STANCES

Anthony V. Alfieri†

I promised to show you a map you say but this is a mural
then yes let it be these are small distinctions
where do we see it from is the question
Adrienne Rich**

INTRODUCTION

The literature of lawyering is far reaching, encompassing doc-
trine, ethics, institutions, and advocacy. In recent years, scholars in-
tent on bridging the divide between theory and practice have
enriched this literature by drawing on interdisciplinary work in an-
thropology, linguistics, and sociology. This integration has opened
up new visions of lawyer/client discourse, interpretation, and prac-
tice. The visions reflect the postmodern turn to contest, contin-
gency, exclusion, hierarchy, multiplicity, partiality, and plasticity.¹
This turn has begun to reveal a sociolegal world of lawyer/client
discourse—voices, narratives, stories—that is contested. In this
world, lawyer knowledge is partial; lawyer interpretation is contin-
gent upon multiple categories of age, class, disability, ethnicity, gen-
der, race, and sexual orientation; and lawyer/client relations are
configured by a dominant-subordinate hierarchy of exclusion. Ac-
ccordingly, the practices of lawyering—interviewing, counseling, ne-
gotiation, litigation—appear not as the neutral conventions of a

† Associate Professor of Law, University of Miami School of Law; A.B., Brown Uni-

I am grateful to Naomi Cahn, Mary Coombs, Clark Cunningham, Richard Delgado,
Marc Fajer, Michael Fischl, Ellen Barker Grant, Lili Levi, Peter Margulies, Austin Sarat,
Stephen Schnably, Jean Stefancic, James Boyd White, and Steven Winter for helpfully
commenting upon earlier drafts of this essay. I also wish to thank David Bodian,
Porsche Shantz, Kathleen Young, and the University of Miami School of Law library staff
for their research assistance. My analysis, however unfinished, of modern/postmodern
lawyering has benefited greatly from ongoing conversations with Marie Ashe, Naomi
Cahn, Clark Cunningham, Steven Winter, and Lucie White. They are surely not respon-
sible for my misjudgments.

** Adrienne Rich, Here is a map of our country, in AN ATLAS OF THE DIFFICULT WORLD:

¹ For lucid explications of postmodernism, see Marie Ashe, Inventing Choreographies:
Feminism and Deconstruction, 90 COLUM. L. REV. 1123 (1990); Drucilla Cornell, Toward A
Modern/Postmodern Reconstruction of Ethics, 133 U. PA. L. REV. 291 (1985); Pierre Schlag,
"Le Hors de Texte, C'est Moi"—The Politics of Form and the Domestication of Deconstruction, 11
CARDozo L. REV. 1631 (1990); Steven Winter, Painless Postmodernism (Dec. 1991) (un-
published manuscript, on file with the Cornell Law Review).
skilled craft, but rather as unstable interpersonal and institutional contexts for the play of lawyer power and client resistance.

This postmodern analysis has begun to erode the modernist foundations of lawyering. These foundations embody commitments to express historical forms of lawyer/client discourse, interpretation, and practice. The forms construct a modernist aesthetic marked by a devotion to craft, reason, understanding, and text. Carried on by tradition, craft invests normative value in the professional skills and attitudes of lawyering. Reason includes logic and pragmatism in that value system. Understanding adds the norms of empathy and self-reflection.

The good modernist lawyer employs skilled craftsmanship, pragmatic reasoning, and empathic understanding to engage the multiple texts—client, doctrinal, institutional—of the sociolegal world. The activity of engaging those texts in advocacy involves a process of translation. Because that process is distorting, certain textual meanings will be lost. This loss is the tragedy of modernist lawyering. It is a tragedy, however, experienced as imperfection, rather than as the negation of meaning.

The modernist version of tragedy-as-imperfection is crucial to discerning why the aesthetic canons of modernist lawyering are no longer adequate to describe or explain the sociolegal world. Under postmodern scrutiny, the content of lawyer knowledge is incoherent and unverifiable. The composition of lawyer discourse is suppressive. The organization of legal practice is disempowering. Nevertheless, the foundations of modernist lawyering remain substantially intact. Whatever movement is detectable grows in part from the challenge mounted by the scholars gathered here.

In this Essay, I present a rough outline of this emerging challenge. To illuminate its main themes, I survey the different stances posed by the instant collection of works. Under the thematic of "modernist" stances, I examine approaches to lawyering that struggle with the epistemic difficulty of deciphering and translating client stories into paternalistic and disciplinary legal discourses which distort the meaning of such stories. Under the thematic "postmodernist" stances, I explore approaches to lawyering that recognize this difficulty as a given, yet strive to find room to liberate the client-subject and to permit lawyer/client intersubjectivity in order to reconstruct dominant legal discourses.

---

At the outset, I confess that I may have erred towards the overbroad and unambiguous in distinguishing these thematic stances. Like all dichotomies, the modern/postmodern dichotomy may overextend and underappreciate the insights of an inchoate and perhaps irresolvable body of scholarship. At best, the thematics may prove to be a useful heuristic device to guide future inquiry. For this initial inquiry, the Essay is divided into two parts. In Part I, I address the modernist stances garnered from the writings of Clark Cunningham, James Boyd White, and Naomi Cahn. In Part II, I consider the postmodernist stances gleaned from the writings of William Felstiner and Austin Sarat, Richard Delgado and Jean Stefancic, and Lucie White.

I

MODERN STANCES

The works of Clark Cunningham, James Boyd White, and Naomi Cahn elegantly express a modernist faith and doubt in lawyering. Together, they share three articles of that faith: translation, tragedy, and empathy. Through lawyer empathy, each seeks to enter and to translate the sociolegal worlds of clients while diminishing the tragedy and, at times, the folly of their efforts.

A. Translation

Clark Cunningham explicitly adopts the stance of storyteller to disclose the linguistic and institutional forces of subordination permeating the process of legal representation. To frame his story, he proposes the metaphor of the “lawyer as translator,” invoking an image of “‘speaking for another’ that is not inherently silencing of that other.” By means of this metaphor, Cunningham straddles the modern/postmodern dilemma—simultaneously asserting the efficacy of translation and the false necessity of silencing. For Cunningham, a translator consenually amplifies and alters the voice of

---

9 Cunningham, supra note 3, at 1299-1300.
10 Id. at 2 (quote is in an original draft, on file with author) (emphasis added).
the other, thereby transforming her meaning. The postmodern quandary is whether silencing must be an inherent aspect of that transformation.

Cunningham offers the metaphor of lawyering as translation to demonstrate "that one can understand at least some of the silencing of the client's voice as the lawyer's failure to recognize and implement the art and ethic of the good translator . . ." By his definition, the good translator is one "who shows conscious awareness of shifts in meaning and who collaborates with the speaker in managing these changes." Borrowing from the discursive methods of legal ethnography, Cunningham argues that translation "can be an effective way of recognizing the difference of 'the other' and expanding imagination sufficiently to have some understanding of the other's story." Collaboratively executed, therefore, translation may alleviate much of the client silencing produced by lawyer discourse. Full understanding of the client-other apparently is unnecessary to accomplish that reduction.

To test this thesis, Cunningham recounts a story of a mishandled translation centering on his representation of M. Dujon Johnson, a black graduate student arrested by state police and charged with disorderly conduct. The miscarried translation began with Cunningham's first reading of the police report. From this reading, Cunningham initially concluded that police troopers unlawfully stopped and searched Johnson, and then converted the illegal stop into a pretextual disorderly conduct arrest when Johnson protested their misconduct. Building his case theory on this conclusion, Cunningham pursued a Fourth Amendment defense strategy. Accordingly, he filed a pretrial motion to suppress evidence of Johnson's alleged disorderly conduct. To Cunningham's surprise, the county judge denied the motion and declared the incident an "attitude arrest." Cunningham recalls: the "opinion jolted me out of thinking about what happened only in Fourth Amendment terms." Although dismayed by the denial of his motion, Cunningham explains that the judge's characterization of the arrest suggested an alternative reading of Johnson's narrative that had been silenced by Cunningham's own Fourth Amendment strategy. On this reading, the arrest symbolized "an escalating clash of conflicting attitudes:

11 Id. at 1300.
12 Id. at 1301.
13 Id.
14 Id. at 1302.
15 Id. at 1303-10.
16 Id. at 1311-13.
17 Id. at 1320.
18 Id. at 1322.
Johnson's demand for respect and [the police trooper]'s show of authority.”

The revision of Johnson's case to portray the struggle of a black man to preserve his individual dignity and identity in the face of state violence disrupted Cunningham's representation. Recognizing his misreading, Cunningham moved to refashion the process of representation itself. For the modernist lawyer, the discovery of a narrative misreading requires a new strategic intervention, such as a new case theory. For the postmodernist, the same discovery evinces absence and negation, and thus provides the occasion for a new vision of the lawyer/client relation to enable increased collaboration in constructing the discursive meanings of representation. Cunningham opted for both. He sought to redescribe the arrest incident and to reformulate Johnson's claim for relief. Furthermore, spurred by Johnson's refusal to plea bargain and his demands for the restoration of his dignity and the vindication of his rights, Cunningham proposed that Johnson himself cross-examine the arresting trooper at trial.

Cunningham conceived of the cross-examination not only as a means to satisfy Johnson's dignity interest and meet his demand for procedural justice, but also as a "bridging experience" to communicate Johnson's experience of indignity to the jury and ensure the convergence of procedural justice and substantive relief. Cunningham presumed that this dual translation would decrease the likelihood that Johnson would be again silenced. Cunningham notes: "[b]y thinking of the cross-examination, rather than the verdict, as the relief, . . . we could make available a legally enabled experience that shared structural and substantive elements with the experience of harm." But, before Cunningham implemented his trial strategy of translation, the county prosecutor dismissed the complaint against Johnson. In granting the dismissal, the judge reiterated:

"I think this was an attitude ticket. We see a lot of attitude tickets and um, no question about it." To Cunningham's surprise, Johnson reacted with outrage, castigating the outcome as "patronizing, patronizing!"

---

19 Id. at 1325.
20 Id. at 1326-28.
21 Id. at 1327-28.
22 Id. at 1328.
23 Id. at 1329.
24 Id.
25 Id.
Later, Cunningham explored the trial outcome with Johnson. In doing so, he learned that Johnson experienced disempowerment during the very process of representation that Cunningham conceived and directed purportedly in Johnson’s best interest. For the modernist lawyer, empowerment resembles a weak version of autonomy defined by client decisionmaking. The client is empowered if she makes an informed and voluntary decision regarding a lawyer-generated option. For the postmodernist, empowerment approximates a strong version of autonomy denoted by the emancipation of the client-subject. The client-subject is emancipated when her covert resistance grows into overt political intervention.26 Confronting Cunningham with this latter version, Johnson declares:

“You’re the kind of person who usually does the most harm. You have a guardian mentality, assume that you know the answer. You presume you know the needs and the answers. Oversensitivity. Patronizing. All the power is vested in you. I think you may go too far, assuming that you would know the answer.”27

To understand Johnson’s reaction to the process and outcome of representation, Cunningham revisits the metaphor of translation. His starting point is the centrality of language “in the constitution of knowledge...”28 Language, Cunningham contends, “can dramatically affect a person’s understanding of experience.”29 The task of the translator is to “continually confront the flaws of the expression he is creating in the second language, return to the ‘other’ in the first language, and then begin the endeavor anew.”30

Cunningham embraces this task by retelling the story of the Johnson representation. He experiences the task of translation as a cycle “of creating meaning only to discover its limits, returning anew to discover what aspects of the client’s experience were excluded, trying again, failing again, yet trying once more.”31 For Cunningham, the tragic quality of this cycle of endless and unfinished translation is offset by the “promise” of dislodging the elements of domination plaguing even client-centered acts of representation.32 Here again, Cunningham displays his modernist faith that the lawyer/client relation may be purged of the contaminations of power. For the postmodernist, the corruptions of hierarchical power cannot be ousted from the lawyer/client relation.

27 Cunningham, supra note 3, at 1330 (footnote omitted).
28 Id. at 1331.
29 Id. at 1338.
30 Id.
31 Id. at 1339.
32 Id. at 1348.
They are a constitutive part of that relation—open to resistance, but not disinterment.

Cunningham demonstrates his modernist faith by construing client narrative as a world text imbued "with inherent, autonomous meaning" to be transcribed, observed, and examined.\textsuperscript{33} He claims that such a construction of the client's social reality supplies thick description to the process of representation. At the same time, he comments that obtaining and communicating that description may "interfere" with "effective" representation.\textsuperscript{34} The client may hesitate to furnish a full textual description. Further, temporal and strategic considerations may militate against its acquisition.

Had Cunningham prevailed at the Johnson suppression hearing, his original translation/silencing strategy might prove defensible on instrumental grounds. Cunningham makes no mention of any such necessitarian rationale. Instead, he discusses the logic of the suppression motion as a vehicle to shift the locus of the trial from substantive criminal law to the broader protections of the Fourth Amendment; and moreover, the shock of witnessing the judge's disfigurement of constitutional principles to safeguard the illegitimate police exercise of state authority.\textsuperscript{35} As a result, it is unclear whether Cunningham sanctions translation/silencing strategies when they work, that is when the client \textit{wins}. Similarly, it is unclear to what extent and under what conditions Cunningham values client collaboration in translation or whether he prefers a more narrow range of participation in, for example, circumstances where the client's material interests warrant greater lawyer intervention. Based upon Cunningham's own description of how he planned the cross-examination strategy for trial, it appears that Johnson's primary role was to acquiesce in Cunningham's decisions.\textsuperscript{36} In this sense, Cunningham reenacted the ritual of authority and submission imposed by the police, prosecutor, and judge.

Cunningham devotes scant discussion to this subject. We learn that Johnson yearned for respect and that the police and judge accorded him none.\textsuperscript{37} But we do not learn why Cunningham was so inattentive to this concern in the course of representation. Hence, we are left to wonder whether—in the same way that a "lack of re-

\textsuperscript{33} \textit{Id.} at 1349.
\textsuperscript{34} \textit{Id.} at 1362.
\textsuperscript{35} \textit{Id.} at 1363-66.
\textsuperscript{36} \textit{Id.} at 1326 n.48. Cunningham states: "I was the first to raise the idea [of cross-examination], but Johnson immediately responded that he had been thinking about asking us if he could participate in cross-examining [the arresting trooper]." \textit{Id.}
\textsuperscript{37} \textit{Id.} at 1366-68.
spect" was a crucial part of Johnson's "story of racial oppression"—a lack of respect may be a constitutive part of translation. 38

If the act of marginalizing difference in translation does not imply a lack of respect, then how do we understand Cunningham's treatment of race in the Johnson case? With great insight, Cunningham writes:

I had from the outset a common-sense impression that what happened that night was a "racial incident," but as a lawyer I did not talk about "the case" that way, and therefore I ceased to think in terms of racial issues as our various translations shaped and limited our shifting understanding of what was legally relevant. 39

Here, Cunningham's description of the Johnson case suggests that certain properties of the social world—class and race for example—are not easily translated into lawyer discourse. The act of translation in fact may exclude or trivialize such differences. Even if translation respects difference, there is no guarantee that the institutions of the juridical state will grant like recognition. 40 Cunningham acknowledges this danger, noting that "[t]he final, authoritative description of 'what happened' was spoken in chorus by the prosecutor and judge: 'this is a $50 attitude ticket.' " 41

Cunningham attributes to language the cause of his inadvertent eradication of Johnson's racial identity during his original act of translation: "While one is speaking a language, its limitations seem so natural that they are invisible." 42 Although this attribution may be correct, Cunningham ignores the fact that discourse is intimately bound up in the negations of interpretive violence: marginalization, subordination, and discipline. 43 These interpretive practices govern the rules of legal discourse. Moreover, Cunningham overlooks the tie connecting interpretive and material violence. 44 Indeed, he never speaks of violence—the violence of language, of translation,

38 Id. at 1368.
39 Id. at 1370-71.
40 In this respect, Johnson comments: "The judge wasn't interested in a translation of what I had to say; he was interested simply in justifying the actions of the troopers. You are assuming that the judge—the system—was interested in a translation." Id. at n.250.
41 Id. at 1372.
42 Id. at 1377.
of representation, or of state agents. In the modernist lawyer canon, who would have believed him anyway?45

B. Tragedy

James Boyd White turns the modernist stance into an admission of tragedy. Evaluating representation as a form of translation46 and a method of creating meaning, he urges lawyers to honor rather than appropriate legal texts: “we must make [their] terms our own, and give them meanings of our own making.”47 This arguably is proper when the text is composed of constitutional, statutory or common law rules, but what of the living texts of lawyer practice? Is it possible to honor the living text of the client-other? Is it possible to honor a client’s story while displacing its narrative terms and meanings?

White suggests that lawyers consider different ways of telling stories, using different languages and voices, in the hope of arriving at a shared point of view. He cautions, however, that the language of the law renders unmediated voices improbable.48 Rather than be diverted by this condition, White prods us to assess the merits and values of legal discourse, notwithstanding its imperfections. Of critical importance for him is the enabling and inhibiting power of legal language, even if the adopted version of that language omits portions of the social world or of an individual identity.49

To White, the effacement of reality and identity is a tragedy that accompanies the translation of conventional language into legal discourse. Although that erasure reflects the exertion of power, it is an assertion wielded on behalf of the powerless. Thus, White admonishes lawyers to heed the violence of legal discourse, but not to be dissuaded from its exercise. This is the tragic imperfection of the modernist stance: the accommodation to violence. That accommodation cannot be saved by White’s appeal to the lawyer craftsman’s application of professional skill and moral attitude.50

45 In his correspondence with Cunningham, Johnson writes: “I did not tell you it was a racial issue, although I knew from the very beginning that it was (my arrest) racially motivated. I would have confided this, but who would have believed me anyway?” Cunningham, supra note 3, at 1385 (emphasis added).

46 For an alternative exposition of translation, see JAMES B. WHITE, JUSTICE AS TRANSLATION 254-58 (1990) (defining translation as the “composition of a particular text by one individual mind in response to another text” in a manner that honors the difference of the other and asserts the autonomy of the self).

47 White, supra note 4, at 1390.

48 Id. at 1391-93.

49 Id. at 1394-95.

50 Id. at 1395.
C. Empathy

Feminist stances purport to challenge the theory/practice dichotomy underlying conventional lawyering. Yet, Naomi Cahn observes that feminist stances are often "divorced" from practice. Cahn attributes this decoupling to a practical failure to translate theoretical insights into "substantive and methodological ways of helping women." Her objective is to facilitate that translation, to return theory to practice. She writes that "[a]s theory remains grounded in practice and ethnographic, localized study, not only of courts, but also of what happens in the attorney-client relationship . . . ."

For Cahn, theory and practice are intertwined. To illustrate this thesis, Cahn tells "a story of representation." The story describes representation as a complex process of constructing and valuing multiple legal narratives. Cahn focuses on several aspects of that process, including: "1) the client's representations to herself concerning the nature of her problem and her use of the legal system; 2) the client's representations to her lawyer; 3) the lawyer's representation of the client to the world outside of the attorney-client relationship . . . ."

To explicate the multiple dimensions of representation, Cahn employs the methodology of the theoretics of practice movement. Thus, she examines the intersection of theory and practice in specific lawyer/client situations, here involving sexual violence against women. Her text is the language of the reasonable man encoded in the law of sexual harassment, battered women, and rape.

Cahn contends that the reasonable man standard excludes consideration of women as reasonable actors. She demonstrates how

---

52 Cahn, supra note 5, at 1 (in original draft, on file with author).
53 Id. at 1 (quote in an original draft, on file with author).
54 Cahn admits to reservations "about whether the legal process can meaningfully address women's needs." Id. at 1498.
55 Id. at 1446.
56 Id. at 1429 n.138.
57 Id. at 1438 n.181.
58 Id. at 1439 n.186.
60 Cahn, supra note 5, at 1400.
61 Id.
the standard operates to subordinate and engender violence against women.\textsuperscript{62} To halt such physical and interpretive violence, Cahn proposes reforming conventional theories and methods of representation. She offers the reasonable woman standard as creating the possibility of change.\textsuperscript{63}

Cahn argues that the reasonable woman standard embodies women's perceptions of sexual harassment, domestic violence, and rape. The standard thus serves to foster women's credibility and to preserve women's stories.\textsuperscript{64} Despite its effectiveness in communicating and validating the experiences of difference, Cahn also finds that the reasonable woman standard essentializes and marginalizes women by exploiting stereotypes of virtue and passivity.\textsuperscript{65} She notes that both the positive and negative attributes contained in such stereotypes may prove useful in uncovering conditions of disempowerment and strategies of resistance.\textsuperscript{66}

Cahn's transformative strategy is designed to reclaim and reconstitute the power embedded in women's stereotypes through application of the reasonable woman standard.\textsuperscript{67} As she acknowledges, this strategy is complicated by the diversity of client "backgrounds and motivations" and by the difficulty of translating client "experiences into legally cognizable claims or defenses."\textsuperscript{68} The acknowledged multiplicity of women's experiences distorts the representation process insofar as feminist lawyers "must try to fit [the] client ('the victim') into an acceptable story so that she can win."\textsuperscript{69} In this way, stereotypes necessarily infect the application of the reasonable women standard.

Cahn defends her strategy on instrumental grounds. The reasonable woman standard makes feminist representation "easier" and mitigates institutional distrust of women's stories.\textsuperscript{70} The strategy, however, may actually harm clients. Cahn recognizes "the potentially damaging effects of stereotyping within the attorney-client relationship."\textsuperscript{71} Nonetheless, she seems willing to permit the feminist lawyer to "choose to portray her client in a certain way so that she will win."\textsuperscript{72}

\textsuperscript{62} \textit{Id.} at 1404.
\textsuperscript{63} \textit{Id.} at 1400, 1444.
\textsuperscript{64} \textit{Id.} at 1409-10.
\textsuperscript{65} \textit{Id.} at 1415-17.
\textsuperscript{66} \textit{Id.} at 1417-18 n.104.
\textsuperscript{67} \textit{Id.} at 1418-19.
\textsuperscript{68} \textit{Id.} at 1420.
\textsuperscript{69} \textit{Id.} at 1421.
\textsuperscript{70} \textit{Id.} at 1422.
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.} (emphasis added).
Vesting the power to name women in lawyer discourse reproduces the essentialization and marginalization that Cahn protests. Cahn points out these results, observing that women’s stories which do not fit neatly within conventional discourse will be excluded. Women, she laments, “must still accommodate their experience to someone else’s reasonableness standard.”

Paradoxically, Cahn both challenges and ratifies instrumental accommodation in representation. This is the paradox of modern practice and postmodern theory. The study culled from her domestic violence practice, the case of Arlene Sims, reveals this opposition and the ensuing tension of irreconciliation. Cahn introduces Arlene Sims as a victim of spouse-inflicted domestic violence struggling to enforce a court issued order of protection against her husband. Investigating the case to establish evidence for a contempt proceeding, Cahn highlights two incidents of abuse in violation of the court’s order of protection. In the first incident, Sims’s husband beat her with a chair. In the second incident, Sims stabbed her husband with a knife to fend off another attack.

Cahn is troubled by this second incident, especially by the “inconsistencies” in Sims’s story. To comprehend the incidents, Cahn develops alternative case theories based on “reasonable woman” and “victim” stories. In the reasonable woman story, Sims is “confused about when exactly she had stabbed [her husband] with the knife.” In the victim story, Sims is “stuck in an abusive situation . . . unable to step out of a cycle of violence with her husband.”

Cahn asserts that both theories and stories are true. Because of the relative truth content of each version, Cahn adopts an instrumental calculus to determine her strategy of representation at the contempt proceeding. On this calculus, the question becomes “whether [Sims] would have a better chance at winning a contempt proceeding if she appeared to be a victim or a reasonable

---

73 By naming, I mean the act of describing and classifying women in terms of certain essentialist characteristics. See Elizabeth V. Spelman, Inessential Woman 177 (1988) (showing “how fundamental assumptions of feminist theory help to disguise the conflation of the situation of one group of women with the situation of all women.”).
74 Cahn, supra note 5, at 1422-23.
75 Id. at 1423.
76 Id. at 1424-30.
77 Id. at 1424.
78 Id. at 1426-27.
79 Id. at 1427.
80 Id.
81 Id.
82 Id.
83 Id. at 1428.
woman." Cahn selects "the reasonable woman approach because it allowed Ms. Sims some dignity in telling her story to the judge and in front of her husband."

Significantly, on the date of trial, Sims declined to proceed, withdrawing the complaint against her husband. Although denied the opportunity to test her strategy in practice, Cahn concludes that "[it] did work to make Ms. Sims feel that she could tell her story in court." According to Cahn, a reasonable woman standard enables clients to "feel more 'fluent' within the legal system . . . ." Cahn, however, presents little support for these conclusions. Without backing, they seem more ideological than real.

Cahn's unwillingness to bolster her conclusions may be traced to her own postmodern doubt. Cahn concedes that doubt, remarking: "[e]ven to me, [Sims's] behavior initially seemed somewhat risky, not quite reasonable." Cahn admits that her image of a reasonable woman is informed by her own experiences. Unlike Sims, she is "not a black mother of three who receives AFDC and has been battered by [her] husband." To empathize with Sims's situation, Cahn seeks "to know as many facts about her life as possible . . . ." Here, Cahn confronts the postmodern recognition of the partiality of knowledge. This inevitable partiality weakens her conclusions and limits her plea of thick description on behalf of Sims. Even if that plea could be fully mustered, it is unlikely to obtain a fair hearing in a legal process where the partiality of class, gender, and race are constant.

This institutional partiality accounts for Cahn's contradictory stance of embracing a standard of reasonable conduct that simultaneously affirms and denigrates women's lives. The contradiction is unsurprising; as Cahn mentions, "[t]he reasonable woman standard developed from the experiences of outsiders." Differences of class, ethnicity, gender, race, and sexual orientation characterize those experiences. Although the reasonable woman standard potentially includes a multiplicity of women's experiences, the legal

84 Id.
85 Id.
86 Id.
87 Id. at 30 (quote in an original draft, on file with author).
88 Id. at 1435.
89 Id. at 1429.
90 Id.
91 Id.
92 Id. at 1430.
93 Id.
94 Id. at 1432.
95 Id. at 1435.
process and, by extension, the act of representation, systematically exclude them.\textsuperscript{96}

This is the source of Cahn's modern/postmodern tension. As she calls for a "return to the excitement of learning from our clients' experiences in order to craft more effective and responsive legal theories," modernism claims the prerogative to reshape those clients' stories.\textsuperscript{97} As she demands that feminist lawyers give clients "space to speak their own words," modernism cabins that space.\textsuperscript{98} As she instructs lawyers to "draw ... strength from communities of disempowered people,"\textsuperscript{99} modernism consolidates lawyers' power.\textsuperscript{100}

Cahn realizes that these tensions are not of her own making but are inherent in the process of representation. She traces them to the competing imperatives of "construct[ing] a narrative that tells the client's story as she would like it to be told"\textsuperscript{101} and implementing "concrete strategies that show the inadequacy of existing standards."\textsuperscript{102} To resolve such tensions, Cahn encourages feminist lawyers "to be critically aware of [their] motivations" and to better understand their actions when they seize "others' images" to ensure legal victory.\textsuperscript{103}

Moreover, Cahn urges feminist lawyers to rethink the practice of feminist representation.\textsuperscript{104} Rethinking requires contextual struggle in the practice of representation, especially within the lawyer/client relationship.\textsuperscript{105} This struggle ineluctably confronts the issue of power. Cahn identifies two distinct types of power: male patriarchy and lawyer paternalism.\textsuperscript{106} She suggests that feminist lawyers unavoidably exercise paternalism to combat patriarchy.\textsuperscript{107} For Cahn, feminist paternalism is a kind of doctrinal "distortion."\textsuperscript{108} The limits of doctrine constrain feminist lawyers to shape clients into reasonable women/victims in order to "win."\textsuperscript{109} To curtail such distorting paternalistic tendencies, Cahn recommends that feminists assess: "how explicit their perspective is to themselves

\begin{thebibliography}{10}
\bibitem{96} Id. at 1431-32.
\bibitem{97} Id. at 1436.
\bibitem{98} Id.
\bibitem{99} Id. Cahn recommends changing prevailing community attitudes, though it is unclear how she intends to do so. Id.
\bibitem{100} Id.
\bibitem{101} Id. at 42 (quote in an original draft, on file with author).
\bibitem{102} Id. at 1432.
\bibitem{103} Id. at 1440.
\bibitem{104} Id. at 1440-41.
\bibitem{105} Id.
\bibitem{106} Id. at 1439-40.
\bibitem{107} Id. at 1442.
\bibitem{108} Id. at 1443-44.
\bibitem{109} Id. at 1444.
\end{thebibliography}
and their clients; how well it accords with existing ethical norms; and how it affects client narrative."\(^{110}\)

In spite of her sensitivity to the motions of sociolegal power, Cahn's treatment of paternalism as a functional distortion assumes too much. It declines to explain why paternalism is justifiable when exerted explicitly and omits meaningful comparison of explicit and implicit forms of paternalism. Further, Cahn's treatment neglects to establish why paternalism should be judged by the ethical norms of the existing adversarial system. In fact, she overlooks powerful criticisms condemning the internal, paternalistic tilt of governing ethical norms.\(^{111}\) This omission is perplexing given Cahn's own forceful critique of the ethical norms dominant in feminist practice.\(^{112}\) Additionally, Cahn does not explain why paternalism should be appraised by its effect on client narrative. Even granting the legitimacy of this appraisal, without a fuller definition of client narrative it is difficult to gauge the impact of paternalism, much less to assess the accuracy of that measurement.

Because Cahn hesitates to pursue these matters, her calls for critical self-awareness, collaboration, and dialogue in feminist representation sound plaintive.\(^{113}\) Empathy is no cure when feminist theory affords its practitioners license to "choose to use their own experiences to inform the representation process."\(^{114}\) While this freedom may allow women's experiences to be heard in the law, those experiences will be based on the lives and choices of lawyers—not clients. Appeals to feminist lawyers to share information and power with their clients do not salvage the paternalism implicit in this rhetorical stance.\(^{115}\) Notwithstanding Cahn's contextualized approach, the competing aesthetics of client-centered decisionmaking and lawyer authority may be incompatible.\(^{116}\) The importance of Cahn's analysis lies in highlighting this inconsistency at the intersection of doctrine and practice.

---

\(^{110}\) Id. at 45 (quote in an original draft, on file with author).


\(^{113}\) Cahn, supra note 5, at 1443-44.

\(^{114}\) Id. at 1442-43.

\(^{115}\) Id. at 1444.

II
POSTMODERN STANCES

The works of Richard Delgado and Jean Stefancic, William Felstiner and Austin Sarat, and Lucie White proceed from a postmodern distrust of lawyering. Their common insight is the recognition of the power of the lawyer-subject: the power to speak, to negotiate, and to dominate. Yet, unlike other postmodern theorists who imprison human agency and reject intersubjectivity, they affirm the possibility, however confined, of human emancipation and community.

A. Power and Speech

The postmodern stance of Richard Delgado and Jean Stefancic is animated by a focus on the relationship between power and speech in society. Their thesis is that within the conventions of First Amendment doctrine, speech alone is ill-equipped to remedy broadly entrenched, systemic patterns of racism. They argue that the marketplace ideology of free speech limits the emergence of a "countervailing message" adequate to challenge racism in a historical context. On their analysis, "free speech . . . is least helpful where we need it most." To illustrate this point, they examine the demeaning historical depiction of four American minority subgroups of color: Mexicans, Blacks, Asians, and Native Americans.

Delgado and Stefancic find parallels among the socially constructed "stock characters" and "stigma-pictures" depicting minority subgroups. They question the belief that lawyers can simply "enlarge [their] sympathies [and reimagine these character portraits] through linguistic means alone." Labelling this belief the "empathic fallacy," they challenge the presumption that lawyers "can . . . think, talk, read, and write [their] way out of bigotry and narrow-mindedness, out of [their] limitations of experience and perspective." The modernist lawyer indulges this belief, invoking empathy as a nostrum, hence forgetting the situatedness of his own perspective.

Although Delgado and Stefancic controvert the empathic presumption, they decline to dismiss it altogether. Instead, they offer a

---

118 Delgado & Stefancic, supra note 7, at 1258.
119 Id. at 1260.
120 Id. at 1259.
121 Id. at 1260.
122 Id.
123 Id.
124 Id. at 1261.
more limited version of intersubjectivity. Consistent with his embrace of the empathic fallacy, the modernist lawyer proffers an expansive version of intersubjectivity. This version is instilled by a romantic humanism ungrounded in context. To clarify their more rooted contextual version, Delgado and Stefancic summarize the dominant forms and images of racially repressive speech. The outgrowth of repression is disempowerment: "speech of the Indians—as well as that of African-Americans, Mexicans, and Asians—has been mangled, blunted and rendered inarticulate by whites who then became entitled to speak for them."

For Delgado and Stefancic, stereotyping and its corollary disempowerment deny dominant and subordinate groups "the opportunity to interact with each other on anything like a complex, nuanced human level." In place of interaction, there is an infliction of power. The modernist lawyer is immersed in discourses and relations of power. The counter discourse of resistance contests but does not impede the infinite permutations of power: racism, sexism, homophobia, etc. Constructivist theory teaches that "countervailing speech" will not overcome the assaults of racism. To claim otherwise, according to Delgado and Stefancic, is to misunderstand "the relation between the subject, or self, and new narratives."

Delgado and Stefancic contend that racism is embedded in cultural narratives and, therefore, is concealed from historical view. The modernist lawyer denies the cultural entrenchment of race. Without that denial, his own culturally-intertwined legal narratives dissolve into racially-privileged mystification. Because racism forms "part of the dominant narrative" that lawyers deploy to construct the social world, "speech [is] an ineffective tool to counter it." Like narrative, speech is confined by the boundaries of dominant culture: "[w]ithin that general framework, only certain matters are open for discussion . . . ." The modernist lawyer overlooks these cultural boundaries, mistaking self-regulated forms of client speech for full disclosure.

Delgado and Stefancic argue that certain areas of speech are not only closed to lawyers but are also unrecognizable by them: "we

125 Id.
126 Id. at 1261-75.
127 Id. at 1270.
128 Id. at 1273.
129 Id. at 1276.
130 Id. at 1277.
131 Id. at 1279, 1278.
132 Id. at 1280.
are our current stock of narratives, and they us.”  It is our own living narratives that “shape and determine us, who we are, what we see, how we select, reject, interpret and order subsequent reality.” In this way, racist narratives are self-perpetuating.

Delgado and Stefancic dismiss overblown claims to self-reconstitution. The modernist lawyer is prone to such illusory claims, deluding himself about the organic character of his sociolegal vision. These claims maintain that self-reconstitution is merely a matter of reformist education acquired through reading, talking, and writing. Delgado and Stefancic regard such claims of “reform” as a repetition of the empathic fallacy. The marketplace ideology pervading First Amendment doctrine fuels their skepticism. Because racism is a persistent and thereby “normal” facet of that market, they question the likelihood of speech-based correction. Racism itself may be unsusceptible to such correction, for “racism contains features that render it relatively unamenable to redress through words.”

To identify covert and overt acts of racism, Delgado and Stefancic propose that “sympathizers” learn the “code-words” of race and “racial signalling.” Racism, they stress, “is often a matter of interpretation . . . .” For the modernist lawyer, interpretation is unsullied by racism. Rightly applied, the interpretive cycle expels the tainted properties of class, gender, and race, gradually rendering the representation process an unalloyed medium of communication.

Delgado and Stefancic denounce the interpretive obliteration of racism: “[s]ociety generalizes the wrong lesson from the past, namely that racism has virtually disappeared.” The modernist lawyer tolerates this disappearance, approving a discourse in which racism survives unnamed. By contrast, Delgado and Stefancic point to the continuing presence of racism in public “pictures, images,

---

133 Id. See also Steven L. Winter, The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning, 87 Mich. L. Rev. 2225, 2245 (1989) (“[O]ur very ability to construct a world is already constrained by the cultural structures in which we are enmeshed.”).
134 Delgado & Stefancic, supra note 7, at 1280.
135 For an indictment of these claims, see Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 Cal. L. Rev. 1441, 1497 (1990) (“[T]he naive faith in normative dialogue as a means to accomplish change begins to look like nothing so much as faith in a 'talking cure.'”).
136 Delgado & Stefancic, supra note 7, at 1281.
137 Id.
138 Id. at 1282.
139 Id. at 1283.
140 Id.
141 Id. at 1284.
narratives, plots, roles, and stories . . .”142 These predominantly “negative” images deform the perceptions of both majority and minority persons.143 The internalization of subordinate stories, Delgado and Stefancic warn, “precludes the stigmatized from participating effectively in the marketplace of ideas.”144 They add: “even when minorities do speak they have little credibility.”145 Both Dujon Johnson and Arlene Sims, for example, experienced this debasement of credibility. Even when lawyers encourage public speech, as in the cases of Johnson and Sims, they harbor doubts about its effectiveness and veracity. This racial marginalization, Delgado and Stefancic argue, weighs so heavily on the character of the legal imagination and in the content of legal discourse that “more speech, more talking, more preaching, and more lecturing” is probably fruitless.146 The modernist lawyer discounts this probability, remaining wedded to his reformist discourse.

Delgado and Stefancic’s lesson of Racial Realism—the notion that “things will never get better”147—teaches lawyers to reevaluate speech, particularly the neutral images conjured by modernist speech. Additionally, it instructs lawyers to restructure the process of representation to empower minority clients in interpersonal and institutional settings. Empowerment enables not only individual speech acts but collective acts as well. As Delgado and Stefancic suggest, understanding the dialectic of dominant and subordinate speech is merely a beginning.

B. Power and Negotiation

The postmodern stance of William Felstiner and Austin Sarat is informed by “[t]he view that social relations are constructed and power is exercised through complex processes of negotiation . . .”148 This view rests on dynamic notions of human agency and social interaction. Both individual action and social interaction, they argue, are linked to social structure. The media of action and exchange that comprise the practices of everyday life produce and reproduce that structure.149

Felstiner and Sarat contend that power-suffused social structures are encoded in the mundane experiences of everyday life. The act of encoding is mediated by past situational practice. Entrenched

---

142 Id. at 1287.
143 Id.
144 Id.
145 Id.
146 Id. at 1288.
147 Id. at 1289.
148 Felstiner & Sarat, supra note 6, at 1447.
149 Id. at 1448-49.
patterns of historical practice constrain the range of reformist moves available to lawyers and clients. Nevertheless, Felstiner and Sarat assert "that structure and power are vulnerable to major changes of practice." That sanguine assertion inspires their central thesis of deep-structure negotiation. This postmodern variant of structuralism suggests that social phenomena are negotiated overtly, in a manner fairly recognizable, as well as covertly, "through the exercise of power and attempts at resistance and subversion."

Felstiner and Sarat's post-structuralist negotiation thesis permits wide latitude in the study of social structure and power, especially in the context of legal representation. To verify their thesis, they study the enactments of power specific to lawyer/client interactions during the divorce process. They find that such "power is not possessed at all," but rather circulates throughout the lawyer/client relationship exhibiting mobility and volatility. The constant circulation of power molds the substance of that relationship within discrete cases and across fields of practice.

Felstiner and Sarat's conception of the negotiated quality of power challenges more deterministic, conventional views of the nature of the lawyer/client relation in divorce representation. These views hold to a reductionist, lawyer-based conception in which power is one-dimensional and uncontested. Departing from this conception, Felstiner and Sarat establish two different types and associated arenas of lawyer/client power negotiation: negotiations of "reality" regarding the goals of representation and negotiations of "responsibility" concerning control over case management.

To chart these overlapping forms and forums of negotiation, Felstiner and Sarat provide a case history taken from a female California lawyer's divorce practice. Here, they treat power not as a static property of constituent identities or fields, like a "thing" appended to status or a role, but as a shifting relation "continuously enacted and re-enacted, constituted and re-constituted." Their investigation of this relation focuses on the "microdynamics" of lawyer/client encounters during the process of representation.

Felstiner and Sarat claim that these encounters implicate both individuals and social worlds. In this sense, the encounters signify opaque and partial meetings of limited accessibility. At these meet-

---

150 Id. at 1449.
151 Id.
152 Id. at 1450-51.
153 Id. at 1451-52.
154 Id. at 1454-56.
155 Id. at 1454.
156 Id.
ings, both the lawyer and the client construct and exchange accounts of their respective social worlds. Felstiner and Sarat define this interaction as a "process of story-telling and interrogation in which lawyer and client seek to produce for each other a satisfying rendition of her distinctive world." 157 The process is both evasive and interdependent, characterized by moments of concealment, doubt, and suspicion, all of which limit the assimilation of knowledge. 158

For Felstiner and Sarat, the variable elements of mutual dependency and suspicion displace the conventional taxonomy of lawyer representation in terms of categories such as autonomy, paternalism, and vanguardism. Contrary to this taxonomy, they conjecture that "no one may be in charge," either in "defining the objectives, determining strategy, or devising tactics" of representation. 159 Even when the lawyer/client relation indicates fixed patterns of interaction, the fluidity of power dislocates that configuration, restoring the unstable contest of negotiation. 160

Felstiner and Sarat's concept of relational power as continuously negotiated in lawyer/client interactions decenters the representation process, rendering modernist commitments untenable. Under paternalistic and vanguard accounts of modernist representation, relational power is substantially denied. Instead, power is said to operate unilaterally, flowing unobstrusively from the lawyer to the client. Under competing autonomy accounts, there is evidence of negotiated power, but it is restricted and renamed. Its narrow ambit corresponds to the prevailing weak version of autonomy construed as consent.

Modernist commitments are further challenged by Felstiner and Sarat's observation that relational "enactments of power are situationally and organizationally circumscribed . . . ." 161 The added variables of culture, context, and institution severely limit lawyers' ability to reinvent stable, generalizable categories of representation. Without resort to conventional categories of interaction, the lawyer/client relation drifts among competing social constructions.

Sarat and Felstiner's postmodern vision of the representation process divests lawyers of epistemological confidence. Unlike James Boyd White's modernist archetype, these lawyers lack the authoritative comfort of relying on professional skill and moral attitude for vindication. Intent upon "[d]eveloping a mutually satisfying sense

157 Id. at 1454-55 (footnote omitted).
158 Id. at 1455-56.
159 Id. at 1456.
160 Id. at 1457.
161 Id. at 1458.
of what reasonably can be expected or achieved" in legal representation, they flounder amid the multiple, shifting constructions of the postmodern world. As Sarat and Felstiner's case study indicates, the lawyer and client may be unable to negotiate a mutually satisfactory understanding of what is legally and socially possible. Sometimes dissatisfaction arises from client nondisclosure or lawyer misinterpretation. And sometimes dissatisfaction lies chiefly with the lawyer's practices of manipulation and self-deception.

Two lessons of Felstiner and Sarat's postmodern power "play" are the intractability of lawyer self-deception and the ambiguity of client "exit." Here, I use self-deception to refer to the lawyer's penchant for overestimating his power to negotiate the reality and responsibility of legal representation. Felstiner and Sarat cite this tendency in summarizing the findings of their case study, noting its display in the conduct of the divorce lawyer.

Felstiner and Sarat also mention, without elaboration, that the client featured in the study eventually "asked that [they] stop observing conferences and not interview her further." Because they already have pointed out that the "usual client response" to profound lawyer dissatisfaction "is exit rather than voice," it is puzzling that Sarat and Felstiner decline to speculate on the reason behind the client's sudden exit. Perhaps the client enacted a form of displaced resistance against the few agents subject to her control. Perhaps exit, in its many rhetorical guises, is the only true power of clients.

Sarat and Felstiner's reluctance to explore more broadly the concept of client exit is dismaying given the strength of their analysis. Indeed, the concept seems well-suited to their discussion of power and negotiation. Assuming the dynamic of human agency, exit affords both a form of power and an instrument of negotiation. It signals resistance and withdrawal. Moreover, it is germane to virtually all aspects of the lawyer/client relation.

162 Id. at 1460.
163 Id. at 1461.
164 Id. at 1462-66.
165 Id. at 1495 ("The gap between programmatic objectives and actuality in this case is obvious.").
166 Id. at 1464, 1466.
167 Id. at 1494 ("In the end, [the lawyer] Wendy imagines that she produces not only optimal outcomes, she also produces new women.") (emphasis added).
168 Id. at 1493-95.
169 Id. at 1493 n.121.
170 Id. at 1464.
C. Power and Risk

A third postmodern stance is animated by power and risk. This is the stance of Lucie White. White constructs her stance from meta-theories of discourse and interpretation. Integrating the works of Clifford Geertz and Michel Foucault, she sees words and images as conceptual "screens" or "filters" through which people constitute and interrogate the social world.\textsuperscript{172} To White, knowledge is contingent: \"[d]epending on the screen one looks through—the matrix of terms or concepts through which one filters what one sees—the same event can take on many different appearances.\"\textsuperscript{173}

Turning to the practice of lawyering, White connects Geertz's sociology of knowledge to Foucault's archeology of power, producing a meta-theory of knowledge/power that resembles a holograph: \"an evanescent fluid, it takes unpredictable shapes as it flows into the most subtle spaces in our interpersonal world.\"\textsuperscript{174} For White, the value of this new meta-theory is that it provides "situated micro-descriptions of lawyering practice."\textsuperscript{175} These micro-descriptions locate the routine deployment of power in the lawyer/client relationship.

Although White is interested in mapping the movements of lawyer/client power, her larger purpose is to reconstruct entrenched habits of lawyer speech and consciousness in order to aid "clients' efforts to empower themselves."\textsuperscript{176} White contends that the meta-theory of knowledge/power affords disempowered people a politics of resistance, albeit a politics that is "visible only in the microdynamics of everyday life."\textsuperscript{177} This politics is "neither vanguard-driven, nor co-opted," but a "self-directed, democratic politics among subordinated groups . . . ."\textsuperscript{178} With this political reconfiguration, "alliance and collaboration between professionals and subordinated groups" becomes possible.\textsuperscript{179}

White's political enthusiasm is tempered by the realization that lawyers may overrate the utility of meta-theory. She notes that there is a danger in overlooking the partiality of knowledge in the haste of theory-building. That danger risks not only "erasing or obscuring" the world of others, but also "deluding" ourselves into thinking that "we have finally seized the power to comprehend the world."\textsuperscript{180}

\textsuperscript{172} White, \textit{supra} note 8, at 1500-01.
\textsuperscript{173} \textit{Id.} at 1500.
\textsuperscript{174} \textit{Id.} at 1501.
\textsuperscript{175} \textit{Id.} at 1502.
\textsuperscript{176} \textit{Id.} at 1503.
\textsuperscript{177} \textit{Id.} at 1504.
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.} at 1505.
According to White, this deception is a byproduct of totalizing theory. It misleads lawyers in their analysis of the systematic domination of legal institutions.\textsuperscript{181} Instead of concentrating on the institutional constraints impinging on the circulation of power, lawyers enamored with meta-theory rely upon crude, mechanistic descriptions of institutional power. White cites this misplaced reliance as a barrier to the development of a "theoretics and a reconstructive politics of institutional design."\textsuperscript{182} The absence of a sophisticated institutional politics inhibits the comparison of "specific institutional forms of power against varying flows of power" as well as the explanation of "why some institutions congeal power more than others."\textsuperscript{183}

White's focus on the complex enmeshing of institutional and interpersonal forms of domination is essential to gaining an understanding of subordination as a matrix of knowledge/power. Because of its complex compositional materials, the matrix of subordination will cast varied institutional impressions, linking gender and race in one context, race and class in a second, and gender and disability in a third.\textsuperscript{184}

White fears that even with this appreciation, lawyers will succumb to the tendency to perceive "human interactions as strategic contests."\textsuperscript{185} This reductionist tendency demeans personhood by construing moments of human intersubjectivity in terms of power, rather than communion.\textsuperscript{186} At the same time, White disparages suppositions of "easy access to empathy."\textsuperscript{187} She inveighs against "privileged agents of empathy" who "sanguinely name the feelings of less powerful others, without cautioning that to name another's feelings is also to silence her voice."\textsuperscript{188} For White, this "imperialist version of humanism" permits the reenactment of domination under color of representation.\textsuperscript{189} She complains that the act of representation, even when mediated by the filter of empathy, objectifies the

\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id. at 10 (quotes are in an original draft, on file with author).
\textsuperscript{185} White, supra note 8, at 1506.
\textsuperscript{186} Id.
\textsuperscript{187} Id. at 12 (quote in an original draft, on file with author).
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 1507.
client. Furthermore, she decries the view that empathy must rest on sameness, recalling the tendency to "'essentialize'" the other.\textsuperscript{190}

To White, the wages of meta-theory are paid out in the practice of interpersonal domination. These wages purchase an ephemeral stability in the otherwise turbulent development of a postmodern practice of law. White is unwilling to abide by this exchange relation. But, she is reluctant to deny its inevitability. Instead, she abandons certainty and risks the reiteration of "imperial violence" for the chance "to listen when others speak to us, and to be moved."\textsuperscript{191} For White, the "Other" is neither an object nor a text, but "a human face."\textsuperscript{192} This is White's postmodern paradox: to represent a less powerful Other with tools of domination.\textsuperscript{193}

**Conclusion**

The modern and postmodern stances outlined here are preliminary sketches. They do not, indeed cannot, capture the richness of nor exhaust the issues raised in the original works. Nor do these sketches fully map the contours of the developing contest between modern and postmodern theories of lawyering. Even now, those contours are just materializing. For the moment, we must be satisfied with the opportunity not only to watch, but also to participate in the making of a sociolegal mural. Where we see it from is the question.

\textsuperscript{190} Id. at 1508.
\textsuperscript{191} Id. at 1510-11.
\textsuperscript{192} Id. at 19 (quote in an original draft, on file with author).
\textsuperscript{193} Id. at 1504 n.25.
INTRODUCTION

Conventional First Amendment doctrine is beginning to show signs of strain. Outsider groups and women argue that free speech law inadequately protects them against certain types of harm. Further, on a theoretical level, some scholars are questioning whether free expression can perform the lofty functions of community-building and consensus-formation that society assigns to it.

We believe that in both situations the source of the difficulty is the same: failure to take account of the ways language and expression work. The results of this failure are more glaring in some areas than others. Much as Newtonian physics enabled us to explain the phenomena of daily life but required modification to address the larger scale, First Amendment theory will need revision to deal with issues lying at its farthest reaches. Just as the new physics ushered...
in considerations of perspective and positionality, First Amendment thinking will need to incorporate these notions as well.

Our thesis is that conventional First Amendment doctrine is most helpful in connection with small, clearly bounded disputes. Free speech and debate can help resolve controversies over whether a school disciplinary or local zoning policy is adequate, over whether a new sales tax is likely to increase or decrease net revenues, and over whether one candidate for political office is a better choice than another. Speech is less able, however, to deal with systemic social ills, such as racism or sexism, that are widespread and deeply woven into the fabric of society. Free speech, in short, is least helpful where we need it most.

