. Papke, ed.). A working definition of narrative jurisprudence is: [N]arrative jurisprudence. . . is an effort to see law—think about law, talk about law, understand law—from the perspective of stories. We “do” narrative jurisprudence when we try to see (and tell) stories that take place in law (e.g. stories told as one sets out to become a lawyer, stories that take place in a law office, stories told in a court room or to opposing counsel, stories told by way of appellate opinions) and then, the stories beyond law that have been formed and shaped fundamentally by law (e.g., our contemporary stories about race, gender, sexuality). We might then, say of narrative jurisprudence, that it is a way of thinking about law as composed and comprised of stories. . . .

James R. Elkins, *Narrative Jurisprudence*, available at <http://www.wvu.edu/~lawfac/jelkins/juris02/juris02/intro.html>.

⁵⁵ See, e.g., Ty Alper, Anthony G. Amsterdam, Todd E. Edelman, Randy Hertz, Rachel Shapira Janger, Jennifer McAllister-Nevis, Sonya Rudenstine & Robin Walker-Sterling, *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLIN. L. REV. 1, 20-22 (2006); Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLIN. L. REV. 9 (1994); Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992); Philip N. Meyer *Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in The Estate of Karen Silkwood v. Kerr-McGee Inc.*, 9 CLIN. L. REV. 229 (2002).

⁵⁶ See, e.g., Nancy Cook, *Legal Fiction: Clinical Experiences, Lace Collars, and Boundless Stories*, 1 CLIN. L. REV. 41 (1994); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Stories*, 43 HASTINGS L. J. 861 (1992); Binny Miller *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994).

flict and the satisfaction of its resolution, and concludes with a rewarding moral or lesson.

Storming the Court chronicles the lives and work of lawyers who themselves are telling stories about persecution, flight, illness and U.S. immigration mythology. It also effectively uses narrative techniques to explain a complex series of lawsuits and capture the reader's sympathy for the students and their clients. The author, a Yale classmate with access to many of the people involved, has a writer's talent for pulling in the reader with internal dialogues that expose positive feelings as well as weaknesses and doubts.⁵⁷ The reader is treated to fly-on-the wall observations of legal strategy sessions and a rare glimpse inside the Guantánamo camp. The vivid descriptions of hunger strikes, riots, and the sad tales of illness, confusion, family division and desperation are all engrossing. The case is a classic tale of a quest for justice in the face of a monolithic government enemy. Yet, the heroes themselves possess sufficient angst and frailties on the one hand, andchutzpah on the other, to make them human.

There are several sub-narratives taking place in the book as well. These additional themes permeate the larger stories of the Haitians and the litigation. For some readers, the smaller stories may be just as engrossing and rewarding.

A. *Stories of Personal Transformation*

The book offers tales of personal journeys. Obviously, the refugees who fled from nightmarish conditions in Haiti were transformed by their actual journey from their homeland to the United States. The lawyers and students involved in the litigation also were affected indelibly by a profound professional journey. It would be an exaggeration to say that the students, Harold Koh, or Michael Ratner experienced an epiphany converting them into public interest lawyers but only because most of them began with well-developed politics and commitments to social justice. Yet the ingredients of this litigation, beginning with the human tragedy, moving through the stresses and frenzy of high-stakes litigation in the most prestigious fora, engaging with the public through political and media campaigns, and experiencing the ups and downs of victory and defeat occurred on a scale previously unknown to any of them. Their subsequent careers have been and will continue to be influenced by the knowledge that their hard work and perseverance made the legal system work on behalf of their

⁵⁷ There is a nagging question, however. Where was Brandt Goldstein during the 18 months of litigation? He was a student at Yale Law School but seems to have played no role in the cases. Maybe that does not disqualify him from telling the story, but his lack of participation, when so many students were involved, seems to delegitimize him slightly.

clients.

This book also is a parable of how personal stories influence and drive legal stories. With other lawyers, the legal story might not have occurred at all, or might have followed a very different path. *Storming the Court* devotes considerable space to how Harold Koh's own background as the son of a refugee makes him relate personally to the cause of the Haitians.⁵⁸ His passionate commitment to this case and the clients is explained in large part by this personal history. When his energy flagged he sought motivation in this common experience. Many of his own writings discuss the relationship between his father's past and his empathy for the Haitians.⁵⁹ In the book, thoughts attributed to Harold Koh about his parents and his past recur during stressful moments. He makes an empathic connection with the detainees by referring to his family's own story at the beginning of his initial client meeting on Guantánamo:

When I see your faces, I see the face of my father. Like you, my father supported the first democratically elected government in his county. . . . Like you, my father sought refuge in the United States. It is because of my father that I fight for you.⁶⁰

His message is sincere, not just a ploy to gain the clients' confidence. This shared history provides a valuable reminder that lawyering does not have to be wholly objective and impersonal. Not every case will pull on the private heartstrings of lawyers as powerfully as the Haitian litigation affected Harold Koh, but his students could easily see how his empathy motivated even greater passion and made him all the more effective as an advocate.