We choose racism and racial depiction as our principal illustration. Several museums have featured displays of racial memorabilia from the past. One exhibit recently toured the United States; in January, *Time* reviewed the opening of another. Filmmaker Marlon Riggs produced an award-winning one-hour documentary, *Ethnic Notions*, with a similar focus. Each of these collections depicts a shocking parade of Sambos, mammys, coons, uncles—bestial or happy-go-lucky, watermelon-eating—African-Americans. They show advertising logos and household commodities in the shape of blacks with grotesquely exaggerated facial features. They include

---


5. For example, in trying to decide whether corporal punishment in public schools will promote or deter unruly behavior, the proponents of the various positions might offer expert psychological testimony, give additional philosophical or moral arguments, appear before the school board, engage in a sit-in—all aimed at persuading the decisionmaker and encouraging each other. See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (school expression protected).


9. *Ethnic Notions* (P.B.S. 1986) (on file with authors). By the same film-maker see also Color Adjustment, TV documentary on racial images of the last forty years on prime time television.
minstrel shows and film clips depicting blacks as so incompetent, shuffling, and dim-witted that it is hard to see how they survived to adulthood. Other images depict primitive, terrifying, larger-than-life black men in threatening garb and postures, often with apparent designs on white women.

Seeing these haunting images today, one is tempted to ask: "How could their authors—cartoonists, writers, film-makers, and graphic designers—individuals, certainly, of higher than average education, create such appalling images?" And why did no one protest?" The collections mentioned focus on African-Americans, but the two of us, motivated by curiosity, examined the history of ethnic depiction for each of the four main minority subgroups of color—Mexicans, African-American, Asians, and Native Americans—in the United States. In each case we found the same sad story: Each group is depicted, in virtually every epoch, in terms that can only be described as demeaning or worse. In addition, we found striking parallels among the stigma-pictures that society disseminated of the four groups. The stock characters may have different names and appear at different times, but they bear remarkable likenesses and seem to serve similar purposes for the majority culture. We review this history in Part I.

In Part II, we offer our answer to the "How could they" question. In brief, we hold that those who composed and disseminated these images simply did not see them as grotesque. Their consciences were clear—their blithe creations did not trouble them. It is only today, decades later, that these images strike us as indefensible and shocking. Our much-vaunted system of free expression, with its marketplace of ideas, cannot correct serious systemic ills such as racism or sexism simply because we do not see them as such at the time. No one can formulate an effective contemporaneous message to challenge the vicious depiction; this happens only much later, after consciousness shifts and society adopts a different narrative. Our own era is no different. This is the dominant, overpow-

---

10 Cf. ROBERT JAY LIFTON, THE NAZI DOCTORS (1986) (pointing out that German administrators and physicians who carried out atrocities were highly educated); I-III ELIE WIESEL, AGAINST SILENCE (1985) (same).

11 See infra part I (summarizing the four groups' depiction).

12 See infra text accompanying notes 169-72 (noting that the occasional prophet who speaks out against racism of the day generally lacks an audience); Richard Delgado & Jean Stefancic, Norms and Narratives: Can Judges Avoid Serious Moral Error?, 69 TEX. L. REV. 1999 (1991) (judges rarely see beyond current moral paradigm). Of course, it is possible that consciousness will not progress, but regress or remain at the same level—i.e., we may never condemn David Duke or the Willie Horton commercial. David Duke is an ex-white supremacist who campaigned for state and national office in the late 1980s and early 1990s. The Willie Horton commercial featured a black recidivist; its purpose was to imply that Democrats are soft on crime.
ering lesson we draw from reviewing two centuries of ethnic depiction.

The belief that we can somehow control our consciousness despite limitations of time and positionality we call the empathic fallacy. In literature, the pathetic fallacy holds that nature is like us, that it is endowed with feelings, moods, and goals we can understand. The poet, feeling sad, implores the world to weep with him or her. Its correlate, which we term the empathic fallacy, consists of believing that we can enlarge our sympathies through linguistic means alone. By exposing ourselves to ennobling narratives, we broaden our experience, deepen our empathy, and achieve new levels of sensitivity and fellow-feeling. We can, in short, think, talk, read, and write our way out of bigotry and narrow-mindedness, out of our limitations of experience and perspective. As we illustrate, however, we can do this only to a very limited extent.

In Part III, we show that our system of free speech not only fails to correct the repression and abuse subjugated groups must face, but often deepens their dilemma. Part IV addresses the question, "if not remonstrance, then what?" We suggest a program of social reform that includes speech as only one element, and limn a new, variable theory of the First Amendment that incorporates the insights articulated in this Article.

I

IMAGES OF THE OUTSIDER

A small but excellent literature chronicles the depiction in popular culture of each of the major minority subgroups of color—African-Americans, Mexicans, Native Americans, and Asians. In this

13 The term, as well as the fallacy it names, are our own inventions.
14 For the earliest known discussion of this fallacy, see John Ruskin, 3 Modern Paintings 152 (1885); see also W.K. Wimsatt, Jr., & M.C. Beardsley, The Affective Fallacy, 57 Sewanee Rev. 31 (1949) (further discussion of literary fallacies).
15 Josephine Miles, Pathetic Fallacy in the Nineteenth Century 10-56 (1965) (giving examples, from prominent poets, of nature weeping, smiling, groaning, all in sympathy with humans); see also infra notes 167-68 and accompanying text (setting out our view that both fallacies are rooted in hubris).
16 Some of the works we found particularly helpful are the following: Arthur G. Pettit, Images of the Mexican American in Fiction and Film (1980); Catherine Silk & John Silk, Racism and Anti-Racism in American Popular Culture (1990); Raymond W. Stedman, Shadows of the Indian: Stereotypes in American Culture (1982); E. Wong, On Visual Media Racism: Asians in the American Motion Picture (1978); From Different Shores: Perspectives on Race and Ethnicity in America (Ronald Takaki ed., 1987) [hereinafter Different Shores]; Split Image: African Americans in the Mass Media (Jannette L. Dates & William Barlow eds., 1990) [hereinafter Split Image].

For additional works, see bibliographies in Silk & Silk, supra (dealing with African-Americans). See also Edward W. Said, Orientalism (1985) (dealing with Asian-Ameri-
Part, we summarize that history and draw parallels among the ways that society has traditionally depicted the four groups.

A. African-Americans

Early in our history, as everyone knows, slave traders rounded up African villagers and transported them to the New World in chains. En route, many died; those who survived were sold and forced to work in the fields and houses of a colonial nation bent on economic development and expansion. By the eve of the Civil War, over 4,000,000 African-Americans" were condemned to exist in some form of this American Nightmare.

Slave codes regulated behavior, deterring rebellion and forbidding intermarriage. They also prohibited Southern blacks from learning to read and write, thereby denying them access to the world of print then replete with arguments about "the rights of man." The dominant image of blacks in the popular theater and literature of the late eighteenth century was that of the docile and contented slave—child-like, lazy, illiterate, and dependent on the protection and care of a white master. The first appearance of Sambo, a "comic Negro" stereotype, occurred in 1781 in a play called The Divorce. This black male character, portrayed by a white in blackface, danced, sang, spoke nonsense, and acted the buffoon. The black man's potential as a sexual and economic competitor was minimized by portraying him as an object of laughter.

Blackface minstrelsy found a new popularity in the 1830s when Thomas D. Rice created Jim Crow, modeled on an elderly crippled black slave who shuffle-danced and sang. It is thought that Rice even borrowed the old man's shabby clothes for a more authentic
stage performance. Rice’s performance of Jump Jim Crow won him immediate success in the United States and England. By the 1840s minstrel shows were standard fare in American music halls. In these shows, whites in blackface created and disseminated stereotypes of African-Americans as inept urban dandies or happy childlike slaves. Probably more whites—at least in the North—received their understanding of African-American culture from minstrel shows than from first hand acquaintance with blacks or their ideas.

Because laws forbade slaves to learn to read or write, slave culture was primarily oral. Thus, it is highly significant that former slaves such as Frederick Douglass and William Wells Brown published accounts of captivity, life on plantations, and escapes to freedom. These early slave narratives, published in the North and circulated among abolitionist societies, presented counterimages to the prevailing myths of the dominant culture. The abolitionist movement reached its apogee with the publication of Harriet Beecher Stowe’s Uncle Tom’s Cabin. Though Stowe was successful in presenting the slave master as villain, her portrayal of Uncle Tom changed the stereotype of the black slave only a little: Previously he had been docile, content, or comic, while in her depiction he became gentle, long-suffering, and imbued with Christian piety.

After the Civil War, the black image bifurcated. The “good slave” image continued, but was soon joined by an ominous “shadow” figure. The Uncle Tom character became romanticized, a black mouthpiece espousing an apologia for the beliefs of the old genteel white Confederacy. Though never overtly sexual, his masculine form re-emerged as the avuncular storyteller Uncle Remus, as well as various other “uncles.” His feminine form evolved into a “mammy” figure—cook, washerwoman, nanny, and all-round domestic servant—responsible for the comfort of the Southern white

23 Interview with George Frederickson, in Ethnic Notions, supra note 9.
24 The dandified image (the “Coon”) showed the folly of the North’s policy concerning freedom, while that of the happy Southern slave reassured whites that blacks were happiest in “their natural condition.” See Split Image, supra note 16, at 7. The dandified urban “coon” image, played by white actors, reappeared in the 1920s and continued until the 1950s in the phenomenally popular radio serial “Amos ’n’ Andy.” See Melvin Ely, The Adventures of Amos ’N’ Andy: A Social History of an American Phenomenon (1991).
26 See id. at 8. William L. Van Deburg, Slavery and Race in American Popular Culture 35-36 (1984) (arguing that Uncle Tom’s character was but a slight improvement over previous stereotypes).
household.\textsuperscript{29} With no life of her own, imbued with practical wisdom, she took an intense interest in the welfare and well-being of the white family she cared for.

During the tumultuous Reconstruction period, the sexuality denied to uncles and mammas found a crude outlet in a new stereotype of the recently freed male Negro as brutish and bestial.\textsuperscript{30} The Ku Klux Klan and other illegal raiding parties justified their reign of terror as necessary to control newly freed blacks whom they believed ready to force sex on any white woman they might encounter.\textsuperscript{31} This stereotype, appearing in novels with titles like \textit{The Negro as Beast},\textsuperscript{32} was offered to justify the widespread lynching that took 2,500 black lives between 1885 and 1900.\textsuperscript{33}

The myth of the out of control ambitious black was fueled by currents prevalent in the marketplace of Western thought during the late nineteenth century. Some of these ideas have been identified by Catherine Silk and John Silk: 1) the growth of American imperialism; 2) the absorption of “inferior races;” 3) the white man’s burden mentality—the white South bearing the burden in the U.S.; 4) the manifest destiny belief of the Anglo-Saxons; and 5) the new social science theory concerning genetic inferiority.\textsuperscript{34}

Many of these ideas found expression in the powerful, crass, and influential writings of Thomas Dixon. His work represented an effort to satisfy his two goals in life: making money and converting people to racism. He believed that whites, both Northern and Southern, were duty bound to protect the Anglo-Saxon heritage, particularly white women, who were destined to produce a superior race.\textsuperscript{35} In 1905, Dixon wrote \textit{The Clansman}, a tale of two families, one Northern and one Southern, united through marriage.\textsuperscript{36} It proved a sensation, particularly in the South. Ten years later, film-

\textsuperscript{29} \textsc{Silk \& Silk, supra note 16, at 139; Split Image, supra note 16, at 11; Van Deburb, supra note 26, at 43.}
\textsuperscript{30} \textit{See Split Image, supra note 16, at 11. This obsession with matters sexual dates back to Puritan times in Massachusetts, and has surfaced in similar stereotyping of the four major racial groups in the United States. See Stedman, supra note 16, at 81; Van Deburb, supra note 26, at 122-25 (on recurring image of the Negro as beast).}
\textsuperscript{31} \textit{See Silk \& Silk, supra note 16, at 48-49; see also Allen W. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction (1971).}
\textsuperscript{32} \textsc{Silk \& Silk, supra note 16, at 49; see also H. Faulkner, Homespun Justice: The Lynching in American Fiction, 22 S.D. Rev. 104 (1984).}
\textsuperscript{33} \textsc{Id. at 50; see Russell Merritt, D.W. Griffith’s The Birth of a Nation: Going After Little Sister, in Close Viewings: An Anthology of New Film Criticism 215 (1990).}
\textsuperscript{34} \textsc{Silk \& Silk, supra note 16, at 50.}
maker D.W. Griffith used the plots of this and another of Dixon's novels\textsuperscript{37} for his epic three-hour film, \textit{The Birth of a Nation}.\textsuperscript{38}

The film transformed Dixon's novels into vivid visual images, featuring uncles, mammies, buffoons, an interfering mulatto mistress, and a chase scene in which a black man with animal-like traits pursues a young white woman until she leaps to her death from a pedestal-like perch at the edge of a cliff.\textsuperscript{39} The film played to audiences throughout the country. New white immigrants from Eastern and Southern Europe saw the film in numerous movie houses in poor neighborhoods, where it played for almost a year. In the South it played for fifteen years. A special screening was held at the White House for Dixon's former classmate, President Woodrow Wilson, his guests, and the entire Supreme Court.\textsuperscript{40} Wilson later described the film as "like writing history with lightning."\textsuperscript{41}

Blacks could do little to confront the overwhelming popularity of \textit{The Birth of a Nation}. The NAACP, by then established with its own newspaper, mobilized opposition. But the film's momentum was unstoppable. Film critics, many of them liberal, though decrying its racism, praised the film for its technical and artistic merits.\textsuperscript{42}

In contrast, efforts to present the story of Reconstruction from a black point of view were unsuccessful. Novelist Albion Tourgee, a white superior court judge and activist, used black characters who spoke in their own voices to show the freed man as a person who worked hard and attempted to succeed, but was victimized by the Ku Klux Klan.\textsuperscript{43} Tourgee believed the answer to racism lay in portraying blacks as normal—like everyone else.\textsuperscript{44} His novel, \textit{Bricks Without Straw}, attracted a devoted but small audience; the South's treatment of blacks no longer interested many Northerners, and few Southerners were willing to listen. Black writers suffered a similar fate. While Charles Chesnutt, author of \textit{The Conjure Woman}, was included in a list of "the foremost storytellers of the time," his publisher refused to release his next novel because the previous two about racial themes had been commercially unsuccessful.\textsuperscript{45}

\textsuperscript{37} The Leopard's Spots (1902).
\textsuperscript{38} Silk & Silk, supra note 16, at 125.
\textsuperscript{39} Id. at 126-27; see Merritt, supra note 35; James Kinney, The Rhetoric of Racism: Thomas Dixon and the "Damned Black Beast," 15 AM. LIT. REALISM 145 (Autumn 1982).
\textsuperscript{40} Split Image, supra note 16, at 135; Silk & Silk, supra note 16, at 121, 127.
\textsuperscript{41} Silk & Silk, supra note 16, at 127. Wilson's comment probably was intended as praise, for he added: "[O]ne of my regrets is that it is so horribly true." Id.
\textsuperscript{42} See id. at 128.
\textsuperscript{43} Id. at 31-32.
\textsuperscript{44} See id. at 36.
\textsuperscript{45} Id. at 45; Split Image, supra note 16, at 11-12; Van DeBurg, supra note 26, at 100-02. On the status of the Negro at that time, see Raymond W. Logan, The Negro in American Life and Thought: The Nadir, 1877-1901 (1954).
and Silk point out, "[M]essages only reach those people who are willing to listen. Only when a later audience became receptive . . . could [their] tales be . . . appreciated."46

Although blacks had gained formal legal equality, the Supreme Court, in 1896, upheld segregation in *Plessy v. Ferguson*.47 Lynching continued; racist stereotypes prevailed. Blacks had little access to the press or the film industry and could do little to change the racism that both industries promulgated. Nevertheless, blacks joined the army in droves during World War I. Segregation in the ranks was rigidly enforced, however, and many blacks returned angry and disheartened.48 After the war, unrest in the country led to at least twenty-five urban race riots,49 many in the previously peaceful North.50 Repressive images immediately increased and prevailed for a little over a decade. Then, as the disruption abated, a few writers, such as Eugene O’Neill and Sinclair Lewis, portrayed blacks and their plight sympathetically. Black writers and artists in New York created the Harlem Renaissance.51 Blacks’ image metamorphosed yet again. Whites, excited and enthusiastic over this new artistic rapprochement with blacks, quickly praised them and their work for elements of the exoticism and primitivism popularized by Gauguin. Echoing early images of good-natured, happy-go-lucky blacks, white society began to regard African-Americans as musically talented, rhythmic, passionate, and entertaining.52 Although these developments heralded a somewhat more positive image of blacks, nevertheless the new images retained elements of condescension and previous stereotypes.53 The majority-race critics, intellectuals, and artists who were entranced by the Renaissance may have intended no harm, yet they perpetuated views of African-Americans as the exotic other.54

With World War II, black soldiers and workers were needed for the war effort; the more virulent forms of racism were held in abeyance. However, when the war ended and the soldiers returned, racial hostilities again sharpened. Having experienced a relatively racism-free environment during the war, black workers and soldiers were not prepared to return to lives of menial work and subservi-

46 Silk & Silk, supra note 16, at 46.
47 163 U.S. 543 (1896).
49 Id. at 62.
50 Bennett, supra note 17, at 288.
51 Silk & Silk, supra note 16, at 63; Van Deburg, supra note 26, at 120-21, 202-03.
52 See Silk & Silk, supra note 16, at 63, 135; see also Ethnic Notions, supra note 9 (detailing roles of entertainers such as Paul Robeson and Burt Williams during this period).
53 Van Deburg, supra note 26, at 121-22.
ence to whites. For many, expectations of improvement were fed by war propaganda depicting the U.S. as fighting for freedom. Activism sprang up; the Civil Rights movement began, and once again the dominant image of blacks took on new forms: the cocky, street-smart black who knows his rights; the unreasonable, opportunistic community leader and militant; the safe, comforting, cardigan-wearing (“nice”) black of TV sitcoms; and the Black Bomber of super-stud films, all mutations of, and permutations of, old familiar forms.

B. Other Groups

1. Native Americans

The experience of other groups parallels that of blacks. For example, when the colonists arrived in Virginia and Massachusetts in the seventeenth century, they brought with them images of the Indian created in England and Europe. Early explorers described native peoples of the “new world” as innocent, ingenuous, friendly, and naked. At first, relations between the two groups were cordial. Later, however, more settlers arrived, bringing with them English concepts of property—land transfer, titles, deeds—that were foreign to Indian thought. Indians who did not cooperate with the settlers’ plans were forced off their lands; eventually hostilities broke out, resulting in a conflict that lasted over two centuries.

Early writings about Native Americans reflected two romanticized images—“the Indian princess,” incarnated most notably in Pocahantas, and “the man Friday,” found in Robinson Crusoe, earlier as the troublesome servant Caliban, later as the faithful

---


56 See Color Adjustment, supra note 9 (describing last 40 years of media depiction and noting, among other things, the resemblance between current shows featuring sanitized, myth-making Rhodes Scholar, super-Negroes and previous images); see also Split Image, supra note 16, at 254-80 (same); George Zinkhan et al., Changes in Stereotypes: Blacks and Whites in Magazine Advertisements, 63 Journalism Q. 568 (Autumn 1986).

57 Stedman, supra note 16, at 253 (noting descriptions that explorers Christopher Columbus and Amerigo Vespucci gave). For further writings on Columbus and his early impressions, see The Four Voyages of Columbus (J.M. Cohen trans. & ed., 1969).

58 Dee Brown, Bury My Heart at Wounded Knee 2-5 (1972); Fairfax Downey, Indian Wars of the U.S. Army (1776-1865) (1963); Robert A. Williams, The American Indian in Western Legal Thought (1990).


60 Stedman, supra note 16, at 42-57.

61 Daniel Defoe, Robinson Crusoe (Michael Shinagel ed., W.W. Norton & Co. 1975 (1719)).

loyal Chingachgook, and in the twentieth century the buffoon and sidekick Tonto. The first instance of the “captivity narrative” appeared in Massachusetts in 1682 with Mary Rowlandson’s “Captivity and Restoration.” Early fiction portrayed Indians as looters, burners, and killers—but not rapists, because New Englanders knew that Indians rarely committed rape. But the erotic elements of Rowlandson’s story, although mild and subordinated to her religious message, made it the prototype for later captivity tales that emphasized sexual aggression directed toward Simon-pure captives.

Other writers followed suit without Rowlandson’s delicacy, portraying Indians as animal-like and sub-human, a characterization whose roots go back to Paracelsus (1493-1541), who proposed that Indians were not among “the sons of Adam.” Shakespeare explored this theme when he wrote The Tempest and created a servant for Prospero—Caliban—whose name was an anagram of the newly coined word “cannibal.” Cotton Mather and other Puritan writers called Indians wolves, lions, sorcerers, and demons possessed by Satan. By the nineteenth century, Indians had become savage, barbarous, and half-civilized. In early movies restless natives and jungle beasts were practically interchangeable elements.

64 STEDMAN, supra note 16, at 50-51; see JENNI CALDER, THERE MUST BE A LONE RANGER (1974).
66 STEPHEN OSBORNE, INDIAN-HATING IN AMERICAN LITERATURE 1682-1859, 50(10) Diss. Abstr. Int’l 3228A (1990); STEDMAN, supra note 16, at 77-78 (historian Richard Drinnon has referred to this literature as “violence pornography”).
67 STEDMAN, supra note 16, at 78.
68 Id. at 75; see PERRY MILLER, THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY (1939) (providing a full exposition of “the anatomy of the Puritan mind”).
69 STEDMAN, supra note 16, at 75, 81; see Jean Ehly, Horrifying Story of an Indian Captive, W. FRONTIER ANN. 26 (1975).
70 STEDMAN, supra note 16, at 120. This stereotype occurred with blacks as well. See supra notes 34-42 and accompanying text.
71 STEDMAN, supra note 16, 121.
72 Id. at 123. For a treatment of the cannibal concept, see MICHAEL HARNER & ALFRED MEEKER, CANNIBAL (1979); MARVIN HARRIS, CANNIBALS AND KINGS: THE ORIGINS OF CULTURES (1977).
73 STEDMAN, supra note 16, 125.
74 Id. at 124; see ROY H. PEARCE, SAVAGISM AND CIVILIZATION: A STUDY OF THE INDIAN AND THE AMERICAN MIND (rev. ed. 1965); Robert Keller, Hostile Language: Bias in Historical Writing About American Indian Resistance, 9 J. AMER. CULTURE 9 (Winter 1986).
75 STEDMAN, supra note 16, at 126. Vine Deloria, Jr., wrote “[W]e were never slaves. We gave up land instead of life and labor. Because the Negro labored, he was considered a draft animal. Because the Indian occupied large areas of land, he was considered a wild animal.” VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 7-8 (1969).
No wonder, then, that Indians were removed, with little protest from the dominant society, to reservations, just as wild and rare beasts were confined to animal reserves.

Later movies of the "cowboys and Indians" genre built on these images when they featured war dances, exotic dress, drunkenness, surprise attacks, scalping, raiding, raping, tomahawks, tom-toms, and torture. D.W. Griffith, creator of Birth of a Nation, incorporated these elements and more in The Battle of Elderbush Gulch (1913). In that movie, a white woman, trapped in a cabin surrounded by Indians, awaits her fate, not knowing whether the Indian attackers will kill her or whether one of her white defenders will shoot her before letting the Indians take her alive. By 1911, portrayal of Indians in film had become so demeaning that representatives of four western tribes protested to President William Howard Taft and to Congress. But little change occurred until World War II, when Hollywood transferred the enemy role to the Japanese and Germans. Many of these early Indian movies are still shown on television, feeding the psyches of new generations of Americans with the familiar stereotypes.

Shortly after the end of the war, Hollywood released Broken Arrow (1950), the first movie ever to feature an Indian as hero—Cochise of the Apaches. Though artistically and historically flawed, it was widely praised. Other "noble savage" films reversed the stereotype in the opposite direction, portraying Native Americans with exaggerated nobleness—a striking parallel to the treatment adulating whites gave black writers during the Harlem Renaissance.


See supra notes 36-41 and accompanying text.

Stedman, supra note 16, at 108.

Id. at 157. During this period, some of the titles, in themselves, tell the story. E.g., On the Warpath (1909), The Flaming Arrows (1911), Poisoned Arrows (1911), Incendiary Indians (1911), The Indian Raiders (1910), The Cheyenne Raiders (1910), Attack by Arapahoes (1910), The Dumb Half-Breed's Defense (1910), Saved from the Redmen (1910), Love in a Tepee (1911), The Hair Restorer and the Indian (a "comedy" of 1911); see also sources cited supra note 76.


Id. at 206-09, 218-20.

See supra notes 51-54 and accompanying text.
In 1969, N. Scott Momaday, a Kiowa-Cherokee writer, won the Pulitzer Prize for his novel *House Made of Dawn*. In 1972, PBS ran a BBC production of *The Last of the Mohicans*. In each of these cases, much of the audience was struck by the intelligence of the Native American voice—a far cry from the earlier steady diet (still heard today) of chiefs saying "ugh," braves shrieking war whoops, and Tonto saying "me gettum." It was not always so. Thomas Jefferson wished Congress could speak half as well as orators of Indian nations. William Penn praised the Lenni Lanape language of the Delaware for its subtlety. Yet, speech of the Indians—as well as that of African-Americans, Mexicans, and Asians—has been mangled, blunted and rendered inarticulate by whites who then became entitled to speak for them. Like the other groups of color, Native Americans have been disempowered by the very element which, they are told, will save them.

2. *Asian-Americans*

With Asian-Americans, we find the same pattern we found elsewhere: the dominant depiction in popular culture is negative—although rarely seen as such at the time—and the stereotype shifts to accommodate society's changing needs.

In the middle years of the nineteenth century, Chinese were welcomed into the land for their labor: They were needed to operate the mines, build railroads, and carry out other physical tasks necessary to the country's development. The industrious immigrants soon, however, began to surpass white American workers. They opened small businesses, succeeded in making profitable mines that others had abandoned. Not surprisingly, Chinese became the

---

84 Stedman, supra note 16, at 183.
85 Id. at 58.
86 The gray-eyed Saxon soldier, squinting over his rifle sights, is a little more articulate: The only good Indian is . . . .
87 Stedman, supra note 16, at 62.
88 Id. at 62-63; see William Penn's Own Account of the Lenni Lenapi or Delaware Indians (A. Myers ed., 1970).
90 See, e.g., supra notes 26-30, 57-79 and accompanying text.
scapegoats for the 1870s Depression. Unionists and writers exaggerated negative traits thought associated with them—opium smoking, gambling—and succeeded in having anti-Chinese legislation enacted. By 1882 public sentiment had been mobilized sufficiently so that Congress was able to pass an Exclusion Act, which reduced the number of Chinese in the U.S. from 105,000 in 1880 to 65,000 in 1908.

During this period, Japan's international position was on the rise, yet U.S. writers and politicians depicted all Asians as inferior, unassimilable, willing to work inhuman hours at low wages, and loyal to foreign despots. When Japan defeated first China and then Russia, it began to replace China as the "yellow peril." By 1924, all Asians were barred, an exclusion the Supreme Court had upheld for the Chinese in 1889. During a period of increasing tensions between the two countries, the film industry portrayed Japanese and other Asians—during this period few distinctions were made—in unremittingly negative terms. As with African-Americans and Native Americans, Asian men were depicted as cunning, savage, and as potential rapists interested in defiling white women. (In sharp contrast, white male actors were seen as having legitimate access to Asian women.)

As U.S. militancy grew, films began to devalue Asian—principally Japanese—life. Not even they valued life, the narratives of the day said. Why should we value theirs? During earlier periods, when racism against Asians was relatively quiescent, writers and film-makers employed the stock character of the Charlie Chan—the hapless, pidgin-talking Asian, in many respects the functional

---

93 SAXTON, supra note 91, at 19-45; WONG, supra note 16, at xi-xvii.
95 DONALD HATA, "UNDESIRABLES," EARLY IMMIGRANTS AND THE ANTI-JAPANESE MOVEMENT IN SAN FRANCISCO, 1892-1893 (1979); MILLER, supra note 94; WONG, supra note 16, at xi-xvii.
97 See Chae Chan Ping v. United States, 130 U.S. 581 (1889); see also SHIN S. TSAI, THE CHINESE EXPERIENCE IN AMERICA 56-81 (1986).
98 E.g., WONG, supra note 16, at 25, 72-74; see RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE (1989) (detailing resistance to Asian immigrants); supra notes 77-78 and accompanying text (anti-Black and anti-Indian movies by D. Griffith).
99 WONG, supra note 16, at 24. Viz, by being kamikazes, prepared to die for the Emperor, etc.
100 Id. at 29, 124-28; see PETER IRONS, JUSTICE AT WAR 52-73 (1983).
101 TAKAKI, supra note 98; WONG, supra note 16, at 3, 108.
equivalent of the Sambo or uncle. But as anti-Japanese sentiment increased, we began depicting even domestic Asians as foul and tricky. Anti-Asian films were easy to produce and profitable; Hollywood would often assign a Japanese actor to play a Chinese villain and vice versa.

W.R. Hearst sponsored *Patria*, an anti-Asian film serial that began in 1919 and continued for several years, depicting Asians as a Yellow Menace. At one point, Woodrow Wilson became disturbed by the virulence of Hearst’s production and wrote asking him to soften it. Hearst responded by changing the series so that it became dominantly anti-Mexican. In the period immediately preceding and following World War II, anti-Japanese images continued to proliferate. A stock character was the master Oriental criminal, often played by Anglo actors in make-up. By this time, films and novels were distinguishing between Chinese (who were good), and Japanese (who were bad). After Pearl Harbor, intense anti-Japanese propaganda resulted in federal action to intern 110,000 Japanese Americans, many of whom had lived in the United States all their lives. Many lost farms, houses, and other property. It later came to light that much of the evidence of likely sabotage and fifth column activities had been fabricated.

Following World War II, depictions of blacks and Indians were upgraded to some extent, but those of Asians only a little. Many

---

102 See supra notes 26-29 and accompanying text.
103 WONG, supra note 16, at 34-38, 55-103.
104 WONG, supra note 16, at 74 (much in the manner that Hollywood created the "generic Indian" with either whites or Indians of any convenient tribe assigned to play the part).
105 Id. at 88-92.
106 Id. at 93.
107 Id.
108 Id. at 111-14, 124-28; see PROPAGANDA ON FILM: A NATION AT WAR (R.A. Maynard ed., 1975).
110 WONG, supra note 16, at 136-38; see JOE MORELLA & EDWARD EPSTEIN, THE FILMS OF WORLD WAR II (1973); Lewis Jacobs, World War II and the American Film, 7 CINEMA J. (1967-68).
111 IRONS, supra note 100 (describing events that led up to and followed this tragic chapter in our history). For two Supreme Court cases upholding curfews placed on Japanese-Americans, see Hirabayashi v. United States, 320 U.S. 81 (1943) and Korematsu v. United States, 323 U.S. 214 (1944).
113 NISEI, supra note 112, at 292-301; see generally IRONS, supra note 100 (internment a product of war hysteria and military alarmism).
114 See supra notes 50-55, 80-87 and accompanying text.
of James Bond's villains, for example, have been Asian.115 In recent days, Japan has once again become a serious economic rival of the United States, producing automobiles, computers and other products at a price and quality American industry has proven unable to match. Predictably, a further wave of anti-Asian sentiment and stereotyping is re-emerging.116

3. Mexican-Americans

Images of Mexican-Americans ("Chicanos") fall into three or four well-delineated stereotypes—the greaser, the conniving, treacherous bandido, the happy-go-lucky shiftless lover of song, food, and dance, and the tragic, silent "Spanish" tall, dark, and handsome type of romantic fiction—which change according to society's needs.117 As with blacks, Asians, and Indians, most Americans have relatively few interpersonal contacts with Mexican-Americans; therefore, these images become the individual's only reality. When such a person meets an actual Mexican-American, he or she tends to place the other in one of the ready-made categories.118 Stereotyping thus denies members of both groups the opportunity to interact with each other on anything like a complex, nuanced human level.119

During and just after the conquest, when the U.S. was seizing and then settling large tracts of Mexican territory in the Southwest, "Western" or "conquest" fiction depicted Anglos bravely displacing shifty, brutal, and treacherous Mexicans.120 After the war ended and control of the Southwest passed to American hands, a subtle shift occurred. Anglos living and settling in the new regions were portrayed as Protestant, independent, thrifty, industrious, mechani-

---

117 Pettitte, supra note 16 (cataloging and describing the evolution of these and related images). For treatments of Mexicans in popular and high literature, see C. Robinson, With the Ears of Strangers: The Mexican In American Literature (1963); C. Robinson, Mexico and the Hispanic Southwest, in American Literature (1970); Carl Allsup, Who Done It? The Theft of Mexican American History, 17 J. Popular Culture, Winter 1983, at 150.
118 If the Mexican is quiet, the observer will think, "Oh, he is one of that kind"; if ebullient and outgoing, will assimilate him or her to the other type, and so on.
119 Delgado, supra note 1, at 137 (summarizing sources on how stereotyping accomplishes this); see Pierre L. van den Berghe, Race and Racism: A Comparative Perspective (2d ed. 1978). On the efficacy of racial images and their cultural encoding in our very ideas and vocabulary, see P. Williams, The Alchemy of Race and Rights (1991).
cally resourceful, and interested in progress; Mexicans, as traditional, sedate, lacking in mechanical resourcefulness and ambition.\textsuperscript{121} Writers both on and off the scene created the same images of indolent, pious Mexicans—ignoring the two centuries of enterprising farmers and ranchers who withstood or negotiated with Apaches and Comanches and built a sturdy society with irrigation, land tenure, and mining codes.\textsuperscript{122}

In the late conquest period, depiction of this group bifurcated.\textsuperscript{123} As happened at a different period with African-Americans, majority-race writers created two images of the Mexican: the "good" (loyal) Mexican peon or sidekick, and the "bad" fighter/greaser Mexican who did not know his place.\textsuperscript{124} The first was faithful and domestic; the second, treacherous and evil. As with other groups,\textsuperscript{125} the second ("bad") image had sexual overtones: the greaser coveted Anglo women and would seduce or rape them if given the opportunity.\textsuperscript{126} Children's books of this time, like the best-selling Buffalo Bill series, were full of Mexican stereotypes used to reinforce moral messages to the young: \textit{They} are like this, \textit{we} like that.\textsuperscript{127} The series ended in 1912.

The first thirty years of this century saw heavy Mexican immigration of mainly poor workers. The first Bracero programs—official, temporary importation of field hands—appeared.\textsuperscript{128} With increasing numbers, white-only signs, segregated housing and schools appeared, aimed now at Mexicans in addition to blacks.\textsuperscript{129} Since there was now an increased risk of interaction and intermarriage, novels and newspaper writing reinforced the notion of these immigrants' baseness, simplicity, and inability to become assimilated.\textsuperscript{130}

\textsuperscript{121} Pettit, supra note 16, at xiv-xvii; see Juan Garcia, \textit{Americanization and the Mexican Immigrant}, in \textit{Different Shores}, supra note 16 at 69, 69-70.

\textsuperscript{122} Pettit, supra note 16, at xix-xx; Garcia, supra note 121, at 69-71. For a background and treatment of cultural relations between the two groups, see Angel del Rio, \textit{The Clash and Attraction of Two Cultures: The Hispanic and the Anglo Saxon Worlds in America} (J. Shearer trans. & ed., 1965).

\textsuperscript{123} See supra notes 26-27 and accompanying text.

\textsuperscript{124} See supra notes 23-25, 39-40 and accompanying text.

\textsuperscript{125} See supra text accompanying notes 38-39 (Blacks), 67-69 (Indians), 98-99 (Asians).

\textsuperscript{126} Pettit, supra note 16, at 22-25; see also Cecil Robinson, \textit{With the Ears of Strangers: The Mexican in American Literature} (1963) (tracing this and other Latin stereotypes).

\textsuperscript{127} Pettit, supra note 16, at 137. Compare this series to sources cited supra note 80 (portrayal of Indians in children's books).

\textsuperscript{128} Pettit, supra note 16, at 84, 154-57; Garcia, supra note 121.

\textsuperscript{129} See Pettit, supra note 16, at 84-85.

\textsuperscript{130} See id. at 85-104; see also I & II Albert Johannsen, \textit{The House of Beadle and Adams and Its Dime and Nickle Novels: The Story of a Vanished Literature} (1950).
The movies of this period\textsuperscript{131} depicted Latins as buffoons, sluts, or connivers;\textsuperscript{132} even some of the titles were disparaging: for example, \textit{The Greaser's Gauntlet}.\textsuperscript{133} Films featured brown-skinned desperadoes stealing horses or gold, lusting after pure Anglo women, shooting noble Saxon heroes in the back, or acting the part of hapless buffoons.\textsuperscript{134} Animated cartoons and short subjects, still shown on television, featured tequila-drinking Mexicans, bullfighters, Speedy Gonzalez and Slowpoke Rodriguez, and clowns—as well as Castilian caballeras, light-skinned, upper class, and prone to wearing elaborate dresses and carrying castanets.\textsuperscript{135}

World War II brought the need for factory and agricultural workers and a new flood of immigrants.\textsuperscript{136} Images softened to include "normal," or even noble, Mexicans, like the general of Marlon Brando's \textit{Viva Zapata}.\textsuperscript{137} Perhaps realizing it had overstepped, America diminished the virulence of its anti-Mexican imagery. Yet the Western genre, with Mexican villains and bandits, continues; and the immigrant speaking gibberish still makes an appearance. Even the most favorable novel and film of the post-war period, \textit{The Milagro Beanfield War}, ends in stereotypes.\textsuperscript{138}

A few writers found their own culture alienating or sick and sought relief in a more serene Southwest culture. As with the Harlem Rennaissance, these creative artists tended to be more generous to Mexicans, but nevertheless retained the Anglo hero as the central figure or Samaritan who uplifts the Mexican from his or her traditional ignorance.\textsuperscript{139}

\section*{II}
\textbf{How Could They? Lessons From the History of Racial Depiction}

As we saw in Part I, the depiction of ethnic groups of color is littered with negative images, although the content of those images

\begin{itemize}
\item\textsuperscript{131} Between 1900 and the war, more Americans watched movies than read books. \textit{See supra} notes 39-40 and accompanying text; \textit{see also} \textit{Pettit, supra} note 16, at 13.
\item\textsuperscript{132} \textit{See Pettit, supra} note 16, at 112-14, 129-26, 128-31; Blaine Lamb, \textit{The Convenient Villain: The Early Cinema Views the Mexican-American}, 14 J. West 75 (1975).
\item\textsuperscript{133} \textit{See Pettit, supra} note 16, at 131; for a filmography see \textit{id.} at 264-69.
\item\textsuperscript{134} \textit{Pettit, supra} note 16; \textit{see Juan Garcia, Hollywood and the West: Mexican Images in American Films, in OLD SOUTHWEST/NEW SOUTHWEST} 75 (Jody Nolte ed., 1987).
\item\textsuperscript{135} \textit{See Pettitt, supra} note 16, at 137-45; \textit{see also} George Roeder, Jr., Mexicans in the Movies: The Images of Mexicans in American Films, 1894-1947 (1971) (unpublished manuscript, on file with University of Wisconsin). For another treatment of Mexican women, see Beverly Trulio, \textit{Anglo-American Attitudes Toward New Mexican Women}, 12 J. West 229 (1973).
\item\textsuperscript{136} \textit{See Pettit, supra} note 16, at 155.
\item\textsuperscript{137} \textit{Id.} at 224-31.
\item\textsuperscript{138} \textit{Id.} at 237-45.
\item\textsuperscript{139} \textit{Id.} at 158-77.
\end{itemize}
changes over time. In some periods, society needed to suppress a group, as with blacks during Reconstruction. Society coined an image to suit that purpose—that of primitive, powerful larger than life blacks, terrifying and barely under control. At other times, for example during slavery, society needed reassurance that blacks were docile, cheerful, and content with their lot. Images of sullen, rebellious blacks dissatisfied with their condition would have made white society uneasy. Accordingly, images of simple, happy blacks, content to do the master's work, were disseminated.

In every era, then, ethnic imagery comes bearing an enormous amount of social weight. Nevertheless, we sense that we are in control and that things need not be that way. We believe we can use speech, jiujitsu fashion, on behalf of oppressed peoples. We believe that speech can serve as a tool of destabilization. It is virtually a prime tenet of liberal jurisprudence that by talk, dialog, exhortation, and so on, we present each other with passionate, appealing messages that will counter the evil ones of racism and sexism, and thereby advance society to greater levels of fairness and humanity.

140 See supra notes 30-39, 51-52 and accompanying text.
141 Other ethnic groups, at various times and in response to different social needs, were depicted as: Charlie Chans; hapless, lazy Mexicans interested only in singing and dancing; conniving Indians or greasers; devious or superindustrious Asians willing to work inordinate hours; and so on—all depending on what society needed—immigration or the opposite, cheap or excess labor, suppression, indifference, guilt assuagement, and so on.
142 That is, images respond to powerful forces and needs, always preceding and facilitating change. The relocation, Bracero program, Japanese internment, etc., then happens ineluctably and in a way that seems natural, permissible, and "right." Our First Amendment and system of free expression keep the needs of the control group, the creative community, the mass of people, and the subjugated groups themselves all nicely in balance. See also Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities (1980) (the background of assumptions that make up the dominant world view in any era limits how we see the world, but is always contingent, never necessary); Steven Lukes, Power: A Radical View 21-25 (1974) (powerful groups manipulate discourse to prevent others from appreciating how things work). Compare Delgado & Stefancic, supra note 12 (reviewing judges' role in deciding cases embracing "serious moral error"), with Adam Smith, Lectures on Jurisprudence, in 5 Glasgow Edition of the Works and Correspondence of Adam Smith (R. Meek et al., eds., 1978) (commercial interests determine law and culture).
144 See sources cited supra note 2; Lipkin, supra note 2 (discussing "conversationalism"). For classic works on dialogism or the Republican revival, see Robert M. Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983); Frank I. Michelman, Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4 (1986); Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984).
Consider, for example, the current debate about campus speech codes. In response to a rising tide of racist incidents, many campuses have enacted, or are considering enacting, student conduct codes that forbid certain types of face-to-face insult. These codes invariably draw fire from free-speech absolutists and many campus administrators on the ground that they would interfere with free speech. Campuses, they argue, ought to be "bastions of free speech," for which the appropriate remedy is more speech. Suppression merely drives racism underground, where it will fester and emerge in even more hateful forms. Speech is the best corrective for error; regulation risks the specter of censorship and state control. Efforts to regulate pornography, Klan marches, and other types of race-baiting often meet similar responses.

But modernist and postmodern insights about language and the social construction of reality show that reliance on countervailing speech that will, in theory, wrestle with bad or vicious speech is often misplaced. This is so for two interrelated reasons: First, the account rests on simplistic and erroneous notions of narrativity and change, and second, on a misunderstanding of the relation between the subject, or self, and new narratives.

A. The First Reason—Time Warp: Why We (Can) Only Condemn the Old Narrative

Part I showed that we simply do not see many forms of discrimination, bias, and prejudice as wrong at the time. The racism of

145 See Matsuda, supra note 1; Lawrence, supra note 1 (discussing this controversy).
147 See id. at 359-60 (discussing this argument).
148 Benno Schmidt, Professor of Law & President, Yale University, Remarks at Campus Speech, panel discussion and program, Yale Law School (Oct. 11, 1991).
149 For an exposition of these and related arguments, see Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 DUKE L.J. 484; see also Delgado, supra note 146, at 358-61, 376; Schmidt, supra note 148.
150 That is: Let the marketplace (i.e., more speech) decide; do not prohibit the speech but, rather, speak out against it.
151 To summarize our argument:
(i) That the intensely negative images we described in Part I appeared with little visible, much less effective, popular protest implies that most readers did not see these images as troublesome. See notes 19-24, 27-33, 36-41, 43-46, 59-78, 93, 98-113, 120-37 and accompanying text;
(ii) Early writers ("ahead of their time") who spoke out against racism were ignored until the social paradigm changed, and conditions were right for a new message. See sources cited supra notes 43-46; infra notes 169-73;
(iii) Since writers take their cue from the market, it seems plausible that those who originated the hateful images did so with a sense (conscious or unconscious) that the market would welcome, or at least accept, these images. Common sense tells us that
other times and places does stand out, does strike us as glaringly and appallingly wrong. But this happens only decades or centuries later; we acquiesce in today's version with little realization that it is wrong, that a later generation will ask "How could they?" about us.¹⁵² We only condemn the racism of another place (South Africa) or time. But that of our own place and time strikes us, if at all, as unexceptionable, trivial, or well within literary license.¹⁵³ Every form of creative work (we tell ourselves) relies on stock characters. What's so wrong with a novel that employs a black who . . . , or a Mexican who . . . ?¹⁵⁴ Besides, the argument goes, those groups are disproportionately employed as domestics, are responsible for a high proportion of our crime, are they not? And some actually talk this way; why, just last week, I overheard . . .

This time-warp aspect of racism makes speech an ineffective tool to counter it. Racism is woven into the warp and woof of the way we see and organize the world¹⁵⁵—it is one of the many precon-

---

¹⁵² For detailed analysis of a similar mechanism by which even eminent judges fail to notice the danger in certain cases, see Delgado & Stefancic, supra note 12 (describing justices, such as Taney and Holmes, who ignored "saving narratives" and, as a result, wrote opinions that are now regarded as travesties).

¹⁵³ Sources cited supra note 151; see supra note 10; Van Deburg, supra note 26, at 122 (majority-race viewers protest small deviations from racist paradigms).

¹⁵⁴ Conversation with anonymous motion picture art director in Los Angeles, CA, Sept. 14, 1985 (informant's name withheld at request of author).

¹⁵⁵ Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987) (noting that racism is ubiquitous and discouragingly difficult to eradicate); see supra Part I (racist imagery flourished in every era); see also infra text accompanying
ceptions we bring to experience and use to construct and make sense of our social world. Racism forms part of the dominant narrative, the group of received understandings and basic principles that form the baseline from which we reason. How could these be in question? Recent scholarship shows that the dominant narrative changes very slowly and resists alteration. We interpret new stories in light of the old. Ones that deviate too markedly from our pre-existing stock are dismissed as extreme, coercive, political, and wrong. The only stories about race we are prepared to condemn, then, are the old ones giving voice to the racism of an earlier age, ones that society has already begun to reject. We can condemn Justice Brown for writing as he did in Plessy v. Ferguson, but not university administrators who refuse remedies for campus racism, failing to notice the remarkable parallels between the two.

B. The Second Reason: Our Narratives, Our Selves

Racial change is slow, then, because the story of race is part of the dominant narrative we use to interpret experience. The narrative teaches that race matters, that people are different, with the differences lying always in a predictable direction. It holds that

notes 186-88, 221 (examples of present-day racism only dimly viewed as objectionable); Color Adjustment, supra note 9 (same).


157 But see Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2413-16, 2431-42 (arguing that "counterstorytelling" can sometimes jar or displace comforting majoritarian myths about racial progress). For the view that reform efforts are almost invariably met with skepticism and disbelief, see Stone, supra note 151, at 450.

158 See, e.g., Delgado & Stefancic, supra note 12. See generally Bell, supra note 155 (arguing that racial progress is slow, and majority society is rarely receptive to pleas for justice). For another view of the prospects for reform, see Richard Delgado, Derrick Bell and the Ideology of Law Reform: Will We Ever Be Saved?, 97 Yale L.J. 923 (1988) (reform slow because: (1) mindsets of whites and blacks radically different, and (2) majoritarian positions are firmly rooted in white self-interest).

159 See generally Delgado, supra note 157.

160 In Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896), the Court failed to see any difference between requiring blacks to sit in a separate railroad car and a similar imposition on whites. For Taney, if blacks found that requirement demeaning, it was only because they chose to put that construction on it; the cars were equal, and the races had similar accommodations. See also Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959) (making similar criticism of Brown v. Board of Education: whites forced to associate with blacks were mistreated just as seriously as blacks denied the right to associate with whites—both were denied freedom of action).

In the campus-speech controversy, some argue that the right of a racist to hurl an ethnic insult must be balanced against the right of a person of color not to receive it. Who is to say which right (to speak—or not to be spoken to) is superior? Denying one right strengthens the other, but only at the expense of the first.

161 On the dominant narrative, its content, and comforting function, see Delgado, supra note 158; Delgado, supra note 157, at 2417. For a discussion of the hold that ra-
certain cultures, unfortunately, have less ambition than others, that
the majority group is largely innocent of racial wrongdoing, that the
current distribution of comfort and well-being is roughly what merit
and fairness dictate.\(^\text{162}\) Within that general framework, only certain
matters are open for discussion: How different? In what ways?
With how many exceptions? And what measures are due to deal
with this unfortunate situation and at what cost to whites?\(^\text{163}\) This is
so because the narrative leaves only certain things intelligible; other
arguments and texts would seem alien.

A second and related insight from modern scholarship focuses
not on the role of narratives in confining change to manageable pro-
portions, but on the relationship between our selves and those nar-
ratives. The reigning First Amendment metaphor—the marketplace
of ideas—implies a separation between subjects who do the choos-
ing and the ideas or messages that vie for their attention.\(^\text{164}\) Sub-
jects are “in here,” the messages “out there.” The pre-existing
subjects choose the idea that seems most valid and true—somewhat
in the manner of a diner deciding what to eat at a buffet.

But scholars are beginning to realize that this mechanistic view
of an autonomous subject choosing among separate, external ideas
is simplistic. In an important sense, we are our current stock of nar-
ratives, and they us.\(^\text{165}\) We subscribe to a stock of explanatory
scripts, plots, narratives, and understandings that enable us to make
sense of—to construct—our social world. Because we then live in
that world, it begins to shape and determine us, who we are, what we
see, how we select, reject, interpret and order subsequent reality.\(^\text{166}\)

---

\(^\text{162}\) Source cited supra note 161; see Diana Reep & Faye H. Dambrot, Effects of Frequent
Television Viewing on Stereotypes: “Drip, Drip,” or “Drench?”, 66 JOURNALISM Q. 542 (Au-
tumn 1989); Gregory Sawin, How Stereotypes Influence Opinions about Individuals, 48 ETC.
210 (Summer 1991).

\(^\text{163}\) On the view that the cost of racial remedies is always placed on blacks or low-
income whites, see Derrick Bell, Bakke, Minority Admissions, and the Usual Price of Racial

\(^\text{164}\) On the reigning marketplace conception of free speech, see Abrams v. United
States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Alexander Meiklejohn, Free
Speech and its Relation to Self-Government (1948); John Milton, Areopagitica
(Michael Davis ed., 1965) (classic early statement). See also Stanley Ingber, The Market-
place of Ideas: A Legitimating Myth, 1984 DUKE L.J. 1 (“market” shown to favor entrenched
structure and ideology).

\(^\text{165}\) Delgado & Stefancic, supra note 12, at 1933, 1957.