B. *An Only at Yale Story?*

The book might well prompt the visceral reaction, "Great story, but it could only happen at Yale." In other words, some law students might feel out of sync with the students described in the book. Yale, the premier law school in the country, enrolls students who usually do not have to worry about grades or jobs so they have the luxury to immerse themselves in an all-consuming case and still manage to graduate, then cram for and pass the bar exam. Moreover, Yale is a law school that values the immersion and commitment the cases required.

The "only at Yale" reaction smacks of understandable envy. At

⁵⁸ STC at 30-32.

⁵⁹ Harold Koh himself says, "During the three thousand hours that I worked on the case, I was driven by the memory of my own parents and how they had found refuge in this country. It was because of America's willingness to take them in that I became a lawyer." *Democracy and Human Rights*, *supra* note 7, at 192; *see also id.* at 189; *The Haitian Refugee Litigation*, *supra* note 7, at 1.

⁶⁰ Clawson, *supra* note 7, at 2365. This particular speech is not repeated in the book.

many other law schools, students' futures are more uncertain while their debts are very predictable. They work part-time, sacrifice some freedom of choice and movement to these exigencies, and rightly believe that they must keep up their GPAs in order to get a job after graduation. It is hard to imagine this case being replicated at a school where the majority of students have other educational, financial and family burdens. While some Yale students did have financial concerns and even worried about completing their course requirements or passing the bar exam, their self-confidence and capacity to transcend mundane matters seemed almost limitless. A few students dropped out or burned out but most stayed with the case to the end, up to the emotional moment when their clients arrived at Kennedy Airport.⁶¹

Nor would many clinical teachers be in a position to identify with the magnitude of Harold Koh's personal commitment, the amount of time he diverted from teaching, scholarship and other responsibilities. He even faced possible personal liability for Rule 11 sanctions for filing a frivolous lawsuit.⁶² Without diminishing for a moment the authenticity of his fervor, his sacrifice of time and talent or the potential danger this litigation posed to his career, most clinical teachers lack the security of position or the personal prestige to engage in a single case with such intensity and exclusivity.

Institutional support for public interest activities at Yale is substantial also. Few clinical teachers probably can imagine the scene in Dean (now Judge) Guido Calabresi's office taking place at their own schools. When he learned of the sanctions motion, the Dean's "brow furrowed" and he seemed "distressed" but merely "calmly told Professor Koh to keep him informed."⁶³ There were no fireworks, no attempts to interfere with or subvert the litigation, no demands for financial restraint, just judicious support. Only the rare clinician could embark on such a risky venture without being very confident about the support of the law school or university, and about his or her status. Not every dean would have been as supportive as Dean Calabresi.⁶⁴ For that matter, now that Harold Koh wears the dean's hat at Yale, might even he hesitate to devote so many resources to litigation of this dimension?

C. Good & Evil Stories

This book also is a ripping yarn of good and evil in the best tradi-

⁶¹ Ratner, *supra* note 7, at 217; STC at 290.

⁶² FED. R. CIV. P. 11; STC at 81-82.

⁶³ *Id.* at 86-87.

⁶⁴ Dean Calabresi also signed the Supreme Court brief, putting his name on a brief for the first time ever. *Id.* at 224.

tion of heroic epics. First, there is the story of the pro-democracy Haitians persecuted in their violent country. Then, there is the story of innocent, sick, desperate refugees being turned away by the brutal enforcement of harsh U.S. foreign policy. Finally, the book tells the adversarial story of noble human rights lawyers versus arrogant, incompetent, even dishonest government lawyers. One of the principal government lawyers is quoted as remarking that he wanted Koh and his "goody-two-shoes students to realize that the Justice Department meant business."⁶⁵ For their part, the students saw most of the government lawyers as "evil incarnate."⁶⁶

By its very nature, a hero's tale identifies with its hero. This book has such an obvious bias that it is almost impossible to consider any other than the extreme pro-Yale, pro-refugee perspective. For a law student and lawyer audience seeking a somewhat more balanced account, this bias detracts from the book's persuasiveness. A less partisan account, written without diminishing the excitement and passion rampant among the students and lawyers might have made the book more credible. Good and evil are portrayed so absolutely that the reader has no opportunity even to consider ambiguities. Only once, when an Assistant United States Attorney concedes that the medical treatment of the HIV positive detainees is sub-par, does anyone associated with the government earn any praise.⁶⁷ Armed with knowledge of this viewpoint, however, most readers will be inspired by the students' successes and the Haitians' freedom.

D. *Winning Is Not Everything*

The sub-title of the book, *How a Bunch of Yale Law Students Sued the President and Won*, conveys the unfortunate message that winning was the most exciting part of the lawsuits. Unfortunately, this message is misleading in its oversimplification. Yes, the students did "win" their lawsuit against the government when the U.S. District Court judge granted relief to allow the lawyers access to Guantánamo. And yes, there were some interim victories. And, most importantly, the judge ruled that their HIV positive clients were entitled to medical treatment, thus opening the door to their admission into the United States.⁶⁸ But, the actual legal "losses" probably outweigh the actual legal "wins." After all, the Supreme Court non-return case was lost decisively and remains the law, thereby permitting high seas interdiction and immediate return of potential refugees to the country of ori-

⁶⁵ *Id.* at 92.