\(^\text{166}\) Id; see Milner Ball, Lying Down Together: Law, Metaphor and Theology
135 (1985); 1 & 2 Paul Ricoeur, Time and Narrative (1984-85). For modernist/postmodern expositions of this view, see, e.g., Peter L. Berger & Thomas Luckman,
Social Construction of Reality (1967); Nelson Goodman, Ways of Worldmaking
(1978).
These observations imply that our ability to escape the confines of our own preconceptions is quite limited. The contrary belief—that through speech and remonstrance alone we can endlessly reform ourselves and each other—we call the empathic fallacy. It and its companion, the pathetic fallacy, are both based on hubris, the belief that we can be more than we are. The empathic fallacy holds that through speech and remonstrance we can surmount our limitations of time, place and culture, can transcend our own situatedness. But our examination of the cultural record, as well as postmodern understandings of language and personhood, both point to the same conclusion: The notion of ideas competing with each other, with truth and goodness emerging victorious from the competition, has proven seriously deficient when applied to evils, like racism, that are deeply inscribed in the culture. We have constructed the social world so that racism seems normal, part of the status quo, in need of little correction. It is not until much later that what we believed begins to seem incredibly, monstrously wrong. How could we have believed that?

True, every few decades an occasional genius will rise up and offer a work that recognizes and denounces the racism of the day. Unfortunately, they are ignored—they have no audience. Witness, for example, the recent "discovery" of long-forgotten black writers such as Charles Chesnutt, Zora Neale Hurston, or the slave narratives. Consider that Nadine Gordimer won the Nobel Prize after nearly 40 years of writing about the evils of apartheid; Harriet Beecher Stowe's book sold well only after years of abolitionist sentiment and agitation had sensitized her public to the possibility that

---


168 See also Ely, *supra* note 24; *Color Adjustment, supra* note 9 (noting that socially progressive TV shows from modern era—e.g., *East Side-West Side*, *Frank's Place*, *The Nat King Cole Show*—had brief runs, while *Amos 'N Andy* had a long run on both radio and TV). Cf. WAYNE C. BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 40 (1988) (minds we use in judging and interpreting stories have been formed, in large part, by those very stories).

169 E.g., SILK & SILK, *supra* note 16, at 31-32, 45 (occasional writer or artist able somehow to work against weight of dominant narrative).

170 E.g., CHARLES CHESNUTT, *The Conjure Woman* (1898); ZORA NEALE HURSTON, *Their Eyes Were Watching God* (1937).

slavery was wrong. One should, of course, speak out against social evils. But we should not accord speech greater efficacy than it has.

C. The Nature of the Evil

Another way of approaching speech's role in correcting racism is by examining not language but the referent, race. This examination shows that racism contains features that render it relatively unamenable to redress through words. Racism, even when blatant, resists efforts to rally others against it. Further, talking often makes matters worse.

1. How Much Racism Exists? The Difference Perspective Makes

As we have shown, much racism is not seen as such at the time of its commission. But the extent of even the blatant variety is often underappreciated by whites. The reason is simple: Few acts of clear-cut racism take place within their view. Racism is often covert; the vignettes tend to be played out behind the scenes when no one else is watching. A merchant who harasses well-behaved black teenage shoppers will probably not do so if other whites are watching. A white apartment owner or employer will probably not deny a superbly qualified black applicant an apartment or job if a friend or observer is present.

As a result of its often covert nature, many persons of the majority race, even those of good will, consistently underestimate the extent of racism in society. Persons of color, those who are on the receiving end of racism, generally report much more of it than do whites and naturally place greater priority on its remedying. This puzzles some whites, who wonder whether blacks are exaggerating or trying to guilt-trip them to gain an unfair advantage.

\[172\] Cf. Delgado & Stefancic, supra note 12, at 1936 & nn.23-24 (Douglass and other abolitionists publishing and speaking out during period before book's appearance).

\[173\] See supra part IV (making suggestions for decreasing cultural lag).

\[174\] See supra part I.

\[175\] For an earlier exposition of this view, see Richard Delgado, Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction have a Corollary?, 23 HARV. C.R.-C.L. L. REV. 407, 407-08 (1988); Williams, supra note 119 (detailing extent of racism's inscription in minds of most individuals).

\[176\] Sources cited supra note 175.

\[177\] Id.; see also Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978) (arguing that racism is endemic and law is often impotent to redress it).

\[178\] Delgado, supra note 175, at 408; cf. Derrick Bell, Racism: A Prophecy for the Year 2000, 42 RUTGERS L. REV. 93 (1989) (implying whites place saving the environment and reducing pollution above justice for blacks).

\[179\] For a similar perspective from a black writer, see Randall L. Kennedy, Racial Critiques of Legal Academia, 102 HARV. L. REV. 1745, 1809-10 (1989).
The problem is perspective: Imagine that one's body were somehow magnetically charged. One would go through life astonished at how many metal filings there are in the world and how much we need a clean-up operation. Those not caught in this Kafkaesque dilemma would naturally fail to appreciate the situation's urgency.\textsuperscript{180}

2. \textit{The Subtle Nuances}

Racism's victims become sensitized to its subtle nuances and code-words—the body language, averted gazes, exasperated looks, terms such as "you people," "innocent whites," "highly qualified black," "articulate" and so on—that, whether intended or not, convey racially charged meanings.\textsuperscript{181} Like an Aleut accustomed to reading the sky for signs of snow or a small household pet skilled at recognizing a clumsy footfall, racism's perpetual victims are alert to the various guises racism and racial signalling take. Sympathizers of majority hue often must labor to acquire the knowledge that for minorities comes all too easily.

3. \textit{On Seeing What One Does Not Want To See}

Some refuse to see racism in acts that trigger suspicion in the mind of any person of color.\textsuperscript{182} A well-qualified black applicant fails to get the job. Perhaps it was his tie, his posture, his age, or the way he held himself that caused his rejection. Perhaps he seemed too diffident or too anxious to get the job. Perhaps he had traits, such as voice intonations, that might irritate the firm's customers.\textsuperscript{183} Choosing to believe in a race-free world reduces guilt and the need for corrective action. Racism is often a matter of interpretation; when an interpretation renders one uncomfortable and another does not, which will a person often make?\textsuperscript{184}

\textsuperscript{180} Cf. Franz Kafka, \textit{The Metamorphosis} (Willa Muir and Edwin Muir, trans. 1968). One could see a parallel between the predicament of the insect-man protagonist of Kafka's novel and that of blacks forced to accept an alien view that denies their own reality. That is, both are compelled by outside forces to live life in a fashion other than the one they would otherwise choose.


\textsuperscript{183} In short, absent a confession from the actor, the motive might always have been something else.

\textsuperscript{184} See Darryl Brown, \textit{Racism and Race Relations in the University}, 76 Va. L. Rev. 295 (1990) (suggesting that we construct ideas of race and racism to make transgressions all but invisible); Lawrence, supra note 161 (stating that operation of unconscious masks racial acts).
4. Unlearning the Lessons of the Past

Finally, members of the majority race forget how to see and condemn racism. Society generalizes the wrong lesson from the past, namely that racism has virtually disappeared. We notice, for example, that today there are fewer Sambos than in the past. We thus conclude that those writers from the past must have been acting against conscience, that is, had vicious wills and realized that what they were doing was wrong (as we realize it today), but went ahead and did it anyway. Yet, we think, "I do not act against conscience and neither do my friends."

In fact, those earlier writers were acting blithely, not against conscience, any more than we do today in maintaining our own versions of racism and racist imagery. The Willie Horton commercial strikes many as falling within the bounds of fair play, perhaps only slightly exaggerated—at any rate the sort of thing that one must expect in the rough-and-tumble world of politics. Besides, do not blacks in fact commit a high percentage of violent crime; did I not read that . . . ?

III.

How the System of Free Expression Sometimes Makes Matters Worse

Speech and free expression are not only poorly adapted to remedy racism, they often make matters worse—far from being stalwart friends, they can impede the cause of racial reform. First, they encourage writers, filmmakers, and other creative people to feel amoral, nonresponsible in what they do. Because there is a marketplace of ideas, the rationalization goes, another film-maker is free to make an antiracist movie that will cancel out any minor stereotyping in the one I am making. My movie may have other redeeming qualities; besides, it is good entertainment and everyone in the industry uses stock characters like the black maid or the bumbling Asian tourist. How can one create film without stock characters?

185 See also supra notes 174-80 and accompanying text (noting black-white discrepancies in perception).
186 See supra notes 19-24 and accompanying text.
187 The Willie Horton commercial depicted a black criminal recidivist. It aired as part of the 1988 presidential campaign as an attempt to portray the Democrats as soft on crime.
188 Conversation with anonymous art director, supra note 154 (art director reasoned that a film on which he was working could do little harm, even though it contained stereotypes he admitted were vicious, since other films could counterbalance the one he was making; further, he stated that his attitude was widely held in the film industry).
189 Id.
Second, when insurgent groups attempt to use speech as an instrument of reform, courts almost invariably construe First Amendment doctrine against them. As Charles Lawrence pointed out, civil rights activists in the sixties made the greatest strides when they acted in defiance of the First Amendment as then understood. They marched, were arrested and convicted; sat in, were arrested and convicted; distributed leaflets, were arrested and convicted. Many years later, after much gallant lawyering and the expenditure of untold hours of effort, the conviction might be reversed on appeal if the original action had been sufficiently prayerful, mannerly, and not too interlaced with an action component. This history of the civil rights movement does not bear out the usual assumption that the First Amendment is of great value for racial reformers.

Current First Amendment law is similarly skewed. Examination of the many "exceptions" to First Amendment protection discloses that the large majority favor the interests of the powerful. If one says something disparaging of a wealthy and well-regarded individual, one discovers that one's words were not free after all; the wealthy individual has a type of property interest in his or her community image, damage to which is compensable even though words were the sole instrument of the harm. Similarly, if one infringes the copyright or trademark of a well-known writer or industrialist, again it turns out that one's action is punishable. Further, if one disseminates an official secret valuable to a powerful branch of the military or defense contractor, that speech is punishable. If one speaks disrespectfully to a judge, police officer, teacher, military official, or other powerful authority figure, again one discovers that

---

190 See infra text accompanying notes 191-92.
191 Lawrence, supra note 1, at 466-67 (pointing out that courts construed First Amendment law narrowly, so as to uphold convictions of peaceful civil rights protestors; citing cases).
192 Id.
193 Delgado, supra note 146, at 377-78 (reviewing the following and other "exceptions" to the First Amendment).
194 On the tort of defamation in general, see Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond, 61 Va. L. Rev. 1349 (1975). Of course, an impecunious plaintiff may sue for defamation, just as a wealthy person may. But the poor individual is likely to have less of a property interest in his or her reputation and so will find suit less attractive than one with a higher standing and profile.
one's words were not free;\textsuperscript{197} and so with words used to defraud,\textsuperscript{198} form a conspiracy,\textsuperscript{199} breach the peace,\textsuperscript{200} or untruthful words given under oath during a civil or criminal proceeding.\textsuperscript{201}

Yet the suggestion that we create new exception to protect lowly and vulnerable members of our society, such as isolated, young black undergraduates attending dominantly white campuses, is often met with consternation: the First Amendment must be a seamless web; minorities, if they knew their own self-interest, should appreciate this even more than others.\textsuperscript{202} This one-sidedness of free-speech doctrine makes the First Amendment much more valuable to the majority than to the minority.

The system of free expression also has a powerful after-the-fact apologetic function. Elite groups use the supposed existence of a marketplace of ideas to justify their own superior position.\textsuperscript{203} Imagine a society in which all As were rich and happy, all Bs were moderately comfortable, and all Cs were poor, stigmatized, and reviled. Imagine also that this society scrupulously believes in a free marketplace of ideas. Might not the As benefit greatly from such a system? On looking about them and observing the inequality in the distribution of wealth, longevity, happiness, and safety between themselves and the others, they might feel guilt. Perhaps their own superior position is undeserved, or at least requires explanation. But the existence of an ostensibly free marketplace of ideas renders that effort unnecessary. Rationalization is easy: our ideas, our culture competed with their more easygoing ones and won.\textsuperscript{204} It was a fair

\textsuperscript{197} See, e.g., Bethel School Dist. v. Fraser, 478 U.S. 675 (1986); Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

\textsuperscript{198} See Rollin M. Perkins & Ronald N. Boyce, Criminal Law 304-08, 1048 (3d ed. 1982).


\textsuperscript{202} See Lee C. Bollinger, The Tolerant Society (1986) (racist speech must be protected—part of the price "we" pay for living in a free society); Schmidt, supra note 148; Strossen, supra note 149.

\textsuperscript{203} On "triumphalism"—the view that conquerors always construct history so that they appear to have won fairly through superior thought and culture rather than by force of arms, see Richard Delgado, Norms and Normal Science: Toward a Critique of Normativity in Legal Thought, 139 U. Pa. L. Rev. 933 (1991); Martin, College Curriculum Scrutinized in "Politically Correct" Spotlight, Denver Post, Jan. 25, 1992; cf. Milton, supra note 164. For the view that many Enlightenment figures were genteel or not-so-genteel cultural supremacists, see Bell, supra note 155, at 26-51 (pointing out that the document's Framers calculatedly sold out the interests of African-Americans in establishing a union of free propertied white males).

\textsuperscript{204} See Delgado, supra note 158; Delgado, supra note 157 (discussing majoritarian myths' and stories' role to soothe, still guilt); see also Shelby Steele, The Content of
fight. Our position must be deserved; the distribution of social goods must be roughly what fairness, merit, and equity call for.\textsuperscript{205} It is up to them to change, not us.

A free market of racial depiction resists change for two final reasons. First, the dominant pictures, images, narratives, plots, roles, and stories ascribed to, and constituting the public perception of minorities, are always dominantly negative.\textsuperscript{206} Through an unfortunate psychological mechanism, incessant bombardment by images of the sort described in Part I (as well as today's versions) inscribe those negative images on the souls and minds of minority persons.\textsuperscript{207} Minorities internalize the stories they read, see, and hear every day. Persons of color can easily become demoralized, blame themselves, and not speak up vigorously.\textsuperscript{208} The expense of speech also precludes the stigmatized from participating effectively in the marketplace of ideas.\textsuperscript{209} They are often poor—indeed, one theory of racism holds that maintenance of economic inequality is its prime function\textsuperscript{210}—and hence unlikely to command the means to bring countervailing messages to the eyes and ears of others.

Second, even when minorities do speak they have little credibility. Who would listen to, who would credit, a speaker or writer one associates with watermelon-eating, buffoonery, menial work, intellectual inadequacy, laziness, lasciviousness, and demanding resources beyond his or her deserved share?

Our very imagery of the outsider shows that, contrary to the usual view, society does not really want them to speak out effectively in their own behalf and, in fact, cannot visualize them doing so. Ask yourself: How do outsiders speak in the dominant narratives? Poorly, inarticulately, with broken syntax, short sentences, grunts, and unsophisticated ideas.\textsuperscript{211} Try to recall a single popular narrative of an eloquent, self-assured black (for example) orator or speaker. In the real world, of course, they exist in profusion. But when we stumble upon them, we are surprised: "What a welcome 'exception'!"

\textbf{Our Character} (1990) (arguing merit and competition as the route to success for African-Americans).

\textsuperscript{205} Sources cited supra note 204.

\textsuperscript{206} See supra part I.

\textsuperscript{207} See Delgado, supra note 1, at 136-40 (summarizing studies); Pettigrew, supra note 181.

\textsuperscript{208} Delgado, supra note 146, at 379; Delgado, supra note 1, at 137, 139-40.

\textsuperscript{209} See Buckley v. Valeo, 424 U.S. 1, 17-19 (1976).

\textsuperscript{210} This "economic determinist" view is associated with Derrick Bell, and earlier with Charles Beard.

\textsuperscript{211} See supra notes 19-21, 24, 85-89 and accompanying text (noting that image of outsider groups often contains speech impediments or inarticulateness).
Words, then, can wound. But the fine thing about the current situation is that one gets to enjoy a superior position and feel virtuous at the same time. By supporting the system of free expression no matter what the cost, one is upholding principle. One can belong to impeccably liberal organizations and believe one is doing the right thing, even while taking actions that are demonstrably injurious to the least privileged, most defenseless segments of our society. In time, one's actions will seem wrong and will be condemned as such, but paradigms change slowly. The world one helps to create—a world in which denigrating depiction is good or at least acceptable, in which minorities are buffoons, clowns, maids, or Willie Hortons, and only rarely fully individuated human beings with sensitivities, talents, personalities, and frailties—will survive into the future. One gets to create culture at outsiders' expense. And, one gets to sleep well at night, too.

Racism is not a mistake, not a matter of episodic, irrational behavior carried out by vicious-willed individuals, not a throwback to a long-gone era. It is ritual assertion of supremacy, like animals sneering and posturing to maintain their places in the hierarchy of the colony. It is performed largely unconsciously, just as the animals' behavior is. Racism seems right, customary, and inoffensive to those engaged in it, while bringing psychic and pecuniary advantages. The notion that more speech, more talking, more preaching, and more lecturing can counter this system of oppression is appealing, lofty, romantic—and wrong.

IV

WHAT THEN, SHOULD BE DONE? IF NOT SPEECH, WHAT?

What can be done? One possibility we must take seriously is that nothing can be done—that race and perhaps sex-based subjugation, is so deeply embedded in our society, so useful for the power-
ful, that nothing can dislodge it. No less gallant a warrior than Derrick Bell has recently expounded his view of "Racial Realism": things will never get better, powerful forces maintain the current system of white-over-black supremacy. Just as the Legal Realists of the early years of this century urged society to cast aside comforting myths about the uniformity, predictability, and "scientific" nature of legal reasoning, legal scholars must do something similar today with respect to race. Reformers must labor for what they believe right with no certainty that their programs will ever prove successful. Holding out the hope that reform will one day bear fruit is unnecessary, unwise, and calculated only to induce despair, burn-out, and paralysis.

We agree with much of what Bell says. Yet we offer four suggestions for a program of racial reform growing out of our research and analysis. We do this while underscoring the limitations of our own prescriptions, including the near-impossibility of getting a society to take seriously something whose urgency it seems constitutionally unable to appreciate. First, society should act decisively in cases of racism that we do see, treating them as proxies for the ones we know remain unseen. Second, past mistreatment will generally prove a more reliable basis for remedial action (such as affirmative action or reparations) than future- or present-oriented considerations; the racism of the past is the only kind that we recognize, the only kind we condemn. Third, whenever possible we should employ and empower minority speakers of color and expose ourselves to their messages. Their reality, while not infallible and certainly not the only one, is the one we must heed if we wish to


218 This casts doubts on Professor Sullivan's thesis that we should not focus on the past but devise racial remedies based on today's conditions and perceptions. Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

219 Except, of course, where the racism of the past (lynchings, beatings, use of long-condemned words and images) appears today—in which case we of course seize on and denounce it roundly.

220 Victims of racism are apt to see its enactments and nuances more readily than its perpetrators, supra notes 169-78 and accompanying text, and for that reason are more likely—with encouragement—to speak out against it. But will the majority listen? See supra text notes 155-61, 174-87 and accompanying text (expressing our reservations); see also Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1991 DUKEx L.J. 705 (proposing empowerment of minority spokespersons through race-conscious affirmative action).
avoid history's judgment. It is likely to be the one society will adopt in 30 years.

221 Our candidates for items that today seem innocuous or only mildly troublesome (warranting, perhaps, the "Oh, come on!" reaction)—but that history will declare unspeakable ("How could they?")—include the following:

The English-only movement
Black super-stud films
The Willie Horton commercial
"Political correctness," when used as a put-down for someone trying to redress racism or diversify the academy
Code words such as "articulate (or qualified) black," "those people," "welfare mothers," and "inner-city crime"
Portraying affirmative action as carried out at the expense of "innocent whites"
Refusal to recognize Indian treaty rights
TV programs and films that feature cowboys and Indians (still), blacks only in the role of domestic workers, or minorities or foreigners speaking in funny accents
Maintaining that the right of the racist to hurl a racist epithet trumps or is equally balanced with the right of the victim not to have it addressed to him or her
Immigration quotas and policies aimed at excluding people from developing nations but allowing virtually unlimited entry to propertied Europeans
Sports teams with racist names (Redskins) or stereotypical logos
Op-Ed pages of major newspapers, like the one that appeared in Denver Post, Jan. 9, 1992, at 7-B, featuring three stores, side by side, as follows:

Kisling, *Piling It Higher and Higher* (col. 1), which began as follows:

On the island of Wak, in the South Seas, every time Wak-O, the big volcano, started belching black smoke and the ground began trembling, the people began trembling too.

But they didn't tremble as hard as the king. He shook because he knew that if Wak-O erupted his nene was cooked, even if he managed to escape the great river of boiling lava.

This was because over many centuries of volcanic eruptions, Wakians, in their wisdom, gradually learned how to deal with these more or less regular upheavels: Wak-O erupt, king die.

Next to it appeared Hamblin, *Heartaches in Black Ghettos: Who Benefits?* (col. 2), which begins as follows:

Of all the liberals who wallow in support of the pathetic status of ghetto residents, I have the greatest aversion for the politicians who mislead the public and for the community activists who venerate them. I suspect they are the greatest beneficiaries of heartache in black ghettos. Otherwise, how could they champion them?

— contains the following excerpt as evidence that inner cities are beyond redemption:

FACT: One in four black men ages 20 to 29 in the ghetto are either in prison or on parole. It is a status that makes them riffraff in mainstream America and killers among their own.

FACT: By now, many of us know the Centers for Disease Control have reported that homicide is the primary cause of death among young black men, who stalk and murder each other by a ratio of 101.1 per 100,000. It is a kill rate that is six times higher than for other people in America. The CDC reports that the preferred method which young blacks choose to exterminate themselves is with an "illegal" handgun.

FACT: The six largest black ghettos are located in California, Michigan, Missouri, New York, Florida and the District of Columbia. They account for 51 percent of U.S. casualties where blacks kill each other.

— and concludes as follows:
Scholars should approach with skepticism the writings of those neoconservatives, including some of color, who make a practice of telling society that racism is ended.\textsuperscript{222} In the sense we have described, there \textit{is} an "essential" unitary minority viewpoint;\textsuperscript{223} the others are wrong.\textsuperscript{224} Finally, we should deepen suspicion of remedies for deep-seated social evils that rely on speech and exhortation. The First Amendment is an instrument of variable efficacy, more useful in some settings than others. Overextending it provokes the anger of oppressed groups and casts doubt on speech's value in settings where it is, in fact, useful. With deeply inscribed cultural practices that most can neither see as evil nor mobilize to reform, we should forthrightly institute changes in the structure of society that will enable persons of color—particularly the young—to avoid the worst assaults of racism.\textsuperscript{225} As with the controversy over campus racism, we should not let a spurious motto that speech be "everywhere free" stand in the way of outlawing speech that is demonstrably harmful, that is compounding the problem.

Because of the way the dominant narrative works, we should prepare for the near-certainty that these suggestions will be criticized as unprincipled, unfair to "innocent whites," wrong. Understanding how the dialectic works, and how the scripts and counterscripts work their dismal paralysis, may, perhaps, inspire us to continue even though the path is long and the night dark.

\begin{quote}
But if a few sillies insist on spending their time aspiring to move mountains by trying to transform cavities like Harlem and Detroit into habitable havens again, so be it. In the meantime, I wish they would leave the rest of us alone in our serenity to nurture our children and to get on with our lives beyond the deadly ghettos.
\end{quote}

Finally, next to it appeared Rosenthal, \textit{Americans Wouldn't Like To Be Japanese} (col. 5), portraying Japanese as employing "tricks" and gaining unfair economic advantage through excessive internal cooperation, "conformity, obsequiousness [and] rigidity," all amounting to a "system [that] is being used deliberately against us," and concluding: "A U.S. president should have the courage to say all that."

\textsuperscript{222} \textit{E.g.}, Richard Rodriguez, \textit{Hunger of Memory} (1982) (each author stating that race plays a much less important role today); see also Steven Carter, \textit{Confessions of an Affirmative Action Baby} (1991) (reciting less extreme statement of same position); Thomas Sowell, \textit{Civil Rights: Rhetoric or Reality?} (1984); Shelby Steele, \textit{The Content of Our Character: A New Vision of Race in America} (1990).

\textsuperscript{223} Essential, that is, to our own salvation.

\textsuperscript{224} On the debate about "essentialism" and whether the minority community contains one or many voices, see Angela P. Harris, \textit{Race and Essentialism in Feminist Legal Theory}, 42 Stan. L. Rev. 581 (1990); Kennedy, supra note 179.

\textsuperscript{225} On the special vulnerability of children, see Delgado, supra note 1, at 137-38, 142-43, 146-48.
APPENDIX
RESOURCES FOR THE STUDY OF ETHNIC DEPICTION IN THE UNITED STATES

A. GENERAL WORKS


From Different Shores: Perspectives on Race and Ethnicity in America (Ronald Takaki ed., 1987).

Richard M. Gardner, Toward a Definition of Stereotypes, 26 Midwest Q., Summer 1985, at 476.

James Craig Holte, Unmelting Images: Film, Television, and Ethnic Stereotyping, MELUS, Fall 1984, at 101.


Gustavus Myers, History of Bigotry in the United States (1943).


B. AFRICAN-AMERICANS


Black Films and Film-Makers: A Comprehensive Anthology from Stereotype to Superhero (Lindsay Patterson ed., 1975).


Donald Bogle, Toms, Coons, Mulattoes, Mammys, and Bucks: An Interpretive History of Blacks in American Films (1973).


THOMAS CRIPPS, BLACK FILM AS GENRE (1978).


THOMAS CRIPPS, SLOW FADE TO BLACK: THE NEGRO IN AMERICAN FILM, 1900-1942 (1977).

SAM DENNISON, SCANDALIZE MY NAME: BLACK IMAGERY IN AMERICAN POPULAR MUSIC (1982).


NATHAN IRVIN HUGGINS, HARLEM RENAISSANCE (1971).


DANIEL J. LEAB, FROM SAMBO TO SUPERSPADE: THE BLACK EXPERIENCE IN MOTION PICTURES (1975).


Jack B. Moore, Images of the Negro in Early American Short Fiction, 22 Miss. Q. 47 (1968).


Cecil L. Patterson, A Different Drum: The Image of the Negro in the Nineteenth Century Songster, 8 CLA J. 44 (1964).


Carl Wittke, Tambo and Bones: A History of the American Minstrel Stage (1930).


C. NATIVE AMERICANS

Robert F. Berkhofer, Jr., The White Man’s Indian (1978).


Horace Melton, King of the Dime Novels, Western Frontier Ann., no. 1 (1975), at 22.


A. Petitt, Images of the Mexican American in Fiction and Film (1980).

The Pretend Indians: Images of Native Americans in the Movies (Gretchen Bataille & Charles Silet eds., 1980).


D. Asian-Americans

Ira M. Condit, The Chinaman as We See Him (1900).


Ron Dorfman, From the Yellow Peril to the Model Minority, 76 The Quill 10 (1988).


E. Mexican-Americans


THE LAWYER AS TRANSLATOR,
REPRESENTATION AS TEXT: TOWARDS
AN ETHNOGRAPHY OF LEGAL
DISCOURSE

Clark D. Cunningham†

PROLOGUE ........................................................................... 1299

I. THE CASE OF THE ATTITUDE PROBLEM ..................... 1303
   A. The Beginning ..................................................... 1303
   B. The Police Report ............................................. 1304
   C. The Initial Client Interview ................................. 1310
   D. The Suppression Motion ....................................... 1311
   E. The Suppression Hearing ...................................... 1313
   F. Returning to the Client's Story ............................. 1322
   G. Collaborating with the Client ............................. 1326
   H. The Disastrous Day of Trial ............................... 1328

II. TRANSLATION AS A METAPHOR FOR LAWYERING ........ 1331

III. STUDYING TEXTS OF THE REPRESENTATION OF A CLIENT... 1339
   A. The Roots of Ethnography in Cultural
      Anthropology ..................................................... 1339
   B. From Ethnography to Ethnomethodology ............... 1345
   C. Ethnographic Methodologies for Studying Legal
      Discourse .......................................................... 1349

IV. INTERPRETING THE TEXTS OF THE ATTITUDE PROBLEM
    CASE ................................................................. 1357
   A. The Police Report ............................................. 1357
   B. The Suppression Hearing ..................................... 1363
   C. What the Client Said ......................................... 1366
      1. A Respectable Person ..................................... 1366
      2. Being Treated Differently ............................... 1368

V. LAST WORDS ............................................................. 1383

† Associate Professor of Law, Washington University (St. Louis). Earlier versions of this article have been presented to the 1990 Annual Meeting of the Law & Society Association, the Second International UCLA-Warwick Clinical Conference, the 1989 Symposium on Legal Narrative held at the University of Michigan Law School, the Institute for Legal Studies at the University of Wisconsin Law School, and the Law & Society Program at Macalester College. Helpful comments and advice have been received from M. Dujon Johnson, Helen V. Cunningham, James Boyd White, Paul D. Reingold, Thomas D. Eisele, Milner S. Ball, Suellen Scarnecchia, Anthony V. Alfieri, Roy D. Simon, Patricia Williams, Norman L. Rosenberg, Lewis Henry LaRue, Austin Sarat, Richard Delgado, Naomi Cabin, Jean Koh Peters, and many who attended and participated in the above-mentioned presentations.
This is a true story. It is the story of how the law punished a man for speaking about his legal rights; of how, after punishing him, it silenced him; of how, when he did speak, he was not heard. This pervasive and awful oppression was subtle and, in a real way, largely unintentional. I know because I was one of his oppressors. I was his lawyer.

Earlier drafts of this Article began with the above somewhat melodramatic and self-flagellating words. Although I still hope that the story you are about to read is true, I no longer wish to begin by asserting its meaning. Instead, I strive to present this story in a form that you can interpret yourself, and in so doing, to exemplify a method for both studying and changing the practice of law.

In a recent article, Lucie White points out that the word “client” derives from the Latin verb “cluere,” meaning “to be named, hear oneself named.” In ancient Rome, persons under the patronage of patricians were called “clientem” because they were known by the name of their patron. White explains that because, even for the most enlightened modern day lawyers, “advocacy is a practice of speaking for [the client,] . . . the advocate . . . inevitably replays the drama of subordination in her own work.” The story told below shows how powerful the forces of such client subordination can be despite a lawyer’s conscious intent and efforts, but the Article as a whole also strives to offer some hope against White’s word “inevitably.” I offer the metaphor of the lawyer as translator as a way of both understanding and altering the ways lawyers change the meanings of their clients’ stories. By implying that law is a language foreign to the client, the metaphor suggests that the meaning of the client’s story will “inevitably” be transformed through the lawyer’s representation; no sentence can be perfectly translated from one language to another. Yet if one feels a sense of loss in speaking through a translator, there can also be something gained.

1 Lucie E. White, Goldberg v. Kelly on the Paradox of Lawyering for the Poor, 56 Brook. L. Rev. 861, 861 n.2 (1990) [hereinafter Paradox of Lawyering].
2 Id. at 861.
3 By stressing the inevitability of meaning change, the translation metaphor suggests, for example, that the interviewing techniques advocated in the influential texts authored by David Binder and his colleagues at UCLA, see David Binder & Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977); David Binder, et al., Lawyers as Counselors: A Client-Centered Approach (1991), although valuable, may not be sufficient to assure that the case constructed by the lawyer continues to be the client’s “own story” in a way that is meaningful for the client. See infra note 159. For differing assessments of the limitations of the “client-centered” model of lawyering, see Anthony V. Alfieri, The Politics of Clinical Knowledge, 35 N.Y.L. School Rev. 7 (1990); Robert Dinerstein, Client-Centered Counseling: Reappraisal and Refinement, 32 Ariz L. Rev. 501 (1990); Robert Dinerstein, “Clinical Texts and Contexts,” 39
By speaking through a translator, one can be heard and understood in places where otherwise one is mute. The translator does not silence the speaker but rather seeks to enhance the speaker's voice by adding her own. The good translator does not alter the speaker's meaning without the speaker's consent, and may even collaborate with the speaker to produce a statement in the foreign language that is more meaningful than the speaker's original utterance. Thus, translation offers both an image of the constraints upon a lawyer's ability to represent fully his client's story and a model for recognizing and managing the inevitable changes in meaning in a way that may empower rather than subjugate the client.\(^4\)

More than ten years ago, William Felstiner, Richard Abel, and Austin Sarat pointed out the need to study the process by which disputes are transformed from a layperson's initial sense of injury into legal claims, and noted the dearth of empirical research and scholarly attention to this issue.\(^5\) Legal scholarship that begins with a court's written opinion or even that (all too rarely) delves back to the complaint filed at the outset of litigation misses entirely this critical transformation process. Yet we know that the vast majority of lawsuits filed are resolved without a court decision on the merits and that an even larger number of disputes are handled by lawyers without ever utilizing litigation.\(^6\) The ways lawyers transform their clients' stories into legal terms are the most profoundly important ways that the legal system has effect; yet these transformations have been largely invisible to and unstudied by the legal academy.

What scholarship exists, almost all very recent, provides troubling reports.\(^7\) Works by Tony Alfieri, Gerald Lopez, and Lucie White on poverty and civil rights practice—drawing primarily on their own experiences in these fields—conclude that lawyers routinely silence and subordinate their clients while purporting to tell

4 Of course, client subordination is caused by many other factors than the problem of "translation" nor will better translation by itself necessarily empower most clients. The translation metaphor is offered to supplement, not supplant, other critiques and models of lawyering. It is interesting to note, however, that even one of the most prominent advocates of a radical reconception of lawyering, Gerald Lopez, views "translation" as a necessary aspect of any effort (even by a non-lawyer) to help another person solve a problem. Gerald Lopez, Lay Lawyering, 32 UCLA L. Rev. 1, 9-14 (1984).

5 William L.F. Felstiner et al., The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..., 15 LAW & SOC'y Rev. 631 (1980).


"their" stories. Although these writers tend to emphasize the role of gender, race, and class in such client subordination, the news from other fronts is no better. Felstiner and Sarat have concluded from an extensive empirical study of divorce cases—in which lawyer and client often share the same race, gender, and class features—that "clients largely talk past their lawyers" and that the lawyer's interpretation takes place without a shared understanding. The anthropologist-lawyer team of William O'Barr and John Conley concludes from its studies of legal discourse that "the law has come to define the problems of ordinary people in ways that may have little meaning for them, and to offer remedies that are unresponsive to their needs as they see them." Significantly, research consistently shows that people who have been involved with the American legal system have a more negative view of it than those who have not. Litigant discontent is pervasive and notably independent of outcome; "winners" are as critical as "losers."

In using the metaphor of lawyering as translation, this Article suggests that one can understand at least some of the silencing of the client's voice as the lawyer's failure to recognize and implement the art and ethic of the good translator—a translator who shows conscious awareness of shifts in meaning and who collaborates with the speaker in managing these changes. It also suggests a methodology, drawn from anthropology and sociolinguistics, for making a lawyer aware of how meaning is changing and for revealing the complex significances of the story to be translated. This methodology, termed the ethnography of legal discourse, begins by recording as much as possible of what takes place during the representation of a

---


12 See Tom R. Tyler, Client Perceptions of Litigation, 24 TRIAL 40 (1988); see also TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (1990) ("In evaluating the justice of their experiences [people] consider factors unrelated to outcome, such as whether they have had a chance to state their case and been treated with dignity and respect.").
client. These records are then treated as texts which are given close and repeated reading with the goal of evoking the significance of what was said and done from the standpoint of each participant and, particularly, from the viewpoint of the client. The resulting interpretation is generated through a collective process, perhaps with colleagues and, most importantly, with the client herself. The experience of anthropologists, sociologists, and linguists with similar methodologies suggests that this approach can be an effective way of recognizing the difference of “the other” and expanding imagination sufficiently to have some understanding of the other’s story.

In Part I I tell the story of one case I personally handled, and include many verbatim texts of what was actually written and said. While representing this client, I consciously strove to emulate the translator’s art and ethic, with decidedly mixed results. In Part II I further explicate the metaphor of lawyering as translation, and in Part III I summarize the theory and practice of ethnographic description of legal discourse. In Part IV I apply the translation metaphor and ethnographic methods to the texts that appear in Part I, and in Part V I share my client’s comments on the case as a whole and on my interpretations of what happened. I hope to recreate for you my own experience of growing understanding as it developed through use of the translation metaphor and the methods of ethnography.

In order of preference, forms of recording are videotaping, audiotaping, verbatim transcripts, contemporaneous notes, accounts written soon after the event, and more distant written recollections checked against other persons present at the time.

As explained infra notes 245-46 and accompanying text, my client has consented to the use of his real name and to the disclosure of confidential attorney-client communications in this Article. I have also used the real names of the arresting police officers and the trial judge, and reproduce in figures 1 and 2 actual court and police documents.

By preserving the integrity of the client’s own words in texts that are studied and by including the client in the interpretation of those words, the ethnographic method hopefully de-centers the lawyer and strips him of some of the power that may blind and deafen him. Feminist and critical race theorists suggest that those who have personally experienced disempowerment and marginalization can attain a “multiple consciousness” that enables them to imagine other kinds of marginalized viewpoints. See Richard Delgado, When a Story is Just a Story, 76 VA. L. REV. 95 (1990); Richard Delgado, Storytelling for Oppositionists and Others, 87 Mich. L. REV. 2411, 2414 (1989) [hereinafter Delgado, Storytelling]; Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN’S RTS. L. REP. 7 (1989). In a more modest way that hopefully guards against what Delgado and Stefancic term the “empathic fallacy,” Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 CORNELL L. REV. 1258, 1261 (1992), the ethnographic method may provide a similar insight into the worldview of those situated very differently, a way of responding to the postmodern concern with being trapped within one’s own subjectivity.
THE CASE OF THE ATTITUDE PROBLEM

A. The Beginning

This story begins with a sentence of deceptive simplicity, contained within the complaint in a misdemeanor case:

**FIGURE 1**

STATE OF MICHIGAN
JUDICIAL DISTRICT
JUDICIAL CIRCUIT

<table>
<thead>
<tr>
<th>DISTRICT COURT OFF:</th>
<th>COURT ADDRESS</th>
<th>COMPLAINT</th>
</tr>
</thead>
<tbody>
<tr>
<td>THE PEOPLE OF</td>
<td>M. DUJON JOHNSON</td>
<td>MISDEMEANOR</td>
</tr>
<tr>
<td>CITY/TWP/UTP:</td>
<td>Ypsilanti Twp., Ypsilanti</td>
<td>CASE NO.</td>
</tr>
<tr>
<td>CITY/TWP/UTP:</td>
<td>CITY/TWP: Ypsilanti Twp., Washtenaw</td>
<td>4901-88</td>
</tr>
<tr>
<td>Charge:</td>
<td>Disturbing the Peace</td>
<td>90 days and/or $100</td>
</tr>
<tr>
<td>Warrant authorized on Date</td>
<td>Subscribed and sworn to before me on Date</td>
<td></td>
</tr>
</tbody>
</table>

**STATE OF MICHIGAN, COUNTY OF WASHTENAW**

The complaining witness says that on the date and at the location described, the defendant contrary to law,

did make or excite a disturbance in a business place, located at Hewitt at Washtenaw; contrary to NCL 750.170; MSA 28.367; [750.170]

The complaining witness asks that defendant be apprehended and dealt with according to law.

(Officer only) I declare under penalties of perjury that the statements above are true to the best of my information, knowledge and belief.

Complaining witness signature

Subscribed and sworn to before me on Date

Prosecuting Official
The defendant named in this complaint, M. Dujon Johnson, was arraigned in a district court in Washtenaw County, where the University of Michigan is located. The county seat is Ann Arbor, a wealthy and sophisticated college town located about 40 miles west of Detroit. The other major town in the county is Ypsilanti, a more working-class community with a substantial African-American population. This district court serves Ypsilanti Township, a fairly rural area adjacent to Ypsilanti marked by pockets of suburban encroachment.

Johnson asked for court-appointed counsel because of his limited income. The General Clinic at the University of Michigan Law School was appointed to represent him. At the time, I was one of two clinical professors who taught the General Clinic. The case was assigned to a team of two student attorneys, and I was their supervising attorney.

B. The Police Report

Apart from the rather uninformative misdemeanor complaint, the first information we received about this case came from the police incident report, which we obtained before the initial client interview. The report, reprinted below verbatim, was signed and apparently authored by Michigan State Trooper Wayne Kiser. The abbreviation which appears throughout as "U/S" ("undersigned") sometimes refers to both Kiser and his partner, Trooper Frank Mraz, and sometimes only to Kiser.

---

15 In the Michigan court system, the district court is the lowest court of record, with jurisdiction over misdemeanors and civil cases in which the amount in controversy is less than $10,000. Mich. Stat. Ann. § 27A.8301, 27A.8311 (1987). Populous counties are typically divided into several districts, with a separate court for each district. Id. § 27A.8101; § 27A.8120(2) (creating district court for Ypsilanti Township).

DISORDERLY PERSON/DWLS:

VENUE:

Primary incident occurred at: Intersection of Hewitt and Washtenaw Ave. Vehicle NB Hewitt crossing Washtenaw Ave.

Secondary venue occurred at: TOTAL GAS STN. located on the NW corner of intersection described in primary venue.

DATE/TIME:

Incident occurred on 09/05/88 at: 04:30 A.M. (Monday).

VEHICLE INVOLVED:

1977 Triumph 2Dr Convertable, Blue in color bearing 89/MI 721 VRJ.

Disposition of vehicle: Towed from scene to Ypsi Towing. No Hold.

INFORMATION:

U/S while on patrol were EB on Washtenaw Ave approaching Hewitt Rd. Said intersection was controlled by a traffic signal, traffic signal was observed flashing Yellow for EB and WB Washtenaw Ave traffic.

Signal was further observed, flashing RED for traffic NB and SB on Hewitt Rd.

Vehicle listed above was observed to be travelling NB on Hewitt Rd. and at an estimated speed of 35 MPH. Vehicle did NOT stop or slow for the flashing RED signal.

Vehicle was then pursued by U/S and a subsequent traffic stop ensued.

U/S observed driver of vehicle to look over at patrol unit, now about to make a NB turn onto Hewitt and behind target vehicle.
Vehicle then made an abrupt left turn into the TOTAL gas station and pulled into one of the pump stations.

U/S pulled up to the pump station near suspect vehicle. U/S observed the driver to exit his vehicle and begin walking up towards the building.

U/S obtained the driver's attention and requested same to return to the vehicle. Driver began walking towards officers.

CONTACT DRIVER/OBSERVATIONS:

Upon making contact with the driver U/S was met with irate actions, with driver stating that this wasn't necessary. U/S advised the driver that running a RED light was a necessary stop. Tpr. Kiser making contact with driver requested subject to produce his MICH DRIVER license, Registration and Proof of Insurance for the motor vehicle.

Driver's attention was then directed away from U/S and to Tpr. Hraz who was utilizing his hand held flash light to look into the driver's side of the vehicle. Driver was observed to make statements directed towards Tpr. Hraz indicating to the effect, "What are you doing looking in my car"?

Further, Driver stated U/S have no right looking inside his vehicle and that he knew the law well enough to know "WE" need a search warrant to look into his vehicle.

Tpr. Kiser at this time again asked driver to produce his license at which time driver again asked what he was being "Harrased" for. U/S explained that they observed him run the RED light and that this was the reason for being stopped, and U/S did not feel they were conducting themselves in any offensive manner. Driver then began indicating that he did NOT run the RED light, that he came to a complete stop and that U/S were making this up for a reason to Harrass somebody.

Driver continued with verbal accusations of U/S being the "Strong Armed Vigilanties" and "Taking things out on the Working Public". Driver repeatedly stated: "I have no respect for YOU people", and "You are Bigots".

When driver was asked questions pertaining to and surrounding the events leading up to the incident at hand, would make strong, detailed remarks indicating that the POLICE can't get away with these kinds of things.

CAUSE FOR ARREST:

U/S upon continuing the normal course of action on this traffic stop felt uneasy with the situation as the driver was acting in a manner such to create U/S with a concern for safety of officers. U/S has made
many traffic stops and has not come into contact with persons acting in this nature without attempting to hide something or possibly having contraband or a weapon about their person or accessible inside vehicle.

U/S requested driver to place his hands on the hood of his vehicle and spread his feet back in the normal wall search position. U/S asked the subject if he possessed any weapons, guns, knives, etc... Driver stated that U/S could not search him unless he was arrested for some offense.

U/S again explained to the subject that they wished to pat him down only to dispell the possibility of him having any weapon.

Driver continually stated that he was NOT letting U/S pat him down. Driver was arrested for Disorderly Person. Driver was then handcuffed and patted down with no weapons being found.

Subsequent radio traffic with MSP #26 R/O Koths reference Driver's status and vehicle information found Driver to be Suspended on two (2) FCJ's out of Detroit.

#1. Suspension Date / 12/30/87 FCJ # E736428 / Careless Driving.

#2. Suspension Date / 12/30/87 FCJ # E736429 / Reg and/or Plate violation.

ARRESTED:

H. DUJON-JOHNSON B/M 04/25/59 of: 800 W Huron St Apt. #5, Ann Arbor, MI. OLN # 252 566 000 316. SSN 381 74 1577. Employed: U of M Medical Records Section/also Student UofH. 5-10 145 Blk Bro. Married.

Count #1.

DWLS. Citation issued. Bond of $100.00 requested. Held at MSP pending that action.

Count #2.

Disorderly Person. UD-7B issued. PR bond given, pends subjects cont tact with 14-B Dist Ct of Juris within 10 Days.

SOS REQUEST:

MSP #26 R/O Koths sent request via LEIN to SOS for certified copy of driving record for arrested.

PROSECUTOR CONTACT:

Copy of this complaint sent to Wash Co Pros Ofc for review and Authorization of Disorderly Person.
WITNESSES:

Due to the Driver's actions and statements being made, U/S made contact with the two on-duty employees of the TOTAL GAS STA.

Said employees were within eyesight of the vehicle in question and were requested to supply U/S with their name(s) for any possible future complaint this subject would make pertaining to actions of officers this night.

#1. ALLEN ADKINS W/M of:

#2. PATRICIA WINTON W/F of:

Subject #1 listed above indicted to U/S that he did not watch the entire incident however did observe that the B/H subject was giving U/S officers a hard time and not being very cooperative.

Subject #2 indicated about the same observation(s) as did #1.

COMPLAINT STATUS:

CLOSED.
Upon reading the report, I immediately concluded that the encounter between our client and the state troopers was an improper Terry-stop that had escalated into a pretext arrest. In *Terry v. Ohio*,$^{17}$ the Supreme Court extended the Fourth Amendment's prohibition of "unreasonable searches and seizures" to include the common police practice known as "stop-and-frisk," an interference with liberty short of a full arrest in which a police officer approaches a person she suspects of criminal activity for a brief interrogation.$^{18}$ In order to protect the officer's safety during this brief encounter with a possible criminal, the officer is allowed to "seize" the suspect long enough to conduct a "pat-down" search for weapons if the officer has particularized reasons for believing that the suspect is presently armed and dangerous.$^{19}$ The Court emphasized that such a stop-and-frisk, a procedure now named the "Terry-stop" after the *Terry* case, requires more than an "unparticularized suspicion or 'hunch'."$^{20}$

Taking the incident report as true, it was clear that although the troopers could ask our client to produce his drivers license and registration if they had seen him violate a traffic law, that traffic violation alone gave them no reason to believe he was armed and dangerous. As for the statements appearing under the heading "Cause for Arrest" in the report, they certainly added up to no more than mere suspicion. A pat-down search incident to a Terry-stop must be based on some particular observation that indicates the suspect has a weapon on his person or in reaching distance, such as a suspicious bulge or a sudden movement toward a pocket, combined with evidence of potential dangerousness, typically supplied by the crime the officer suspects the person committed.$^{21}$

Under my analysis, which continued to take the report as true, when our client (quite justifiably) refused to submit to the pat-down search, the trooper converted the stop into a pretext arrest to cover the impropriety of the search. Under *United States v. Robinson*,$^{22}$ a police officer may conduct a complete body search of a person upon arrest regardless of whether the officer has any basis for believing that the arrestee has weapons, contraband, or other evidence on his person.$^{23}$ When an officer makes an arrest in order to take advantage of the broad Robinson exception to the usual Fourth Amend-

---

17 392 U.S. 1 (1968).
18 Id. at 30, 31.
19 Id.
20 Id. at 27.
21 Id. at 27, 30.
23 Id. at 235.
ment requirements for conducting searches, that arrest is termed by most commentators as a pretext arrest.\textsuperscript{24}

In our case, it seemed clear to me, the troopers arrested our client on the pretext that he was "a disorderly person."\textsuperscript{25} The "hunch" that our client had a weapon turned out to be wrong and the troopers were then forced to carry through the charade that our client had committed a misdemeanor.

C. The Initial Client Interview

Students in the Michigan General Clinic work in teams of two. Although each team is closely supervised by a clinical professor who bears the ultimate professional responsibility for representation, one goal of the clinic is to encourage the students to view the cases as their own and thus enter fully into the professional role of lawyer. To this end, the initial client interview usually occurs without the professor present, although, with the client's consent, the interview is videotaped for later review by the students and the professor.

The two student attorneys met Dujon Johnson for the first time on January 25, 1989, more than four months after his arrest on September 5, 1988. The interview took place in the Clinic's conference room, a converted faculty office located off the opulent neo-Gothic library reading room of the Michigan Law School. Johnson was seated at the end of a massive wooden table with the student attorneys located on either side of him along the sides of the table. Above the table, suspended from a florescent light fixture, was a microphone for audio pickup. The video camera was rather obtrusively mounted on an adjacent file cabinet that concealed the recording equipment within. Following standard clinic practice, the students obtained Johnson's written consent to the video recording of the interview before the equipment was turned on.

The videotape of the interview lasted about 50 minutes. I viewed it in the company of the students several days later with three major objectives in mind: to critique the students' interviewing techniques, to get an initial impression of the client, and to check his story against the police report for inconsistencies.

\textsuperscript{24} This substantive Fourth Amendment law is discussed infra at notes 162-91 and accompanying text.

\textsuperscript{25} The police report indicated that Johnson was also charged with driving while license suspended ("DWLS"). POLICE REPORT, supra note 16, at 1. That charge, however, could not have been the basis for the arrest and pat-down, because the troopers only learned about the suspended license after Johnson was searched and cuffed. \textit{Id.} at 3. The license suspension apparently arose out of a misunderstanding regarding whether Johnson had paid two prior tickets. The prior tickets were taken care of and the DWLS charge was dropped before we entered the case.
As for my impressions of Dujon Johnson, he seemed poised, articulate and likeable. Indeed, I remember commenting to the students that it seemed that our client was managing the impressions he created in the interview with at least as much care as the students were managing their interviewing techniques. I learned by way of background that Johnson had served in the military and worked both as an assistant in a law school library and as a paralegal. He was currently finishing his undergraduate degree at the University of Michigan and planning to get a Master's degree in Chinese Studies. He was married and lived in Detroit. His means were very limited. At the time of the interview, he had been unable to repair his car and had to commute the forty miles to Ann Arbor for classes by bus. He had no prior criminal record. He was black, a fact we knew before the interview from the identifying abbreviation in the police report: “B/M” (“Black Male”).

As I viewed the tape, I noted four major inconsistencies between the police report and Johnson's story of what happened that night. First, our client adamantly maintained that he had come to a full stop before proceeding through the intersection. Second, he insisted that the troopers did not tell him that he had run a red light or otherwise explain their actions until after his arrest. Third, he said he was neither belligerent nor demonstrative before he was handcuffed. Finally, he denied accusing the troopers of being "strong armed vigilantes" or of "taking things out on the working public." He did, however, confirm saying, "I have no respect for you people." His response when asked if he said, "you are bigots," was ambiguous: "I may have said that. I don't think I said, 'you are bigots.'"

D. The Suppression Motion

Our client's story further confirmed my theory that this was a case of a pretext arrest. I also saw in one detail of Johnson's narrative a way of advancing this theory in a pretrial motion. He insisted he was neither demonstrative nor belligerent before Trooper Kiser demanded that he submit to a frisk, a claim that seemed consistent with the personality he displayed during the interview. Arguably, if the demand to be frisked was illegal, then our client was entitled to complain loudly; indeed state law suggested he would have even

---

26 The two students and I were all white men. The judge, the prosecutor, and Trooper Kiser were also white men; Trooper Frank Mraz was identified by the judge as a Native American, but our client described him as white.

27 After consulting with me, the students decided not to show the police report to our client before or during the interview.
had the right to resist by force. But rather than wait until the trial to challenge the legality of the frisk order, it occurred to me to take the offensive and file a suppression motion.

Typically, a motion to suppress on Fourth Amendment grounds is brought to prevent the introduction of incriminating physical evidence. The purpose of our motion was somewhat unusual: to suppress all statements made by our client from the moment that the trooper demanded that he submit to the pat-down search, on the theory that these statements were the "fruit" of constitutional violations. If, as our client reported, the only arguably "disorderly" conduct took place after the encounter escalated into the frisk order, suppression of this evidence would greatly weaken, if not destroy, the prosecution's case.

I was far from certain that this somewhat novel tactic would succeed in securing a pretrial dismissal. In part, the motion was appealing simply for tactical reasons. It created the basis for a pretrial evidentiary hearing that would give us the opportunity to cross-examine the troopers for discovery and to preserve their testimony for possible impeachment use at trial. I also wanted a chance to introduce the judge to our Fourth Amendment theory before trial and

---

28 The relevant case law held that a citizen has the right to resist an illegal arrest even by force if necessary as long as the force is no greater than needed. See People v. Landrie, 335 N.W.2d 11 (Mich. Ct. App. 1983). The illegality of an arrest is a complete defense to the charge of resisting arrest, and the state cannot evade this defense by charging peace disturbance instead of resisting arrest. People v. Davenport, 215 N.W.2d 702 (Mich. Ct. App. 1974).

29 Here, excerpted from our brief in support of the suppression motion, is the story we told the court:

In the police report there is absolutely no evidence other than unperticularized suspicion or hunch that defendant was armed and dangerous. The troopers approached defendant after he had emerged from his car. He stood in their plain view. There is no indication that the officers had any visual clue, such as a lump in his waistband, that might make them suspect defendant of carrying a weapon on his person. He made no threatening movements of any sort. Indeed, all that is reported is the irate questioning of the police officer's actions and accusations of misconduct and harassment. Taking the report at face value, we are asked to believe that the officers could reasonably conclude that defendant was "attempting to hid [sic] something or possibly having [sic] . . . a weapon about [his] person" simply because he made what some people would think were rude statements to police.

At no time during the incident in question did defendant do more than object to demands made of him by the police and ask the reason for these demands. The troopers could not have had a reasonable suspicion that defendant was armed and dangerous. The request for pat down thus was improper and the fruit of that unlawful conduct should be suppressed.

test his receptivity. If he was receptive, we might elect to have a bench trial, but if he was not, we would proceed with a jury.

E. The Suppression Hearing

The Ypsilanti Township courthouse rises incongruously out of a wasteland of abandoned fields. A sweeping driveway takes one past a man-made pool complete with fountain and ducks, and up to a modern glass and brick complex. Inside, all is clean and well-appointed; the two courtrooms are flanked by convenient conference rooms and a comfortable lounge marked "for lawyers only."

The undisputed monarch of this small but impressive domain was Judge John Collins. I had appeared before Judge Collins on a number of previous occasions and had mixed feelings about him. I had been told that was an auto worker before becoming a lawyer (Ypsilanti Township is the site of a major automotive plant). He had worked as a prosecutor, township attorney, and in private practice before his elevation. I was surprised on more than one occasion to hear him draw on his personal familiarity with one or more of the parties before him in discussing a case. Indeed, I sometimes wondered how many township residents he did not know. His style was folksy but authoritative.\(^3\)

When we showed up in court for the hearing on our suppression motion, we found that despite notice to the prosecutor and the troopers that we intended to examine both troopers at the hearing, neither trooper appeared. The judge accepted the prosecutor's explanation that their supervisor at the state police post had not received sufficient advance notice.

We were therefore forced to begin with our client's testimony and then continue the hearing to another date for the troopers' testimony. Thus, the only testimony at the first hearing was from our client. I have no notes of his testimony, and we never ordered a transcript. Now as I write this article, I have no clear recollection of what he said other than an impression that it was consistent with his interview and favorable to his case if believed. In retrospect, I find ominously significant my lack of attention to his testimony.

My recollection is that Judge Collins paid little overt attention to Johnson's testimony either. Much of the time his chair was rotated away from the witness stand, so that he could not have looked at our client while he testified even if he had wanted to do so. One point definitely did catch his attention, though: the claim that the troopers might have stopped Johnson because he was black. I do

---

\(^3\) In personality and style, Judge Collins resembles the "Law Maker" judge described by Conley and O'Barr. See Conley & O'Barr, supra note 10, at 87-90.
not recall that our client specifically made this claim during his testimony; however, because we had attached the police report to our motion, the judge could have constructed this claim out of the statements in the report that Johnson told Kiser "[you are] making this up [the traffic violation] for a reason to Harass somebody" and "You are bigots." I know that this point attracted Judge Collins's attention because he volunteered at some point during that first hearing that Trooper Mraz was an Indian (i.e. Native American); he seemed to thereby imply that the actions of the trooper team that night could not have been racially motivated.

At the conclusion of our client's testimony, we made a futile attempt to obtain a ruling on our motion based solely on the record as it stood, arguing that the prosecutor had the burden of producing the troopers to rebut our client's testimony. The judge would have none of it. He wanted to hear "both sides of the story," and so the hearing was continued to a date five weeks later to take the troopers' testimony. The prosecutor agreed that he would produce both troopers without requiring us to subpoena them.

The appointed day for the continued hearing came, but Trooper Kiser did not. The prosecutor said that Trooper Kiser was ill. Thus the only testimony was from Trooper Mraz, who seemed a quiet and well-spoken young man.

We took the lead in examining Mraz. Consistent with my usual practice as a clinical teacher, I allowed the student attorneys to conduct the hearing following a detailed outline that we had rehearsed in advance. I spoke only to deal with evidentiary objections and to ask a few follow-up questions at the conclusion of the testimony. I was delighted with the results of the student's examination of Mraz. When initially asked to admit that Johnson did not appear armed and dangerous when first seen, Mraz responded with a suggestive evasion:

---

31 Our client was also not present. We had told him that although he was not required to be present (since he had already testified), we strongly encouraged him to come to assist us in the examination of the troopers and to observe them as preparation for trial. He had indicated that he would be there so his absence was unexpected. Discussions between the student attorneys and Johnson about attending this hearing proved to be a significant source of tension in the attorney-client relationship. See infra notes 54-55 and accompanying text.

32 The student's question was: "At the point and time which you got out of the car and saw the defendant walking up to the station, he didn't appear to be acting in a way that would indicate that he was armed and dangerous, did he?" Evidentiary Hearing at 4 (1988) (No. 88-0128), People v. Johnson (on file with Cornell Law Review) [hereinafter Hearing].
At that point there was no way of telling, he had clothes on it was winter time,\(^3\) he could have been armed, he could have been dangerous. Any time you make a traffic stop, it could be a [sic] armed and dangerous person behind the wheel, or a passenger in the vehicle.

The student pressed for an answer:

Q. But there was nothing that he specifically did that indicated that he was carrying a weapon? At that point.
A. Like I said, stated every time we pull over somebody we treat it as if they were armed and dangerous.

Q. So, at that point and time, you didn't really have any reason to believe there was any criminal activity afoot, did you?
A. Besides running the red light, no.

...[colloquy between court and counsel deleted]\(^3\)4

...Like I said before, I treat them like everyone is armed and dangerous, I don't relax.\(^3\)5

The student attorney then went through a litany of possible reasons under Terry that would justify a frisk, and Mraz consistently admitted that none were present in their encounter with Johnson.\(^3\)6

\(^3\)3 In fact the arrest took place on September 5. We never pointed out this inconsistency to Mraz or the judge.

\(^3\)4 At this point I objected that the witness had not answered the question. The judge directed us to rephrase the question, which I stated as, "whether or not there was anything he specifically did that led them to believe that he was armed?" Hearing, supra note 32, at 6.

\(^3\)5 Id. at 5-6.

\(^3\)6 The relevant testimony included the following:

Q. So during the time right after Mr. Johnson came back to the area of the two cars, and Trooper Kiser began asking questions ... did you see any lumps or bulges in his clothing?
A. No I did not.
Q. That might conceal a weapon?
A. A lot of times you don't see bulges in the clothing.
Q. But at that point you didn't see anything that looked like a weapon?
A. No I did not.

* * *

Q. During the course of the incident you heard Mr. Johnson accuse you and Trooper Kiser for harassing you didn't you?
A. Yes.
Q. And you also heard him call you and Trooper Kiser bigots, is that correct?
A. Yes.
Q. But you never heard him threaten you or Trooper Kiser with physical harm did you?
A. No.
Q. And you never heard him state that he was carrying any kind of weapon or contraband did you?
A. No.
Q. And he didn't make any furtive gestures did he?
A. Is, what do you mean by furtive?
He then attempted with some success to trap Mraz into admitting that our client was frisked, not because he appeared armed and dangerous, but simply because he spoke up for his rights.

Q: Then isn't it true that Mr. Johnson didn't really do anything that caused Trooper Kiser to submit him to a pat down search, other than make the statements that [are] recorded in your report?
A: I'm sorry what statements are they?
Q: That him calling you and Trooper Kiser bigots and accusing you of harassing him.
A: No. The reason Trooper Kiser patted him down is that, for his safety along with mine. Any time somebody exits the car that we believe, we don't know ok, we do a pat down, it's not a search, it's a pat down for any sense of weapons.
Q: I understand.
A: And he, Mr. Johnson ah, argued about that our pat down, was illegal and said you are not patting me down, that brings up our intensity level a little bit higher, more cause for alarm, so Trooper Kiser patted him down for offensive weapons.
Q: So, the reason, the main reason for the pat down was then because he had refused to submit voluntary [sic]?
A: Basically the pat down was done for the officer's safety, the troopers' safety, myself and Trooper Kiser. 37

I then conducted the following series of follow-up questions:

Q: It's your testimony that it is your policy, your partner's policy to conduct a pat down search of any driver who is outside his car after a traffic stop, is that your testimony?
A: That's correct.
Q: And it was for that reason in this case you asked Mr. Johnson to submit to a pat down search, is that correct?
A: I did not.
Q: Or your partner did?
A: Yes.

Q: I mean he didn't make any sudden movements with his hand toward a pocket or the interior of any of his clothing.
A: Well, when he was talking, he was talking with his hands, and they were moving thrashing about and so forth. As far as going into a pocket or anything like that, I don't recall him making any motion going into his pocket.
Q: And he didn't try to run away at any point, did he?
A: No.
Q: And he didn't try and get back into his car and leave, before the arrest was made?
A: No.

Id. at 8-10.
37 Id. at 10-11.
Q. Ok. And it is your testimony that when your partner asked Mr. Johnson to submit to a pat down search, Mr. Johnson refused, is that true?
A. That's true.
Q. His refusal, in your testimony heightened you [sic] suspicion of him, is that your testimony?
A. Yes.
Q. And because of his refusal, you and your partner then did conduct a pat down search, is that your testimony?
A. No.
Q. Because of his refusal, you and your partner arrested him?
A. My partner arrested him.
Q. All right. And he arrested because of his refusal to submit to the pat down search?
A. No, he arrested him for being disorderly throughout the whole incident.
Q. If Mr. Johnson had not refused to voluntarily submit to a pat down search, he would have not been arrested for a disorderly person at that time, isn't that true?
A. I can't ah, I can't say one way or another.
Q. Because you did not make the arrest?
A. You're asking me a hypothetical and I can't answer what would have been, I can only answer the facts of the case.
Q. Was Mr. Johnson's refusal to submit to the pat down search, one of the reasons he was arrested for being a disorderly person.
A. Yes.
Q. At that point, what other things had he done, to be a disorderly person, other than refuse to submit to the pat down search?
A. By saying that the only reason that we stopped him was because he was black, that we couldn't do things that we did as far as myself flashing the flashlight in through the windows to check for any contraband in the vehicle, Trooper Kiser stopping him in the first place, because he knew his rights, his holler (sic - hollering?) at the, ah myself and Trooper Kiser for things that he knew we were doing illegally, all led up to that, acting disorderly.

THE COURT: Maybe for the record, when we got into this bigot and racial thing, maybe for the record we should indicate that Mr. Dujon Johnson is a black american.

MR. CUNNINGHAM: That is correct your honor.
THE COURT: And can we stipulate as to what the nationality or race the other officers are.
PROSECUTOR: We're going to, I'm sure that this isn't the end of this hearing, your honor, so we're going to have Trooper Kiser on the stand at some point and time, so he can probably tell us himself.

Q Trooper Mraz, was it your understanding, that part of what Mr. Johnson was saying prior to his arrest that he believed he was being stopped and investigated because that he was black?
A Yes.

Q You said he was hollering?
A Yes, he kept yelling at us, "you can't do this, you can't do that" and of course of our traffic stop.38

The prosecutor's examination of Trooper Mraz was limited:

Q Just a few questions. . . . What did you stop, what was the traffic offense for?
A The stop was made initially because of the ah, ah Mr. Johnson running the flashing, going under the flashing red light, ah on northbound Hewitt and Washtenaw.

Q When you came upon him, or at what point and time was the arrest made, do you recall? Was there any search prior to the arrest?
A No.

Q Now, when you asked him if you could perform a pat down search on him, or when you went to perform a pat down search on him, what words did you use?
A You can't ah.

Q What you [sic] words did you use?
A Did I use. I didn't use any words.

38 My questioning then concluded with the following interchange:

Q Who was present at the time other than you and your partner?
A There were two people in the Total gas station booth.

Q Inside the booth?
A Inside.

Q Do you have any evidence that they could hear what they were saying?
A No I do not.

Q He was hollering only at you and your partner, is that true?
A Yes.

Q As far as you know, you and your partner are the only ones that heard what he said, as far as you know?
A As far as I know.

Q Ok. My understanding of your testimony is that you listed five things that he did, which caused him to be arrested for disturbing the peace or being a disorderly person. Is there anything else you want to add in terms of what he did, or have you told me everything as far as you remember?
A As far as I remember.

Q I don't think we have any more questions at this time.

Id. at 14-17.
Q. Did you, were any words used?
A. Trooper Kiser talked to him.

Q. Ok. What did he say?
A. He informed him that the reason that he was doing a pat down, for ah, all I'm going to do is check for offensive weapons.

Q. And did he, was it a question, was it, was he looking for a response, was he asking him if he could pat him down?
A. Basically informed him that he was going to be doing a pat down for the safety of both the troopers present.

Q. Now, tell me about his, about the defendant's demeanor.
A. Very hostile toward the, myself and Trooper Kiser.

Q. What about his tone of voice?
A. In an angry type voice.

Q. What was the intensity of his voice?
A. Loud.

Q. What about his physical actions.
A. Thrashing about, waving his arms and fists and saying (sic).

Q. Is this usual, on a civil infraction for somebody to act like this?
A. No, no not at all.

Q. And uh, what were some of his personal behaviors? . . . Towards yourself and just his actions in general on that specific date and time.
A. Hostile toward us, really for no uh.

Q. Any other customers in the area in the parking area. . . . Were there any other individuals?
A. No.

Q. Pedestrian traffic?
A. No.

Q. That's it. Nothing further.

THE COURT: Did you know this individual?
A. No I did not.

THE COURT: Did you get any indication that Officer Kiser knew him?
A. No.39

Mraz's testimony ended at this point. One of the cliches of teaching trial practice is the warning against asking one too many questions, the wisdom of knowing when to stop. We were so pleased with Trooper Mraz's testimony—his admission that there were no specific facts suggesting our client was armed and dangerous, his description of their practice of treating every driver as if the person were armed and dangerous, and his catalogue of the "things our client had done" to be a disorderly person—that we decided to submit our motion for decision that day rather than insist on ob-

39 Id. at 17-21.
taining the testimony of Trooper Kiser at yet another continued hearing. Although I still wanted a chance to meet Trooper Kiser and preserve his testimony for impeachment use at trial, I was willing to give up these desires rather than risk altering what I viewed as a near-perfect record for our motion.

The hearing on our motion therefore concluded that day with brief arguments by one of the student attorneys and the prosecutor. Of course I was prepared for the possibility of losing our motion, despite the strength of the record. However, when the judge immediately issued his bench opinion after our arguments, I was shocked by the words he used in articulating his decision to deny our motion:

THE COURT: Well, there's no doubt in my mind, this is definitely an attitude arrest and had the person not exhibited the attitude that he exhibited he never would have been arrested, I think that's pretty obvious, and I don't think there's anything wrong with that. I think that officers out on the street are human subject to the same human responses that other people have, and that they react as humans react.

I don't have any problems at all with the traffic stop, this is a valid traffic stop[.] [T]he elements of a valid stop are that a stop must be based on specific and [sic] conduct which would lead a reasonable person to believe that criminal activity is afoot, that's Terry versus Ohio. Civil infraction is sort of a [hybrid], it really isn't quote criminal activity, but certainly the officers had justification to stop this vehicle[.] [T]hey didn't just see a black man in a gas station and say "["]oh there's a black man in the gas station, let's go and arrest him,"["] and that didn't happen. [And] the fact that one person is black and the other person is caucasian does not make it a racial instant [sic-incident?]. I don't see any problem with stopping this individual.

[O]nce having stopped him, he was the author of his own problems[.] [H]e started getting, acting strange and unusual, started walking away from the car as if he was conducting some business in the gas station, raising his hands, howling [sic] at the officers, causing a disturbance of his own making, howling [sic] racism because they stopped him for running a red light[.] I'm sure that these two officers had no clue when they saw this person run the red light, whether he was black or white or brown or red or green or any other color[.] [T]hey just didn't know and so the person was walking around with a chip on his shoulder and these officers were the object of that behavior.

Then the officer asked him, and again in the Terry case, they say once a valid stop is made the officer may engage in a protective search if there's reason to believe the stopped individual is armed and presently dangerous[.] [O]n this particular case they didn't have any reason to believe that the person was armed and presently dangerous. I have said on numerous occasions and I
think I'll continue to say until some Court tells me that I'm dead wrong, that the first duty a police officer has in this society is to survive and I don't think that I'm ever going to find that the police officer is acting unreasonably when he stops an individual for a valid stop and does a brief pat down to protect both himself and his partner.

In this particular case there seems to be a request for pat down which was denied. Now at that point and time, had the individual agreed to the pat down and it turned out that he did not have any weapon, then obviously that would have been the end of it and the police would have just exercised their discretion and moved on. On this particular case, the individual case, the individual says no, I'm not going to let you pat me down. At that point and time I think the officers exercised their discretion and said look, we didn't have to arrest this guy for disorderly conduct for running his mouth in the manner that he did, but if he's gonna act like this then we're gonna exercise that discretion and arrest him. Once they put him under arrest they have a right to do a pat down search, which they did. I think it's definitely an attitude ticket, no question about it.

The most obvious surprise in the bench opinion was the judge's apparent refusal to follow the authority of Terry. He acknowledged that in this case the troopers “didn't have any reason” to believe that our client was armed and presently dangerous. Yet he implied that the troopers nonetheless could require our client to submit to a search, by saying that he did not think he would ever find that a police officer had acted “unreasonably” by conducting a pat-down search, because the officer’s “first duty” was to survive.

The more enduring surprise, though, was the judge's confident description of “what happened” as an “attitude ticket.” I had never heard the phrase before, but I thought I had a good idea of what the judge meant. Our client was arrested for having a “bad attitude,” pure and simple. The judge was sure that this was what happened, did not think there was “anything wrong with that,” and was as casual as he was confident in his comments.

In describing my reaction to hearing Judge Collins's bench opinion, I use the word “shock” quite deliberately without any desire to be overdramatic. “Shock” evokes the image of touching a live wire, producing two successive, but very different reactions. First, I felt momentarily paralyzed and numb—my breath was taken away, I was speechless. What could I possibly say? The judge had with casual authority sanctioned not just a specific instance of police misconduct, but a whole way, a whole world of police-citizen inter-

---

40 *Id.* at 27-29.
action, that seemed to me clearly unlawful. What was obvious to
him, and obviously acceptable to him, was obviously wrong to me.

But the death-like paralysis of a shock passes, sometimes to be
replaced with galvanized movement, for a shock can be a jolt that
revitalizes. Judge Collins’s bench opinion jolted me out of thinking
about what happened only in Fourth Amendment terms.

F. Returning to the Client’s Story

At the time of the suppression hearing I was working on an ear-
lier article that experimented with the metaphor of translation both
by examining its epistemological implications and by applying it to
two earlier clinic cases I had handled. (The article was called *A Tale
of Two Clients: Thinking About Law as Language*.\(^4\)) I presented a draft
of the article at a symposium about a week before Johnson’s trial
was scheduled to begin. In the small-group symposium discussions
that preceded my presentation,\(^4\) I found myself talking more about
Johnson’s case than about the two cases described in the draft. In
the midst of the symposium I decided to devote my twenty minute
presentation in the final session to a presentation and discussion of
the Johnson case, not just as an illustration of my theory of lawyer-
ing as translation, but as a shared opportunity with the other sympo-
sium participants to apply and test that theory in practice.

To prepare for my presentation, I went back and reviewed the
videotape of the initial client interview. In particular I watched sev-
eral times the following portion in which Johnson described “what
happened” after he exited his car at the gas station:\(^4\)

> CL: He whipped around and pulled in off of Hewett. In other
> words, he pulled in as if he was blocking my car. And,
> um, I didn’t do anything about it, as far as I was
> concerned. And the guy said “Hey Yo.” That kind of
ticks me off. I saw a police officer getting out, putting on
black gloves, and he says “Hey yo, you.” And I said
you’re not talking to me, are you? “Yeah, I am talking to

---

\(^{4\text{1}}\) See Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87

\(^{4\text{2}}\) The Law Review editors who organized the symposium had designed an admira-
able format. For the first day of the conference, symposium authors, editors, and confer-
ence participants met in small editing groups to read, discuss, and provide feedback on
the papers. This procedure resulted in much more collaborative and less adversarial
interaction than is often found at such conferences. See Kim L. Scheppele, *Foreword:

\(^{4\text{3}}\) I produced this and later transcriptions from the videotaped interview by record-
ing the audio portion of the videotape on cassette tape which was then stenographically
transcribed by my secretary. I then edited her transcript by repeatedly watching the
videotape to correct ambiguities and fill in barely audible segments from context. “CL”
describes statements by the client; “ST” indicates statements by either student attorney.
you.” I asked him what he stopped me for. Well, he walked to me —

ST: How far from the car were you when he called you?

CL: Four meters from the car. He pulled in front of the car, blocking it after I got out. And he was the first one out of the car because I really didn’t realize they were there until he said “Hey yo.” By that time he was right in front of my car and I was walking away. And I said, “You are not talking to me, are you?” And he said, “Yeah, you, yo.” And he was putting gloves, his old black gloves on—macho kind of thing. And —

ST: Were they white?

CL: Yeah.

ST: Both of them?

CL: Yes. I said, “Is there a problem here?” He said, “Yeah—come here.” And as he was talking the other officer had a flash light and was looking into my car.

ST: So that one guy was talking to you and the other guy was flashing a light into your car? Were you, were the windows in your car rolled up?

CL: Everything was rolled up. I told him, “You don’t have permission to look in my car nor can you look without my consent.” I wasn’t sure but that’s what I told them—I’m not sure if that’s the law. “But if you want to look, that’s OK. I have nothing to hide.”

I said, “What did I do wrong?” He said, “What’s your name?” I said, “What did I do wrong?” He said, “What’s your name?”

So they said, “Do you have your license?” “I don’t have a license on me, it is in the car.” So I went inside the car. And I said “I want to know why you stopped me.”

So I had my wallet with my running bag with the gear. I moved all the bagels and reached out my wallet.

He said, “You stand over here.” I said, “What’s the problem? And he said, “You stand over here.” He said, “Are you going to be a tough guy?” I said, “I want to know why you stopped me. You just can’t arbitrarily stop me for no reason.”

So then the guy takes out his cuffs. I asked him, “What are you doing?” I said “You are arresting me?” But he didn’t say a thing.

ST: He didn’t answer you!
CL: No. No. I told him, "Now unless I'm mistaken and unless I'm misinterpreting the Supreme Court opinion, if you are putting cuffs on me, and you are detaining me, I am certainly under arrest. And if you are arresting me, then read me my rights and then I want to know why you are arresting me."

He put the cuffs on me, told me to turn around, and I said, "I want to know why you are arresting me." He sort of turned me around and pushed my head forward.

... 

CL: Part of the conversation when my face was on the hood was essentially that I let him know I did not appreciate him addressing me in the type of language he used.

ST: In what type of language did he use?

CL: He didn't use profanity. He just [inaudible]. I told him that I was a tax-payer. If this was a suburbanite, you wouldn't approach him with "Hey, yo." My wife and I worked hard to go to school, to be respectable, and I didn't appreciate you treating me like I was a sixteen-year old kid, which obviously I am not.

He claims that, he claims then that "I treat everybody like that." "Well I don't think you do, personally." And that was really the end of the story.44

As I watched this segment of the tape, the word "attitude" kept percolating in my mind. I found myself naming this "The Case of the Client with an Attitude Problem" and then suddenly working out the implications of that pun. Our client did in fact have an "attitude problem," but the problem was not his attitude but that of Trooper Kiser. As soon as I thought in terms of this characterization of "what happened," I was amazed by how much more I "saw" and "heard" in Johnson's narrative than when I had viewed it initially, having already framed what happened in Fourth Amendment terms. Every action by the police bristled with assertive authority. The car did not simply "pull[] up to the . . . station near [his] vehicle," as neutrally described in the police report; it "whipped around and blocked [his] car." When Trooper Kiser "obtained the driver's attention," he did so by calling out "Hey, yo!" The most obviously symbolic detail was Johnson's observation that as Trooper Kiser approached, he "put on his black gloves."

44 Videotape of Initial Client Interview with M. Dujon Johnson at the University of Michigan General Clinic (Jan. 25, 1989) (on file with author) [hereinafter Initial Interview].
I also noticed in Johnson's story a recurrent pattern in each exchange between Johnson and Trooper Kiser: Johnson would ask a question and receive an order instead of an answer; Johnson would repeat the question and receive the same order. According to Johnson's account, he never argued with the troopers nor lost his temper until after the arrest. Instead, his attitude was a consistent demand for respect, typified by the initial interchange. When Kiser said "Hey yo," Johnson replied, "you're not talking to me, are you?" My impression was not that Johnson actually thought the trooper was addressing someone else, but rather that our client had refused to acknowledge an address that was demeaning. His insistence on an explanation from Kiser for the stop and frisk was likewise not just a search for information, but maintenance of a considered position that he was a citizen who deserved an explanation from the police. When Johnson referred to himself as a "respectable" person, he seemed to mean that not only was he "of decent character," but more literally "worthy of respect," a respect that Trooper Kiser refused to give.

The encounter thus became transformed for me into an escalating clash of conflicting attitudes: Johnson's demand for respect and Kiser's show of authority. Seen in this light, the arrest no longer seemed motivated by the trooper's desire to search the client. Rather, Johnson was arrested for being a "disorderly person"—that is a person who would not take orders, who was stubbornly resistant to authority, what Trooper Kiser referred to as "a tough guy."

Indeed, in the taped interview, Johnson recognized that his response to authority was a central issue and eloquently explained why he did not consider his actions to be those of a "disorderly person." When asked if he used profanity at any point during the encounter, Johnson said:

I don't use that kind of language. First of all—[pause]—authority, I think a person should respect it. At the same time, that places a high level of standards on authority. So while I respect authority, the abusing of it I don't respect. I told him [Kiser], I don't respect you whatsoever.

At my symposium presentation, I shared the first excerpt from the client interview as well as portions of the police report and the bench opinion. Almost everyone found the details I had previously ignored, especially the black gloves, to be essential in persuasively

---

45 As one of the students perceptively observed later, the client was always hearing demands when he had asked for answers. The client himself emphasized that "he wouldn't answer me."

46 Initial Interview, supra note 44.
recreating what happened from the client's viewpoint. Although all the comments contributed to the events of the next week, two comments from a fellow participant, Derrick Bell, had the most immediate and long-lasting effects. One comment lay fallow until much later, and will therefore be discussed below. His other comment had immediate effect. He observed that both the two tales of my draft article and Johnson's case were fundamentally about clients who sought to preserve their dignity and identity. His comment highlighted a fact that I have not shared yet in this article, precisely because it had been largely excluded from my thinking about the case up until the time of the symposium.

One day during the period between the two evidentiary hearings on our suppression motion, one of the students stopped me to relate a telephone conversation he had just had with Johnson. In this conversation our client had revealed for the first time that, at the arraignment before our appointment, the prosecutor had offered to dismiss the criminal complaint if Johnson paid court costs. Johnson told the student he had refused this deal.

Johnson's rejection of a deal that for fifty dollars would have eliminated the risk of being found guilty made clear that he wanted something more than simply being cleared of the misdemeanor charge. Therefore, I began to think that my translation task might require not only an innovative expression of "what happened" but also a "new word" for relief.

G. Collaborating With the Client

Several days after the symposium ended, Johnson came in for a meeting to plan for the upcoming trial. He arrived a few minutes early, before the students had come down to the clinic, so I took the opportunity to talk with him. I asked him what he wanted out of this case. His response, as best as I can reconstruct from my memory and a few notes taken at the time, included the following points: "I would like to have my reputation restored, and my dignity. The inconvenience can't be corrected. It got me a little unsettled, which is very unusual for me. It's my honor, my name. I feel violated. They tarnished my name." We talked for a few minutes about the results of the arrest, how his car was towed, how he spent several hours held at the state police post, how he had to show up late for work the next day and felt that people knew he had gotten into some kind of trouble.

47 Professor Derrick Bell is a distinguished African-American lawyer and academic. See, e.g., Derrick Bell, And We Are Not Saved (1987); Derrick Bell, The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles, 99 Harv. L. Rev. 4 (1985).
I then told him how I had been thinking about his case and relating it to my ideas about representation. I said I wanted to find a way to communicate to the judge and jury what the events had meant to him. During the ensuing conversation, we developed the idea of literally giving him a voice in the courtroom by having him cross-examine Trooper Kiser. The idea had some appeal as a matter of trial strategy because such a cross-examination might almost re-enact for the jury the confrontation of that night, giving them a chance to see Johnson and Trooper Kiser interact directly rather than through proxies. In effect we would be saying:

Observe Dujon Johnson as he asks the trooper to explain his actions; he was doing the same thing that night. Today he stands behind a podium with the force of this court behind him as he asks his questions; therefore, he receives answers. That night he stood with only his own courage behind him; therefore, he received no answers, only orders to submit to arbitrary authority. Today he receives the respect to which all free citizens in a democracy are entitled; he deserved no less than that night.

But more importantly, under this novel approach the trial itself could potentially provide the relief Johnson sought: the restoration of his dignity. The very structure of the trial would enable him to obtain the answers, and the respect, he was denied that night. The trooper would have to answer questions about why he stopped Johnson, “what the problem was,” and why he needed to conduct a pat-down search. If Trooper Kiser was a smart witness, he would answer directly and with courtesy, thus treating his interrogator as a respectable person. If he did not treat Johnson with respect, assuming that Johnson conducted the examination properly, the jury, hopefully, would vindicate Johnson’s view of who had the attitude problem that night.

I emphasized to Johnson that this approach would require a substantial amount of preparation time and would involve perhaps some higher risk of conviction; the strategy could backfire and alienate the jury. He said he was more than willing to put in the required time and take the risk.

Reflecting back on this strategy, it seems to me that I was trying to use the cross-examination of the trooper as a bridging experience for two different translations. First, I wanted to translate to the jury

---

48 As best as I can recall, I was the first to raise the idea, but Johnson immediately responded that he had been thinking about asking us if he could participate in cross-examining Kiser. I did not discuss this important change in trial strategy with the student attorneys before presenting it to the client, thus “taking over” the case from them at a critical point. My intervention at this point without first involving the students was inconsistent with the goal of encouraging them to take primary responsibility for their clinic cases, see supra p. 1310, and probably was a mistake in terms of clinical pedagogy.
our client's understanding of what happened by creating an analogous event in the courtroom. I also wanted to bridge the gap between the relief our client said he wanted and the relief that the limited vocabulary of the law enabled us to express. The law attempts to tailor judicial remedies to the harm caused. We speak of making a plaintiff "whole" as if courts can always restore what was taken. But in this case, clearing Johnson of the charge of peace disturbance seemed to have nothing in common with the harm he felt, as made clear by his refusal to accept the prosecutor's deal. By thinking of the cross-examination, rather than the verdict, as the relief, however, we could make available a legally enabled experience that shared structural and substantive elements with the experience of harm.

G. The Disastrous Day of Trial

On the morning of trial we arrived at court early, armed with our detailed jury instructions and trial brief. But yet another surprise awaited us in this case. As soon as our case was called, the prosecutor rose and said:

Your honor, in this case I've had an opportunity to talk to the police officers about this case. I've reviewed it myself. I've made the decision and the record should reflect it's solely my decision that the People do not wish to proceed. We're moving to dismiss. It's a 90 day, hundred dollar misdemeanor. Under the facts of the case even if the Defendant were found guilty a nominal fine would probably be the appropriate sentence. I don't see a great use to the taxpayers of the State of Michigan to expend literally thousands of dollars with police officer's time and overtime, witness fees, court time, to proceed in this particular case. And again, it's fully my decision. Due to the nature of the case, also due to the nature of other cases I have to have prepared by Monday morning I would like to state that the police were ready to proceed. They do not agree with my decision, that the witnesses were in fact here this morning and this is over their objection, the Michigan State Police. But I cannot justify a trial on the costs to the taxpayers of the State of Michigan.49

The judge responded as follows:

Well, I said on the record from the very beginning that there was no question in my mind that it was an attitude ticket. I'm not saying that that's even improper. The police officers do have a good deal of discretion. We see it everyday. Sometimes they ex-

49 Dismissal at 3-4, People v. Johnson (No. 88 1205) (April 7, 1989) (on file with Cornell Law Review) (the prosecutor on the day of trial was a different person than the prosecutor at the evidentiary hearings).
exercise it in a manner that we think is commendable, other times we think that maybe they shouldn’t have exercised it that way. But nevertheless they do have discretion.

We give a man a badge and a gun and a bunch of training and put him out on the street, we have to assume that they have some discretion and give them some discretion to operate. I think this was an attitude ticket. We see a lot of attitude tickets and um, no question about it. If the person had behaved in a different manner the ticket never would have happened and I don’t find fault with the Prosecutor in bringing it, I don’t find fault with the Prosecutor in dismissing it.

[To the students] As a practical matter there are very few people that would have spent the kind of time and effort and legal talent to fight, as the Prosecutor has pointed out, a fifty dollar attitude ticket. Very few people would have gone through the effort you did. But it’s a great experience for you.50

It might have been a great experience for the students, but it certainly was not for Dujon Johnson. I could tell that he was fuming. His first words as he left the courtroom were “Patronizing, patronizing!” I decided to take advantage of the unexpected free time that we all suddenly had in our morning schedule to “debrief” with our client in the “lawyers only” lounge at the courthouse. What I thought would be a 20 minute conversation turned into a deeply-challenging, and for me soul-searching, exchange.

Immediately after we settled in the lawyers’ lounge, Johnson said,51 “I didn’t get what I wanted. I’m very upset by this.” The students asked why he was not at least happy that he did not have a conviction. The ensuing discussion led him, with my encouragement, to talk about how he felt about our representation.

He said that our representation of him placed part of his life in the control of someone other than himself. Too much of the case had been out of his hands “from the get-go.” “Sometimes I feel like I’m not an adult, always responsible to someone else.” He observed that

the fact you are in law school makes you see differently. I can’t fault you guys for having more control over your life than I have; this is my lot in life. The fact I had to come to you and I’m not

50 Id. at 9-11.
51 Of course, I do not have a recording or transcript of this conversation with our client. What follows is a reconstruction taken almost directly from notes I made at the time. The phrasing and sequence therefore may be slightly different than what actually occurred.
paying you, that fact alone means that I'm in the back-seat.\footnote{52} Even today during court this morning, I'm in the back-seat.\footnote{53} Always the secondary person.

He said that at times we had made him conscious that he was different and specifically treated him as if he was "an indigent mentally as well as physically." He felt that this treatment suggested that we expected him to exhibit a kind of "laziness, nonchalance." He gave specific examples of conversations in which the students had reminded him of the importance of attending various court dates. He asked, "Why must I qualify myself, reveal my soul to you, convince you that I wasn't there for good reasons?\footnote{54}"

Our client then spoke more directly about how it seemed we were treating him "differently."

I have a big thing about respect. Sometimes it was as if you were talking to a child, trying to make me understand as if I had no common sense. . . . Do you guys actually think I'm stupid, lazy and slow? Most black people have that stereotype, of being that way. You don't know that? . . . The way you guys talk to me and approach me—it's a little like the way Trooper Kiser approached me.

Up to this point, Johnson had been speaking primarily to the two student attorneys. But he then turned his attention to me.

You're the kind of person who usually does the most harm. You have a guardian mentality, assume that you know the answer. You presume you know the needs and the answers. Oversensitivity. Patronizing.\footnote{55} All the power is vested in you. I think you may go too far, assuming that you would know the answer.

\footnote{52} As I recall, Johnson made this point literally by stating that whenever he and the students travelled in the same car, the two students sat in the front seat while he rode in the back. There had been several such trips because the students had offered to pick Johnson up at the bus station in Ann Arbor and take him to court.

\footnote{53} By this statement, Johnson was referring to the fact that he was sitting behind the bar in the audience section rather than at counsel table when the prosecutor moved to dismiss and the judge responded. I cannot recall why this was the seating arrangement. Certainly we would have had our client seated with us for the trial. Perhaps we forgot to make room for Johnson at the table when the case was called and were too surprised by the prosecutor's motion to explicitly invite Johnson to cross the bar and join us. I will confess it never occurred to me to ask Johnson if he wanted to respond to the prosecutor's motion himself or to speak directly to the judge.

\footnote{54} Apparently Johnson was referring, at least in part, to a telephone conversation with one of the student attorneys in which the student encouraged him to attend the hearing during which the troopers would be examined and to a later telephone discussion when one of the students asked him why he failed to appear for that hearing. See supra note 31.

\footnote{55} This was the second time that day Johnson had used the word "patronizing." The first time was in reference to the judge's speech in the courtroom. See supra p. 1329.
And here the story ends, at least the story of my efforts to represent Dujon Johnson.\textsuperscript{56} After the symposium, but before the trial date I had thought of changing that earlier article into \textit{A Tale of Three Clients}, by adding Johnson's case to illustrate how the translation approach could be applied. But faced with Johnson's devastating critique, I quickly changed the title back to \textit{A Tale of Two Clients}. I was hesitant to assume "that I knew the answer"; indeed, I was sure I did not understand "what had happened" well enough to write about it.

But in a sense, the story has continued, as I have presented this case to various audiences, thought about it, and finally attempted to write about it. The next sections tell the story of my struggle to understand what happened, and thereby test the translation metaphor as a way of both thinking about and changing the way I practice law.

\section*{II}

\textbf{Translation as a Metaphor For Lawyering}

My ideas for describing the practice of law as a kind of translation have their foundation in a very simplified theory of knowledge. This theory uses a model of mental activity divided into three separate levels: sensation, experience, and knowledge. In this model, the level of sensation consists of the raw input from the external world, the complex pattern of nerve impulses from the sensory organs. This is the lowest level of animate being; pure sensation can stimulate an animate response but cannot be consciously experienced in that form. In order for sensation to rise to the level of experience it must be sorted and structured in relation to independent forms of intuition. For example, the impulses from the optic nerve are sensation; visual perception is experience. We perceive an object as having a certain shape, size, and position, all in relation to an inherently assumed space.\textsuperscript{57}

Instead of a sharp dichotomy between an external "real" world and an internal "subjective" world, this model postulates a dynamic relation. The internal world we experience is \textit{constituted} out of sense

\textsuperscript{56} On that last day, we did discuss with Johnson the possibility of a civil rights suit against the troopers. He was quite interested in such a suit; unfortunately, we had to tell him later that our clinic was not able to take on that kind of litigation. I did contact the director of the Michigan ACLU, who indicated they might be interested in assisting Johnson. Two months after the trial date, I left Michigan to take my current job, but I wrote a long letter to Johnson referring him to both the ACLU and several private attorneys who did civil rights litigation. I also said in that letter that I had called both the Michigan Civil Rights Commission and the Intra-departmental Affairs Office of the state police and had been told that both agencies would review any complaint he filed with them regarding the arrest.

\textsuperscript{57} \textit{See} I Ernst Cassirer, \textit{Philosophy of Symbolic Forms} 100-01 (Ralph Manheim trans., 1953).
data derived from the external world. A similar relation is proposed linking the levels of experience and knowledge. Knowledge is neither independent of nor simply dependent on experience; rather, the conceptual world is constituted out of the elements of experience.

In this model, language plays a central role in the constitution of knowledge out of experience. The very process of naming reduces the particularity of experience to reveal inherent factors of form and relation, and then formalizes and stabilizes them.58

This model differs from both empiricism and idealism. It asserts that concepts are neither abstracted from empirical objects nor derived from transcendent ideals, but rather are realized in the process of objectifying experience. By giving a name to experience, consciousness frees itself from passive captivity to sensation and experience and creates a world of its own, a world of representation. It is this world of representations that we “think” about and communicate to others.

The world of representation, the realm of knowledge, is in a dynamic relation with the world of experience. Initially, experience gives rise to the concepts which can be known and communicated. However, these forms of knowledge in turn may alter the way in which we experience, just as the forms of intuition structure our sensations.59 Under this model, “reality,” as we know it, is neither simply “out there” nor merely a social construction.60

One way I have attempted to explain this model of knowledge to my students is to show them the following picture on an overhead projector:

---

58 Id. at 281.
59 For discussion of a scientific experiment that appears to show language differences influencing actual perceptions of color, see Cunningham, supra note 41, at 2475-79.
I ask them what they see in this picture; most respond that they see nothing but a lot of lines. I then overlay a second transparency with the shape of a capital B highlighted in color:
Next I repeat the process using a transparency highlighting the shape of a capital E:

**Figure 4**

Seeing a letter in the picture requires them to exclude part of the picture and focus only on certain lines. Whether they see a $B$ or $E$ depends on what they exclude and what they emphasize. These letters are neither simply “in” the picture$^{61}$ nor imposed on it by the color frames. Rather the letters are constituted out of the bewildering array of lines through a process of selection and exclusion.

The “framing” metaphor created by this exercise, although helpful in clarifying my abstract model of mental activity,$^{62}$ overemphasizes exclusion and deemphasizes the equally important concept that language and other forms of knowledge *add* something in the process of constituting experience. The framing metaphor also suggests a unilateral progression from experience to knowledge rather than a dynamic interaction in which the mind moves back and forth.

$^{61}$ One might suggest my illustration is fundamentally flawed because both letters were “in” the picture before the framing exercises—I created the initial picture by overlapping pre-existing pictures of “B” and “E.” Although I did create the picture in this way (actually I also added pictures of “K” and “D”), students also plausibly saw other patterns in the picture, such as “F” and “13,” that I did not “put” there. Indeed, “13” may be a more plausible pattern because to “see” the letter “B,” one must “fill in” gaps between the upright and horizontal strokes according the conventions of Gothic typeface, while the gaps are consistent with the standard image of “13.”

$^{62}$ For an analogous use of “framing” to discuss the exclusionary nature of legal narratives, see Scheppelle, *supra* note 42, at 2085.
from experience to knowledge, always testing concepts against experience, the results of which in turn are used to create altered concepts.63

The idea of translation captures and communicates more of the theoretical model than the narrower metaphor of framing. In applying the word “translation” to the practice of law,64 I have been influenced by James Boyd White’s presentation of translation as a complex and creative practice requiring of the translator both high art and a demanding ethic. White uses the etymology of “translation” (from the Latin “trans” (across) and “latus” (carried)) to illustrate what he considers a common but fundamental epistemological mistake about the nature of language and translation.65 To think of translation as “carrying across,” transportation, is to treat language as if it were simply a vehicle for transporting invariable meanings from the shores of one mind to another. But White persuasively argues that meanings invariably change as part of the “trip” because they do not exist apart from language.66 Borrowing from the terminology of the Spanish linguist Ortega y Gasset, White describes every translation as involving two kinds of meaning transformation:

63 Katherine Bartlett has advocated a form of feminist epistemology she terms “positionality” that similarly emphasizes a dynamic relationship between experience and knowledge. See Katherine Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 880-87 (1990). Phyllis Goldfarb has applied such an epistemology to describe how the clinical approach to legal education promotes the use of experience to develop and test theory. See Phyllis Goldfarb, A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education, 75 MINN. L. REV. 1599 (1991).

64 The translation metaphor is appearing more and more often in legal scholarship. See, e.g., Gerald Lopez, supra note 4 at 11 (in lawyering, a representative “translates and, if necessary, transforms” the story a person is living into a story that an audience “can identify, believe and find compelling”); Lucie White, Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 544 (1987-88) (legal culture defines the attorney's core role “as that of a translator who serves to shape her client’s experiences into claims, arguments and remedies that both the client and judge can understand”); Nancy Rourke, The Language of the Law: A Comment on the Legitimacy of the Adversarial Trial, 1990 Annual Meeting of the Law & Society Association 8 (“It is fairly widely acknowledged that lawyers engage in a process of translation, changing the client’s problem into a claim the law can recognize.”). There are strong similarities between the translation metaphor and the concept of "voice" in feminist legal scholarship. See, e.g., Naomi R. Cahn, The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice, 77 CORNELL L. REV. 1398 (1992); Lucinda Finley, Breaking Women’s Silence: The Dilemma of the Gendered Nature of Legal Reasoning, 64 NOTRE DAME L. REV. 886 (1989); Carrie Menkel-Meadow, “Portia in a Different Voice: Speculations on a Woman’s Lawyering Process,” 1 BERKELEY WOMEN’S L.J. 39 (1985); Ann C. Scales, Surviving Legal De-Education: An Outsider’s Guide, 15 VERMONT L. REV. 139, 141, 144-45 (1990). For an interesting description by a linguistic anthropologist of legal education as the teaching of a new language, see Susan Philips, The Language Socialization of Lawyers: Acquiring the “Cant”, in DOING THE ETHNOGRAPHY OF SCHOOLING 177 (G. Spindler, ed. 1982).


66 Id. at 234-35.
deficiency and exuberance. Deficiencies are aspects of meaning of the original expression not replicated in the translated expression; exuberances are aspects of meaning that appear in the translation but are not part of the original. Because, for White, meaning is inextricable from language, to become aware of the deficiencies and exuberances of a translation is to become aware of the limits and potentialities of one's own mind and of the mind of another.

According to White, these epistemological implications of translation make translation a model for a kind of ethic:

[Translation] recognizes the other—the composer of the original text—as a center of meaning apart from oneself. It requires one to discover both the value of the other's language and the limits of one's own. Good translation thus proceeds not by motives of dominance or acquisition, but by respect. It is a word for a set of practices by which we learn to live with difference... It is not simply an operation of mind on material, but a way of being oneself in relation to another being... The activity of translation... offers an education in what is required for [the] interactive life [of lawyering], for... to attempt to "translate" is to experience a failure at once radical and felicitous: radical for it throws into question our sense of ourselves, our languages, of others; felicitous, for it releases us momentarily from the prison of our own ways of thinking and being.

The following story of how the English word "lawyer" could plausibly be translated as "translator" is intended to illustrate how through translation one can recognize profound difference, respond to that difference with imagination and mutual education, and expand the meaning of one or both languages.

Imagine an American lawyer visiting the court of the emperor of China in 1800. Through a Mandarin translator, he starts to tell the emperor that he is a lawyer, only to be informed by the translator that there is no word in Mandarin for "law." The closest approximation is the word *fu*, meaning "punishment" or "sanction."

---

67 *Id.* at 235.
68 *Id.*
69 *Id.* at 257.
70 My assumption that an American lawyer in 1800 would describe the practice of law as we would today is no doubt anachronistic. In fact, in the pre-Revolutionary period, many colonies shared the Chinese attitude reflected in this story by barring lawyers from court and prohibiting pleading for hire. Lawrence Friedman, *A History of American Law* 81-82 (1973). However, by 1835, if we are to believe de Tocqueville, lawyers enjoyed the highest status and influence in American society. Alexis de Tocqueville, *Democracy in America* 284-90 (1973).
Thus, if the translator described the American as one who practices \( fu \), the emperor would assume that he was a judge, one who administers punishment.

The American is encouraged to learn that at least the emperor has a word for “judge,” but the translator quickly informs him that a better translation for the title of the Chinese official who administers \( fu \) would be “magistrate,” because such officials exercise administrative as well as judicial functions.\(^7\) The American then asks the translator if there is a word for a person who assists those appearing before a magistrate. The translator replies there is, \( song-gun \), but suggests against using the word because it is a term of scorn, perhaps similar to the word “shyster.”\(^7\) He explains to the puzzled American that in Chinese “courts” the parties always represent themselves. Illiterate persons often employed the services of a scrivener, but these scriveners were generally prohibited from giving advice or trying to influence the magistrate’s decision. A scrivener who ignored such prohibitions was called a \( song-gun \). Thus there is no word for a professional court advocate, and indeed no noun “advocate.”

The translator asks the American to explain what exactly a lawyer would do in a court. The American suddenly decides to use the translator himself as an example, saying that as he helps the lawyer explain himself to the emperor, so too the lawyer helps his client explain his case to the judge. The language gap between the speakers of different languages is thus bridged by a common experience: the event that the emperor and the American are sharing at the very moment. This move may be especially plausible in this context because for both Anglo-American and Chinese cultures there has been a similar evolutionary relationship between the court of a ruler, literally the physical space where subjects can approach the ruler and be heard (the space where the American is now located),\(^7\) and the court of a judge (the space where he functions as a lawyer). For both cultures “court” has shifted in meaning from a specific location

---

\(^7\) For a fascinating description of a Chinese Magistrate, see CELEBRATED CASES OF JUDGE DEE, (Robert Vangulik trans., 1976)(anonymous 18th century detective novel based on the legendary exploits of the famous Tang dynasty Judge Dee Jen-djieh (630-700 A.D.)).