⁶⁶ *Id.* at 108.

⁶⁷ *Id.* at 266-67.

⁶⁸ *Id.* at 276-77.

gin.⁶⁹ On the basis of this decision, other groups in flight from persecution have been intercepted and repatriated without being allowed to enter the U.S. or even another safe harbor for refugee screening.⁷⁰

The nobility of the uphill battle of civil rights and human rights lawyers is romanticized in *Storming the Court*. The book fairly and sometime suspensefully portrays the Sisyphean nature of this litigation. At the end, these efforts are rewarded by some of the results. General cheering and congratulations ensue. The respectful treatment of the claims in the district court proceedings, and the humanitarian spirit and courageous individualism of U.S. District Judge Sterling Johnson also send a powerful message of optimism about the possibilities of this kind of extreme effort.

This contrasts to the more disheartening batting average characteristic of the career public interest litigator. The book actually may be sending a distorted message about the rewards of the work where successes are few and far between. One particularly poignant and ironic anecdote is attributed to Michael Ratner after the District Court Judge ruled in favor of the plaintiffs. When asked what to do next he replied, "I don't know. . . . I've never won one of these before."⁷¹ Despite this history of lack of success, his devotion over decades has never wavered. The sense that achieving justice is possible no matter how long it takes may be the more crucial lesson than the "win" itself.

Although the mixed outcomes can be parsed and analyzed, the absolutist message of the sub-title is antithetical to clinical legal education which emphasizes the process of learning over particular results. The law students were winners but their principal victories occurred outside the courtroom. They won because they participated in a struggle on behalf of truly disempowered people. They gained self-confidence and learned many skills in the process. They collabo-

⁶⁹ Most believe that the Supreme Court decision in *Sale v. Haitian Centers Council* made very unfortunate law. The U.N. Commissioner for Refugees considered "the Court's decision a setback to modern international refugee law. . . . It renders the work of the Office of the High Commissioner in its global refugee protection role more difficult and sets a very unfortunate example." 32 I.L.M. 1215 (1993). The Inter-American Commission on Human Rights resolved to call upon the United States to review as a "matter of urgency" its Haitian interdiction and repatriation practice. 32 I.L.M. 1215 (1993). See also *Miranda*, *supra* note 6, at 717-718 (1995); Guy S. Goodwin-Gill, *The Haitian Refoulement Case*, 6 INT'L J. REFUGEE L. 103, 104-105 (1994).

⁷⁰ In 1999, President Clinton delegated to the Attorney General the authority to keep an undocumented person encountered on an interdicted vessel on the high seas. 64 Fed. Reg. 53883 (Oct. 5, 1999). Under this authority, Chinese nationals intercepted in U.S. territorial waters near the Northern Mariana Islands were repatriated to mainland China. 76 No. 39 INTERP. REL. 1490 (Oct. 11, 1999).

⁷¹ STC at 89.

rated effectively to achieve relief for their clients. The personal satisfaction for the students, their teachers and the lawyers on the case is undisputed. And, as the book's final sections make clear, as a result of the students' efforts, the Haitians have begun new lives in safety. The real achievement in this litigation is the permanent impact it had on all of the participants.

CONCLUSION

Storming the Court is hardly neutral but its partisanship is a large part of its appeal. Despite its undisguised bias, and its reliance largely on interviews and information from the Yale team, the book makes a serious effort to explain government policies and to accurately report legal details resulting in a spirited, highly readable and reliable account of the lawsuits. This kind of insider reporting is a welcome contribution to anyone interested in federal civil procedure, clinical legal education, and a concise history of U.S. foreign policy toward Haiti.

The labors of the Yale law students demonstrate that there is still a role for passion, creativity, boundless energy and lots of caffeine in any clinical program – even one which is more of a free-for-all than a highly structured academic experience. The timing of the book is propitious. Interdiction of refugees continues. Indefinite detention on Guantánamo persists. Anti-immigrant sentiment percolates. The natural resource of law school clinical faculty and students was put to use so well in the Haitian litigation that the behind-the-scenes story may persuade other programs to undertake similar kinds of matters. The excessive burdens of the work are tempered, if not outweighed, by the rewards to everyone involved.⁷² In any case, the story of this once-in-a-lifetime whirlwind of legal activity provides an unrivalled glimpse into the hearts and minds of the principal participants. It is well worth the read for both clinical students and teachers.

⁷² Indeed, some law school clinics currently represent Guantánamo detainees under the guidance of their clinical teachers and the Center for Constitutional Rights. These are not ideal clinic cases since students cannot meet the client or see much of the evidence because the Department of Justice will not give students security clearance. Nor can students argue in court. But as one clinical teacher reported, “[S]tudents ain’t complaining — it’s fascinating and important [work] and an amazing teaching vehicle for the entire school.” Email from Professor Baher Azmy, Seton Hall Law School, to author (June 14, 2006, 6:25 PM) (on file with author).