\(^7\) Jones, supra note 71, informs me that \( song-gun \) literally means “litigation stick,” i.e., one who “stirs up” litigation. “Shyster” apparently entered the English language around 1840, derived either from the name of a specific New York lawyer, Scheuster, frequently rebuked for pettyfoggery, see WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY (1967) “shyster” (at 306), or from the German word Scheisse, meaning excrement, see STUART BERG FLEXNER, I HEAR AMERICA TALKING: AN ILLUSTRATED TREASURY OF AMERICAN WORDS AND PHRASES 167 (1976).

\(^7\) Indeed, “Court” originally meant something like “yard,” thus showing the common link among such diverse uses as “tennis court,” “court of law,” and “courtyard.”
in a ruler's residence to one of the key functions once performed in such a space.

This exercise in translating "lawyer" might lead the American, the Chinese translator and, through him, the emperor to a new understanding of what happens in their respective "law courts," by suggesting the gap between the language used by the parties and the language used by the judge might be large enough to require the services of a "translator," even though both might have previously assumed that everyone in their respective courts was speaking the "same language," either English or Mandarin.

The translation metaphor suggests that the introduction of a "new word" (typically by expanding the meaning of an existing word by using it in a novel way) can dramatically affect a person's understanding of experience. Indeed, by discussing lawyering as a kind of translation, I am myself using "translation" as a "new word" in an effort to expand my understanding of my experience of practicing law. As linguist George Lakoff and philosopher Mark Johnson have suggested, a novel metaphor can "define reality" by making "coherent a large and diverse range of experiences." The process they describe by which a metaphor "defines reality" by highlighting "certain aspects of our experience" and blocking others resembles the model of mental activity discussed above. More recently, Lakoff has suggested that metaphors create meaning primarily by "mapping" from one domain of experience to a corresponding conceptual structure in another domain of experience. For example, the American in my story "mapped" the domain of experience from appearance in a royal court onto the domain of the courtroom by taking advantage of structural and other similarities between the two domains.

The translator's ethic compels a continuing cycle in which the translator must continually confront the flaws of the expression he is creating in the second language, return to the "other" in the first language, and then begin the endeavor anew. For White, this cycle impels the translator toward a high art he terms: "integration: putting two things together in such a way as to make a third, a new thing with meaning of its own . . . not to merge the two elements or

75 George Lakoff & Mark Johnson, Conceptual Metaphor in Everyday Language, 77 J. Phil. 453 (1980). This article summarized ideas which are developed more thoroughly in a book by the same authors, Metaphors We Live By (1980).
76 Id. at 484, 485.
77 Id. at 484.
79 This cycle resembles the "theory-practice spiral" discussed by Goldfarb, supra note 63.
blur the distinctions between them, but to sharpen the sense we have of each, and of the differences that play between them." This art must be constantly "remade afresh, in new forms."

Through the preceding narrative (and in my interpretations of this story in Part IV) I hope to recreate my sense of having participated in such a cycle: of creating meaning only to discover its limits, returning anew to discover what aspects of the client's experience were excluded, trying again, failing again, yet trying once more. For this reason I have told the story of representing Johnson as I understood it at the time, which meant that some details of what happened were sometimes introduced not in chronological sequence, but rather at a later point when they first developed meaning for me.

III
STUDYING TEXTS OF THE REPRESENTATION OF A CLIENT

A. The Roots of Ethnography in Cultural Anthropology

The metaphor of the lawyer as translator would seem to lead naturally to the metaphor of "representation as text" if the client's story is viewed as a text for the lawyer to translate for legal audiences. "Text" also suggests an analogy to literary interpretation, which is the primary disciplinary cross-fertilization that gives rise to use of the translation metaphor by James Boyd White. Although the methods of literary interpretation do influence this approach, they are brought to bear through a circuitous route that begins in cultural anthropology—and in the remote islands of Indonesia.

In thinking of my representation of Johnson as a text, I am taking as my model the practice of ethnography, initially developed in cultural anthropology and since applied in a number of sociological methodologies. A cultural anthropologist traditionally created an ethnography by living in a foreign (usually exotic) society for an extended period. This "field work" involved becoming a "participant-observer," participating in the daily life of the society as much as

---

80 White, supra note 65, at 263.
81 For me the translator's art of integration can be a useful metaphor for the kind of multiple consciousness advocated by critical race theorists. See Delgado, supra note 14; Matsuda, supra note 14; Patricia Williams, The Obliging Shell, 87 Mich. L. Rev. 2128, 2151 ("It is this perspective, the ambivalent, multivalent way of seeing that is, I think, at the heart of what is called critical theory, feminist theory, and the so-called minority critique. It has to do with a fluid positioning that sees back and forth across boundary. ... Nothing is simple. Each day is a new labor.").
82 Besides being a law professor, White is also a professor of English Literature.
83 Translating its Greek components literally, ethnography means "nation writing" (ethnos—nation; graphein—to write) in the same way that geography means "earth writing." A geography of a country describes (writes down) its terrain and other physical features; an ethnography of a country describes the people who live there.
possible, sometimes by laboring in a specific indigenous work role, while simultaneously observing all that was taking place around her. A constant dialogue with co-operating members of the society, usually termed (unfortunately) "informants," supplemented these observations and clarified their significance.

The gap between the ethnographer and the society studied was usually vast; many ethnographers arrived with almost no information and did not even speak the language. If an ethnographer could gain meaningful insight into a vastly different culture despite such hurdles, then ethnographic methods might offer some hope for crossing the apparently smaller gap between attorney and client.

The approach to ethnography I am taking as my model is that practiced and explicated by Clifford Geertz, one of our most influential (and eloquent) contemporary cultural anthropologists. Geertz starts with the premise that "[t]he ability of anthropologists to get us to take what they say seriously...[is primarily due to] their capacity to convince us that what they say is a result of their having actually penetrated...another form of life, of having...truly 'been there.'"

The requirement that anthropological research be based on field work gets the anthropologist "there"; the participant-observer method ensures that she is intensively "being" while there. But how can such a stranger in a strange land presume to "penetrate" the very foreign life being lived around her?

The trick is not to get yourself into some inner correspondence of spirit with your informants...The ethnographer does not, and, in my opinion largely cannot, perceive what his informants perceive. What he perceives...is what they perceive "with."...[For example, in] my own work...I have been concerned, among other things, with attempting to determine how...people...define themselves as persons, what goes into the idea they have...of what a self...is. And in each case, I have tried to get at this most intimate of notions not by imagining myself someone else, a rice peasant or a tribal sheikh, and then seeing what I thought, but by searching out and analyzing the symbolic forms—words, images, institutions, behaviors—in terms of which, in each place, people actually represented themselves to themselves and to one another.85

For example, in perhaps his most famous ethnographic essay,86 Geertz studies the practice of cockfighting on the Indonesian island

of Bali. After carefully describing cockfighting as a sport—inventorying its rules, strategies and techniques—and its role in the social economy through the complex systems of gambling that surround such fights, Geertz moves to a consideration of the cockfight as an art form, comparable to a play or poem. He assumes that by participating in a cockfight, the Balinese are saying something, about themselves to themselves. Thus, interpreting the cockfight need not be an imposition of the anthropologist's foreign concepts because the cockfight is already inherently meaningful. “To put the matter this way . . . shifts the analysis of cultural forms from an endeavor in general parallel to dissecting an organism, diagnosing a symptom, deciphering a code, or ordering a system . . . to one in general parallel with penetrating a literary text.” Geertz thus imagines culture itself as an “ensemble of texts . . . which the anthropologist strains to read over the shoulders of those to whom they properly belong.”

The twin metaphors—culture as text and ethnography as literary interpretation—inform ethnographic methodology as described by Geertz. For him, the “graphic,” i.e. the “writing,” aspect of ethnography is key: “What does the ethnographer do?—he writes.” It is not sufficient simply to observe and participate in the events “there”; by meticulously recording these cultural events, the ethnographer transforms their figurative texts into literal texts that can be given the close and recurrent attention needed for the interpretive process.

[There are four characteristics of ethnographic description:] it is interpretive; what it is interpretive of is the flow of social discourse; . . . the interpreting involved consists in trying to rescue

---

87 Id. at 445, 450.
88 Geertz finds the cockfight richly evocative. He regards it as saying many things in complex, interrelated ways, like a Shakespearean play. Among other things, the cockfight says that a Balinese man, socialized to be subdued and controlled, especially in conflict, is “at heart” full of passion capable of exploding into the kind of murderous rage exemplified by one cock hacking another into pieces with beak and claw; it also says that the status relationships which are portrayed in the complex patterns of cockfight betting are, like the fight itself, “matters of life and death.” Id. at 446, 447. If Americans “go to see Macbeth to learn what a man feels like after he has gained a kingdom and lost his soul, Balinese go to cockfights to find out what a man, usually composed, aloof, almost obsessively self-absorbed . . . feels like when, attacked, tormented, challenged, insulted, and driven in result to the extremes of fury, he has totally triumphed or been brought totally low.” Id. at 450.
89 Id. at 448.
90 Id. at 452.
the "said" of such discourse from its perishing occasions and fix it in perusable terms ... [and]; it is microscopic.\textsuperscript{92}

The goal of this methodology is to produce what Geertz calls "thick descriptions," which both record specific events in their complex particularity and evoke the varied nuances of their symbolic import. The important thing about such descriptions "is their complex specificity, their circumstantiality."\textsuperscript{93} They are "not privileged, just particular; another country heard from."\textsuperscript{94}

Although the production of thick description is necessarily interpretive, the interpretation does not become more certain as the description thickens.\textsuperscript{95} Rather, the more fully the ethnographer evokes an event "there" the more complex becomes its potential meaning and the more resistant the event becomes to explanatory paraphrase. Likewise, a good interpretation of \textit{Macbeth} does not produce a self-apparent simple truth, a clear "moral of the story," but rather shows the play to be even more mysterious and subtle than it appeared before. What thick description can achieve, though, whether of a cockfight or a play, is the expansion of the imagination.\textsuperscript{96}

Although ethnographic methodology was developed to describe cultures alien to the ethnographer and her audience, social scientists have increasingly applied its techniques to their own societies. As Geertz explains, participant-observation of exotic cultures is essentially a device for displacing the dulling sense of familiarity with which the mysteriousness of our own ability to relate perceptively to another is concealed from us. Looking at the ordinary in places where it takes unaccustomed forms brings out ... the degree to which meaning varies according to the pattern of life by which it is informed.\textsuperscript{97}

The very distance between the ethnographer and the people she studies enables the ethnographer to discern what Geertz terms "experience-near concepts," concepts that a member of the society "might himself naturally and effortlessly use to define what he or his fellows see, feel, think, imagine, and so on, and which he would readily understand when similarly applied by others."\textsuperscript{98}

\begin{footnotes}
\item \textsuperscript{92} \textit{Id.} at 20-21.
\item \textsuperscript{93} \textit{Id.} at 23.
\item \textsuperscript{94} \textit{Id.}
\item \textsuperscript{95} "Cultural analysis is intrinsically incomplete [and] the more deeply it goes the less complete it is.... [Its] most telling assertions are its most tremulously based." \textit{Id.} at 29.
\item \textsuperscript{96} "[T]he aim of anthropology is the enlargement of the universe of human discourse." \textit{Id.} at 14. "To write ethnography ... [is to] enlarge the sense of how life can go." \textit{Geertz, supra} note 84, at 139.
\item \textsuperscript{97} \textit{Id.} at 14.
\item \textsuperscript{98} \textit{Geertz, supra} note 85, at 57.
\end{footnotes}
such concepts are so "near" to people, they tend not to be con-
sciously aware of their complex conceptual nature. "People use ex-
perience-near concepts spontaneously, unself-consciously . . . .
That is what experience-near means—that ideas and the realities
they inform are naturally and indissolubly bound up together." 99

In his endeavor to understand the idea of selfhood in three dif-
ferent societies 100—Javanese, Balinese, and Moroccan—Geertz re-
lies heavily on such experience-near concepts as: the idea of a
bounded self with distinction between "inside/outside" (batin/lair)
for the Javanese; the fear of inept public performance—"shame"
(lek)—for the Balinese; and the varying familial, tribal, and commu-
nal affiliations all expressed through use of the Arabic linguistic
form nisba for the Moroccans. 101

In these ethnographic descriptions, like most of his others, 102
Geertz focuses on semantic explication of what I would call key
words: batin, lek, nisba. 103 This conjunction of linguistic and ethno-
graphic description is not coincidental. Ethnographic methodology
owes much to the techniques of descriptive linguistics developed
before and during the rise of anthropology as an academic
discipline.

The descriptive linguist faced the challenge of developing
"techniques which would enable the linguist to overcome his own
perceptual limitations so as to discover the system of a second lan-
guage." 104 He could not simply ask a native speaker to explain the
language's phonetics or grammar, because such linguistic con-
straints "operate largely below the level of consciousness." 105 The
ability of native speakers to produce well-formed utterances and to
recognize whether other utterances are well-formed, termed "com-
petence" by linguists, appears to be based on knowledge of a com-
plex rule system, like the ability to make correct moves in chess or
bids in bridge. Nevertheless, the competent speaker may be quite
unable to explicate any such rules. People can and do speak gram-
matically without ever learning a single rule of grammar. 106

99 Id. at 58.
100 See supra text accompanying note 88.
101 GEERTZ, supra note 85, at 59-68.
102 For example, see Geertz's comparative description of what "law" means in Mo-
rocco, Java, and Bali. Id. at 184-214.
103 In attempting to translate words that are so complexly bound to their cultural
context as to seemingly defy translation, Geertz is demonstrating for us the translator's
art and ethic.
104 John J. Gumperz, Introduction, in DIRECTIONS IN SOCIOLINGUISTICS: THE ETHNO-
GRAPHY OF COMMUNICATION 6 (John J. Gumperz & Dell Hymes, eds., 1972).
105 Id.
106 Recurrent differences in grammatical usage between two groups who speak the
"same" language signal the existence of different dialects, not linguistic incompetence.
Nonetheless, the descriptive linguists learned to make effective use of speakers' competence through a variety of interactive techniques in which the linguist would first guess at a rule from an apparent pattern in his recorded observance and then test it by generating a new utterance according to that rule and asking a native speaker whether it was well-formed. Many native "informants" developed sophisticated insights into their own languages through this interactive process and could increasingly assist the linguist in determining why apparent exceptions to the hypothesized rules led the way to a deeper consistency. The linguist's work was constantly driven by the expectation that even seemingly arbitrary speech patterns reflect inherent, meaningful structure of which speaker competence was both evidence and product.

The resulting linguistic descriptions were not simply "found" in either the empirical speech data observed or the conscious knowledge systems of the native speakers. They were constructed by the intellectual collaboration of linguist and native informant, yet they arose from and were testable against empirical speech events. Thus, the accomplishments of descriptive linguistics are a powerful example of the dynamic interaction between experience and concepts assumed by the model of mental activity described above.

Linguists generally believe that semantic structure is product of the same kind of unreflective speaker competence as phonetics (pronunciation) and syntax (grammar). Recording and studying different uses of what appears to be the same "word" and testing inductive guesses by interaction with a native speaker may make explicit a complex system of meaning that the speaker can manage but not necessarily articulate unaided. Geertz's thick descriptions can be viewed as an extension of this technique: elaborate and eloquent semantic descriptions of the key words—the experience-near concepts—by which members of a society express themselves.

on the part of one group (e.g., the use of "I is" instead of "I am" among many African-Americans or the omission of "the" before "hospital" among the British).

107 "The process thus involves learning for both the linguist and the informant." Gumperz, supra note 104, at 7.

108 See supra text accompanying notes 57-81.

109 For further discussion of semantic competence and an example of the application of such competence to analyze the interpretation of legal texts, see Clark D. Cunningham, A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense, 73 IOWA L. REV. 541 (1988).

110 Anthropologist Charles Frake explicitly applies the techniques of descriptive linguistics in his "thick description" of litigation among the Yakan people of the Philippines. Charles O. Frake, Struck by Speech: The Yakan Concept of Litigation, in DIRECTIONS IN SOCIOLINGUISTICS, supra note 104, at 106 (leading some commentators to describe his study as "ethnographic semantics").
B. From Ethnography to Ethnomethodology

The recent application of ethnographic methods to the study of American and British legal discourse owes much to the blend of linguistics and ethnography known as ethnomethodology. Ethnomethodology extends the techniques of descriptive linguistics to speech events such as conversations or group decisionmaking which are more complex than single utterances on the assumption that the social categories that produce and manage such interactions are in essence semantic categories. These larger units of speech are often termed "discourse." For some, entire ways of talking that characterize a profession or discipline can be analyzed as a unitary form of discourse.

Ethnomethodology extends ethnography by treating the researcher's own society as the subject of study on the premise that ethnographic techniques can render the researcher's own "seen but unnoticed" competence sufficiently "strange" for explication and analysis. The distinct challenge for studying ethnomethodology is that the researcher is a member of the same "folk" as the subjects of the study and thus, initially, also "takes for granted" these complex reasoning processes. Therefore, a basic principle of ethnomethodology is that all the material studied is treated from the outset as "anthropologically strange":

111 Interestingly, ethnomethodology has its origin in the famous Chicago Law School empirical study of jury deliberations. See Harry Kalven, Jr. & Hans Zeisel, The American Jury (1966). Sociologist Harold Garfinkel, a part of the team, became intrigued while studying tapes of the jurors' deliberations which involved use of what appeared to be very sophisticated methods of lay reasoning distinct from, yet functionally equivalent to, the legal reasoning used by the lawyers and the judge. In coming to an agreement among themselves as to "what actually happened" the jurors found "ways of reaching, within finite time limits, a series of decisions which are not only very complex, but are also of just the sort that have provided central and elusive problematic for generations of philosophers and social scientists." Anita Pomerantz & J. Maxwell Atkinson, Ethnomethodology, Conversation Analysis, and the Study of Courtroom Interaction, in Psychology and Law 283, 285 (Dave J. Muller et al. eds., 1984); see also Harold Garfinkel, The Origins of the Term 'Ethnomethodology,' in ETHNOMETHODOLOGY: SELECTED READINGS (Roy Turner ed., 1974). Garfinkel coined the term "ethnomethodology" to describe this "folk methodology," the methods used by members of a community in everyday living "to analyze, make sense of, and produce recognizable social activities." Pomerantz & Atkinson, supra, at 286. These methods are "taken-for-granted" in their use, "seen but unnoticed" by the members themselves. Id.

112 Gumperz, supra note 104, at 15, 18.

analysts must be willing to treat even the most apparently mundane or ordinary events as puzzling enough to be worthy of serious analytic attention. Otherwise, they too [like the subjects studied] are likely to overlook, or take for granted, the very practices that they are aiming to identify and describe.114

The student of ethnomethodology renders the mundane "strange" by applying the same techniques used by the ethnographer of the exotic: meticulous recording of naturally occurring events and microscopic analysis of the resulting "text." This "microanalysis" operates on an assumption similar to that which underlies both linguistic and ethnographic description: the activity studied has an inherent order that is created by the participants and can be revealed by close and repeated examination, even though the participants themselves may not be aware of this order. Thus, this method paradoxically treats the commonplace as strange in order to make it explicable.

For example, much ethnomethodological research has focused on conversation analysis, including such apparently mundane issues as "turn-taking," the ways speakers alternate speech so that they are not speaking simultaneously. Although speakers may not be consciously aware of using a system for taking turns, microanalysis of recorded conversations reveals a consistent and complex pattern of orderliness created by the speakers to make their communication coherent.116

The emphasis on how participants themselves produce and interpret each other's actions leads to two distinctive features of ethnomethodological research. First, the research focuses on how human behavior works, rather than why such behavior occurs. Second, theoretical conclusions are radically inductive because the research is dictated by what the participants themselves are doing and how they do it rather than by a pre-existing hypothesis that is tested against the data.117 These features are analogous to Geertz's approach in which he studies an event such as a cockfight, not as direct evidence of a cultural trait, but as an expression by that culture's members of their own understanding of their traits.

One of the most interesting and, for my purposes, suggestive examples of conversation analysis is linguist Deborah Tannen's study of American male-female conversation described recently in a

114 Pomerantz & Atkinson, supra note 111, at 287.
116 See, e.g., Emmanuel A. Schegloff, Sequencing in Conversational Openings, in Directions in Sociolinguistics, supra note 104, at 346.
117 Pomerantz & Atkinson, supra note 111, at 286-87.
popularized version entitled *You Just Don’t Understand*.\(^{118}\) She succeeds in making what might seem most familiar, the speech of one’s own spouse, “anthropologically strange.” Her meticulous examination of apparently thousands of male-female conversations persuasively reveals that American men and women speak in sufficiently different ways which she terms “genderlects.”\(^{119}\)

Tannen does not study male-female conversation to assemble evidence that men dominate women. Rather, her work shows how language behavior may result in domination even absent intent to dominate.\(^{120}\) Even men and women striving in good faith to create a nondominant relationship often have great difficulty because of the differences in their genderlects.\(^{121}\) Without rejecting the many

---


\(^{119}\) Tannen obviously creates this term out of “gender” and “dialect.” *Id.* at 42. For example, if a husband says to his wife, “I just want to be more independent,” the key word “independent” is likely to have different meanings for husband and wife. The husband may mean, “I don’t want to be controlled, I want to be free.” The wife, however, may hear, “I am denying our relationship, I want to be out on my own.” Tannen attributes this difference to a general pattern that emerges from her research. Men tend to treat conversations as negotiations in which people try to achieve and maintain the upper hand and protect themselves from being put down by others; this way of talking reflects a view of the world as a hierarchical social order. *Id.* at 24-25. Women tend to treat conversations as negotiations for closeness in which people seek and give confirmation and support and protect themselves from being pushed away; this reflects a world view in which the individual is part of a network of connections. *Id.* at 25. From the man’s viewpoint, life is a contest, a struggle to preserve independence and avoid failure. From the woman’s perspective, life is a community, a struggle to preserve intimacy and avoid isolation. *Id.* at 24-25. Although acknowledging similarities to the work of Carol Gilligan, *e.g.*, *In a Different Voice* (1982), Tannen maintains that her analysis derives directly from her own sociolinguistic data. *Tannen, supra note* 118, at 300 n.25.

Tannen suggests that even men and women who grow up in the same family may learn different ways of speaking and hearing, because boys and girls tend to spend most of their formative language acquisition time in same-sex play groups. Ethnographic study of such play groups shows that the forms of play differ greatly, resulting in different uses of language. Boys tend to play outside in large groups that are hierarchically structured around a leader who tells the other boys what to do and how to do it, and tend to negotiate status by giving orders. Play revolves around games with winners and losers, and language is often employed in elaborate discussion of rules. In contrast, girls tend to play in small groups or pairs. Their games, such as jump rope, hopscotch and playing house, are co-operative rather than competitive. Girls measure status by relative closeness; a girl is more likely to strive to be another’s best friend rather than the leader of a group. Girls who give orders are likely to be rejected as “bossy,” so preferences are usually expressed as suggestions. Girls thus tend to use language to create closeness rather than control. *Id.* at 43-44.

Tannen’s work is reminiscent of Geertz’s ethnography in that its microscopic analysis of recorded daily events reveals more and more about entire world views as it becomes more detailed. Like Geertz, she identifies key words (intimacy, independence) as important to participants themselves. And like Geertz, she is primarily interested in expanding the imagination.

\(^{120}\) *Id.* at 18.

\(^{121}\) *Id.* at 16.
nonlinguistic factors influencing male-female domination, Tannen offers a partial diagnosis and remedy for unintended domination. By using the metaphor of cross-cultural, even cross-language communication, Tannen avoids attribution of blame and keeps open the possibility of mutual change and mutual growth:

Taking a cross-cultural approach to male-female conversations makes it possible to explain why dissatisfactions are justified without accusing anyone of being wrong or crazy. Learning about style differences won't make them go away, but it can banish mutual mystification and blame.\(^\text{122}\)

Just as the ethnographer need not learn to think "like a native" to expand her own understanding, one need not acquire the ability to speak the other gender's language in order to improve communication.

Can genderlect be taught? . . . [A] more realistic approach is to learn how to interpret each other's messages and explain your own in a way your partner can understand and accept. Understanding genderlects makes it possible to change—to try speaking differently—when you want to. But even if no one changes, understanding genderlect improves relationships. . . . Once they know that men and women often have different assumptions about the world and about ways of talking, people are very creative about figuring out how this rift is affecting their own relationships.\(^\text{123}\)

Application of this ethnographic method to the attorney-client relationship might offer similar promise to remedying patterns of domination, control, and incomprehension that persist even when the attorney is consciously attempting to develop an open, listening, "client-centered" relationship. The attorney would begin by treating the client's account as "anthropologically strange," ideally by recording it verbatim for later close study. This structured act of distancing preserves the possibility that the client's ways of understanding and speaking may be significantly different from the attorney's. To the extent that both share similar methods for creating order and attributing significance to events, close reading may make these implicitly shared ways of thinking explicit, thus highlighting areas of difference. The recognition of difference focuses the lawyer's attention on the "text" created by the client with the goal of interpreting the meaning it already has for the client. What the client says would never be treated as naive, disorganized, or ill-informed, mere raw material needing the attorney's sophisticated expertise to give it shape and significance. Rather, the lawyer would

\(^{122}\) Id. at 47-48.
\(^{123}\) Id. at 296, 297.
assume that the client's account had its own inherent order and complex interlocking meanings worthy of rapt and disciplined attention. In particular the lawyer would search for key words that might reveal the particularities of the client's world view as focused in this account.

The metaphor of representation as text suggests not only a literal transcription of the attorney-client interaction, but also the initial distancing of that activity from one participant—the attorney—so that he can also become an observer. Once the activity is textualized so that it can be examined other than in the attorney's memory, so that it is presented in a stable form with inherent, autonomous meaning, then it can be brought close again, close enough for microscopic examination.

C. Ethnographic Methodologies for Studying Legal Discourse

Recent sociolinguistic studies of legal discourse tend to fall into two categories. One type tends to be quantitative: researchers code and count recurrent formal speech features across a wide sample of recorded discourse and then correlate the results either to identify features distinctive from everyday discourse or to test hypotheses regarding the social effect of formal speech forms. The second type is more qualitative, showing the influence of ethnography and ethnomethodology: a smaller set of recorded discourse—sometimes only one speech event—is read closely and repeatedly to identify features apparently significant to the speakers rather than to a researcher's pre-existing theory. Features cannot be coded because the researcher does not know which features are significant or recurrent before coming to the text and because her theoretical un-

---

124 For a similar taxonomy, see Maynard, supra note 115, at 5-9; Donald Brenneis, Language and Disputing, 17 ANN. REV. ANTHROPOLOGY 221, 228-29 (1988); R. Dunstan, Contexts or Coercion: Analyzing Properties of Courtroom "Questions," 7 BRITISH J. L. & SOC'y 61 (1980).


derstanding shifts constantly as insights are gained and tested with
each new reading.127

The latter approach is not unlike the "moving classification sys-
tem" of common law reasoning:

[T]he classification changes as the classification is made. The
rules change as the rules are applied. More important, the rules
arise out of a process which, while comparing fact situations, cre-
ates the rules and then applies them.128

From my perspective the similarity is not accidental: one can view
both common-law reasoning and the ethnographic approach to in-
terpreting events as specialized instances of the dynamic relation be-
tween experience and knowledge that is fundamental to all thought.

The anthropologist-law professor team of William M. O'Barr
and John Conley at the Duke-University of North Carolina Law and
Language Project have conducted perhaps the most extensive eth-
nographic research into legal discourse.129 Their most recently re-
ported research, on the discourse of small claims litigation, provides
a useful example of current ethnographic methodology for studying
legal discourse. First, they interviewed plaintiffs at the time they
filed their pro se complaints.130 The observation and tape record-
ing of small claims trials formed the core of their research; they re-
corded 48 days of trials and collected a total of 466 cases (not all of
which went to trial). Finally they interviewed a number of the liti-
gants approximately a month after their cases concluded.

They adapted the group analytic method, commonly used by
conversation analysts, for studying the small claims trial tran-
scripts.131 A group composed of Conley, O'Barr and usually three
or four others trained in law, social science, or both would listen to a
tape segment (typically a single witness's testimony or the bench
opinion) while following along on the transcript. They would play
the tape repeatedly (sometimes five or six times) until all group
members were satisfied they had heard it enough; then all would
write detailed notes focusing on what each thought was important to

127 See Conley & O'Barr, supra note 10, at xiii; Maynard, supra note 115, at 4-13, 18-21; Dunstan, supra note 124.
128 EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949).
129 O'Barr is on the anthropology faculty at Duke University; Conley teaches at the
University of North Carolina Law School and has a PhD in anthropology as well as a law
degree. In addition to their own extensive work, Conley and O'Barr edit a new series of
publications from the University of Chicago Press entitled Law and Legal Discourse.
130 They also attempted to conduct pretrial interviews with defendants but were
general unsuccessful because the defendants did not have to come to court before trial
and were generally unreceptive to interviews at home. Id. at x-xi.
131 See William M. O'Barr & John M. Conley, Litigant Satisfaction versus Legal Adequacy
in Small Claims Court Narratives, in LANGUAGE IN THE JUDICIAL PROCESS 97, 108 n.9 (Judith
the speaker on the tape. They would then present these observations in a roundtable discussion. The entire process typically lasted two hours.132

Although acknowledging that this method seems "deceptively simple," Conley and O'Barr assert that it is nonetheless intensely empirical.133 They see the open-ended insights of the group participants as actualizing the participants' inherent competence as native speakers by forcing the participants to make explicit their implicit processes of interpreting the text.134 Conley and O'Barr report a striking consensus among session participants in identifying and agreeing on issues of interest in a given text, even from members not previously involved in the research project.135 More important, though, than the consensus among researchers is the fact that Conley and O'Barr provide their readers with the same texts so that each reader can test the researchers' interpretations against the reader's own competence as an interpreter of speech events. Finally, Conley and O'Barr describe their method as intensely empirical because, in a sense, the litigants themselves set the research agenda; what appears important to them, rather than to the researchers, is the focus of analysis.136

The inductive nature of Conley and O'Barr's method is exemplified by the way their research changed their very idea of the nature of a dispute. Their original design, in seeking to capture early "uncontaminated" accounts of disputes before they reached the courthouse, presumed that a dispute had a concrete, essential nature independent of the various accounts of that dispute.137 However, their research brought them to conclude

that at any particular point in time the dispute is the account being given at that time. Each new account that the disputants give ... reflects somewhat different understandings, beliefs and emphases. Thus, any account is both determined by what has gone before and determinative of the present and future shape of the dispute.138

Conley and O'Barr distinguish their approach from both traditional ethnography and conversation analysis.139 Although they

132 Conley & O’Barr, supra note 10, at xii, 35; see id. at 108.
133 Id. at xi.
134 Conley & O’Barr, supra note 131, at 109.
135 Conley & O’Barr, supra note 10, at xii.
136 Id. “In listening to litigants’ accounts, we have concentrated on what they say and how they say it rather than trying to impose predetermined structures and categories on the data.” Id. at xi.
137 Id. at x.
138 Id.
139 Id. at xi-xii.
share with ethnographers an emphasis on careful, detailed observation and inductive analysis, Conley & O'Barr differ from traditional ethnographers in that they observe and analyze language use as the object of their study, while most ethnographers view language as a window through which to view cultural attitudes. Although Conley and O'Barr draw on the techniques developed by conversation analysts, they are interested in more than the accomplishment of conversational interchange. Rather, they study entire accounts in order to learn how language use shapes and constructs social reality.140

One can draw a number of parallels between the methodology used by Conley and O'Barr and my analysis of the Attitude Problem case which appears below.141 In reviewing the records of what was said during the case, I attempt to emulate their open-minded, inductive approach by attending to what seems significant to the speakers. I have incorporated into my analysis many of the comments received when presenting excerpts of the case to a wide variety of audiences,142 thus approximating the two-hour group session used by Conley and O'Barr. By making verbatim texts of the discourse in this case available to you, the reader, to interpret using your own competence as a speaker and member of society, I hope to create a similar check against my own idiosyncracies.143

In my analysis I also have worked toward creating a Geertzian thick description, focusing on key words and offering possible explanations of their broader and more complex meanings as constructions of social reality. In doing so I found guidance in two other ethnographic descriptions of legal discourse. In the first study, the German sociologist Beatrice Caesar-Wolf described the way a judge transformed lay testimony into "adjudicable evidence" in a West German civil hearing.144 Her goal was to explicate how the judge, through the way he questioned the two witnesses, transformed their fragmented testimony into "a thematically coherent, sequentially presented story."145 Caesar-Wolf subjected the transcript of the

140 Id. at xi; O'Barr & Conley, supra note 131, at 109.
141 See infra text accompanying notes 162-80.
142 These audiences included my students, colleagues, and participants in the various conferences listed supra note 1. These audiences typically reviewed at least the judge's bench opinion and Johnson's initial interview description of the stop and arrest; they watched the actual interview videotape and a re-enactment of the bench opinion while following the text displayed by an overhead projector. Many also read the other texts which appear in this Article. Most, however, did not repeatedly review these texts before commenting, unlike the group participants in the Conley and O'Barr research project.
143 I also hope that readers' independent interpretations of these facts will provide a check against my bias as a participant in the events, a bias not present in the Conley and O'Barr research.
144 Caesar-Wolf, supra note 126.
145 See id. at 195.
hearing to "extensive and exhaustive content analysis with regard to the . . . largely latent meaning structures, which may not necessarily be intended subjectively by the parties involved." In addition to micro-analysis of this text itself, she reconstructed its context by reviewing the legal processing of the case prior to the hearing, including all available documents, a procedure similar to my account of the history of the Attitude Problem Case. In her view, this method

both generates and tests theoretical propositions about legal reality construction in court hearings. It is predicated on the assumption that social interactions, even strictly individuated ones, are not determined purely idiosyncratically, but at the same time express general structures. These structures are manifested in the objective meaning contents generated in the course of the communication process; as such, they may be reconstructed only hermeneutically.

The second study, by Michael Agar of testimony by truckers before the Interstate Commerce Commission, described an ethno-graphically-influenced method of discourse interpretation he termed "thematic analysis":

Thematic analysis begins with a careful reading of a text to get a sense of recurrent topics which indicate high-level content areas significant for the speaker(s). The analyst selects one of the topics, goes through the text, and pulls out all topic-relevant passages. These passages are then used, together with whatever else the analyst knows, to develop knowledge that enables an outsider to comprehend them. Some parts of the knowledge so developed will be recurrently useful in understanding; these parts are the "themes."

These recurrent, significant topics seem akin to what I term key words; their "high level content . . . signals differences between worlds." For Agar such textual analysis

serves as an occasion for the organization of the wide-ranging knowledge that comes from participant observation and theoretical interest. Constructing and interpreting the themes allows one . . . to pull together scattered knowledge from readings, interviews, and participant observation in a way that was both motivated and constrained by the text at hand.

---

146 Id. at 196.
147 Id.
148 Id.
149 Agar, supra note 126, at 113.
150 Id. at 117. Compare "meaning structures" in Caesar-Wolf, supra note 126.
151 Agar, supra note 126, at 124.
One problem I face with applying any of the above studies is that in none of the cases studied was an attorney significantly involved: Conley and O'Barr studied pro se litigants in small claims courts, in the West German civil hearing all the questioning was conducted by the judge, and in Agar's study the truckers apparently spoke for themselves without assistance of counsel. This absence of attorney discourse is actually typical of much of the research done to date, which uses data from small claims courts or informal mediation proceedings. Even more rare are empirical studies of how attorneys talk with their clients in private; no doubt a major reason is the problem of attorney-client privilege.

A notable exception is the research project undertaken by former American Bar Foundation Executive Director William Felstiner and political scientist Austin Sarat to record and study 115 lawyer-client conversations in forty divorce cases. Their analysis documents a consistent failure by the divorce attorneys to translate—or even respond to—their clients' understanding of the significance of the events that brought them to a lawyer's office:

---

152 In a West German civil hearing the judge examines all of the witnesses; counsel may only ask questions with the court's permission. The judge is largely unrestricted in the type or form of question that can be asked. Caesar-Wolf, supra note 126, at 194-95. At the conclusion of a witness's testimony, the judge dictates into the record a summation of what he understands the testimony to be, using the first person as if he were the witness; the witness must then explicitly confirm the judge's account. Id. at 195, 212-13. The German judicial hearing thus has surprising structural similarities with an American attorney's interview of a client—the judge takes the role of the attorney—which makes Caesar-Wolf's study more relevant for my purposes than might first appear.

153 See, e.g., CONLEY & O'BARR, supra note 10; MERRY, supra note 113; O'Barr & Conley, supra note 131; Pomerantz & Atkinson, supra note 111; Barbara Yngvesson, Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town, 22 LAW & Soc'y REV. 410 (1988).

154 See Felstiner et al., supra note 5, at 646 ("One of the reasons that data about lawyers and dispute transformation are so incomplete and theoretical is the paucity of observational studies of lawyer-client relationships."); see also Dinerstein, supra note 3, at 577 n.342 (1990). Other, more limited empirical studies of private attorney-client discourse include Bryna Bogoch & Brenda Danet, Challenge and Control in Lawyer-Client Interaction: A Case Study in an Israeli Legal Aid Office, 4 TEXT 249 (1984), and Carl J. Hosticka, We Don't Care What Happened, We Only Care About What Is Going to Happen: Lawyer Client Negotiations of Reality, 26 Soc. PROBS. 599 (1979).

155 The project is initially described in Austin Sarat & William L.F. Felstiner, Law and Strategy in the Divorce Lawyer's Office, 20 LAW & Soc'y REV. 99 (1986). Various analyses of the data set, which Sarat and Felstiner collected over thirty-three months in two sites from different states, are reported in: Vocabularies of Motive, supra note 9; Austin Sarat & William L.F. Felstiner, Lawyers and Legal Consciousness, 98 YALE L.J. 1663 (1989); Austin Sarat & William L.F. Felstiner, Legal Realism in Lawyer-Client Communication, in LANGUAGE IN THE JUDICIAL PROCESS, supra note 131; Austin Sarat, Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education, 41 J. LEGAL EDUC. 43 (1991); and their contribution to this symposium, Felstiner & Sarat, supra note 7. Sarat and Felstiner do not report using the group session technique employed by O'Barr and Conley; presumably their analyses are largely the product of their own collaborative review of the texts.
Clients focus their interpretive energy in efforts to construct an explanation of the past and of their marriage's failure. Lawyers avoid responding to these interpretations because they do not consider that who did what to whom in the marriage is relevant to the legal task of dissolving it. In this domain clients largely talk past their lawyers, and interpretive activity proceeds without the generation and ratification of a shared understanding of reality.¹⁵⁶

Absent even from Felstiner and Sarat's work though is the equivalent of the input provided by the "native informant" in traditional ethnography.¹⁵⁷ The ethnographer of the exotic guesses at the meaning of events which seem initially opaque because of their strangeness; this opacity at least makes visible the "experience near concepts" which are transparent to the natives who live with and by them. But the ethnographer typically then tests his guesses by interchange with the natives themselves, who may then be able to confirm the implicit meanings the ethnographer's necessarily arduous and therefore intense analysis has made explicit.¹⁵⁸

The ethnographies of legal discourse discussed above seem to rely almost exclusively on the researcher's own introspective insights on the meaning that a recorded event has for the participants. Perhaps to the extent that the researcher is also a lawyer, the researcher may assume that her competence to interpret the meaning of the discourse is co-extensive with the lawyers who participate in the studied events.¹⁵⁹ From my perspective, though, the absence

¹⁵⁶ Sarat & Felstiner, Vocabularies of Motive, supra note 9, at 742.
¹⁵⁷ In their article in this symposium issue, Felstiner and Sarat do report on interviews with both client and attorney about their understandings of what was happening in the relationship. Felstiner & Sarat, supra note 7, at 1475-81, 1491-95. It does not appear, however, that they discussed their own analyses with either participant. Cf. notes 154 and 155, supra.
¹⁵⁸ Geertz, for example, claims the Balinese have confirmed his interpretation of cockfighting as a complex dramatization of status relationships. Geertz, supra note 86, at 440. Indeed he derives from his conversation with the Balinese the metaphorical description of cockfighting as "playing with fire." Id. Geertz has been criticized, though, for imposing his own understandings from a privileged position in the guise of presenting the "native point of view" in the Balinese cockfight essay. See Vincent Crapanzano, Hermes' Dilemma: The Masking of Subversion in Ethnographic Description, in Writing Culture 74 (James Clifford & George Marcus eds., 1986), discussed in Christine B. Harrington & Barbara Yngvesson, Interpretive Sociolegal Research, 15 Law & Soc. Inquiry 135, 145 (1990). Because "the authority of the anthropologist to portray the world of others is contingent on dialogue and engagement," id. at 145, ethnographers continue to strive for collaborative relations with the people studied. A striking example is a recent ethnographic film about Australian aboriginal life that was produced through a group decisionmaking process involving both Western ethnographers and native Australians. The film, entitled Two Laws, is discussed id. at 148.
¹⁵⁹ By turning the ethnographic gaze onto the apparently mundane activities of the researcher's own culture, the ethnomethodological researcher becomes her own informant, assuming she has exactly the same competence to make sense of a studied event as
from existing studies of the reflective lay person—client or pro se litigant—as "informant" is even more serious. Conley and O'Barr are typical in asserting that whether their interpretations of recorded discourse are idiosyncratic can be tested against the reader's own assessment of the same texts. But the researcher and her audience are likely to be a rather small, homogenous group of privileged, academically trained persons, probably members of the same intellectual discipline. Thus the gap that these studies consistently reveal between client and lawyer, party and judge—a gap related at least in part to differences in ethnicity, class and education—could well be replicated between researcher and studied participant.  

Lost is what seemed to be the major contribution of ethnography in the first place: the sense of encountering a mind distinctly different from your own and of thereby expanding your own imagination of how life can be lived and understood.

One could provide a partial answer by structuring research so that the interpretations produced by micro-analysis of texts are then the participants themselves. However, it is likely that few of those researchers into legal discourse who are legally trained have practiced extensively in the settings studied; typically the cases represent areas of practice where the bar is quite specialized: misdemeanor defense, divorces, legal aid work. As Maynard persuasively showed in his study of misdemeanor plea bargaining, such practice settings have their own distinctive forms of discourse that have little to do with what most lawyers learned in law school. MAYNARD, supra note 115.

Admittedly, if as in this Article the person analyzing recorded discourse is also one of the lawyers participating in the case, there is a risk of self-aggrandizing or self-flagellating bias. My suggestion that a lawyer use ethnographic techniques on her own case is directed more toward improving the lawyer's representation of that particular client and toward expanding the lawyer's imaginative capabilities (for a similar use of ethnography as a model for lawyering, see Lopez, supra note 8, at 1656, 1677). I am not ready to assert that such very participatory observation has empirical value for researchers.

A very recent experiment in using graduate anthropology students to conduct ethnographic analyses of actual client interviews by clinical law students at the D.C. School of Law suggests that such collaboration is capable of both improving the quality of legal representation and providing useful social science data. See Lynne Robins, et al., "Using Ethnography in a Public Entitlements Clinic" (Paper presented to 1992 Annual Meeting of Law & Society Association; on file with author). In particular, Robins, et al., suggest that the law students' experience of studying their recorded interviews in collaboration with the anthropologists gave a far more fundamental understanding of why they needed to alter their modes of client interaction than could be achieved solely by teaching techniques for interviewing. Id. at 2; see supra note 3.

160 Conley and O'Barr provide incisive criticism of both traditional and critical legal studies for failing to systematically listen to and present the voices of those actually using and affected by the legal system. CONLEY & O'BARR, supra note 10, at 170. I agree that they provide a significant service by presenting substantial verbatim texts of the participants' actual speech rather than simply characterizing their discourse. Nevertheless, only the voice of the scholar is heard when that discourse is given significance through interpretation. The same criticism could have been made of this Article but for Johnson's initiative in contacting me last year that made possible the inclusion of his voice in the analysis of his case.
discussed with the lay participants themselves.\textsuperscript{161} In earlier versions of this Article I spoke with deep regret about my inability to engage in such a dialogue with Dujon Johnson about my interpretations of what had happened during our representation of him because he was no longer my client. But last year I was delighted and surprised to receive a letter from Johnson, now living and going to school in Iowa, inquiring whether I had ever written that article about his case. I responded by sending him the current draft with a number of pointed questions. What followed was a long telephone conversation, a three page letter from Johnson, and a very pleasant meeting in Iowa City last fall (where I happened to be for a conference) during which I finally met his family and, I think, made the transition from attorney and researcher to friend. This fortuitous experience convinces me that involving the client in the interpretive process has great value, at least if the client is willing and doing so does not interfere otherwise with effective representation.

With his consent, I am incorporating many of Johnson's comments on my analysis into this paper as the last section. As you will see, his response surprised me on a number of points. I am deliberately giving Dujon Johnson the last word on the meaning the Attitude Problem Case.

IV

INTERPRETING THE TEXTS OF THE ATTITUDE PROBLEM CASE

A. The Police Report

I begin my analysis by attempting to make explicit my own understandings, as a participant in the case, of the significance of the

\textsuperscript{161} For example, Conley and O'Barr report post-trial interviews with parties but do not indicate whether their own group analyses (which perhaps had not yet taken place) were incorporated into those interviews. \textit{Id.} at xi. Indeed, the parties' own retrospective interpretations of the litigation events are not generally reported beyond their general dissatisfaction with process and result, although Conley and O'Barr state that the post-trial interviews "yielded telling insights and some of the most important clues to the interpretation of earlier phases of disputes." \textit{Id.}

Austin Sarat, in a recent ethnographic description of how nineteen welfare recipients discussed their experience in being represented by legal aid attorneys in welfare disputes, seems to have engaged in such discussions with at least one of his informants whom he identifies as "Spencer." Sarat takes his provocative title, \textit{The Law is All Over}, directly from Spencer's own words and builds much of his analysis around this and other metaphoric key words and phrases used by Spencer and other informants to describe the meaning of their experience. Austin Sarat, "... \textit{The Law is All Over}': Power, Resistance and the Legal Consciousness of the Welfare Poor, 2 \textit{Yale J.L. & Humanities} 343 (1990). Further, Sarat reports a continuing dynamic engagement with Spencer during the entire two-month research period about Spencer's contention that Sarat "couldn't really understand" Spencer's experience, which at least suggests that he shared his provisional interpretations with Spencer. \textit{Id.} at 350-51, 379; \textit{see also id.} at 369 n.63 (Sarat questioning his own ability to comprehend his subjects' immediate material needs).
police report. When I read the police report for the first time, something like the following sentences formed in my mind: "Our client wasn't really arrested for disturbing the peace. This is a case of a traffic stop that escalated into an abortive Terry stop-and-frisk which was then converted into a pretext arrest." The second sentence can only be fully understood if one knows the meaning of the three key phrases in the language of the Fourth Amendment: traffic stop, Terry stop-and-frisk, and pretext arrest. The use of these phrases brought into play a complex way of conceptualizing the relationship between American citizens and the police, a conceptual system built on the single sentence of 54 words that constitutes the Fourth Amendment to the United States Constitution.162

The Fourth Amendment protects the right of the people to be secure against "unreasonable searches and seizures" and specifically prohibits issuance of warrants for searches and seizures unless the warrant is based on probable cause, supported by sworn statement, and specifies the place to be searched and the person or things to be seized. The paradigmatic examples of permissible Fourth Amendment activity are the seizure of a criminal suspect pursuant to an arrest warrant and the search of a house for evidence of a crime, pursuant to a warrant specifically identifying the location of the house and the items of evidence to be seized.163 However, the core activities of arrest and house search pursuant to warrant now represent only a small part of the Fourth Amendment world. Primarily through a process of expanding and complicating the meanings of "reasonable," "search" and "seizure," a Fourth Amendment language has developed which can now be used to describe and regulate an enormously wide variety of interactions between citizens and the police.164

The Supreme Court's 1968 decision in Terry v. Ohio initiated one of the most important expansions of Fourth Amendment language.165 A policeman had approached Terry on the street, asked him his name, and then patted Terry's breast pocket, feeling a pistol

162 The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

163 Implicit within the Fourth Amendment meaning of "warrant" is a process of presenting the probable cause evidence to an independent magistrate; the search or seizure can only take place if the magistrate decides to issue the warrant and then the activity must take place within the limits set forth in the warrant.

164 In Cunningham, supra note 109, I discuss extensively the semantic history and currently confused meanings of "searches" in the language of Fourth Amendment law.

165 392 U.S. 1 (1968).
within. At that time, those actions did not readily translate into Fourth Amendment terms. The Court chose to expand the language of the Fourth Amendment to cover what happened to Terry by adding to Fourth Amendment vocabulary two words from police vernacular: stop and frisk. The brief interrogation of Terry on the street (the stop) although not an arrest was still a kind of seizure of his person. The pat of his pocket (the frisk) was a kind of search, albeit far less intrusive than the paradigm search of a house.

Terry was not, however, a case of simplistic translation of “stop” (police vernacular) into “seizure” (Fourth Amendment), or of “frisk” into “search.” Stop, frisk, search, and seizure all changed in meaning as a result of the way they were used in the Terry opinion. Indeed, the creation of new meaning in Terry is routinely recognized through reference to this new category of search and seizure as the “Terry stop-and-frisk.” Before Terry, the stop and frisk were entirely discretionary police procedures. Terry transformed the stop and frisk into exercises of Fourth Amendment power and thus subjected them to the Fourth Amendment principles of justification and restraint. But because the stop and frisk clearly could not fit within the warrant process, the meaning of “reasonable searches and seizures” in the Fourth Amendment suddenly became much more complex. The Court held that if a seizure of a person is only a Terry stop, it is reasonable as long as the officer has observed “unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot.”166 If the search of a person is only a Terry frisk, then it is reasonable so long as the officer can reasonably conclude “that the persons with whom he is dealing may be armed and presently dangerous.”167 Gone from the meaning of “reasonable search and seizure” in this context is the requirement that the police suspicion of criminal activity be based on the far more demanding standard of probable cause or that an independent magistrate first evaluate the suspicion based on sworn statement before the search or seizure can take place. However, the officer must be able to articulate specific observations to support a stop and frisk—an “unparticularized suspicion or ‘hunch’ ” will not suffice.168

The expansion of Fourth Amendment language to encompass the Terry stop and frisk also led to the specialized meanings I understood when I used the phrases “traffic stop” and “pretext arrest.” Stopping a motorist to issue a traffic ticket clearly is not an arrest, but after Terry “stop” now suggested Fourth Amendment activity. The Court has indeed extended Terry to traffic stops, holding in Del-

166 Id. at 30.
167 Id.
168 Id. at 27.
aware v. Prouse\textsuperscript{169} that a traffic stop must be based on "at least articulable and reasonable suspicion" that the motorist has violated the law.\textsuperscript{170} Could a traffic stop then lead to a Terry frisk? Again the answer is yes: an officer engaged in a traffic stop can go so far as to order a motorist out of the car and then frisk him.\textsuperscript{171} However, as in Terry, the frisk must be justified by two separate articulable suspicions: (1) that the suspect is engaged in a crime (the traffic violation) necessitating the investigative stop, and (2) that the stopped suspect is armed and presently dangerous.

The phrase "pretext arrest" also has special meaning in the post-Terry legal world. Although Terry declined to apply strict probable cause and warrant protections to the frisk, it retained the underlying principles of justification (by requiring articulable suspicion that a frisk was necessary to protect the officer from armed assault during the encounter) and of restraint (by limiting the frisk to searching activities likely to eliminate that risk). However, five years after the Terry decision, the Supreme Court abandoned even these principles in the context of frisks taking place after an arrest. In United States v. Robinson,\textsuperscript{172} the Court held that incident to a lawful arrest, an officer could conduct a complete search of the suspect even if he had no basis for believing that the suspect was armed or carrying evidence of a crime. Because earlier decisions had already sanctioned warrantless arrests if the officer had probable cause and needed to act swiftly to prevent escape or further crime, Robinson created the obvious danger that an officer who wanted to frisk someone, but lacked the articulable suspicion required by Terry, would arrest the person on a pretext and then conduct the frisk with impunity.\textsuperscript{173}

By changing the meanings of "searches and seizures" in the Fourth Amendment, the Court not only created new ways of talking about police-citizen interactions; it changed those interactions in profound and widely-varying ways. Although Terry may have been intended to protect citizens from unjustified or excessive police tactics, it also created new incentives to abuse the traffic stop and warrantless arrest. A patrolling officer wanting to interrogate and frisk a suspect might be tempted to find a pretext to issue a traffic ticket.\textsuperscript{174} Having then stopped the suspect but lacking articulable suspicion that the suspect was armed and dangerous, the officer

\begin{footnotesize}
\begin{enumerate}
\item[169] 440 U.S. 648 (1979).
\item[170] Id. at 663.
\item[172] 414 U.S. 218 (1973).
\item[173] See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.8(a), at 59-63 (2d ed. 1986).
\item[174] Fear of such potential abuse of the traffic stop led the Court in Delaware v. Prouse to bar the practice of stopping motorists without evidence of a traffic violation. Prouse,
\end{enumerate}
\end{footnotesize}
might then make an arrest for a petty crime and frisk incident to the arrest. Police discretion over traffic violations and misdemeanors is broad in practice and abuse is likely to go unnoticed, particularly if the frisk reveals no evidence of serious crime. If the frisk turns up an unregistered handgun or illegal drugs, then, in a felony prosecution based on the discovered evidence, the prosecutor may have to litigate the legality of the stop or arrest in a suppression hearing. But if the frisk is unproductive, only the pretextual traffic ticket or misdemeanor charge remains. Such cases rarely draw the attention that could uncover abuse because they are litigated, if at all, in the lowest courts which operate almost invisibly, in part because appeals from such courts rarely result in published decisions. Thus it is the totally innocent person, who neither committed a traffic violation or petty crime nor carried evidence of a crime, who is least likely to receive vindication for violated Fourth Amendment rights. Because of these dangers, many commentators have recommended that Terry stop and frisk activities be permitted only on articulable suspicion of serious offense, excluding such petty crimes as loitering and disorderly conduct.

Application of Fourth Amendment language to the police report operated in several different ways. When I read the phrase "traffic stop," I assumed that the phrase had the same meaning in the officer's vernacular as in my Fourth Amendment language. I did not consciously translate; I just assumed the writer of the report and I at that point were speaking the same language. However, several

440 U.S. at 663. Nevertheless, the Court left open the possibility of less-intrusive "spot checks." Id.

The Court has sanctioned the use of roadblocks which stop all motorists to check for sobriety in large part because the police have no discretion to stop particular motorists on the pretext of checking for drunkenness but with a real agenda of looking in the car or frisking the driver. Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990). Although the felony defendant may have the incentive and resources to challenge a police abuse of the Terry doctrine, such settings are inimical to correction of the abuse. The defendant is often unsympathetic—many cases reach appellate courts on a guilty plea conditioned on the right to appeal a lost suppression motion. And, of course, it appears that the "abusive" practice has in fact ferreted out and perhaps prevented criminal activity.

175 Many searches are undertaken without any intent to prosecute. LAFAVE, supra note 173, § 9.4(f), at 537 & n.197.

176 For example, in Michigan, appeal from the district court is to the circuit court which, unlike the intermediate state courts of appeal, does not issue published opinions. See Mich. Ct. Rules 4.102(E) (appeals from misdemeanor trials in district court); 7.101 (appeals to circuit court); cf. Mich. Ct. Rule 7.215 (publication of opinions of the court of appeals).

177 See LAFAVE, supra note 173, § 9.2(d).
paragraphs later I deliberately translated the officer’s request to “pat him down only to dispel the possibility of him having any weapons”\textsuperscript{179} as an attempted Terry frisk. Understood as a Terry frisk, the officer’s initial attempt at a pat down was “abortive” because the officer’s feeling “uneasy with the situation” did not translate into Fourth Amendment articulable suspicion that our client was armed and presently dangerous. The statements under the heading “Cause for Arrest” added up to no more than a hunch that our client might be armed and dangerous. The officer did not report observing anything specific, such as a bulge under clothing or a sudden movement toward a pocket, that would indicate our client had a weapon on his person or in reaching distance.

Still using Fourth Amendment language, I then substituted my interpretation of what happened (a pretext arrest) for the officer’s statement, “arrested for Disorderly Person.”\textsuperscript{180} When Johnson (quite justifiably) refused to submit to a frisk, the officer converted the Terry encounter into a pretext arrest in order to cover up the impropriety of the frisk. When his hunch that Johnson possessed a weapon or was hiding something such as contraband turned out wrong, the officer was forced to carry through the charade that Johnson had committed a misdemeanor.

By translating the police report into Fourth Amendment terms, I sought to bring what happened into a universe of carefully regulated relationships between citizens and police where the officer, not our client, was the wrongdoer. At the same time I imposed on a rather inchoate mass of shifting and fast moving events a structure, sequence, and set of rules, rather like a chess game or courtly dance.

This translation appealed to my desire for a sense of moral outrage to fuel my advocacy and seemed to promise a winning strategy. Of course it had nothing to do with our client’s story—which I had not yet heard—but at the time developing a theory of the case based entirely on the police report seemed perfectly normal. Strategically, we would win more easily if we could take the police version of what happened as true rather than force the fact-finder to make a credibility choice between the police account and our client’s story. But as a result, when I did hear the client’s story by reviewing the videotape of the interview, I had already decided to translate the events into Fourth Amendment terms.

\textsuperscript{179} Police Report, supra note 16, at 3.

\textsuperscript{180} Id.
B. The Suppression Hearing

In retrospect, thinking of my advocacy as translation, I now see the suppression motion as motivated in significant part by our desire to shift the language in which the opposing lawyer and judge discussed the case from that of substantive criminal law (the peace disturbance) to the language of the Fourth Amendment. In the translation of "what happened" into the language of the misdemeanor complaint much was lost from Johnson's viewpoint. The complaint failed to indicate that the only persons "disturbed" by Johnson were police officers. Likewise, the only setting for what happened in the complaint was "a place of business" (the gas station). The context of police interrogation and searching was lost. The complaint's language seemed to limit us to be arguing either that our client did not speak and act as alleged or, if he did do, that his conduct did not rise to the level of criminal peace disturbance. We could hardly speak of the troopers as police at all. In contrast, the suppression motion brought into play a language rich in vocabulary about police conduct that we could use to talk persuasively about our client as victim rather than wrongdoer.

However, like all vital languages, the language of the Fourth Amendment had both limitations and potentialities beyond my comprehension at the time I chose to use it. I thought of that language, if at all, as simply one of many tools I could take to hand in the service of my client. It took a shocking defeat to make me realize that what I thought was well in hand possessed a life of its own.

The shock of hearing the judge's blatant disavowal of what I thought Terry stood for caused me to become aware of how meaning was both lost and added by translating "what happened" in Fourth Amendment terms. James Boyd White has suggested that the Supreme Court's interpretations of the Fourth Amendment be read as creating a language that citizens and police officers might actually use in talking about their interactions.\footnote{James Boyd White, \textit{The Fourth Amendment as a Way of Talking About People}, 1974 SUP. CT. REV. 165 [hereinafter White, \textit{Talking About People}]. A revised and edited version appears as Chapter 8 in \textit{Justice as Translation}. See White, \textit{supra} note 65, ch. 8. In the original article, White refers to this concept as a "discourse of adjudication." White, \textit{Talking About People, supra}, at 166. In the revised version which appears in \textit{Justice as Translation} he has changed his terminology to "language of adjudication." White, \textit{supra} note 65, at 178.} One correlative of this concept is that the citizen and the police officer each would demand of Fourth Amendment language that it "speak to the situation in a way that he can respect."\footnote{White, \textit{Talking About People, supra} note 181, at 166.} This standard does not require the Court to satisfy the expectations of both citizen and officer; in any given interpretation one or the other might justifiably feel that his
rights and needs have not been given adequate weight. But nonetheless, as long as the Court's language provides a vocabulary in which each participant can voice his concern, the Court successfully creates a "comprehensible public world" that both can respect.\textsuperscript{183} The alternative is an interpretation creating a language that one of the participants, either citizen or officer, "cannot speak, in which he cannot locate himself, which does not deal in intelligible ways with claims he regards as important."\textsuperscript{184}

\emph{Terry} can thus be read as providing a language that gives a voice to both the citizen and the officer. The officer can speak of his interest in protecting his safety and his corresponding need to make quick, on-the-spot decisions; thus, in his view the court should respect his judgment and discretion. In turn, the citizen can speak of even a momentary interrogation against his will, or a brief intrusion on his personal privacy, as a violation of his legal rights. \emph{Terry} gives the citizen a voice to ask the officer to justify his actions in terms of the officer's mission to detect or prevent crime, and further empowers the citizen to ask the officer to limit his intrusion to the minimum necessary to serve that mission.

However, there is a potential danger in the language created by \emph{Terry}. What if the officer turns the language of \emph{Terry} against the decision by arguing to a court in the following way:

You are not speaking fairly to the hazards and uncertainties of my task. When I stop a suspect, my decisions must be made quickly and on the basis of incomplete information. You are asking me to risk my life just because I might not be able to justify my actions months later to a judge by pointing to what you call "articulable" facts. Yet I know and you know that my sense of danger may be both real and accurate even if I cannot articulate it.\textsuperscript{185}

Before \emph{Terry}, the officer, in her attempt to describe the search as "reasonable," would have been largely limited to speaking of the need to preserve evidence and the limited intrusion of the search. The ensuing discussion would have therefore implicitly balanced the citizen's Fourth Amendment rights only against the effective detection and prosecution of crime. The citizen could speak of his own real and specific harm caused by the search, but the officer could invoke only speculative prevention of harm to a hypothetical future crime victim if the search could not take place. But \emph{Terry}

\begin{footnotesize}
\textsuperscript{183} Id. at 167.
\textsuperscript{184} Id.
\textsuperscript{185} This passage is based on a similar imaginary argument in White's article. See Id. at 199; \textsc{White}, supra note 65, at 193-94. For a well-reasoned argument that \emph{Terry} and its progeny strike the wrong balance of competing Fourth Amendment values, see Tracey Maclin, \emph{The Decline of the Right of Locomotion: The Fourth Amendment on the Streets}, 75 \textsc{Cornell L. Rev.} 1258 (1990).
\end{footnotesize}
changed this by giving the officer an enormously powerful new rhetorical resource: the ability to match, and perhaps overwhelm, the citizen's voice by also speaking in the first person of his own rights and of the not very speculative potential harm to him while conducting his perilous public service.

The Robinson decision\(^{186}\) can be read then as fulfilling the dangerous potential of the language created by Terry. Under the Court's holding in Robinson the simple fact of arrest terminates the citizen's right to speak in the language given to him by Terry: once arrested, a citizen can no longer ask the officer to justify a search of his person, on grounds of either preserving evidence or protecting the officer's safety.\(^{187}\) The Robinson decision shows that, once the citizen is thus silenced, the voice of the officer, speaking of the need for a standardized practice of disarming and discovering evidence in all arrests, carries the day.

Interpreted in this light, Trooper Mraz's testimony was charged with a force I did not recognize at the time. His responses to our insistent questioning about whether Johnson appeared armed and dangerous no longer appear to be evasions designed to cover a weak case. Instead, Mraz was saying that from his point of view it did not matter whether there were visible signs that Johnson was a potential threat to their safety because, in order to protect themselves and perform their duty, the troopers must treat every motorist "as if they were armed and dangerous."\(^{188}\) He took every opportunity to speak of their need for personal safety.\(^{189}\)

When we wrote our suppression motion, we thought with satisfaction that we were mounting our client on a vehicle that might carry him to victory; instead, we had set in motion a juggernaut that rolled right over him. I had failed to recognize that our Fourth Amendment translation included the semantics of Robinson as well as Terry. Beguiled by the superficial holding of Terry, I thought Mraz's testimony was favorable to us and thus did not hear the force

\(^{186}\) 414 U.S. 218 (1973); see text accompanying notes 172-73.

\(^{187}\) "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the arrest which establishes the authority to search." Robinson, 414 U.S. at 235.

\(^{188}\) See supra p. 1315. Mraz essentially made this statement three times within two pages of the hearing transcript. Toward the end of the student's examination, Mraz emphasized the point again: "As I stated previous [sic], every time we make a traffic stop we treat the person as if, doesn't mean that they were, as if they were carrying a weapon, for our safety." Hearing, supra note 32, at 13.

\(^{189}\) See Hearing, supra note 32, at 11; supra p. 1316 ("The reason Trooper Kiser patted him down is that, for his safety along with mine. . . . Basically the pat down was done for the officer's safety, the troopers' safety, myself and Trooper Kiser."). I do not know whether Mraz's emphatic testimony on these points was spontaneous or part of a standard police "script" for testifying on Terry stop issues.
of his consistent claim that their actions were taken to protect "the troopers' safety." But Judge Collins heard Mraz's voice loud and clear, so clearly that he extended the logic of Robinson to explicitly reject the holding of Terry itself. Acknowledging that in this particular case the troopers "didn't have any reason to believe that the person was armed and presently dangerous," he nonetheless said that Trooper Kiser acted reasonably in doing "a brief pat down to protect both himself and his partner" because Kiser's "first duty" was to survive. It seemed that in the world created by the language of Robinson, Dujon Johnson had no right to ask for explanations or justifications; his role was to submit. Even worse, his effort to speak the Terry-language of the Fourth Amendment to the police was properly punishable as the wrong "attitude." The police had the first, last, and only word.

C. What the Client Said

1. A Respectable Person

When I reviewed the videotape of Johnson's interview before the trial date, the judge's key phrase "attitude ticket" alerted me to a correlative key word in Johnson's narrative: respect. He referred to himself as a "respectable person" and made a careful distinction between respecting authority and not respecting the abuse of authority. I thus interpreted his narrative as being about the troopers' failure to give him the respect he deserved and his appropriate refusal to accord them the respect they wrongfully demanded: a problem of attitudes.

Although our intent in shifting the case's language from substantive criminal law to that of the Fourth Amendment was to move the focus from our client's alleged wrongdoing to that of the troopers, the Fourth Amendment language did not enable us to talk meaningfully about what Johnson perceived as their "attitude problem." The central question at the suppression hearing was whether

---

190 See id.
191 If a citizen asked how ... Robinson defined his place in a public world, he would find that he is given no right to insist that the officer explain or justify what he does; his role is simply to submit. ... Robinson ... stands as a permanent rhetorical resource ... [for] anyone who wishes to argue that the police should have one blanket power or another as a matter simply of "authority." ... It introduces into our constitutional law a principle of moral and intellectual brutality .... [Robinson] expose[s] to a substantial, arbitrary, and unreviewable exercise of police power every person who violates a substantial traffic rule, which is in practice virtually everyone ... [and] defines the arrested person as an object of unregulated power ....

Talking About People, supra note 181, at 203, 205.
192 See supra p. 1391.
the troopers had particularized suspicion that Johnson was armed and presently dangerous. Therefore, the probing spotlight we intended to shine on the troopers promptly reflected back onto our client. And that refracted light had a very narrow focus. The physical space illuminated was a short, narrow corridor extending from Johnson’s car at the gas pump to the point where he first stopped when Kiser called out to him. The temporal space was even smaller: the minute or so from the time Kiser called out to the moment of arrest. Left obscured in darkness were the images of the police car “whipping in” to block Johnson’s car, the swaggering Kiser pulling on his black gloves as he stepped toward Johnson, and Mraz peering into Johnson’s car with a flashlight.

And the loss was even greater. By translating the event as a “Terry-stop,” we narrowed the issue to whether Kiser justifiably felt a threat to his safety, making only two aspects of “what happened” relevant: how our client appeared to the trooper and how the trooper felt about that apparent behavior. The Fourth Amendment story we sought to tell could be imagined as a scene played out on a tiny, briefly illuminated stage on which only one isolated actor appeared (Johnson), who spoke and responded to an unseen person in the wings (Kiser).\(^{193}\) How the troopers behaved, and how our client felt about their behavior, were simply not part of the picture.

The impact of the judge’s “translation” of what happened, “attitude ticket,” not only shocked me loose from the constraints of viewing the events solely in Fourth Amendment terms but also suggested a new way of hearing and communicating our client’s story. The word “attitude” inherently assumes an interactive relationship. One can not have an attitude in total isolation. The underlying question always is, “attitude in relation to what?” Judging Johnson’s attitude therefore required inclusion of the troopers’ behavior, opening the door for us to argue that our client’s attitude was en-

---

\(^{193}\) I have slipped into a dramatic metaphor. The proscenium arch that separates the stage from the audience in a typical theater is literally a frame and even a “real-life” play must be a kind of translation. No matter how the playwright, actors, and director strive for accuracy, they can not help but exclude much of what happened in the reenacted events and add their own interpretations.

One could make the same point by imagining our Fourth Amendment framing in terms of a television camera. By using the report as our experiential foundation, we had used the trooper’s perspective for our camera angle. We presented only what he saw without shifting the angle to our client’s perspective, putting the trooper “on screen,” or moving the camera to a third party perspective which would have placed both client and trooper in the camera’s frame. Like the play, even the apparently verbatim nature of videotaping is a translation, because any perspective and focus necessarily involves exclusion, an exclusion that results in an interpretation of what happened. For example, even if the camera is held from the vantage point of a disengaged third party, it cannot then “see” exactly what either participant sees.
tirely appropriate in response to what the troopers were doing and saying.

2. Being Treated Differently

The last meeting with our client on the day of trial had left me with the gnawing doubt that much of his bitter frustration resulted from our inability to understand enough of what he was saying to translate well, that our "attitude problem" translation was incomplete. But it took months before I recognized the first of what were to be many clues that my doubt was well-founded.

As I pondered this problem, the other comment Derrick Bell made at the symposium came back to me. This comment was as casually confident, in its own way, as the judge's "attitude ticket" description. He was sure that the "problem" was a very familiar one: our client got in trouble simply because he was viewed as "an uppity nigger."

Bell's comment suggested that the lack of respect was part of a story of racial oppression. Of course, such a story would extend far beyond the narrow confines even of our lifetimes. But that story, at a minimum, began several minutes earlier and several hundred yards outside the frame that my "respect" translation imposed: back at the intersection of Hewitt and Washtenaw Avenues.

When I had replayed the videotape of the client interview in reaction to Judge Collins's bench opinion, I had deliberately fast-forwarded to the point where Johnson described what happened after he got out of his car at the gas station. I only studied this three-minute segment of the videotape (which is reprinted above), as I prepared and presented the first draft of this article. Although I had seen the entire tape shortly after it was made, I did not view the tape from the beginning of the interview again until several months after first presenting the draft article, when I prepared to use the tape for a discussion of interviewing in my class on pre-trial practice.

I asked the students in watching the tape to apply the translation model by using one word or phrase to summarize from the client's description "what happened" and then asking themselves what was necessarily left out from the client's story when that word or phrase was used. Regardless of the phrase used by the various students (typically "illegal search"), almost all of them "left out" the

---

194 See supra text accompanying note 47 (discussing Bell's first comment on the Attitude Problem Case made at the University of Michigan Law Review's Legal Storytelling Symposium).
196 I was willing to play a longer sequence because I had a captive audience for a longer period and I wanted my students to see how the interview began and developed.
following rather long narrative about Johnson's trouble with the clutch in his car—a part of the videotape that I had literally omitted up to then by my selective viewing and which of course I have left out of the story I have told you so far:

Cl I was having problems with the clutch; I had run down on hydraulic oil. And when I went shopping previously and [inaudible] observed I needed some gas, I went shopping for some oil because every time I went to a stop light, you know, the clutch, I couldn’t shift it, so I had to turn it off, in order to shift it.

St Wait. You had to turn the car off to . . .

Cl You see, I was having problems with my clutch.

St Right.

Cl The significance will, will develop as I [inaudible]. Well, I had problems with the clutch. I know at the time it was short of hydraulic oil. I'm not a mechanic. Uh, I went to Meijer's for the shopping and went to the auto department and asked them, well I've got this problem, what can I do?

St Was this, this right before . . .

Cl Right before I realized I needed gas.

St Are they open 24 hours?

Cl Yes, they most certainly are.

Other St Oh yeh!

St I didn’t know that — so that’s good to know.

Cl I can’t recall the cashier’s name but I know his face so if I went back, he probably . . . He explained to me that I need, um, hydraulic oil. The problem with the clutch was that it would stick. I couldn’t shift. In order to shift the gear, I would have to turn the engine off — that way I wouldn’t damage it. So after telling me some hydraulic oil — I bought some, purchased some. And I said . . . I got into the car and [inaudible] the gas. I said, what I’ll do, I’ll put this in when I pump my gas. So I proceeded to the gas station on Hewitt and Washtenaw. And there was a flashing red light. I turned the car off.

St Right.

Cl Because I couldn’t slow down and shift. Turned the car off. Put it in first. Crossed the street and then went on. There wasn’t any traffic coming.

St So, did you come to a complete stop?
Cl Came to a complete stop. Lights stayed on and everything, though.

The failure to pay attention to this part of the interview is particularly striking because Johnson himself emphasized that the clutch problem's significance "would develop" as he told the whole story.

When I pre-viewed the tape before class, I had mentally skipped over the clutch story much as I had done earlier by fast-forwarding the machine. However, as I watched the tape again with my students in class, I suddenly "saw" for the first time why the clutch problem was significant to Johnson and why generally the moments before our client entered the station, which I had edited out, might in fact be indispensable to a faithful translation of Johnson's story.

The problem with the clutch was important to Johnson because it made him certain that he had come to a full stop at the intersection. Because the clutch was "acting up," he needed to stop and turn off the engine in order to shift gears. Thus, when Trooper Kiser approached him at the gas station, Johnson apparently felt sure that the trooper could not have thought, even mistakenly, that he had run the flashing red light. Given that certainty, what was the most likely explanation in Johnson's mind for the stop?

Trooper Mraz testified that Johnson had said that night "the only reason that we stopped him was because he was black." Indeed, Mraz listed this statement as the first "reason" when asked what our client had done to be a "disorderly person." Judge Collins clearly thought our client was making this claim and rejected it, saying "they didn't just see a black man in a gas station and say oh there's a black man in the gas station, let's go and arrest him . . . that didn't happen." Yet at no point during the entire 50 minute initial interview, nor later during our representation, did Dujon Johnson tell us that he thought the trooper stopped him because he was black or otherwise claim that their actions were motivated by racism. Indeed, he did not even volunteer the information that the troopers were white; the students asked that question on their own initiative. I believe that Judge Collins introduced the actual word "racism" first into the language of the case when he described our client as "hollering racism" in his exchange with the troopers. I find it telling that the two-page statement of facts written by the students after the initial interview not only did not mention a possible issue of racism, but also did not even indicate that our client was black.

As best as I can recall, I had from the outset a common-sense impression that what happened that night was a "racial incident."

197 See Hearing, supra note 32, at 15; supra p. 1317.
198 See Hearing, supra note 32, at 27; supra p. 1320.
199 See Hearing, supra note 32, at 27; supra p. 1320.
but as a lawyer I did not talk about "the case" that way, and therefore I ceased to think in terms of racial issues as our various translations shaped and limited our shifting understanding of what was legally relevant. The Fourth Amendment theory seemed race neutral, and even our "attitude problem" trial strategy did not (at least explicitly) present Johnson's demand for answers in racial terms. But my long-overdue recognition of Johnson's emphasis on why he was stopped in the first place forced me to face the possibility that we needed to include in our representation of Johnson a legal translation of the statement, "I was stopped because I was black." Once I began trying such a translation, I also started noticing other elements that I had previously excluded from the descriptions of events given by the troopers, prosecutor, and judge. Indeed, as I re-read the incident report in this new light, I found myself thinking that I might have mistranslated the police report as much as our client's narrative.

My initial reaction to reading the report had been that, despite its title, it was not a story about arresting a "disorderly person," but rather the account of a Terry-stop that went awry, turning into a pretext arrest. This translation not only caused me to ignore much of my client's narrative; it also excluded the first page and a half of the report itself by beginning the story after Johnson exited his car. Because the new translation focused on why Johnson was stopped in the first place, rather than simply on what happened after the stop, I needed to examine the reasons given in the report for the stop.

Once I shifted my attention, I noticed immediately that the report itself began by identifying the "primary incident" as occurring at the intersection; the events at the gas station were described as "secondary." Given this clue, I soon realized that the language of the entire report was that of routine traffic regulation, not crime detection and enforcement. Johnson was referred to, not as "suspect," but as "Driver." The description of events at the gas station was prefaced with the phrase, "a subsequent traffic stop ensued." The critical paragraph, "Cause for Arrest," began with the words, "upon continuing the normal course of action on this traffic stop."

200 See supra at pp. 1326-27.
201 See POLICE REPORT, supra note 16. In analyzing narrative structure in plea bargaining, Maynard emphasizes the importance of "the police report as a socially constructed "documentary reality" . . . one that aims for particular readings in contexts other than that in which it was written." Douglas W. Maynard, Narratives and Narrative Structure in Plea Bargaining, in LANGUAGE IN THE JUDICIAL PROCESS, supra note 131, at 65, 80.
203 Id. at 2.
Because we thought we had a strong argument that Trooper Kiser had exceeded the proper scope of a traffic stop when he sought to conduct a pat-down search, we never contested the powerful and pervasive claim implicit in the report that what happened was "incident to" a routine traffic stop. But as I reread the report, I suddenly recalled other words Johnson said at our post-dismissal meeting: "I'm not trying to put my story against their story. They're trying to paint a picture and I'm trying to destroy it." What was the "picture" Johnson was trying to destroy? Probably not the pretext that grounds for a Terry frisk existed; that was more like putting our story against their story, and accepting the basic premise, as did the judge, that the police had legitimate reasons to be interrogating Johnson in the first place. Perhaps Johnson wanted to destroy that basic premise.

Because I did not realize the force of the language describing what happened as a "routine traffic stop," I also failed to appreciate the significance of the word "ticket" when I seized upon Judge Collins's phrase "attitude ticket." Instead, I just focused on the word "attitude." But the "ticket" aspect of his translation set us up for the devastating day of trial by trivializing what happened. What we viewed as criminal prosecution, and what Johnson viewed as a serious assault on his dignity, the troopers, the prosecutor, and the judge viewed as a ticket.

What were the implications of translating what happened as a ticket? First, it continued the primacy of the "routine traffic stop," making the interrogation, search and arrest "incident" to a traffic ticket. Second, it radically decreased the importance of what was at stake. Citizens are not expected to seriously contest tickets. They either pay them or ignore them. Because this was just a ticket, our efforts to convert the criminal procedure into a re-enactment of the event, a courtroom drama that would ritually restore Johnson's dignity, were not taken seriously. The prosecutor had an irrefutable response: this is not worth my time. The final, authoritative description of "what happened" was spoken in chorus by the prosecutor and judge: "this is a $50 attitude ticket." The initial affront to our client's sense of respect was thus repeated in the guise of resolving the case in his favor.

As these implications of accepting the "routine traffic stop" characterization sank in, I began looking harder for ways to accomplish Johnson's goal of destroying the whole picture. As a result, I

---

204 Maynard's study of plea bargaining in a California misdemeanor court has led him to conclude that such judicial processes are essentially bureaucratic, that defendants are treated "as objects in [an] assembly-line," and that the courtroom ritual is structured so as to be "status degrading for defendants." Maynard, supra note 115, at 30, 48.
noticed a number of other details that were excluded from our prior translations:

The car: Johnson was driving a 1977 Triumph two-door convertible, no doubt a very sporty-looking car despite its age.

The time: The events took place at 4:30 a.m., a time when police might be particularly suspicious of criminal activity.\textsuperscript{205}

The clothes: Johnson was still wearing his jogging clothes.

The location: the intersection was located near the county country club in a fairly affluent white suburban area between Ypsilanti and Ann Arbor, at some distance from the "poor black" part of Ypsilanti.

The disposition of the traffic ticket: the ticket for running the flashing light was dismissed when neither trooper showed up for the scheduled court date.

I also recalled another fact we had largely ignored: Johnson's insistence, contrary to the report, that the troopers had \textit{not} told him that he had run a red light when they stopped him.\textsuperscript{206}

These details, combined with Johnson's certainty that he had made a full stop, suggested that the troopers were engaged in what might be euphemistically called "good police work."\textsuperscript{207} They saw someone who fit their own profile of a drug dealer or burglar and decided to investigate to see what might "turn up." The fact that the person was black might have been an important reason why the profile "fit," both because he was "out of place" in a white part of town in the middle of the night, and because of stereotypes about the criminal propensities of blacks, especially young black men.\textsuperscript{208}

\textsuperscript{205} Johnson told us he was out so late because he had worked an evening shift, went running after work, stopped at a relative's house in Ypsilanti to shower and change, and then did some shopping at a 24-hour grocery store before beginning to head home for Detroit.

\textsuperscript{206} Supra, text following note 27.

\textsuperscript{207} One survey of police officers revealed that 80\% believed the need to deter crime by an aggressive police presence justified rigorous stop-and-question tactics, even if those tactics exceeded the letter of the law. Dan Stormer & Paul Bernstein, \textit{The Impact of Kolender v. Lawson on Law Enforcement and Minority Groups}, 12 HASTINGS CONST. L.Q. 105, 115 n.56 (1984).

\textsuperscript{208} "Studies show... that police officers perceive blacks as more likely to engage in criminal activity or to be armed and dangerous. When minorities are found outside minority neighborhoods, race may become the principal basis for an officer's suspicion." \textit{Id.} at 116 (citations omitted).

Spend an evening on patrol with Mobile Reserve officers Dick Burgess, John Frank or John Winter and watch them stop one car after another. They are especially interested in cars with two or more young black males, or in rental cars with out-of-state plates, which they say can be a telltale sign of a drug car. It is all constitutional, according to the police lawyers. 'Reasonable suspicion,' they say.

From this perspective, the fact that this person objected to a search of his car and person only confirmed their hunch, or in the words of Trooper Mraz, "[brought] up [their] intensity level a little bit higher." Thus the motive for a pretext arrest changed from the grounds expressed by the judge at the suppression hearing—an anxiety over personal safety—to a deliberate plan to search for evidence of some unknown crime based largely on the race of the suspect.

My new focus on why the troopers stopped Johnson revealed another detail in the police report that we had ignored before. On the first page of his report, Trooper Kiser stated that, as they "pursued" the car after it went through the intersection, he "observed driver of vehicle to look over at patrol unit . . . . Vehicle then made an abrupt left turn into the TOTAL gas station." This detail acquired significance for three different translations of what happened. From the perspective of the police report, Trooper Kiser's observation apparently suggested to him that the driver was attempting to evade pursuit, thus providing the first articulated basis for suspecting the driver of criminal activity. According to Johnson, he planned to stop for gas before he reached the intersection and, far from pulling in to evade pursuit, was not even aware of the troopers until he got out of his car. Combining these facts with what I was now assuming to be Johnson's belief that there was no nonracial reason for stopping him, Kiser's "observation" did not translate into reasonable suspicion, but rather into either hypersensitivity because the driver was black or an after-the-fact lie made up to justify his actions at the station. However, this detail in the report took on greatest significance for the judge's translation of what happened. Although we had made no assertion in our brief that what happened was racially motivated, the judge obviously assumed that was Johnson's view. His confident rejection of that view was critical to his conclusion that what happened was a justified attitude ticket. His logic was: (a) the officers had justification to stop the vehicle, (b) they "didn't just see a black man in a gas station and say . . . let's go and arrest him," and (c) "once having stopped him, he was the author of his own problems.”

Of course for purposes of the suppression motion we had conceded the first premise of Judge Collins's argument. However, our focus on the gas station portion of the report led us to miss an important admission in the report that undermined the judge's second premise. The judge said:

209 See Hearing, supra note 32, at 11; supra text accompanying note 37.
211 See Hearing, supra note 32, at 27; supra text accompanying note 40.
I'm sure that these two officers had no clue when they saw this person run the red light, whether he was black or white or brown or red or green or any other color. They just didn't know and so the person was walking around with a chip on his shoulder and these officers were the object of that behavior.\textsuperscript{212}

Judge Collins obviously assumed that the troopers saw only a car and not the driver within it, yet Trooper Kiser's acute observation that the driver "looked over at patrol unit" certainly suggested, to the contrary, that he got a good look at Johnson as the car passed through the intersection.

By eliminating race from our translation of what happened, we not only excluded a possible alternative explanation for the troopers' actions, we also probably distorted Johnson's motivations. Our story of what happened portrayed Johnson as a person with a lawyer's concern for the technicalities of the law, asking the police to justify their investigative actions in terms of the Fourth Amendment. In telling this story we did not invent elements; our client really did report to us that he referred to Supreme Court precedent in responding to the troopers’ demand to submit to a pat-down search.\textsuperscript{213} But by framing out Johnson's possible larger concern, we may have presented a very distorted and ultimately rather unsympathetic picture of our client.\textsuperscript{214} What the judge "saw" were two state troopers just trying to do their jobs, whose patience was exhausted by a guy who was "too smart for his own good."\textsuperscript{215}

---

\textsuperscript{212} Hearing, supra note 32, at 28; supra text accompanying note 40 (emphasis added).
\textsuperscript{213} See Initial Interview, supra text accompanying note 44.
\textsuperscript{214} But see Johnson's own explanation for why he did not raise the issue of racism, infra note 248 and accompanying text.
\textsuperscript{215} During the fall of 1991, Gerald Early, a black professor at Washington University, was subjected to a Terry stop at a suburban St. Louis shopping mall because a shopkeeper had called the police when he saw Early window shopping while waiting for his wife to come out of a meeting. In an Op-Ed article entitled, "Living in Fear of Fear," Early responded to the view that the shopkeeper's fear was reasonable and that the police officer was "only doing his job":

This is what happens when one becomes a category instead of a person. Life takes on all the depressing dimensions of something vaguely yet ominously totalitarian because, if one is at the caprice of fearful whites because of one's skin color, then one is always at the mercy of something that one can neither defend against nor deny . . .

[When] I received calls and expressions of support from blacks . . . almost always they were accompanied by a story of some similar indignity that they themselves had suffered and how they were unable to get it publicized because they were not "distinguished university professors." They were ordinary people (of course I am no less ordinary) for whom my interrogation and demand for apology became all the interrogations they had ever endured because some white thought them "suspicious" or in the wrong place at the wrong time.

[T]here is a far more important principle at stake than concern for the shopkeeper's security: In order to have a free society, a democratic
In thinking about the way that our translations of Johnson’s story erased his racial identity, I am reminded of hearing Patricia Williams, a black law professor, tell her experience of having her race literally edited out of an article she had submitted to a law review.\(^2\) The article as submitted began with a personal account of being denied entrance to a New York City boutique when she pressed her “brown face” to the window of the locked door.\(^2\) Her rage when the clerk within looked at her and said, “We’re closed” (at one o’clock in the afternoon) became the springboard for the rest of the article.\(^2\) The editors deleted the “brown” from her “face,” explaining that their editorial policy barred descriptions of “physiognomy.”\(^2\) She reported that, “Ultimately, I did convince the editors that mention of my race was central to the whole sense of the subsequent text; that my story became one of extreme paranoia without the information that I am black.”\(^2\)

It seems obvious that the reader needed to know that Williams was black to appreciate her rage and to understand its application to her article, but as she pointed out, it was “the blind application of principles of neutrality, through the device of omission [that acted] . . . to make me look crazy.”

Had we, through a similar blind application of legal language, acted to make our client look paranoid, crazy? How much blame did we share for Judge Collins’s judgment that our client was “acting strange and unusual” and “was walking around with a chip on his shoulder”?\(^2\)

Of course even if Judge Collins believed that the troopers could tell that Johnson was black when they first saw him at the intersection, he apparently still would have rejected a claim that their actions were racially motivated. In a very telling remark, the judge stated: “the fact that one person is black and the other is caucasian does not make it [a] racial incident.”\(^2\) At one level, of course the

---

society, everyone must be permitted equal and free access to public spaces so long as he or she is engaged in publicly acceptable behavior. To understand and accept democracy is to understand and accept the risk implicit in this principle, for no one forfeits his or her right to unscrutinized and unquestioned public access or the presumption of innocence in his or her actions upon mere nervous suspicion.


\(^2\) This story is told in Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* ch. 3 (1991).

\(^2\) Id. at 44.

\(^2\) Id. at 45.

\(^2\) Id. at 47.

\(^2\) Id.

\(^2\) See Hearing, supra note 32, at 27, 28; supra text accompanying note 40.

\(^2\) See Hearing, supra note 32, at 27; supra text accompanying note 40. It is not accidental that the judge used the singular when describing “the other” as caucasian
difference in race makes the incident "racial." What Judge Collins seemed to mean was that the fact that Trooper Kiser was white did not automatically mean that his conduct toward a black was racist. Further, Judge Collins implied that our client had wrongly assumed that the conduct was racist simply because the trooper was white: "the person was walking around with a chip on his shoulder and these officers were the object of that behavior." If there was any racial aspect to the incident, the source of the tension was entirely Johnson himself. "He was the author of his own problems," the judge ruled.

Up to this point our failure to argue that our client was the victim of racism may have not appeared really a problem of translation. Rather the cause seemed to have been due to our client's failure to raise this claim to us directly and our distraction from evidence pointing toward such a claim by our preoccupation with other legal theories. The translation metaphor does, however, suggest why we were so easily distracted. While one is speaking a language, its limitations seem so natural that they are invisible. At the outset of our representation, I seized upon the details of the frisk in the police report in large part because I could talk about them easily in legal language. Facts that did not translate well were excluded as irrelevant in a way that seemed perfectly natural and appropriate to us.

Perhaps use of the translation metaphor might have alerted us to the narrowness of our Fourth Amendment account of what happened that night and prompted us to follow up on the obvious clues; we might have asked Johnson directly if he thought race was an issue and, if so, in what ways. An investigation might have resulted that could have produced further evidence that the troopers' actions were racist. But the translation metaphor also suggests that a more profound problem existed than attention to evidentiary proof would solve—a problem that might explain Judge Collins's

thus omitting reference to Trooper Mraz. My new sensitivity to the racial overtones of the case caused me to remember that the judge placed considerable emphasis at the first hearing on that fact that Trooper Mraz was Native American. He apparently was making the common, but erroneous, assumption that the presence of a nonwhite person automatically purges a white-dominated enterprise of any potential racism. He further made the mistake of equating all persons of color, ignoring the obvious fact that there can be racism between different nonwhite groups.

223 See Hearing, supra note 32, at 28; supra text accompanying note 40.
224 See Hearing, supra note 32, at 27; supra text accompanying note 40.
225 We did file a motion seeking access to the personnel records of Kiser and Mraz to find out if there had been any complaints or discipline. Judge Collins denied the motion out of hand and, unfortunately, discovery rights in Michigan criminal proceedings were quite limited. But we could have taken other steps (e.g., trying to find former black employees of the state patrol troop who might have confided in us, talking with public defenders or local community leaders who might know the troopers' reputation, and seeking records under the state freedom of information act).
vigorous rejection of a claim of racism and our client's failure to raise the claim with us.

Johnson might have failed to entrust us with his belief that what happened that night was a "racial incident," because he anticipated the same skepticism from us that his assertion received from the troopers and Judge Collins. When a white person hears a black person use a word like "racist," the response is often a strong defensive reaction that implicitly says to the black person, "prove it!" And the standards of proof are those white people are comfortable with: evidence of conscious racial animus, intent to harm and degrade.

The possibility of such narrow meaning for the word "racist" has caused some scholars to introduce a new word, "racialist," to describe judgments and actions controlled by racial stereotypes without adopting an accusatory tone. Peggy Davis explains how racial stereotypes produce countless acts of "microaggression" by whites against blacks under circumstances where whites will vigorously deny the influence of race:

"Microaggressions" "are subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders." Psychiatrists who have studied black populations view them as "incessant and cumulative" assaults on black self-esteem. Management of these assaults is a preoccupying activity, simultaneously necessary to and disruptive of black adaptation. The microaggressive acts that characterize interracial encounters are carried out in "automatic, preconscious, or unconscious fashion" and "stem from the mental attitude of presumed superiority." Because racial prejudice is now widely treated as socially unacceptable, whites are motivated to deny that they are influenced by racial feelings. As a result, "Anti-black attitudes persist in a climate of denial. The denial and the persistence are related. It is difficult to change an attitude that is unacknowledged." Kiser's disrespectful, swaggering attitude reported by Johnson can be seen as just such an example of microaggression and Kiser's insistence that he "treats everybody that way" part of the same system of behavior.

---

227 Davis, supra note 226, at 1565, 1566 (citations omitted).
228 Id. at 1565.
229 When Patricia Williams, see supra notes 216-20 and accompanying text, and infra note 237, read a draft of this article, she told me that she was particularly offended by Kiser's use of the word "everybody." Placing herself in Johnson's place, she resisted Kiser's assumed authority to include her in a single, undifferentiated mass of people defined by him. Presumably "everybody" to Kiser was everyone he deals with as a police officer regardless of race, gender, age, or class. (Angela Harris lodged a similar objection against the presumptive assertion by the white male authors of the Declaration of
At the conclusion of one of my presentations of this article in draft form, a white person attending the presentation identified himself as a former police officer (and prosecutor) who now was a lawyer in private practice (and who did substantial criminal defense work). He said that our client’s effort to receive courteous answers from the police officers was doomed to failure because the police are trained from the academy to take command of situations like the one that night. By issuing only orders, not answers, the police officer creates a show of authority that prevents resort to potentially deadly force by either suspect or officer. From this perspective, the troopers conduct was simply sound, standard operating procedure.  

But what happens when the “everybody” subjected to this standard procedure is differentiated by race? Davis tells us that the most potent form of microaggression is the long-established American color-caste behavior described as “deference” by scholars of racism more than fifty years ago:

The most striking form of . . . “caste behavior” is deference, the respectful yielding exhibited by the Negroes in their contacts with whites. According to the dogma, and to a large extent actually, the behavior of both Negroes and white people must be such as to indicate that the two are socially distinct and that the Negro is subordinate.  

Derrick Bell made the point more succinctly when he used the key phrase, “uppity nigger,” to tell me what the Johnson case was “really” about.  

Independence when they begin the document with the words “We the People.” Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 582 (1990). The problem is not just that Kiser might in fact not treat everybody the same by the standard of observable behavior, but that white and black Americans are not the same “everybody.” As Johnson reported saying to Kiser that night, Kiser probably would not have approached a white, apparently middle-class suburbanite, with the opening phrase, “Hey yo,” but even if he addressed all stopped motorists that way, the impact might be different on black persons. Williams saw in the “Hey, yo” expression a deliberate caricature of what a white person understands to be black dialect, a form of microaggression she encounters frequently.

For an eloquent response to this point, see Early, supra note 215.  

Davis, supra note 227, at 1567 (quoting Allison Davis et al., Deep South 22-23 (1941); see also Delgado & Stefancic, supra note 14, at 1288 (“Racism . . . is ritual assertion of supremacy . . . . It is performed largely unconsciously . . . . Racism seems right, customary and inoffensive to those engaged in it . . . .”).  

See supra text accompanying note 194. In 1990 the Massachusetts Attorney General issued a report on practices of the Boston Police Department in response to complaints of racism. Among the many incidents catalogued in that report are the following that parallel the Johnson case:

[A] black male taxicab driver was driving home in his own car when a police cruiser pulled him over and frisked him. When the taxicab driver
James Boyd White, in commenting on the way that the Robinson decision treated the arrested suspect as an object "belonging to the police" rather than as a person with a voice, has said that it reminds him of the way the Supreme Court in the Dred Scott case denied Scott the right to speak in court as a plaintiff by turning him into a piece of property, and of the way the 1850 Fugitive Slave Act prohibited an alleged slave from testifying in the very proceeding intended to determine whether the person was indeed a slave. It seems obvious that there is a difference between treating a black American as if he were property and treating a white American in "the same way." But how does one make this point in legal language? In Fourth Amendment terms, Johnson was simply "Everyman"; his Fourth Amendment rights were supposedly no greater nor less because he was black. But what if the whole world created by our current Fourth Amendment language was inherently racist? Does the language of Robinson become racist whenever it is spoken by a white officer to a black citizen, creating a vicious cycle seeming to lead inevitably to the consequences suffered by Dujon Johnson?


White, supra note 65, at 195.


Federal Fugitive Slave Act, Ch. 60, Sec. 6, 9 Stat. 462, 463 (1850) ("In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted into evidence . . .").

White, supra note 65, at 195.

See Patricia Williams' meditation on this point. Patricia Williams, On Being Property, in WILLIAMS, supra note 216, at 216.

[The police officers] are especially interested in cars with two or more young black males. . . .

A curious thing happens when some cars are stopped. Without being asked, some of the male occupants get out, unhitch their belt buckles and place their hands on the roof of the car—a frisk procedure they've obviously been through before.

McGuire, supra note 208, at 1D.

In their own eyes, officers stop no one except for good cause. They expect detainees to recognize that they have been detained for good reason
Was the context that made my client's experience understandable as a "racial incident" as invisible to me, the student attorneys, and the white judge as the air we breathed? How then could I understand Johnson well enough to even attempt to translate his story to other white Americans? What in my own experience could I possibly draw upon? Many times I approached this question in writing this Article: my fingers grew still on the computer keyboard, and I eventually moved to a different part of the Article. But in reviewing my notes of that painful meeting with Johnson on the day the case was dismissed I may have found a possible bridge: my own experience of representing Dujon Johnson.

This idea was not my own; Johnson himself suggested it. Johnson made an explicit analogy between the way we treated him and the way he was treated by Trooper Kiser. He said, "The way you guys talk to me and approach me—it's a little like the way Trooper Kiser approached me." At the time and for months thereafter I did not think about those comments, perhaps because I did not understand them, perhaps because it was too painful to try and understand them.

The most obvious common element between our representation and Johnson's treatment at the hands of Trooper Kiser seemed to be that he did not feel he was treated as an adult.\textsuperscript{289} More subtle was the similarity between our reaction to what Johnson was saying and the reaction he received from Trooper Kiser and Judge Collins. Naturally, we were defensive, saying that we certainly did not intend to treat him differently or like a child. The students went further and asserted confidently that they would not have treated him any differently if he were white—that if they had been rude or impatient, it was just their personalities, not him. Only when I was deep into writing this article did I notice the uncanny way that this interchange echoed the end of the story Johnson told during the initial interview:

\begin{quote}
I told him [Trooper Kiser] that... I didn't appreciate you treating me like I was a sixteen-year old kid, which obviously I am not. He
\end{quote}

\textsuperscript{289} Compare Johnson's post-dismissal statement that during our representation he felt that he was not an adult, \textit{supra} p. 1329, with his comment to Trooper Kiser that he did not appreciate being treated like a sixteen-year old, \textit{infra} text accompanying note 240.
claims... then that "I treat everybody like that." "Well I don’t think you do, personally."  

Perhaps Johnson realized the risk that, like Trooper Kiser and Judge Collins, we might interpret his complaints about being treated differently as a strong accusation of being racist, "racist" as the word is understood by white Americans. Recognizing the gap, he told us, "I never said you were racist." Instead, he urged us to admit that we were different from him and therefore were necessarily going to treat him differently. He asked that we be sensitive to the differences and adjust what we said and did accordingly. What he said was something very close to the following words:

What’s wrong with realizing that different people have different needs? You wouldn’t say “Hi” to someone you know doesn’t speak English. You wouldn’t say, “let’s run over to the store,” to someone who doesn’t have legs. If both parties are making an effort, there eventually will be a consensus about how to deal with the solution, about how to communicate.

Rereading these words in my notes, it finally, belatedly occurred to me that at that last meeting, it was perhaps our client who was the translator, not us. He was right: by being trapped in my assurance as a lawyer and professor that I knew the answers, I could not be a student, could not learn. Perhaps only if the humiliation of that encounter matures into some humility can I begin to appreciate our client’s skill and sensitivity in trying to bridge a terrible gap.

I originally ended this Article here by quoting Patricia Williams’s description of the dilemma she feels in her separation from white Americans: “[the distance] is marked by an emptiness in myself, . . . [which] is reiterated by a hole in language, by a gap in the law . . . .” Williams goes on, though, to move from this sense of emptiness to conclude in hope that we can achieve a nonracist sensibility through the hard work of boundary-crossing in which a person somehow can see multiple perspectives simultaneously. In that earlier draft I concluded with regret that I could not move further because Dujon Johnson was no longer my client and, therefore, I could not ask him to express in his own language his understanding of how what happened was a “racial incident.” Nor could I collaborate with him in reworking my legal language to express that understanding.

240 Initial Interview, supra note 44.
241 Some of the comments printed supra pp. 1329-30 were made in this context.
242 At one point he said, “I’m not sure you guys are as careful about what you say as I am.”
244 Id.; cf. Delgado, Storytelling, supra note 14; Matsuda, supra note 14.
However, as I mentioned above, through no virtue of my own, Dujon Johnson contacted me during the late spring of 1991 on his own initiative and has since reviewed this Article and provided his own comments. I therefore conclude differently, by relating the dialogue between us, striving to make the last words of this Article not only mine but also those of Dujon Johnson.

V

Last Words

In May 1991 I unexpectedly received a letter from Dujon Johnson which read in part as follows:

Dear Clark,

It has been quite some time since I've been in contact with you (July 3rd, 1989), and I thought I would drop you a short letter to say all is well.... I appreciate all that you did for me concerning my experience with the Michigan State Troopers. I can only wonder what might have happened without your (and the Univ. of Michigan Legal Clinic) assistance. Did you ever write the article concerning lawyer-client relationships for a law review? If so, I would like to read it. ....

I wrote back, enclosing the then-current draft of this Article (which did not include Parts II and III), along with a letter asking for his comments in general and responses to a number of specific questions. He responded, first with a telephone call, and then with a detailed letter.

The first of several surprises I experienced came in his response to this question:

Although I recall your giving me permission to write about your case, in the more recent drafts of the Article I have used fictional names because of concern that I may be revealing more private information than you would be comfortable with. In some ways I regret this change, because it diminishes the "true story" force of the narrative. Please let me know whether you would like to be identified or want me to continue to use fictional names.

When Johnson called me, he said not only did I have his permission to use his real name, he insisted that I do so. He said:245

If my name is not used I would be a non-person again. [During the case] I was talked over; I was talked through. [In the version of the Article sent to him] I still don't exist. I want to be identi-

---

245 I am relying on almost verbatim notes taken during the telephone conversation.
In what I thought might have been an excess of concern for Johnson's feelings and for the confidentiality of his communications, I had replaced his real name (and the names of the locations and other actors) with pseudonyms. It had never occurred to me (nor do I think would it occur to most attorneys) that my client might be upset by this removal of his identity from a recounting of "his" case—a striking example of apparent paternalism operating below the threshold of awareness.

I will present Johnson's other comments by alternating excerpts from my questions with an edited version of his written responses.

Cunningham

I leave out of the article the fact that you did not, in fact, prepare to cross-examine Kiser. My recollection is that your car broke down on the day you planned to come to Ann Arbor to prepare. What, if anything, would you like me to say about this fact? What other reasons, if any, were there for the failure of our plan to have you share in the trial? What could have been done differently to make the plan work? (One obvious possibility is that we could have come to Detroit to work on the preparation.)

Johnson

I believe that the strategy to cross-examine Kiser was planned, not the content itself. We did not develop it further than talking strategy. I would have, and could have prepared to cross-examine Kiser. I believe that counsel waited too far into the legal process to allow me to become involved, thus any attempts to involve me seriously into my case (with my personal responsibilities in mind) would have been rushing it too fast. I do, however, agree that some attempt to work with me in Detroit could not only have been more convenient, but would have shown me that my counsel understood the economical, social constraints that I felt I had in dealing with the legal system. The failure of my student-attorneys and yourself to make such an attempt showed me that it was too inconvenient (or unimportant) to leave the ivory tower(s) of Ann Arbor. No one really asked me what I wanted or how I wanted to proceed until long after (and in some cases after) the legal proceedings were underway.

246 Johnson's seemingly effortless skill at metaphoric extension of key words is displayed in these comments; the transition from the anonymity of "the client" in the earlier draft of this article to his anonymity in the case is apt and powerful.

247 I also omitted what may seem to some readers this important fact from the case narrative in Part I because I wanted it to be interpreted at this point, in the context of Johnson's comment.
Cunningham

Have I done a fair job of presenting what you said to us after the case was dismissed? Have I left out important things that were said? Are there thoughts and feelings you remember from that meeting that you did not express that you would like me to know about now?

Johnson

More or less. What I said, or meant to imply is that as white educated men (or as two law students), the three of you would never have to worry about finding employment or about providing for your families. This society is geared toward and protected by white men. No matter what the outcome of my case, no one’s life would be changed. In fact, in a matter of time this would be forgotten by the attorneys themselves. I dealt with a situation which probably led to me losing my job at the University of Michigan, the loss of respect and dignity in my arrest, and now I was threatened with the very real and near prospect of being convicted. The very fact that I was involved in the legal proceedings, as I saw it, was a presumption of guilt (I have the two requirements: I was a person of color, and I didn’t know my place.) This then was a fight of survival for whatever control I had left. How can I not have control of my life and still have goals, dreams, and ambitions? How could I be a husband? And father? How would my wife view me? Yes, these were things that were pressing against my mind when I referred to control over one’s life. I felt very emasculated, less than a man.

Cunningham

Am I right in thinking that you did not tell us in our various meetings that you thought you were stopped because you were black? If you did tell us, can you remember when and how you told us and what our reaction was? If you did not tell us, did you think nonetheless that Kiser’s actions were racially motivated? If you thought so, why did you not say so explicitly to us? (I have some guesses as to the answer to the last question, but would prefer to hear from you.)

Johnson

I did not tell you it was a racial issue, although I knew from the very beginning that it was (my arrest) racially motivated. I would have confided this, but who would have believed me anyway? I felt that on the basis of law itself that I did not have to interject the aspect of racial bias. I knew, legally, that Kiser’s actions were wrong. And I felt I had taken the higher moral and legal ground.248

248 My biggest surprise was learning that Johnson had made a deliberate choice to exclude the issue of race from his defense of the misdemeanor charge. As he further explained to me in his telephone call and at our subsequent meeting in Iowa City, he did not want to interject the issue of racial bias because he “didn’t want to cloud the legal
Cunningham
I would like to hear more specifically what happened when you tried to pursue your complaint against Kiser.

Johnson
Basically, I was told that there wasn't any substantial damage physically, and despite a clear violation of rights, it wasn't worth their time to pursue without a substantial monetary deposit.249

Cunningham
Most importantly, how could we have represented you better? Some who have read the draft article have suggested that my translation metaphor misses the key point, which is that the judge (and jury) needed to hear and understand your story told in your own voice and words. In other words, you didn't need a "lawyer-translator." Other readers say that the inherent flaws of the legal system made it impossible for you to get any meaningful relief (i.e. the restoration of dignity that you wanted) and that we should have told you so. Or do you think it is possible that you and we could have collaborated together and produced a better translation of what happened, one that made sense to you and was effective in the courtroom?

Johnson
I agree with your two stated points, although I would argue that the "untrained" needs a "lawyer-translator" to some degree.250 I do believe some type of collaboration would have been most effective for the officers involved and for the court as well, if indeed the court wanted to be educated.

---

249 Johnson told me that one lawyer he contacted wanted $2000 up front and that the ACLU never got back to him.

250 In conversation, Johnson elaborated:
I didn't see you as a translator; in order for me to get even the appearance of my day in court, I needed you guys. The judge wasn't interested in a translation of what I had to say; he was interested simply in justifying the actions of the troopers. You are assuming that the judge—the system—was interested in a translation.
Johnson concluded his letter with these words:

[M]y deepest regret [is] that the judge assumed he knew how I was as an individual, and, on this assumption, he judged me on what he believed and not on what was said by me, my counsel, or even on what he saw (other than my race). To be voiceless was the greatest pain of all. What struck me most about the judge is that he seemed so compassionate [to other parties in other cases I observed] in the 10 months or so that I came to the courthouse waiting for hearing after hearing to be rescheduled. I never saw this compassion, I never received the “I have been there before, I can relate” talks that he frequently gave to those who came before him. I suddenly and unconsciously realized why.

Before I received Dujon Johnson’s letter in May 1991, my draft of this Article ended with these words that he said to us on the day his case was dismissed:

You guys can afford to examine yourselves. I can’t. I’m on the threshold of existence. There’s no safety net. You guys know you won’t be walking the streets tomorrow. I can’t know that. The moment you guys drop me off, I need to start thinking about where the next month’s rent is coming from. Most of the time I don’t come into contact with guys like you. We don’t walk in the same streets.

In that earlier draft I wrote that I was haunted by these words. I still am. But I want to add to them the concluding sentences of Dujon Johnson’s May 1991 letter:

In closing, I did attempt to, two years ago, pursue my complaint against Officer Kiser’s conduct, but no attorney or legal organization considered it worth their while without a considerable monetary sum up front. I guess laws are for those who can afford it. But I consider it a valuable experience and a lesson learned. I wish you continued peace.

Sincerely,

M. Dujon Johnson
I think that Clark Cunningham's article, *The Lawyer as Translator,* is a wonderful piece of work, full of life and interest and originality. I especially admire: his ability to make vivid to the reader the ways in which languages do truly differ, and differ beyond our efforts to bridge them—as he shows when he imagines an attempt to translate our most common professional terms into Chinese; his recognition of the kind of force that our languages have over our minds, both as we see the world and as we tell stories about it; his sense that what we think of as "events" are really texts calling for interpretation, and his consciousness that interpretation in turn is a mode of thought by which the practices of our own minds can be made the object of critical attention; his development of the idea that the practice of translation entails an ethic of respect for the difference and equality of persons; and his constant awareness that his own use of language, both as a lawyer in the Johnson case and as a scholar-critic writing about it, is an ethical performance, and one at which he—and in our turn, we—not only can, but in some sense certainly will fail. This last is the most important point, for it is this perception that leads him to see that he must not only say what he thinks about the various issues that come before him, as if he were engaged in a purely intellectual exercise; he recognizes that he will perform his meanings in his writing, whether he likes it or not. It is in his own use of language—and in the relation he thus establishes with the habits of his own mind and with both Dujon Johnson and the reader—that his central terms and values acquire their most important meanings.

I.

My first comment is about this point. The whole paper moves from a single metaphor, that what the lawyer does is a form of trans-
translation, to which it gives increasing meaning as it proceeds. I want
to direct attention to the way in which this meaning is created. Im-
agine yourself being asked to define these two terms, "lawyering" and "translation," and to explain the connection you see between
them. Many of us, I think, would have the instinct to do this by
defining the terms in propositional form: "by translation I mean . . . ."; "by lawyering I mean . . . ." One would then conclude with a
comparison of the features the two practices share. This sort of
writing would assume that what is called for is at heart a kind of
definition and description, all in a single voice. In slightly fuller
form the answer might run like this:

Translation is the replication in one language of what is said in
another. The lawyer is like a translator because she represents in
legal language what is said in ordinary language. But she is unlike
a translator in that her two languages are not mutually self-exclu-
sive, perhaps not "languages" at all; and she is more than a trans-
lator because the law is a discourse of power.

In such a form the point is true enough but almost entirely banal; if
the voice in which I have thus begun went on to trace out these
analogies and disanalogies with greater specificity, whatever it said
would tend towards the lifeless and dull. This is a form of writing
that assumes its own adequacy.

Cunningham, by contrast, sees the statement of the analogy as
defining a writing problem for him: he must give meaning to his
terms, both of them, in such a way as to make them live for the
reader. He does this, as I say above, both descriptively, as he talks
in a variety of ways about translation and lawyering, and, more pro-
foundly, in his own prose, as he enacts the vision of language and
life that he wishes to express. In this sense this is what I would call a
highly literary piece of work.

See what the consequences are: if he had proceeded in the first
mode, he would have claimed to have stated in propositional form
an idea that could be used, without change, by others. "Cunning-
ham's analogy between lawyering and translation" is a phrase that
could be repeated without further work, plugged into an analytic
scheme, or compared with other metaphors, themselves reproduced
in a similarly conclusory way. Instead, what Cunningham is implicit-
ly saying to others is that you too must give these terms meanings

2 I have also used this analogy in my writing, especially in Justice as Translation
(1990). But there I focus more on the activity of judges than lawyers, and more on the
reading of legal texts than on clients' narratives. The Legal Imagination (1973), which
is primarily about lawyering, depends on the sense that lawyers translate what is said in
other languages into the law, but it does not develop the analogy in an explicit way. It
gives me great pleasure to see how far beyond what I have done Cunningham has gone.
of your own, in texts of your own making. If you try to reduce either
translation or lawyering to a process describable in a conceptual or
mechanistic language you will do justice to neither human activity.
What kind of language is possible, then? One, like his, that recog-
nizes and makes vivid the experience and meaning of translation on
the one hand, lawyering on the other. But each speaker must create
this language afresh, or the metaphor will become a dead one. We
cannot simply appropriate his text; we must make its terms our own,
and give them meanings of our own making.

It is from this point of view that I have some doubts about the
long section locating his work in its academic context. This is obvi-
ously valuable, but I do wonder whether there is not an unproduc-
tive conflict between the voice in which he does all this—talking
about methodologies a bit as though they were intellectual technol-
gies, usable in any hands, producing replicable results, and so on—
and the voice in which the paper actually lives, when he gets to the
story he has to tell. The first voice may invite the reader to look at
Cunningham’s work in the way he himself looks at the rest of the
scholarship, locating it on a grid, as if its merits lay in his “method”
rather than in the qualities of his own mind and prose. After all, it
would be possible to use ethnomethodology in a mechanistic or
close-minded or insensitive way—and it would be equally possible
to use the translation metaphor that way too. Perhaps this section
of the paper might stand better as a separate piece on method, or as
an appendix. For the great merit of Cunningham’s work lies not so
much in the idea or analogy from which it proceeds as in what he
makes of it in working it out, his exemplification of what it can mean
to rethink one’s experience and one’s language. He makes rewriting
itself a mode of thought that can move him to new ways of imagin-
ing, new ways of being. To imitate him one would have not only to
start from his analogy, but to learn to write, in one’s own way, as he
writes.

II.

Two other, briefer points. First, it is a great merit of Cunning-
ham’s paper that he focuses on the experience and art of the lawyer,
and does so as a lawyer himself. In my view far too much writing
about “law” proceeds on the premise that both writer and reader
are somehow outside of the process, on some remote and presum-
bly superior platform. The issue then becomes a question of pol-
icy—“What should the rule be?”—or a question of structure and
process—“How should these judgments be made?”—as if we were
all social architects, or omnipotent legislators, shaping the world to
our ideas. Cunningham, by contrast, focuses on his own experience
as a lawyer situated in a certain context and engaged in a certain activity of mind and language. It is the quality and nature of this activity, in this context, that engages his attention. He tries to make a way of talking about it that will at once capture its ethical and intellectual qualities and provide a method for thinking about how we might learn to do it better. He speaks to us as fellow-lawyers, too, as people whose lives are shaped by the process of lawyering. This is a most welcome change. There are many, after all, who tell us what rules we should make or follow; but all too few who speak well about the meaning and quality of the practices of mind that define our professional lives.

This point is related to a second: that to take Cunningham's article seriously is to consider new ways of teaching law. For if the lawyer is a translator, should we not teach our students how to do what translators do? This would include giving prominence to the process of interviewing clients and witnesses, seen not simply as bureaucratic "intake" or as the occasion for emotionally supportive (or destructive) behavior but as an essential part of all lawyering. More than that, this kind of teaching would insist, across the curriculum, on bringing to the surface of attention some sense of the different ways in which the stories of cases we read could be told in different languages and voices. It would lead us to call upon our students' sense of ordinary language, ordinary life, not just as a matter of intellectual curiosity or political ideology, but with the sense that to do this is an important part of training in the activity of lawyering.

III.

It is striking that Cunningham's rewritings enable him to engage critically with his own discourse. As he retells the story—partly with Johnson's assistance—he comes to see it, and his own role within it, very differently; the kind of language with which he began, which he used without questioning, becomes inadequate, unusable. This happens not only in ways familiar to the lawyer, for example as he sees the case more sharply in terms of Robinson\(^3\) than Terry,\(^4\) but also in ways that are not so familiar, as he comes to see the case as being about: the kind of respect human beings are due, both as a general matter and under the Fourth Amendment; why Johnson was denied this respect; the need for Johnson's own voice to be heard; and, most of all, his own role in what he comes to see as a mistranslation. This—the extent to which it becomes an exercise in self-

criticism—is perhaps what is most remarkable about Cunningham's whole performance.

It is one thing to criticize someone else for failing to hear your voice, for failing to accord you respect, and so forth, but is quite another to criticize oneself for failing to hear another or accord that person respect. In the first case the objects of complaint are salient and visible—the speaker feels injured by them—while in the second the occlusions and erasures and insensitivities are one's own and, however visible they may be to others, they tend in the nature of things to be invisible to oneself. Take racism as an example: as Professor Delgado and his co-author argue in their paper in this symposium, a great deal of racism is simply invisible to most white people, partly because it takes place out of their sight or because they miss, or misunderstand, what they actually see; but, more profoundly and disturbingly, often because it is unwittingly their own. This is a feature not only of racism and sexism, I think, but of cultural power more generally: it tends to be invisible to the person who exercises it.

To try to learn what your conduct looks like from another's point of view, then, is not so easy. The natural first step is to read or try to listen to what others say, but when I, at least, read accounts of the experience of African Americans, today or under slavery or Jim Crow—say in the autobiographies of Frederick Douglass, Malcolm X, Dick Gregory, or Maya Angelou, or in the novels of Alice Walker or Toni Morrison, or in Black Ice, Lorene Cary's recent story of her early life—I find that it is easier for me to identify with the person suffering injustice and talking about it than it is to see myself on the other side of things, in the slavemaster or bigot or patronizing white liberal.

This is not surprising, I think, for it arises not only from the desire to avoid painful truths, but from our common understanding of the relation between narrator and audience in such a text, which invites the sharing of the speaker's point of view. In reading David Copperfield, for example, one feels with the narrator how horrible the Murdstones are, how lovable Peggotty, without asking how lovable


6  How can a writer avoid this blunting of her story? If she attacks her audience directly, she risks alienating it entirely. And in some sense the deepest point of much of this writing is to demonstrate the human reality of one's experience, which depends upon the very sympathetic identification I describe. I have no ready answer, but can simply report that James Baldwin's THE FIRE NEXT TIME (1963) did seem to persuade many white people of their own implication in the system of race, in part by describing it persuasively as a white invention. Something of the same thing is true of Catharine MacKinnon's work, especially FEMINISM UNMODIFIED (1987), I think for the same reason.
or brutal one is oneself. As readers we are always on the right side, except in the greatest works of art: The *Iliad*, which teaches its audience both the equal reality of all human experience and our irresistible need to forget that knowledge; the novels of Jane Austen, which implicate the reader in misreadings that parallel the misreadings the reader makes in life; or *Huckleberry Finn*, which involves the white reader in the impossibility of his language of race.\(^7\) In his own way, modest by comparison with those just mentioned but not with the efforts of most of us, Cunningham has shown us how to engage in a kind of reflection that can bring within the focus of attention our own vices and stupidities. This is a great achievement.

It is related to another point, suggested above, namely that to think of conversation as a kind of translation entails an ethic of fundamental equality. If it is recognized that translation always involves significant gains and losses in meaning, there can be no universal language in which universal truths are uttered. This means that every act of interpretation, every conversation in the world, takes place across differences in language, for none of us speaks exactly the same dialect as anyone else, and these differences cannot be resolved by the imposition of a super-language. We are each entitled to our own meanings and these can never be the same. This point is eloquently made, in somewhat different form, by Mari Matsuda in her recent article on accent discrimination,\(^8\) which maintains, and in a literary way demonstrates, that every American speaks English with an accent. There is no "normal" or "standard" pronunciation, and we should not talk as if there were. The same thing is true of our languages as well: each of us speaks a dialect, or a set of dialects; to see this is to recognize that lines of communication must be established among us, and among our languages, from positions of mutual equality, across whatever lines of power may deny this truth. It is because Cunningham knows this, and tries to hear what Johnson is telling him as something that matters, that he is able to subject his own language, his own ways of constructing the world, to such an impressive kind of self-criticism.

IV.

In all of this Cunningham's work is remarkable: in its capacity for self-criticism, its thoughtfulness, its insistence upon a whole-minded way of thought that cannot be reduced to a methodology, its

---

\(^7\) I mean the first sixteen chapters, which in my view stand as a complete text, written several years before the rest of the book and different in quality from it.

sensitivity to the experience of others, and its eagerness to learn. He shows extraordinary resourcefulness and imagination as a lawyer, especially, I thought, when he has the idea of letting Johnson cross-examine the trooper, thus giving him the legal power to demand answers to the very questions the trooper's earlier disregard of which was the essential act of disrespect Johnson wanted redressed. But I do want to raise a question here, not so much by way of criticism of what Cunningham has done as to suggest a line for further thought, for him and for those who may be taken with his way of working: What could be said in a positive way about the process of translation he describes?

Cunningham directs his attention to the way in which Johnson's voice went unheard, and his person unrespected, by the translations that took place, on the unstated but apparent assumption that perfect legal discourse would reflect all that without flaw or distortion, like a perfect plane of glass. But I think the situation is more complicated. The language of the law, with all of its distortions—in fact by means of these distortions—enables us as a society, and as citizens and litigants, to achieve something we could not do through our own unmediated voices. Consider here as one example the finding of Sarat and Felstiner, referred to by Cunningham, that lawyers in divorce cases seem to disregard much of what their clients are really saying to them. In particular, we are told, they do not seem interested in "who did what to whom." In particular, we are told, they do not seem interested in "who did what to whom."

What might an experienced divorce lawyer say on her own behalf? Perhaps something like this:

Of course it is wrong if we fail to hear and respond to what our clients are telling us, and I am sure I do that all too often. We should listen with special care when they talk about their children, for example, and try to provide a conversational context in which they can discover more fully their own wishes as they come to recognize more fully the reality of their own situation.

But this very phrase suggests that we have a role that cannot be reduced to meeting their wishes, or translating their stories without distortion, even if that were possible, namely to help them to come to see the reality of their situation and to form wishes appropriate to that. It is so common as to be nearly universal that divorcing people think unrealistically about their futures, both in economic terms and in terms of their children's lives. In fact they often deny that they are really getting divorced—they see the future as a continuation of their marriage, which has often by then dissolved into a fight. And an essential part of the fight is blame

10 Id. at 742.
and retaliation: wanting to retell the story of what the other spouse did wrong and they did right, over and over, as a way of justifying themselves to themselves and others, and indeed as a way of justifying their own present hostility, their refusal to cooperate, their insensitivity to their children’s needs, their denial of changes in their economic and social circumstances, and the like. If all goes well, someday they will in fact give up the fight, and the claims of right and wrong by which they carry it on. The question, who did what to whom, will then have meaning only diagnostically, as they try to figure out their own contribution to what was bad about the marriage so that they will not repeat it.

One of our objects as lawyers is to help them move in that direction earlier than they otherwise might: to help them to accept their circumstances and to form appropriate wishes based upon them. As an essential part of doing that, we divert their attention repeatedly from what they wish to tell us to what they are denying. Part of our task, that is, and a good part, is the education of our clients. Two good lawyers, working with such an attitude on opposite sides of a bad divorce, can greatly reduce the amount of misery the divorcing partners inflict on themselves and others, and do so in ways for which they will later often be grateful.

And think of this too: bad as the language of divorce law is, and the institutions through which it works, suppose that we tried to deal with the breakdown of relations solely in the language of the parties themselves. We would have nothing but negotiation, and ill-focused negotiation at that—no way to learn from the past, and no way to reach a collective judgment about important matters, such as the value of work in the home or the way to think about custody and visitation.

The legal process works a translation that entails a loss, but it also entails, or can entail, a gain. The proper duty of the translator is not solely to the language and text out of which she works, but runs as well to the language in which she speaks, and to the demands of the social and cultural context in which she functions.

This explanation has considerable appeal to me, and not only in connection with divorce. Think of the relation between police officer and suspect: here the law of the Fourth Amendment and unlawful arrest provides a language for thought and speech about this relation, and for its regulation as well. It will never reflect without distortion whatever an officer or suspect might say. But it may nonetheless be a good language—one that can make possible thought and argument about the transaction that they share in a way that does more to include the legitimate concerns of both, and of the rest of society too, than either of their own ways of talking, standing alone, would do. I think, then, that we need to give attention not only to the erasures and omissions and misrepresentations that take place in legal discourse but also to what we think to be the
merits and values of this language, or the opposite of these things, and hence of translation into it. A part of our subject, in fact, is the analysis and comparison of different languages, or different versions of the same language, of which we can ask what they enable us—as lawyers, as people, and as a society—to achieve, as well as what they inhibit or prevent.

A great deal of attention has recently been focused on the way the law disadvantages the powerless. Law is indeed sometimes conceived of simply as a disguise or legitimization for the exercise of power, a huge fraud. Of course there is the element of disguised power, but that should not blind us to what else is present, namely that the law also can and does provide protection to the powerless. The cynical and power-hungry Callicles in the *Gorgias* showed that he knew this when he said that all talk about justice should be discarded as pointless sentimentalism; it is only a convention, he said, imposed on the powerful by the weak, and those who are powerful, like him, should deny its force. But for this very reason it is right for those of us who live with the law as its caretakers to assert its possibilities, knowing that it is partly on behalf of the powerless that we do so.

Think of this very case: it is certainly true, from what we are told, that Johnson was treated disrespectfully by the police, abusively by the prosecutor, and (at first) a bit ineptly by Cunningham. But it is also true that it is the law that provides him with a hearing before a judge, with a lawyer paid for by the taxpayer, with a forum in which he could challenge abuse by police officers, and it does this not only for him, but for many people. This is not a small achievement, and would be envied by the powerless in many other countries. This is of course not to deny the abuse, or the effacement, or to say that they do not matter; of course they do and for the reasons Cunningham so eloquently presents. But there is another side: the law is not only a source of violence, it reduces violence; it not only oppresses the weak, it defends them. The conversion of the language of the people into the law, while always an effacement, may also be right, both from their own point of view and from the point of view of the larger world the law is trying to create. There is thus in the law an ineluctably tragic element that the image of translation captures: translation is always imperfect; but it is necessary that it

---

11 It is important to recognize that the client or witness often has not one single story, which will be translated well or badly, but a variety of possible ways to tell his story, among which choices must be made. The very process of translation may draw attention to this circumstance and help the speaker work out the version of his experience which is most satisfactory to him in this context.

be done if we are to listen to each other at all, and certainly if we are
to maintain a generally shared language of justice. The question is
how—with what skills and what attitude—this is to be done, and in
his paper Cunningham offers an admirable example.
THE LOOSENESS OF LEGAL LANGUAGE: THE REASONABLE WOMAN STANDARD IN THEORY AND IN PRACTICE

Naomi R. Cahn†

INTRODUCTION

For feminists working with the law, the relationship between theory and practice has been critical, although often uneasy and problematic.¹ Part of this tension between theory and practice² stems from inevitable, and important, questions about whether the legal process can meaningfully address women's needs.³ Nonetheless, because the strength of feminist theory is grounded so deeply in the actual experiences of women,⁴ an exchange between theory

† Visiting Professor, Georgetown University Law Center. Many thanks to Joan Meier, Tony Alfieri, Clark Cunningham, Cynthia Farina, and Holly Fechner for reviewing an earlier draft, to Nancy Tong for research assistance, and to Lei Udell for editing.

¹ See, e.g., Katharine Bartlett & Rosanne Kennedy, Introduction, in Feminist Legal Theory: Readings in Law and Gender 1, 4 (Katharine Bartlett & Rosanne Kennedy eds., 1991). The following story illustrates this problem:

Several years ago I attended a small seminar where a noted feminist legal theorist presented a brilliant paper, replete with theoretical insights into women's subordination. When she finished the presentation, we all clapped in admiration. During the discussion period, a participant said, "Many of us are lawyers who represent women in court, seeking protection from batterers, equal employment in the workplace, a fair trial. Have you thought about how your theories can help us?" The noted feminist looked blankly at the questioner. She was silent for a few seconds before she said, hesitantly, "That is a very interesting idea. You know, I had never really thought about how my ideas could help women in practice."

² I am interested not only in the process of how feminist jurisprudence affects practice, but also in more specific questions of how changes in law and methodology are intertwined in this process. For an extraordinary study of these issues, see Elizabeth M. Schneider, The Dialectic of Rights and Politics: Perspectives from the Women's Movement, 61 N.Y.U. L. Rev. 589 (1986); see also Kathryn Abrams, Feminist Lawyering and Legal Method, 16 Law & Soc. Inquiry 373 (1991). Abrams comments that "[t]he impact of feminism on the methods of lawyers—those who work for legal change in the courts, legislatures, and other public forums—is only now beginning to be explored." Id. at 374.

³ See Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1196 (1989); Phyllis Goldfarb, A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education, 75 Minn. L. Rev. 1599, 1687 (1991); Margaret J. Radin, The Pragmatist and the Feminist, 63 S. Cal. L. Rev. 1699, 1700 (1990) (arguing that rather than think about justice in an ideal world, we should think about "nonideal justice: given where we now find ourselves, what is the better decision?"). These questions arise both in substantive law and in methodological concerns. See Naomi R. Cahn, Defining Feminist Litigation, 14 Harv. Women's L.J. 1 (1991).

⁴ See Cahn, supra note 3; Goldfarb, supra note 3, at 1668.
and practice should remain central to the differing visions of what feminism can be.

This is where the theoretics of practice, a developing movement that attempts to understand the interaction between legal theory and practice, can inform feminism. It studies how the lawyer perceives and can empower, or do violence to, her client. Much of this scholarship is based on experiences with real clients, and includes both analysis of lawyers' struggles to translate client experiences into language that is meaningful in the law, and critiques of the translations. As scholars, looking at practice in our theorizing not only keeps us grounded in reality, but also ensures broader participation in the law so that changes are engendered by clients as well as lawyers, thereby challenging existing legal categories and methods.

Theoretics of practice scholarship primarily has focused on poverty law and drawn much of its critical strength from attempts to reconstruct poverty law practices. In this Article, I use the theoretics of practice to examine the relationship between feminist the-

5 Feminism is not, of course, a single viewpoint, but includes many different ideas from a variety of viewpoints. See Martha Minow, Making All the Difference (1990).

6 While no single definition describes the theoretics of practice, the thread common to all is a foundation in practice. By practice, we mean ways of arguing as well as relating to other participants in the legal system, including clients, the relevant communities, judges, and other lawyers.

Theoretics of practice is different from practice theory, which "reintroduces agency and practice into disciplines traditionally preoccupied with systems and structures, without abandoning the shaping power of socially constructed structures as retreating to a methodological individualism." Rosemary J. Coombe, Room for Maneuver: Toward a Theory of Practice in Critical Legal Studies, 14 Law & Soc. Inquiry 69, 71 (1989).


10 See Anthony V. Alfieri, Reconstructing Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 2107 (1991); White, supra note 7.
ory and practice by exploring specific situations involving sex and violence against women. The language of legal doctrine about "the reasonable woman" in sexual harassment law, battered woman self defense law, and rape law is the text I seek to interpret.11 My perspective is grounded in legal practice; I wonder how feminist theory and legal practice interact, and how both can help women. I also examine what it means to help women; helping some women may not help others.12

I examine the practice of the reasonable woman standard in the contexts of rape, sexual harassment, and domestic violence because these areas are linked, and because the impact of this standard in each area has important implications and lessons for the others.13 The three phenomena involve different forms of violence against women; each symbolizes different forms of women's subordinated status.14 The reasonable woman standard raises the possibility of changing this status by providing a legal standard that increases the potential for effective enforcement of laws against subordinating behavior. The need for a new standard in sexual harassment and battered woman cases emerged from the divergence between women's experiences and legal doctrines addressing these gender-specific acts,15 and the concept of the reasonable woman developed to "account" for the differences between these experiences and those of men in a form that the legal system could comprehend and incorporate.

Part I explores some ideological considerations relevant to the reasonable woman concept. As a constructed image of reasonable

11 Like Joan Scott, I believe that by examining the ways that "language constructs meaning we will also be in a position to find gender." JOAN W. SCOTT, GENDER AND THE POLITICS OF HISTORY 55 (1988). Language in the legal process occurs in many different settings: in court, between lawyers, between lawyers and their clients, between clients, with courtroom clerks, etc. It is important, then, not to focus on only one type of talk. See Austin Sarat & William L.F. Felstiner, Legal Realism in Lawyer-Client Communications, in LANGUAGE IN THE JUDICIAL PROCESS 133 (Judith Levi & Anne Walker eds., 1990) (exploring law talk in various contexts).


14 As Robin West argues, they are "gender-specific injuries." West, supra note 13, at 82. Men, too, are battered, raped and harassed; overwhelmingly, however, these acts happen to women. See Catherine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1301-02 (1991).

behavior, the reasonable woman has several theoretical underpinnings, each of which has different implications for the content of the standard. One theoretical underpinning of the reasonable woman construct may be "difference" feminist theory, which suggests that men and women differ as groups, and that women are more nurturing and moral than men. Through another lens, the reasonable woman can be viewed as a construct of difference-as-dominance feminist theory. This concept persuasively shows the need to include women's experiences in a system with asymmetrical power relations that has historically excluded women's participation. A third body of theory, critical race studies, also confronts the alleged objectivity of supposedly "neutral" rules that exclude the experiences of outsiders. Such experiences may result in the need to change universal standards.

In sharp contrast with the reasonable woman standard in sexual harassment and domestic violence cases stands the reasonable woman standard used to judge the victim's behavior in rape cases. In rape law, this standard implicitly requires women to conform to a certain image, developed largely by men, before the legal system will recognize their experience as rape. For example, women are still blamed for provoking or seducing men, unless they meet the male-set standard of "reasonable" resistance. Thus in rape law

---

16 Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 799, 807 (1989); See infra notes 84-95 and accompanying text. Williams provides an insightful critique of difference theory by showing that it adopts for women positive attributes from traditional stereotypes, such as women's connection to others, while discarding negative ones, such as women's passivity. Williams, supra. Additionally, as discussed infra, difference theory rarely attributes positive values to men. See also Jeanne L. Schroeder, Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination, 70 Tex. L. Rev. 109, 124-130 (1991) (difference feminism establishes a universal male that is opposite to female).

17 See Catherine A. MacKinnon, Legal Perspectives on Sexual Difference, in Theoretical Perspectives on Sexual Difference 213 (Deborah L. Rhode ed., 1990). As discussed infra at notes 65-95 and accompanying text, I believe the standard results from a mixture of difference and dominance theories.

18 See History and Power in the Study of Law 1, 6-11 (June Starr & Jane F. Collier eds., 1989) (discussion of power relations in the legal order).


20 See Harris v. International Paper, 765 F. Supp. 1509, 1515-16 (D. Me. 1991) (exploring different responses of whites and blacks to particularly harassing behavior, and noting that "the fact finder must 'walk a mile in the victim's shoes' to understand" the effects of discriminatory acts).

21 See Susan Estrich, Real Rape (1987) (discussing societal expectations of reasonable behavior of a raped woman); see also Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813 (1991) (analogies between rape and sexual harassment law) [hereinafter Sex at Work].
the image of the reasonable woman hurts women, confining them within a particular discourse. In rape law, men developed this standard to protect other men who, in their eyes, were wrongfully accused of rape. As a result, the rape law standard's attributes of reasonableness differ from those embodied in the sexual harassment and domestic violence law standard. The image of the reasonably raped woman, because of its ubiquitous nature and foundations in popular culture, constrains legal thought and language. Once such a stock figure is developed, it is difficult to displace, to find new language to think beyond it.

Part II illustrates the potential dangers inherent in a reasonable woman standard in any context by discussing stories that construct reasonable women as told by lawyers and judges. At the center of this Part is a story about a reasonable woman based on clients that I have represented. Ms. Sims was a battered woman who, among other things, had stabbed her husband with a knife after running into his house. Our challenge of representing her as feminist lawyers required us to think through what it means to be a reasonable woman. This client differs from those portrayed by other theorists of practice because her story, in her own words, may not have been entirely sympathetic to a legal tribunal. Her story thus shows the need to ensure that legal constructs reflect real stories, and shows how the powers of doctrine (not just the powers in the attorney-client relationship) distort.

I argue that even in sexual harassment and domestic violence cases, where the standards were developed to respond to women's needs, the theory and practice of the reasonable woman standard further stereotypes and disempowers. While its use may empower some women, in the practical reality of the attorney-client relationship and in the courtroom, the reasonable women standard both encourages client passivity and ignores the complexities of the client's situation. Moreover, the use of separate standards operates to entrench differences between men and women, rather than to establish

---

22 By discourse, I mean "a way of talking about actions and relationships . . . . Like other discourses, law is limiting in that it asserts some meanings and silences others." Sally E. Merry, Getting Justice and Getting Even 9 (1990).

23 See Delgado, supra note 19.


REASONABLE WOMAN STANDARD

a standard that transcends issues of sameness and difference\textsuperscript{26} and provides for even more effective litigation strategies.\textsuperscript{27} Just like a reasonable man standard, the reasonable woman standard is biased and deliberately ignores the reality that women's experiences are diverse. Should the actions of an Hispanic lesbian woman be measured against those of a reasonable woman, or against those of a reasonable Hispanic lesbian woman? In failing to address these diverse experiences, the reasonable woman standard illustrates feminists' dilemmas over how to reconstruct the law (including attorney-client relationships) so that the dominant discourse is not male. Feminist challenges to the traditional stereotype of the reasonable man and its categorization of women, too often result in new stereotypes and inflexible categories of our own.\textsuperscript{28}

Finally, Part III suggests the beginnings of a new paradigm based on feminism as well as the theoretics of practice (including my own experiences in representing victims of domestic violence and sexual harassment), and applies it to generate some practice strategies. Using this paradigm, I reinterpret the reasonable person standard to include the experiences of both women and other excluded groups, as well as alternative conceptions of reasonableness. I examine the attorney-client relationship, and show how we can begin the process of developing new constructs that respect client autonomy, and create spaces for women in the law without fostering stereotypes and passivity.

\textsuperscript{26} See Lucinda M. Finley, A Break in the Silence: Including Women's Issues in a Tort Course, 1 YALE J.L. & FEMINISM 41, 64 (1989).

The debate over whether men and women should be treated the same or differently has divided feminists for decades. For a collection of citations to recent literature on the debate, see Leslie Bender, From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law, 15 VT. L. REV. 1, 4 nn. 6-8 (1990); see also THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, supra note 17 (collection of essays on differences between men and women).


\textsuperscript{28} By itself, categorization is not inherently destructive, so long as "we can recognize changes and interactions within the category." Mari J. Matsuda, Pragmatism Modified and the False Consciousness Problem, 63 S. CAL. L. REV. 1763, 1773 (1990). At the same time, however, it is critical to examine whose community norms determine categories such as reasonableness, and then to challenge any stasis within the category. See Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177 (1990).
ISOME STORIES ABOUT THE DEVELOPMENT OF THE REASONABLE WOMAN STANDARD

A. The Challenge to the Reasonable Man

The reasonable man standard remains an entrenched and pervasive standard by which courts measure potentially illegal conduct. Tort law, criminal law, and employment discrimination law all employ this standard to determine whether conduct is appropriate. That conduct is acceptable if it is "reasonable" is one of those "neutral" principles with which everyone can agree. As one critique points out, "[t]he notion that reason is divorced from 'merely contingent' existence still predominates in contemporary Western thought . . . ."  

The standard actually incorporates two different, although interrelated, requirements: first, that conduct be "reasonable," and second, that conduct be that expected of a "man." By "reasonable man," of course, the standard purports to be universal, to include all "mankind," and in practice courts have applied it to women as well as men.  

Feminism challenges both aspects of the standard: the implicit assumption of a "man" as the standard, as well as the assumption of reasonableness. The male bias inherent in a standard that explicitly excludes consideration of women as reasonable actors is obvious.

Using a term that is centered on a "man" channels and informs the content of the standard even when the court (or jury) knows that

32 See, e.g., Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. Legal Educ. 3, 20-25 (1988); see also Susan Bordo, Feminism, Postmodernism, and Gender-Skepticism, in Feminism/Postmodernism, supra note 30, at 133, 137. For a discussion of the difficulties in defining "man," see Judith Butler, Gender Trouble (1990); see also Suzanne J. Kessler, The Medical Construction of Gender: Case Management of Intersexed Infants, 16 Signs 3 (1990) (discussing assignment of gender in children born without defined sex characteristics). At a very basic level, there are at least three linguistic problems with the "generic masculine": first, there is a "nonparallelism between the male and female terms"; second, it is unclear in particular instances whether the term includes or excludes women; which, in turn, is partially caused by the third problem of exclusivity, because "man" sometimes does just mean men and not women. Wendy Martinez, The Psychology of the Generic Masculine, in Women and Language in Literature and Society 69, 69-78 (Sally McConnell-Ginet et al. eds., 1980); see also Collins, supra note 31, at 315-17 (noting that, historically, courts may have intended the reasonable man standard to apply only to men, while they adopted a standard for women closer to that of children).
they are applying the standard to a woman.\textsuperscript{33} In recognition of these problems, courts have articulated, as at least a cosmetic improvement, a reasonable person standard.\textsuperscript{34} In application, however, little but the male language of the standard has changed.\textsuperscript{35}

This leads to feminism's second critique: a reasonable person may resemble a reasonable man because the term "reasonable" is problematic. Existing conceptions of reasonableness are gendered through their creation of a standard of conduct based on rationality, exclusive of emotions and morality.\textsuperscript{36} Feminist theory has re-examined the reasonableness standard as part of a critique of "objective" standards.\textsuperscript{37} So-called neutral and objective standards may contain unstated assumptions that are actually gendered.\textsuperscript{38} This questioning of "neutral" rules has taken many forms: Regina Austin has challenged the tort of intentional infliction of emotional distress as gender, race, and class biased;\textsuperscript{39} Joan Williams has challenged a

\footnotesize{\textsuperscript{33} It is a truism that language influences and structures experience. ROBIN LAKOFF, LANGUAGE AND WOMAN’S PLACE 1-50 (1975); GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS 39-84 (1987).

The reasonable man standard renders women invisible. See Donovan & Wildman, supra note 29, at 436; see also Collins, supra note 31, at 315-17 (suggesting that this was based in the common law view that husband and wife are the same person in the law).

\textsuperscript{34} E.g., State v. Norman, 366 S.E.2d 586, 591 (N.C. App. 1988) (battered woman case finding that “person of ordinary firmness” might have killed a sleeping husband in self-defense), rev’d on appeal, 378 S.E.2d 8, 12 (N.C. 1989) (“person of ordinary firmness” would not have killed a sleeping husband in self-defense).

\textsuperscript{35} See Finley, supra note 26, at 59 (in her torts course she includes some cases “in which it appears that, despite use of ‘reasonable person’ language, courts are evaluating a woman’s conduct according to a male standard.”). See generally Martha Minow, Supreme Court Foreword: Justice Engendered, 101 HARV. L. REV. 10 (1987)(relationship between gender and judicial action). The contribution of Richard Delgado and Jean Stefancic to this Symposium discusses how difficult it is to recognize contemporary expressions of discrimination. Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 CORNELL L. REV. 1258 (1992).

\textsuperscript{36} Bender, supra note 26, at 23. Rationality is not a neutral standard, and includes its own gendered versions of emotion and morality. See Ehrenreich, supra note 28 (discussing construction of meaning of "reasonableness").

\textsuperscript{37} See JANE FLAX, THINKING FRAGMENTS (1990); Bordo, supra note 32, at 136-37 (ascribing questioning of objectivity and neutrality to movements that emerged “to make a claim to the legitimacy of marginalized cultures”); Donovan & Wildman, supra note 29; infra notes 85-91 and accompanying text. The challenge to reasonableness resonates historically with the legal realist challenge to abstract formalist concepts. See Joseph W. Singer, Legal Realism Now, 76 CAL. L. REV. 465, 503 (1988).

Objectivity is not, of course, just a topic for feminist inquiry; other outsiders have developed powerful critiques of it. See Delgado, supra note 19, at 108 (the objective approach is accepted because it embodies the views of the stronger, more culturally powerful, party, and renders irrelevant the perspective of the subordinated party).

\textsuperscript{38} See Minow, supra note 5, at 51; Martha Minow, Feminist Reason: Getting it and Losing it, 38 J. LEGAL EDUC. 47, 51 (1988).

workplace that establishes an ideal worker based on male norms, which does not include child care.\textsuperscript{40}

On a practical level, feminists have challenged the reasonable man standard in an attempt to modify it to correspond with women's lives. The challenge to a male standard of reasonableness has been successful in two areas discussed in this Article: sexual harassment law and battered women self defense cases.\textsuperscript{41} In rape law, however, though standards have begun to change, a distorted expectation concerning the reasonable behavior of women persists not only because a male legal system established what constitutes reasonable behavior, but also because rape is a deeply entrenched symbol of male control over women.\textsuperscript{42} For black women, rape represents an even more complex form of oppression: it "includes not only a vulnerability to rape and a lack of legal protection radically different from that experienced by white women, but also a unique ambivalence" because black men are disproportionately accused and punished for rape as compared to white men.\textsuperscript{43}

B. The Reasonable Woman Standard

The parameters of the reasonable woman are largely determined by the type of case in which the standard is used, and many are still very much in flux. Reasonable woman standards are designed to reflect women's perceptions of what constitutes sexual harassment\textsuperscript{44} and what constitutes a sufficient basis for a battered woman to kill her abuser.\textsuperscript{45} Unlike in the sexual harassment and battered women's contexts, in rape cases the reasonable woman's standard rarely benefits women, instead reflecting men's perceptions of what constitutes force and consent in sexual intercourse.\textsuperscript{46}

\(\text{over emotional security and interpersonal relationships actually disadvantages women when it comes to torts for which there is no comparable male injury).}\)

\textsuperscript{40} \textit{E.g.}, Williams, \textit{supra} note 16, at 822.

\textsuperscript{41} \textit{See infra} notes 49-64 and accompanying text. It has, of course, been successful in other areas not covered by this Article.

\textsuperscript{42} \textit{See Estrich, Sex at Work, supra} note 21, at 814-15 (Rape is an area of the law where "traditional male prerogatives are most protected, male power most jealously preserved.").

\textsuperscript{43} Angela P. Harris, \textit{Race and Essentialism in Feminist Legal Theory}, 42 \textit{Stan. L. Rev.} 581, 601; see Kimberle Crenshaw, \textit{A Black Feminist Critique of Antidiscrimination Law and Politics, in The Politics of Law} 195, 205-08 (David Kairys ed., 1990); see also \textit{Furman v. Georgia}, 408 U.S. 238, 250 (Douglas, J. concurring) (noting studies showing that the death penalty was disproportionately applied to blacks convicted of rape).

\textsuperscript{44} \textit{See Abrams, supra} note 3, at 1206.


\textsuperscript{46} In an oft-cited quote, Susan Estrich notes, "the reasonable woman, it seems, is not a schoolboy 'sissy'; she is a real man." \textit{Estrich, supra} note 21, at 65.

When a woman has been raped, the law (and society) impose expectations concerning her behavior. Helena Michie labels these expectations "the cultural master-narrative
The standard is not defined explicitly so much as it is merely used without elaboration. To give it meaning, it is regularly contrasted to the perspective of a reasonable man; thus, implicitly (and often explicitly), there is an underlying belief that the reasonable woman differs from the reasonable man. The standard thus helps women win in situations where a reasonable man standard might preclude their claims.

The standard may include either a subjective (what did this reasonable woman think at the time?) and/or an objective (how would other reasonable women react?) element or both. Accordingly, it

of rape that says that in all cases of rape women are complicitous, that rape is not a rape in the first place." Helena Michie, The Greatest Story (N)ever Told: The Spectacle of Revatation, 9 GENDERS 19, 21 (1990). As an example, consider the case of the young black female student at St. John's University who said that she had been sodomized and sexually assaulted by six white male students, most of whom belonged to the school's lacrosse team. Joseph P. Fried, 3 St. John's Students Acquitted of Sexually Assaulting a Woman, N.Y. TIMES, July 24, 1991, at A1. At three of the men's criminal trial, the woman testified that they made her drink a mixture of vodka and orange soda, and then forced her to perform fellatio. The defendants' lawyers argued that the woman consented to whatever sexual activity occurred, and that she subsequently fabricated the story because she was ashamed of her actions. After the jury acquitted the three men, some jurors explained that there were too many inconsistencies in all of the testimony they had heard. John Kifner, Jurors Say Complainant Didn't Seem Believable, N.Y. TIMES, July 24, 1991, at B4. As with many sexual harassment stories, this rape story was not perfect.

On the campus, one student applauded the verdict, and asked, "Who in their right mind would have gone to a house where eight guys lived?" Id. As Susan Estrich asked about the woman who claimed that William Kennedy Smith raped her after he picked her up in a bar and brought her to the Kennedy family compound in Palm Beach, "Can you rape a woman who voluntarily comes up for a drink at 3:30 A.M.? . . . The right question in rape cases is not what she did wrong, but what he did." Susan Estrich, The Real Palm Beach Story, N.Y. TIMES, Apr. 18, 1991, at A25.

Another example of the general distrust of rape victims is contained in the film Thelma and Louise (Metro-Goldwyn-Mayer 1991). Thelma flirts with a man who plies her with drinks, and then almost rapes her (she is rescued by the well-timed intervention of Louise). Louise kills the man. The two women begin driving away; when Thelma suggests calling the police, Louise points out that they would never believe two women who were drunk and who had been flirting.


48 In Ellison v. Brady, the court noted:

A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women . . . . [W]e believe that many women share common concerns which men do not necessarily share.

924 F.2d 872, 878-79 (9th Cir. 1991) (citations omitted). See Yates v. Avco Corp., 819 F.2d 630, 637 n.2 (6th Cir. 1987) (acknowledging that men and women are vulnerable in different ways and offended by different behavior); Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 HARV. L. REV. 1449, 1459 (1984).

49 For example, the Ellison court used an objective test, explaining that a plaintiff must allege conduct that "a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." 924 F.2d at 879 (citation omitted). In another sexual harassment case, the court
requires both an individualized inquiry and a "community norm" inquiry.

The reasonable woman is used fairly consistently in different contexts: in sexual harassment cases, it is used to judge whether a similarly situated woman would have felt harassed; in domestic violence cases, it is purportedly used to judge whether another woman would have felt comparably endangered; and in rape cases, it is used to judge whether another woman would have felt herself raped. By providing an authoritative image of acceptable conduct, the reasonable woman standard enhances the credibility of women whose conduct or beliefs conform with that image. Its use makes women's accounts believable within a system that puts the reasonable man on a pedestal and denies legal protection to unreasonable behavior.

used a similar objective test, but also required the plaintiff to show that the discrimination adversely affected her. Andrews v. City of Philadelphia, 895 F.2d 1469, 1480-81, 1486 (3rd Cir. 1990)(two female police officers who were regularly subjected to derogatory and obscene name calling, and to pornographic pictures in the workplace could have alleged "a work environment hostile and offensive to women of reasonable sensibilities"); see Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991), appeal docketed, No. 91-3655 (11th Cir. 1991) (same test). The reasonable woman standard is actually only one component of a larger test to determine hostile environment sexual harassment.

In State v. Wanrow—a women's self-defense case that has been used as a model for battered women's cases—that court used a subjective test, stating that Ms. Wanrow "was entitled to have the jury consider her actions in light of her own perceptions of the situation." 559 P.2d 548, 559 (Wash. 1977).

As Kathleen Lahey points out, "various kind[s] of abuse . . . [including] sexism . . . condition and shape people in ways that often make it easy to label them 'unreasonable.'" Kathleen Lahey, Reasonable Women and the Law, in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 3, 5 (Martha A. Fineman & Nancy Thomadsen eds., 1991).

Senate hearings on the nomination of Judge Clarence Thomas to the Supreme Court dramatically illustrate the need for a reasonable woman standard. After Anita Hill, a law professor at the University of Oklahoma, reported that Judge Thomas had sexually harassed her, the judiciary committee attempted to determine the "truth" of her allegations.

Although Professor Hill described her experiences, often in graphic terms, there was a sense throughout the Senate debates that many men did not "get" it—did not understand sexual harassment. E.g., Anna Quindlen, Public & Private: Listen to Us, N.Y. TIMES, Oct. 9, 1991, at A25. As Senator Dennis DeConcini explained his reaction to Professor Hill's statement, "people have to make their judgments based on what happens to them in their life at their period of time. I don't say that it didn't happen but I'm convinced that there's another side to this story." Excerpts from 2 Panel Members' Comments on Allegations Against Thomas, N.Y. TIMES, Oct. 8, 1991, at A20; see Kathryn Abrams, Hearing the Call of Stories, 79 CAL. L. REV. 971 (1991) (discussing how narrative accords with personal experiences). His attitude of incredulity typifies that of many Senators and shows, in the words of Professor Susan Deller Ross, that men simply may not understand what it feels like to be "a vulnerable and trapped female." Maureen Dowd, The Thomas Nomination: The Senate and Sexism, N.Y. TIMES, Oct. 8, 1991, at A1, A21.

Repeatedly, Senators questioned how a woman could remain silent for ten years about egregious sexual harassment, and even maintain a cordial relationship with her harasser. Excerpts From Senate's Hearings on the Thomas Nomination, N.Y. TIMES, Oct. 12, 1991, at A12, A15. Beyond questioning Professor Hill's actions in not reporting the
In some cases, the reasonable woman standard has successfully helped women win sexual harassment and domestic violence cases. Indeed, the "reasonable woman" is starting to become something of a stock figure in such cases because it helps women explain their experiences to judges and juries. For example, in sexual harassment cases, the standard shows why a woman might find that sexually explicit pictures in the workplace constitute harassment; in domestic violence cases, it helps explain why a woman might reasonably feel that she is in imminent danger at a time when her husband is sleeping.

In both sexual harassment and battered woman's cases, expert testimony has helped to establish the conduct and reactions of the reasonable woman, providing additional support for the reasonableness of the woman's feelings. For example, in *State v. Stewart*, Ms. Stewart had been repeatedly abused by her husband: he had beaten her with a baseball bat, shot one of her cats, and threatened repeatedly to kill her. She shot him while he slept. At her trial, she called an expert witness who testified that she suffered from battered woman syndrome. The court held that "expert evidence of the battered woman syndrome is relevant to a determination of the sexual harassment, Senators also raised questions about her character. Andrew Rosenthal, *White House Role in Thomas Defense*, N.Y. TIMES, Oct. 14, 1991, at A1. Pennsylvania Senator Alan Specter accused Professor Hill of perjury. *Id.* In an extreme example of male incomprehension, Senator Thurmond noted that he had "been contacted by several psychiatrists, suggesting that it is entirely possible she is suffering from delusions. Perhaps she is living in a fantasy world." 137 CONG. REC., S14,649 (daily ed. Oct. 15, 1991) (remarks of Senator Thurmond). In evaluating all of the evidence, Senator DeConcini (who voted to confirm Justice Thomas) explained that it was appropriate to use a "reasonable person" standard. *Id.* at S14,656 (statement of Senator DeConcini).

---

51 *See*, e.g., *Ellison*, 924 F.2d at 872 (sexual harassment); *State v. Kelly*, 478 A.2d 364, 577 (N.J. 1984) (self-defense) (expert testimony is relevant to determining the reasonableness of the belief of a battered woman that she was in imminent danger).


54 *See* State v. Leidholm, 334 N.W.2d 811, 820 (N.D. 1983) (expert testimony on the battered woman syndrome helps the jury to decide "the existence and reasonableness of the accused's belief that force was necessary to protect herself from imminent harm.").

55 *Robinson*, 760 F. Supp. 1486 (sexual harassment); *Kelly*, 478 A.2d at 364 (battered woman's syndrome).

56 As Kim Lane Scheppelle explains, "The use of expert testimony allows a woman to win a case against a man by having a 'qualified person' testify that she was suffering from trauma or delusion . . . ." Kim L. Scheppelle, Just the Facts, Ma'am: Considering Considered Stories 33 (Nov. 1991) (unpublished manuscript on file with the *Cornell Law Review*).

57 763 P.2d 572 (Kan. 1988).

58 *Id.* at 575.

59 *Id.* at 576.
reasonableness of the defendant's perception of danger."\textsuperscript{60} Evidently, even under a reasonable battered woman standard, the reasonableness of a particular woman's conduct is not always obvious; she often needs additional corroboration. Expert testimony provides the means to look outside of "objective" rules and expectations; that is, while many women have been raped, battered, or sexually harassed, their experiences may not be familiar to judges or juries. Alternatively, because prevailing societal myths blame women for letting these things happen to them, it is easy to believe that these women are aberrational, and even for other victims not to recognize the feelings.\textsuperscript{61}

Indeed, this is how the reasonable woman standard works in rape cases. Several myths exist about how women act that make rape cases difficult, such as: "women mean 'yes' when they say 'no'; women are 'asking for it' when they wear provocative clothes, go to bars alone, or simply walk down the street at night; only virgins can be raped."\textsuperscript{62} In the future, the reasonable woman in battered women self-defense cases and in sexual harassment cases may come to resemble the reasonable woman in rape cases, rather than the rape standard changing.\textsuperscript{63}

The following section explores the reasonable woman in feminist theory. This examination helps to illustrate why a new "quasi-metanarrative"\textsuperscript{64} has been created to replace the reasonable man, and how the reasonable woman fits into some debates in contemporary feminist theory. Because the reasonable woman standard is also a construct which attorneys use in practice when seeking to rep-

\textsuperscript{60} Id. at 577.

\textsuperscript{61} See Christine A. Littleton, Women's Experience and the Problems of Transition: Perspectives on Male Battering of Women and the Problem of Transition, 1989 U. Chi. L.F. 23. These myths are held by women, as well as men. Morrison Torrey reports:

In one experiment, female subjects believed that over 25 percent of the female population would derive some pleasure from being victimized [by rape], even though the subjects themselves clearly believed that they personally would not derive pleasure from being victimized under any circumstances.


\textsuperscript{62} Torrey, supra note 61, at 1015. Professor Torrey notes the need for expert testimony concerning the falseness of these myths in order to change attitudes and expectations about women's behavior. Id. at 1067.

\textsuperscript{63} See Estrich, Sex at Work, supra note 20 (making similar observation with respect to the standards in rape and sexual harassment cases); letter from Nancy Ehrenreich, 3/5/92 (on file with Cornell Law Review).

\textsuperscript{64} "Quasi-metanarratives" are concepts which "tacitly presuppose some commonly held but unwarranted and essentialist assumptions about the nature of human beings and the conditions for social life." Nancy Fraser & Linda Nicholson, Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism, in FEMINISM/POSTMODERNISM, supra note 30, at 19, 27.
resent "reasonable women," later sections then examine how these theoretical debates can inform future practice strategies.

C. The Reasonable Woman and Feminist Theory

Feminist practice and scholarship are mainly concerned with issues of sameness and differences between and among men and women. Two somewhat overlapping perspectives from within feminism exist on these issues: sameness-difference and domination-subordination. Critical race theory adds a third perspective.

"Sameness" feminist theories are concerned with similarities between men and women, and differences among women; they "target overtly sex-based legislation as problematic because it limits how we may define ourselves and how we can unfold over time." "Difference" theories are concerned with differences between men (as a group) and women (as a group); theorists argue that "abolishing overt sex categories in the law does not . . . directly attack women's disadvantages and subordination." Catharine MacKinnon rejects both sameness and difference feminism, arguing that these theories do not address the experiences of women who live under conditions of sex inequality. Both sameness and difference feminists use a male standard to evaluate issues of sameness or difference, and MacKinnon argues that women simply are not similarly situated to men, especially with respect to issues of sexual assault and reproduction. Indeed, she believes that the sameness approach to legal issues obscures women's inequality because it finds discrimination only where men and women are similarly situated. Her theory also diverges from difference feminism in that she objects to reifying differences, perceiving this as insulting because it

---

65 See ALICE ECHOLS, DARING TO BE BAD (1990), for an historical perspective on the sameness-difference debate among radical feminists.

66 Joan Williams begins her 1989 article as follows: "I start out, as have many others, from the deep split among American feminists between 'sameness' and 'difference.'" Williams, supra note 16, at 798; see also Bender, supra note 26.

Feminist jurisprudence and epistemology challenge the exclusion of women's experiences from prevailing discourses and the (male) perspective of the all-knowing, objective person. See generally Marie Ashe, Mind's Opportunity: Birthing a Post-Structuralist Feminist Jurisprudence, 38 SYRACUSE L. REV. 1129 (1987); Clare Dalton, Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 BERKELEY WOMEN'S L.J. 1 (1989); Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN'S RTS. L. REP. 7 (1989); Heather R. Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence, 1 BERKELEY WOMEN'S L.J. 64 (1985).


68 Id.

69 MacKinnon, supra note 14, at 1296-99.

only affirms, as "feminine," what a male society has permitted women to be.\(^7\) MacKinnon contends that sex discrimination results from the power inequality between men and women, and she has developed a difference-as-dominance theory.\(^2\) Under MacKinnon's theory, gender is a hierarchy constructed by men.\(^3\) Because men have power, they have constructed this hierarchy of inequality.\(^4\) Difference is the way that men dominate women.

Like feminists, other outsider groups have developed new ways of challenging how difference is constructed. Critical race theory, which focuses on the relationship between the law and race, critiques how law "create[s] racial categories and legitimates racial subordination."\(^5\) Critical race theorists believe that racism is part of American culture,\(^6\) and that telling counterstories about the victim's experience may help to change the dominant culture.\(^7\) Through these stories, others may be able to recognize the complexity of oppression for outsiders.\(^8\)

Even though some feminists are seeking to move beyond the sameness-difference discussions and related ideas,\(^9\) and to incorporate insights from critical race theories, these discussions are still useful in sorting out the significance of the reasonable woman standard. We cannot move beyond the sameness-difference debate until we better understand its implications.

Sameness feminism suggests that the reasonable woman standard is too limiting. Such a standard perpetuates distinctions between men and women, rather than developing a standard applicable to both sexes. Thus, sameness theories would advocate a reasonable person standard. Difference feminism critiques a re-

\(^2\) Others have developed modifications of MacKinnon's approach. Ruth Colker bases her analysis of sex discrimination on the antisubordination principle. Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. REV. 1003 (1986). Under this approach, any policy or practice that contributes to the subordination of an historically dominated group is discriminatory.
\(^3\) MACKINNON, supra note 70, at 227.
\(^4\) Id. at 219.
\(^5\) Crenshaw, supra note 43, at 213 n.7. She emphasizes that there is no single definition of critical race theory. The first conference on critical race theory was held in July 1989. Gary Peller, Race Consciousness, 1990 DUKE L.J. 758, 758 n.2.
\(^8\) Crenshaw, supra note 43, at 212.
\(^9\) E.g., Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 COLUM. L. REV. 1118 (1986); Joan C. Williams, Dissolving the Same-

sonable person approach, because only the language, and not the underlying content, changes. It would call for a reasonable woman standard that takes into account women’s perceptions and experiences that differ from men’s, and likewise a reasonable man standard that reflects these different experiences. Dominance theorists might articulate a reasonable woman perspective for both men and women, imposing women’s perspectives onto men’s lives, just as men’s perspectives have been imposed on women. The problem would be determining a woman’s perspective that is developed outside of the structures which subordinate women.

As a theoretical construct, the reasonable woman standard accords nicely with difference feminism because it focuses on similarities among women and differences with men. An examination of the premises of difference feminism reveals that the reasonable woman standard parallels difference theories. Consequently, critiques of difference theory provide insights into the shortcomings of the reasonable woman standard from which we can generate more effective practice strategies.

Many difference theorists draw upon the work of psychologist Carol Gilligan and philosopher Nel Noddings. These “cultural feminists” assert that women use an ethic of care in their moral reasoning, while men are more oriented to an ethic of rights. Dio-

---

81 Id.
82 See MacKinnon, supra note 70, at 183.
83 Id. at 117. For a critique of false consciousness, see Kathryn Abrams, Ideology and Women’s Choices, 24 GA. L. REV. 761 (1990) (suggesting alternative strategies to describe women’s choices, such as articulating multi-causal explanations).
84 However, unlike dominance theory, which suggests a new standard for all based on a reasonable woman, difference theory suggests different standards based on sex. As discussed supra notes 44-64 and accompanying text, courts have contrasted reasonable men and women, rather than suggesting a reasonable woman’s perspective should control the action of both sexes.
85 E.g., CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) [hereinafter GILLIGAN, DIFFERENT VOICE]; CAROL GILLIGAN, MAPPING THE MORAL DOMAIN (Carol Gilligan et al., eds., 1988) [hereinafter GILLIGAN, MORAL DOMAIN].
86 E.g., NEL NODDINGS, WOMEN AND EVIL (1990); NEL NODDINGS, CARING (1984) [hereinafter NODDINGS, CARING].
88 This perspective views women as more caring and oriented towards relationships than men. Women tend to perceive morally troubling problems as situations in which people might be hurt, RAND JACK & DANA C. JACK, MORAL VISION AND PROFESSIONAL DECISIONS 173 (1989), and try to resolve conflicts by using strategies that maintain connection and relationship, NODDINGS, CARING, supra note 86, at 8. Correspondingly, women are contextual, looking at the concrete circumstances surrounding any problem. GILLIGAN, DIFFERENT VOICE, supra note 85, at 38; NODDINGS, CARING, supra note 86, at 8, 96; Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543, 587 (1986). Men, by contrast, are oriented towards individual autonomy and impartial rules. They tend to see problems in terms of violations of rights, rather
ference feminism criticizes the legal system because (white) men constructed it to accord with male values, overlooking or devaluing female values. The legal system values claims of individual rights, and overlooks claims that are based on interconnection and responsibility. A legal system based on connection, rather than on competing rights, would value different aspects of each case, and might result in court opinions that "cr[y] out in anguish about the lessons of history, power and domination," rather than opinions that use "neutral" language. It might result in according the right to shelter, a basic human need, a higher status than the right to own property, a male assertion of individual rights. Procedurally, litigation might involve more negotiation and mediation, rather than aggressive litigation battles.

For women in the workplace, difference feminism appears to free women from the need to succeed according to male standards, because it aspires for a workplace that appreciates both traditionally male and female attributes. It allows women to value both motherhood and work. This newly restructured workplace would "fit female persons and lifestyles to the same extent they now fit male ones." In battered women's cases, feminists have developed an image of a reasonable battered woman as a way not only to explain battered women who kill their husbands, but also to justify the need for special intrafamily statutes that offer protection to battered women. than relationships between people. JACK & JACK, supra, at 173. Men are more likely to resolve conflicts by examining competing rights, and applying neutral and abstract standards. See, e.g., Lucinda M. Finley, Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning, 64 NOTRE DAME L. REV. 887, 897 (1989) (discussing dissent in City of Richmond v. Croson) 488 U.S. 469, 528 (1989) (Marshall, J., dissenting).


90 JACK & JACK, supra note 88, at 167-68; see also Bender, supra note 32; see, e.g., Webster v. Reproductive Health Servs., 492 U.S. 490, 537 (1989) (Blackmun, J., dissenting) (contrasting the (nonexistent) duty to rescue from an ethic of right and an ethic of care); Tracy Higgins, Note, Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy, 103 HARV. L. REV. 1325 (1990) (contrasting treatment of pregnant, drug-addicted women from an ethic of right and an ethic of care perspective).


94 For the development of this image on the criminal side, see LENORE E. WALKER, TERRIFYING LOVE (1990); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984); LENORE E. WALKER, THE BATTERED WOMAN (1979) [hereinafter WALKER, BATTERED WOMAN]; Schneider, supra note 25. On the civil side, see SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE (1982).
REASONABLE WOMAN STANDARD

Given that existing legal standards generally exclude women's experiences, a new standard that centers and values women's experiences is needed. To ensure that women's lives are adequately recognized, this recommended standard accordingly recognizes that women and men may need different treatment. The reasonable woman standard is a powerful development in practice for women in sexual harassment and self-defense cases.

II
MORE STORIES ABOUT REASONABLE WOMEN: FEMINIST THEORY, STEREOTYPES, CATEGORIES, AND CLIENTS

A. Double-Edged Nature: Stereotypes and Categories

Notwithstanding its many benefits, the reasonable woman standard is problematic. Not only does it remind us of earlier stereotypes of women as more pure and moral than men, but it also reduces women's experiences by attempting to capture the essential, relegating "other" experiences to the margins of acceptance. While the standard nonetheless has enabled women to win some cases, and it may also depict some valuable attributes that can contribute to new possibilities of lawyering on behalf of women, its problems ultimately overwhelm its utility.

First, the reasonable woman standard is reminiscent of earlier dominant images of white middle class women. The prevailing discourse of the nineteenth and twentieth centuries depicted women as pure, chaste, virtuous, and altruistic. Today, women are still en-

96 Joan C. Williams, Domesticity as the Dangerous Supplement of Liberalism, 2 J. WOMEN'S HIST. 69, 71-72 (1991) (men were associated with baseness, women with "higher" virtues).
97 See Barbara Welter, The Cult of True Womanhood: 1820-1860, 18 AM. Q. 151 (1966); see also SUZANNE LEBSOCK, THE FREE WOMEN OF PETERSBURG 232-34 (1984) (suggesting that while the true womanhood cult was closer to reality than is comfortable, it was a conservative response to changes in women's status). In Victorian literature, women were generally depicted as thin, delicate creatures. They rarely ate because to eat was to display hunger and sexuality; the very absence of female bodily needs defined women. HELENA MICHIE, THE FLESH MADE WORD (1987). It is important to note the many women were excluded by this discourse: women of color, lesbians, and women of a lower socioeconomic class. See HAZEL CARBY, RECONSTRUCTING WOMANHOOD 25-30 (1989) (contrasting discourse that defined the roles of the white plantation mistress and female slaves); see also Harris, supra note 43, at 598-601 (exploring differences between rhetoric of rape, which is based on white women's experiences, and the meaning of rape to black women). In the early twentieth century, these stereotypes resulted in courts upholding "protective" employment restrictions for women. E.g., Muller v. Oregon, 208 U.S. 412 (1908) (limiting hours women could work).
couraged to reject self-interest. Similarly, the reasonable woman standard today denies the needs and realities of women in order to create them as passive, delicate creatures. By definition, the reasonable woman standard establishes certain expectations for women that are different than those for men. A reasonable woman is offended by workplace decorations that depict nude women; a reasonable woman will not go to a man's house at three a.m. (nor allow a man into her house at that time) unless she expects sex, and will report promptly to the authorities if her virtue is violated; a reasonable woman will not tolerate repeated battering or, if she does, she will certainly not respond aggressively or resort to violence herself. The reasonable woman thus becomes a victim who needs protection; when her actions can be portrayed as those of a victim, she is protected by the courts. Other women do not, unfortunately, fit the reasonable woman stereotype.

A second problem with the reasonable woman standard is that it does not accommodate the experiences of all women. Women define harassing behavior differently. Some women accept as normal operating behavior actions that other women would equate with harassment; indeed, various forms of sexual harassment are so pervasive that many women have learned to "take it and smile," lest they be labelled an "uptight bitch." The reasonable woman standardizes harassing behavior, making it conform to a certain standard before it is legally actionable. Women who have suffered the

99 See Finley, supra note 26, at 64.
100 Professor Anita Hill's experiences, see supra note 50, show the diversity of attitudes among women about what conduct is reasonable. Many women understood why Professor Hill only reluctantly reported sexual harassment years after it occurred. On the other hand, however, many other women simply did not believe Professor Hill and dismissed her claims. Various polls found differing percentages of women who believed, or did not believe, Professor Hill. An ABC News poll conducted on the eve of the confirmation vote showed that 49% of women found Judge (now Justice) Thomas more credible. Priscilla Painton, Woman Power, Time, Oct. 28, 1991, at 24. In a USA Today poll taken after the hearings, 45% of women believed Justice Thomas, while 26% believed Professor Hill. Steve Marshall, Poll: Sexes in Agreement on Thomas, USA Today, Oct. 14, 1991, at A1. One woman stated, "There were too many inconsistencies in [Professor Hill's] story.... I think women are scheming little creatures." Eloise Salholz et al., Dividing Lines, Newsweek, Oct. 28, 1991, at 24.

According to Catharine MacKinnon's perspective, we can dismiss these views as constructed by genderized power relations. See generally MacKinnon, supra note 70. Such a perspective, however, denies women any agency, negating the reality that many women experience. See Abrams, supra note 83; Colker, supra note 80.

101 If we acknowledged that these actions were sexual harassment, our work environments would be intolerable. See Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1 (1991); cf. Littleton, supra note 61 (notwithstanding the pervasiveness of domestic violence, victims are isolated and unbelieved, because of the horror of their reality).
requisite type of conduct have been harassed or raped; others who suffer different types of behavior, or react differently to "accepted" behaviors, have no claim.

Finally, the reasonable woman standard is victim-focused. It is used in evaluating the behavior of sexual harassment, rape, or domestic violence victims. Rather than the harasser/rapist/abuser being held to certain standards of behavior, it is the recipient of male actions who is judged according to whether she reacted appropriately.

Yet I find myself reluctant to dismiss entirely the reasonable woman standard. Yes, the reasonable woman standard builds on earlier stereotypes of women, emphasizing women's virtuous and sensitive nature in sexual harassment cases, and her passivity in self-defense cases. Sometimes, however, these images are accurate: more women than men are apparently offended by certain types of sexually explicit behavior. Some of these images are inaccurate, especially, of course, in rape cases. Many women are reluctant to report that they have been raped, not because the rape never occurred, but because they do not want the publicity, or do not want to acknowledge their vulnerability, or they fear being debased by the legal process. The question then becomes whether and how to balance some of the truths behind stereotypes with the damage caused by the stereotypes in legal theory and practice in these areas.

Stereotypes about women, when "viewed differently, reflect real injuries of subordination and subtle strategies through which people cope with a relative lack of social power." We need not embrace the stereotypes as accurate in order to acknowledge that they may contain positive attributes. These "outsider" exper-

---

102 The research by Pauline Bart on women's and men's attitudes towards pornography shows that they respond differently. E.g., Pauline Bart, et. al., The Different Worlds of Men and Women, in BEYOND METHODOLOGY 171 (Mary Freeman & Judith Wok eds., 1991). For example, she found that 29% of women moderately or strongly agreed that pornography has its place, compared to 61% of men. Id. at 175.

103 Lucie E. White, Lawyering for the Poor, 56 BROOK. L. REV. 861, 881 (1990); see also Kathleen Lahey, On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory, in CANADIAN PERSPECTIVES ON LEGAL THEORY 319, 320-21 (1991) (women's silence has been a form of resistance).

104 Joan Williams has suggested that many of the stereotypes of women as nurturing and moral as compared to selfish, self-interested men, that underlie Gilligan's work and feminist difference theory men are more of a "status report" of contemporary gender role ideology than a description of how women actually behave. Williams, supra note 98. She suggests that women's behavior is actually far more complex than these stereotypes suggest: women are caught in a society which promotes a selfish ideal worker, rather than the moral and nurturing mother that female gender ideology promotes, and women feel themselves torn between the two competing images. Id. at 82.

As Kathryn Abrams notes, however, Williams's analysis results in "abstracting" gendered attributes from gender. Abrams, supra note 3, at 1193. Abrams points out that this is dangerous because men and women often do act differently, and it may bene-
iences contain potential sources of strength and positive imagery, although they are not necessarily "more" valid than insider's experiences. Thus, stereotypes that show the effects of disempowerment can also illustrate strategies of resistance. For example, women used the value of their supposed virtuousness as a reason to get suffrage in the early twentieth century. That women had to manipulate male legislators by using the stereotyped attribute of "virtue" in this manner does illustrate their comparative powerlessness, but also shows that they could use this "positive" stereotype to their advantage. Or take "deference," an attribute that Kathryn Abrams labels "unproductive" for women. This powerless quality may be an important component of a reconstructed attorney-client relationship where the attorney defers to her client's goals, encouraging some clients to assume control over the terms of the representation. The stereotype here may empower the clients and help the lawyer to resist the tendency toward lawyer domination.

The reasonable woman standard can be seen as a comparable strategy of resistance. It was developed by reclaiming stereotypes about women, using the positive aspects of those stereotypes but not challenging the utility of the stereotypes themselves. While it

105 See Matsuda, supra note 66; see also Patricia H. Collins, Learning from the Outsider Within, in BEYOND METHODOLOGY 34, 39 (Mary Fonow & Judith Cook eds., 1991) (While stereotypes are used to control subordinated groups, "many of the attributes extant in Black female stereotypes are actually distorted renderings of those aspects of Black female behavior seen as most threatening."). But see Williams, supra note 79, at 317 (noting that, unlike difference feminists, "outsider-scholars" do not try to revive traditional stereotypes of blacks because they "are so unambiguously insulting.").

106 Women have some power even in a male-dominated society. See Colker, supra note 80 (if male power were so all-encompassing, there could be no feminist consciousness); Flax, supra note 30, at 56; Linda Gordon, Response to Scott, 15 Signs 4 (Summer 1990).

107 Abrams, supra note 3, at 1194 n.47.

108 I am not arguing for a full endorsement or adoption of stereotypes. To the contrary, I am arguing for the need to disclose the historical link between certain modes of self-understanding and modes of domination, and to resist the ways in which we have already been classified and identified by dominant discourse. This means "redefining [] from within resistant cultures." June Sawicki, Identity Politics and Sexual Freedom: Foucault
establishes a new standard, however, this standard is one that accepts that there is a reasonable man, and that the reasonable woman acts differently from him in ways that the legal system can understand, and that courts can apply. It does not change the underlying standard, which still applies male notions of reasonableness to women.

The reasonable woman thus remains an image drawn in reaction to male images of women, which in turn draw upon women's biological nature. Even in the areas of sexual harassment and battered woman self defense law, where women have assumed some of the power to define legal images, the resulting standard still can be destructive to women because it embodies and perpetuates stereotypes and requires women to conform to them. In the rape context, the reasonable woman standard certainly is destructive because it establishes myths for juries about women's behavior. While some interpretations of the reasonable woman do help women, the standard accepts commonly held images of women and as such, is "conservative." It constructs rhetoric based on moral or passive women, regardless of who controls the imaging powers. It is not a standard that facilitates the slow and careful exploration of individual client realities.

The multiplicity of voices which emerges from the experiences of individual clients is the undoing of the reasonable woman. As is clear, the experiences of women in different groups (and the experiences of individual women within these groups) varies. Not all women who were sexually harassed never indicated welcomeness; not all battered women are helpless; and some raped women flirted and acted seductively with their rapist. The variety, depth, and complexity of conduct that can be reasonable within given circumstances needs to be recognized within legal theory and practice. Although it

\begin{itemize}
  \item and Feminism, in Feminism and Foucault 177, 186 (Irene Diamond & Lee Quinby eds., 1988).
  \item But see Williams, supra note 67, at 106 (arguing that when laws assign benefits based on whether one is Jake or Amy (Carol Gilligan's paradigmatic male and female), then "the women who are supposed to be Amys but look more like Jakes, or in some other way not-Amy, are foreclosed from expressing who they are and are officially invalidated for it.").
  \item See Schroeder, supra note 16.
  \item This was Elizabeth Schneider's goal in developing women's self-defense. See Elizabeth Schneider, Lesbians, Gays, and Feminists at the Bar, 10 Women's Rts. L. REP. 107 (1988). Of course, whenever a new and powerful theory is developed, there is a temptation to transform it into a "grand theory." See Frances Olsen, Feminist Theory in the Grand Style, 89 COLUM. L. REV. 1137 (1989); supra note 9 and accompanying text.
\end{itemize}
is easier to use one grand stereotype,\textsuperscript{113} convenience simply does not justify this practice.

There are, of course, many practical problems to representing women's differences while seeking to end (at least some forms of) discriminatory treatment. Indeed, the issue of how to represent the complexities of women's experience within the legal system is complicated and frustrating. Professor Abrams suggests various methods for presenting multiple views to a legal forum, such as presenting the interests of different clients in an amicus brief.\textsuperscript{114} The reasonable woman standard is another attempt to represent women's differences, at least by suggesting their differences from men (although not from each other). While it essentializes women, the standard is, nonetheless, an attempt to meet the need for different standards that respond to concrete realities.

B. Practice: How the Stereotype of the Reasonable Woman Affects Attorney-Client Relationships

Our clients come to us for many different reasons, with diverse backgrounds and motivations, not all of which are comprehensible. We translate their experiences into legally recognized claims or defenses.\textsuperscript{115} We see individual clients, but we also see these clients as manifestations of larger patterns.\textsuperscript{116} In fact, it is imperative to determine whether similar claims have been made by others, and what strategies have been effective.\textsuperscript{117} Consequently, stereotypes operate within the attorney-client relationship for both attorney and cli-

\textsuperscript{113} Abrams, \textit{supra} note 83; Olsen, \textit{supra} note 112.

\textsuperscript{114} Abrams, \textit{supra} note 2, at 393. This strategy may work well at the appellate level, where amicus briefs serve as a recognized forum for presenting multiple overlapping and supporting perspectives. \textit{See} Sally Burns, \textit{Notes From the Field: Reply to Professor Colker}, 13 \textsc{Harv. Women's L.J.} 189 (1990) (discussing the development of amicus briefs in Supreme Court cases).

But the problems are more difficult at the trial level. Nonetheless, trial counsel often do convey a multiplicity of perspectives when they plead in the alternative as permitted under procedural rules. \textit{E.g.}, \textsc{Fed. R. Civ. P.} 8(e)(2) ("A party may set forth two or more statements of a claim or defense alternately or hypothetically . . . A party may also state as many separate claims or defenses as the party has regardless of consistency."). Even under this strategy, which presents multiple, possibly competing claims, each claim is considered separately, without an attempt to develop a whole mosaic.

\textsuperscript{115} "The job of a lawyer is to re-present her client's views in such a way that the client's 'story' comes across as compelling to a judge or jury." Kim L. Schepple, \textit{Telling Stories}, 87 \textsc{Mich. L. Rev.} 2073, 2090 n.53 (1989); \textit{see} Cunningham, \textit{Thinking About Law}, \textit{supra} note 8, at 2492 (contrastng "re-presenting" with translation).


\textsuperscript{117} I mean "effective" in the limited sense of the plaintiff achieving the purpose of her suit, as declared in her pleadings. I am not addressing empowerment.
ent. For the attorney, the focus in these cases is often on whether her client is a victim and whether she meets the requisite standards for legal recognition. The lawyer must try to fit her client ("the victim") into an acceptable story so that she can win. Her actions must become "reasonable," as that term is defined, by some community standard. Rather than examine standards of conduct that allow the aggressor to behave as he has, we must instead examine our client's actions to see whether she is a worthy victim. If she did not resist enough, if she led him on, or if she did not leave when she had (what we now see as) the opportunity, then she did not act sufficiently reasonable and will not win. Instead, she will be blamed for talking to a man, flirting and teasing, drinking too much, or being too wild.

At the same time as we scrutinize her individual behavior, we are trying to fit her into a group with distinguishable characteristics. We are familiar with the legal requirements for sexual harassment victims, battered women, and rape victims. There are syndromes that help to describe their behavior. We want our clients to fit into the recognized patterns. Not only does it make our jobs easier, but

---

118 See Alfieri, supra note 10, at 2124 (poverty lawyers name their clients as dependent); Thomas Ross, The Rhetoric of Poverty: Their Immorality, Our Helplessness, 79 GEO. L.J. 1499 (1991) (discussing dominant visions of the poor).

119 For an example of how a rape survivor had to be represented as weak and vulnerable, rather than angry, see Kristin Bumiller, Fallen Angels: The Representation of Violence Against Women Legal Culture in At the Boundaries of the Law 95 (Nancy S. Thomuelsen & Martha Fineman eds., 1991). For a comparable discussion of homelessness and victimization, see Lucie E. White, Representing "The Real Deal", 45 U. MIAMI L. Rev. 271, 298 (1990-1991); Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 BUFF. L. Rev. 1, 46 (1990) ("The lawyer had scripted [her client] as a victim. That was the only strategy for the hearing that the lawyer... could imagine for [her client].") [hereinafter White, Subordination].


121 See Camille Paglia, Rape: A Bigger Danger than Feminists Know, NEWSDAY, Jan. 27, 1991, at 32 ("A woman going to a fraternity party is walking into Testosterone Flats... A girl who goes upstairs alone with a brother at a fraternity party is an idiot."); Ann Landers, After Hours of Petting, It's Too Late to Stop, CHI. TRIB., Aug. 4, 1991; see also VACLIEF P. HANS & NEIL VIDMAR, JUDGING THE JURY 204 (1986) (citing studies of jury attitudes in rape cases that reflect male perspective of what is reasonable: many believed 50% of all rapes are reported by women seeking revenge on men or trying to cover for an illegitimate pregnancy); 2 Charged with Assault on Student from Loyola, CHI. TRIB., Sept. 9, 1987, § 2, at 4 (two men who allegedly gang raped a woman were charged with misdemeanor criminal sexual assault rather than felony rape because woman had been drinking and delayed reporting the incident until the morning after it occurred). But see Naomi Wolf, We're All "Bad Girls" Now: Our Lives are Just as "Lurid" as Those of Alleged Rape Victims, WASH. Post, Aug. 4, 1991. Similarly, as discussed infra, in our domestic violence cases, it is more difficult to construct a case to support a client's receipt of a protection order, especially for women who are too angry, hit back, started fights, or who left home without their children.
it also may help our clients overcome some of the distrust directed
against them, so that they will be believed.

Thus, the actual physical violence committed against our clients
may be compounded by their lawyer's and judge's reactions.122 An
example from one of my classes shows the potentially damaging ef-
fects of stereotyping within the attorney-client relationship. We
were exploring the reasons that battered women might stay with
their abusers. Many of the students suggested that the battered
woman was a victim of learned helplessness and could not leave for
psychological reasons. Then a formerly battered woman, who had
observed hundreds of cases and talked with thousands of victims,
spoke. She suggested that the battered woman may stay because
she loves her abuser and cannot afford to live apart from him.

A lawyer who cannot see (or understand) how love affects a bat-
tering relationship or the importance of economics is missing im-
portant aspects of her client's life.123 She will not understand why
her client stays with the abuser or returns to him. As a result, she
will grow angry and frustrated with her client, and perhaps seek
ways to terminate the representation. This will make her client feel
blameworthy for her "unreasonable" love for the batterer, and the
client will feel judged—by her own lawyer—at the moment she first
enters the legal system. Of course, understanding this context does
not ensure that the attorney will not become angry and frustrated;
however, her emotions will be tempered with understanding.

Even if she does understand her client's circumstances, in her
role as intermediary between the client and the court, the lawyer
may nonetheless choose to portray her client in a certain way so that
she will win. I do not criticize feminist lawyers for trying to help
their clients in this way. But having achieved some success, we must
evaluate the costs and benefits of existing legal standards and the
mode of their development within—and to—the attorney-client re-
122 See Schneider, supra note 25 (abuse of battered woman self defense syndrome);
White, supra note 7.

123 See Littleton, supra note 101, at 43-47; Mahoney, supra note 101.

124 See supra notes 97-101 and accompanying text; see also Shirley Sagawa, A Hard Case
for Feminists: People v. Goetz, 10 HARV. WOMEN'S L.J. 253, 266 n.71 (1987) (citing to
criminal case in which defense counsel's use of battered woman syndrome was held er-
characteristics as unreasonable. Second, the image marginalizes those women whose stories do not fit within the image, and those women who have different, and difficult, stories to tell.125 For example, what do we do with the sexually harassed woman who had a consensual sexual relationship with her harasser and then sued him?126 What about the woman who was raped by a former boyfriend with whom she previously had consensual sex?127 What about the victim of domestic violence who wants custody of her children but has “abandoned” them when she fled the violence, or worse, has beaten them?128 As lawyers, we must look at the entire contexts in which these actions occur in order to make sense of them, and we must convince courts to examine context, rather than to rely on summary standards.129

Third, although the reasonable woman standard emerged from women’s actual experiences, it has since been overtaken by lawyers and legal theorists. Consequently, it shifts power from women to their lawyers.130 Rather than challenging definitions, women must still accommodate their experience to someone else’s reasonableness standard. Moreover, because reasonableness is a powerfully

129 Of course, we must also figure out how to set limits. See Abbe Smith, Presentation at Frontiers of Legal Thought: Race, Gender and Justice (Duke University School of Law, Jan. 24, 1992) (discussing criminal defendant who shot two women after he saw them making love because he is homophobic). In setting these limits, we may appear arbitrary: why should domestic violence be relevant, while homophobia is not? My answer is that we must choose certain determinate values. See Joan Williams, Rorty, Radicalism, Romanticism: The Politics of the Gaze, 1992 Wis. L. REV. 131, 143 (discussing the possibilities of certainties without absolutes—we can believe in right and wrong so long as we recognize that they are arbitrary beliefs).
130 See White, supra note 103, at 886 (arguing that poor people must take the power to define themselves away from the courts); see also Tove S. Dahl, Taking Women as a Starting Point: Building Women’s Law, 14 IRR”L J. SOC. L. 239, 239-40 (1986) (articulating the purpose of women’s law as describing, explaining, and understanding actual experiences to improve their position in law and society; women’s experience is removed from the subjects themselves and becomes filtered through the interpretations of their lawyers).
drilled-in legal standard (beginning in first year torts), it is difficult for lawyers to challenge the paradigm of reasonableness.

We represent our clients in a system that has excluded women from the legal process. As we think about litigation on behalf of women, we must beware of reverting to traditional methods of thinking and developing doctrine. Instead, we must focus on the impact of our theory on practice as a method for understanding the impact of doctrine on images and cultural stereotypes of women that operate within the attorney-client relationship.

C. A Representation

A client representation that occurred in our clinic illustrates many of these themes.

We first met Arlene Sims at our Citizens' Complaint Center, where the local police send virtually all victims of domestic violence. She came in through Center intake with a one-page form setting out a summary of her reason for being there. She had already seen at least two people that day, one from the local prosecutor's office and another from the Court Social Services office. She had been at the Center since nine a.m.; by the time we interviewed her, it was about two p.m.

A student in my clinic called her into our office from the central waiting area. Ms. Sims followed slowly. The student began by apologizing to Ms. Sims for the long delay at the Center and that she hoped we would be the last people Ms. Sims needed to talk to that day. Ms. Sims looked up, and smiled a little. The student explained that she was a law student, acting under the supervision of an attorney-professor. She then informed Ms. Sims that we understood she was at the Center because her husband had beaten her with a chair, and that she wanted to go to court about this. The student then asked, "Is this accurate?"

131 See White, Subordination, supra note 119, at 20-21 (while some women do participate "fluently" in the legal process, many are unable to do so).


132 To protect my clients and my future practice, the facts in this case are based on a compilation of several cases and, for this reason, I have summarized the attorney-client conversation. Clark Cunningham has commented that my methodology takes away the client's voice. Because Ms. Sims does not exist, there was no way to get her permission to use her actual words; yet, I did not want to invent either her actual words or mine. This article, then, omits illustrating some of the steps in the process of how client language is distorted by the law. The attorney deliberations discussed infra are hypothetical.
Ms. Sims said, "yes." Looking back, I am not sure what she meant; what we later learned she wanted and what had happened to her were different from what the intake form stated.

Ms. Sims explained that she already had a civil protection order (CPO), but that had not stopped her husband from beating her. The student asked for a copy of the CPO; it did indeed direct Mr. Sims to stay away from his wife, and not to molest or assault her. We also noticed that the order was issued by consent. Ms. Sims and her husband, with the help of a victim advocate, had negotiated the terms of the order. The victim advocate is not a mediator, and she explains at the start of each session that she is there to help the complainant. The advocate has handled virtually all domestic violence cases in the local court for more than ten years, and is sensitive to power disparities between the parties. She is also skilled at negotiating terms that the complainant wants and that are acceptable to the abuser. When the parties consent in this kind of process there is no hearing. The judge generally reads out the terms of the agreement, and makes sure both parties understand the penalties for a violation. Even though such orders only direct batterers to stay away from victims, judges often tell victims also not to go anywhere near the batterer.

The fact that an abuser consents to a civil protection order does not necessarily mean that he admits to any of the allegations underlying the initial complaint. Nor does it mean that he is more likely to comply with the order than if it had been issued after a full fact-finding hearing. It often does mean, however, that the abuser is intimidated by the court process, that neither party wants to explain all the details of their relationship in court, or that the parties still have some type of minimal relationship. Ms. Sims explained later that she felt intimidated by being in court and had gone through the consent process because she did not want a hearing. She was concerned, however, that because there had been no court hearing, Mr. Sims had not taken the court proceedings as seriously as she had. This was of particular concern because, as Ms. Sims explained, she and her husband still lived within one block of each other. She continued to visit friends on his street, and he lived with her uncle.

Within the previous two weeks, he had beaten her twice. The first time, he came to her house one weeknight to visit their three children, Alice, who was two years old, Jim, who was five, and Dan, who was seven. Even though the civil protection order allowed him to visit only on weekends, she let him into her house. She explained that she wanted him to see the children, and that she was also scared he would bang on her door until she let him in. As soon as he walked in, he began to hit her, punching her on the right side of her
face with his fist, kicking her legs. She screamed, and by the time a neighbor came to the door, he had stopped. We could still see the faint bruise marks on her face.

The second time he beat her after she refused to hand over the keys to "his" car. When they were first married, Mr. Sims bought a 1980 Chevy. Ms. Sims did not work, so he provided the car payments and kept up the insurance. While he was at work, she used the car mostly to drive the children to and from school, to go grocery shopping, and for other errands. At the court hearing on the CPO, neither of them had brought up use of the car, so the order said nothing about it. Because he had lost his keys, she knew that she had the only set.

Ms. Sims explained that on the day before she came to the Center, she and the children had stopped to visit some friends on her husband's street after doing grocery shopping. As she was standing in front of a friend's house, she saw Mr. Sims pull up in his truck. He parked, and she watched him, hoping he would not come near her. He came towards her, yelling at her to give him the keys to his car. She ran into her uncle's house (also her husband's home) to ask him for help. Mr. Sims followed her inside the house and her uncle walked outside, leaving her in the house with her husband. He again demanded his keys. She ran into the kitchen, and got a knife, because she did not think he would let her leave the house. She tried to leave the house, but he blocked the door. She was somewhat confused about what had happened next. She believes that he picked up a chair and approached her with it, and that she stabbed him as she tried to ward him off. He then lifted the chair over his head and brought it down on her head several times. A friend of his ran into the room and told him to stop beating her. She left, got her kids, went home, and called the police.

About an hour later, two officers appeared. She showed them her CPO, but they told her that there was nothing they could do because he was no longer around and they had not seen anything happen. They referred her to the Center for help. This police response seemed frustrating to her— it certainly was to me. I had just finished working on a survey of how the police respond to domestic violence victims in the District of Columbia, which found that, notwithstanding a police general order to the contrary, the existence of a CPO had little effect on police response.133

As she told her story, Ms. Sims was soft-spoken and matter-of-fact. Even when she showed us the bruises, her demeanor did not

---

change. She seemed prepared to talk to many "professionals" before she could get help. She said that what she wanted was for Mr. Sims to stop abusing her. She had hoped the CPO would take care of his violence; it had not, and she was resigned to taking the next step. When we told her that we might be able to represent her, she seemed desperate for our help. Several times, she asked if we really thought we could represent her, and she seemed genuinely glad when we said we would. When she asked if it made any difference to us that she had refused to give him the car keys, run into his house, and then used a knife against him, we reassured her that it did not. We tried to take photographs of her bruises (they did not appear on our Polaroid pictures), and arranged to meet with her two days later so that we could file the necessary court papers to enforce her CPO through a motion for contempt.

During the next few days, the student and I had numerous discussions about how to handle the second incident. We were concerned about what might appear to a judge to be "inconsistencies" in her story, such as her grabbing the knife and stabbing him. Clearly, he had approached her first and she had acted only in self-defense. Refusing to give him the car keys seemed reasonable because she did not want to be bullied by him, and she needed the car for family errands. Running into her uncle's house to ask him for help also seemed reasonable, although we did wonder why her friends on the street did not try to protect her. We assumed that she did not want to involve any of them in her "personal" problems, and that they did not even know that she had a civil protection order. When we asked her why she had run to her uncle rather than to a friend, she explained that he was family and knew something about her relationship with her husband; while her friends were also her husband's friends and they told her they did not want to get involved in choosing sides. We struggled with how to present these facts to a judge, who might blame Ms. Sims for visiting friends on her husband's street, not leaving as soon as he arrived, running into "his" house, and drawing a knife on him.

In discussions with Ms. Sims, we developed two theories. Our first theory concluded that any reasonable woman in her situation would have acted as she did. Many of her friends lived on the same street as Mr. Sims did and she did not want to stop seeing them nor always ask them to come see her. Her friends were also his friends; these friends knew little of his past violence, and thought he was a decent man. Given this, she could turn only to her family for help. After her uncle refused to help her, she had to help herself. When her husband still lived with her, he had broken her nose, pulled out her hair, and threatened to do worse. She feared him, justifiably
and reasonably so. Grabbing the knife was an act of desperation. In this version of the story, she would tell the judge that she was confused about when exactly she had stabbed him with the knife.

In our second story about the incident, Ms. Sims was a lifelong victim. She had become stuck in an abusive situation, and was unable to step out of a cycle of violence with her husband. Her father had abused her mother, and her mother had abused her. She expected abuse in a relationship. In the first incident that formed the basis for the contempt motion, she knew that he had been building towards a severe beating, notwithstanding the CPO. She let him into her house, resigned to his abuse. In the second incident, she again knew that a beating was inevitable, and almost literally walked into it. She had grabbed the knife, but felt unable to use it to hurt him, and in fact dropped it quickly.

The facts in both stories were true (that is, they corresponded to Ms. Sims's actual experiences). In discussions with Ms. Sims, we needed to decide which story had fewer “inconsistencies,” whether she would have a better chance at winning a contempt proceeding if she appeared to be a victim or a reasonable woman. We three lawyers preferred the reasonable woman approach because it allowed Ms. Sims some dignity in telling her story to the judge and in front of her husband. We knew, however, that at the time, she was not thinking about whether her reactions were reasonable. Moreover, as her representatives, we felt it was important to let her know that we believed many judges would find her actions unreasonable and provocative. A judge quite simply might not believe that she had acted reasonably in visiting friends across the street from where her batterer lived, running into his house, and then stabbing him. We told her we especially feared this result because we tried to talk to the friend who intervened in the second beating, but he told us he did not want to get involved. In a case where a judge must determine credibility based on the parties’ testimony, with a high burden of proof (beyond a reasonable doubt), a judge simply might not believe her, and could easily find reasonable doubts about her actions.

We did not have a trial. On the day we were scheduled for court, she decided that rather than having a hearing at which the penalty might be jail time for him, or at which she might lose, she

---

134 See White, Subordination, supra note 119, at 46. Our victim theory was based on the cycle of violence/battered women syndrome identified by Lenore Walker. See sources cited supra note 94.

135 At the time, the stories seemed too inconsistent to combine. On reflection, I think we could have tried harder to combine the two images. Even so, we might have faced the same issues in court. It may also be that the stories are too divergent. See Delgado, supra note 77, at 2411 (discussing different stories for dominant and subordinate social groups).
would rather Mr. Sims relinquished possession of the car and paid child support. She reasoned that he could not earn money while he was in jail. Thus we do not know whether our reasonable woman strategy would have worked in practice.\textsuperscript{136}

Looking back, I am particularly aware of the risks of painting her actions as reasonable to a court. Mr. Sims clearly violated the order, and Ms. Sims's actions are irrelevant. Nonetheless, his behavior could be excused or justified because of her actions. Even to me, her behavior initially seemed somewhat risky, not quite reasonable. I imagine that if I were in her situation, I would have called the police as soon as he came over on a weeknight to visit the children. But then I remember that not only did she not have a phone at the time, but in the past when she called the police, they had not come in time.\textsuperscript{137} I also imagine that I would give up visiting my friends, so as not to run into him. And I believe that I could never stab anyone.\textsuperscript{138} But I do not really know.

My definition of the actions of a reasonable woman is based on my own experiences. I am not a black mother of three who receives AFDC and has been battered by my husband. The only way that I can begin to represent her situation is to know as many facts about her life as possible, to understand my position in interpreting them,\textsuperscript{139} and to examine the power structures underlying her

\textsuperscript{136} Another story shows the gap in understanding that we feared. A friend recently represented a victim of domestic violence who had been raped repeatedly over a ten year period. The victim testified that she returned to her batterer because he promised not to rape her again, and because she could not earn enough money to support herself and their children. The judge simply did not believe that she could have stayed for ten years with a man who repeatedly raped her (and thus it must not have been rape). Staying with her rapist-husband simply does not appear to be the action of a reasonable woman. Mahoney, supra note 101, at 64; West, supra note 13; see also Maryland Special Joint Committee, Gender Bias in the Courts 7 (May 1989) (judges do not understand why victim of domestic violence might not leave the abusive situation or might return to her husband). Another influence may have been that, until recently, marital rape was a legal contradiction.

\textsuperscript{137} Several courts have found that police respond discriminatorily to domestic violence calls. \textit{E.g.}, Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Com. 1984); see Carolyne R. Hathaway, Comment, Gender Based Discrimination in Police Reluctance to Response to Domestic Assault Complaints, 75 Geo. L.J. 667 (1986).

\textsuperscript{138} My doubts illustrate some of the limits of the method of "participant observation study." My beliefs and knowledge are central to this story. I have labelled this story "a story of representation" because it is my story of how I represented this client, both to myself and within the legal system. See Ross, supra note 112, at 1546; White, Subordination, supra note 119, at 45 n.143.

\textsuperscript{139} Clifford Geertz suggests that any interpretation is particular and holds different meaning in any cultural setting. Clifford Geertz, \textit{Local Knowledge} 167-234 (1983).
story.\textsuperscript{140} How can we possibly give such a “thick description”\textsuperscript{141} to a judge, given current definitions of relevance and limited images of reasonableness for poor black battered women?\textsuperscript{142}

III

PRACTICE STRATEGIES

We have seen how the reasonable woman standard affects sexual harassment, domestic violence, and rape law. When it emerges from women’s experiences, it has the capacity to help women, to make women feel less alien in the legal system, and to make women’s experiences appear more credible. When the standard develops from a male legal system, it clearly disadvantages women. Obviously, when it responds to the concrete realities of the lives of women who are using the legal system, it succeeds; in any other situation, as in the context of rape law, it fails, and, indeed, damages women. What, then, do we do with the reasonable woman standard? How should it affect legal strategy and representation?

It seems to me that we can choose from several possible approaches. Understanding its dangers of essentialization, marginalization, and potential disempowerment, we can nonetheless embrace the standard when it does account for women’s lives, and reject it in all other situations; we can use a reasonable person standard; or we can articulate a new standard that does not depend on an analysis in each situation of whether the reasonable woman image developed from women’s lives. Whichever of these difficult strategies we follow, it must be accompanied by revisions to the attorney-client relationship.

\textsuperscript{140} See Martha Minow & Elizabeth V. Spelman, In Context, 63 S. Cal. L. Rev. 1597, 1647-52 (1990) (in examining the particular experiences of individuals, it is important to examine larger patterns of power and oppression to aid in judgment).

\textsuperscript{141} See Alice Miller, Breaking Down the Wall of Silence 156 (1991) (explaining that because an American fighter pilot’s feelings were frozen inside of him, he could not feel the anger and powerlessness of the people he was bombing). Geertz borrows this term from Gilbert Ryle to refer to “the multiplicity of complex conceptual structures, many of them superimposed upon or knotted into one another, which are at once strange, irregular and inexplicit and which [an ethnographer] must contrive somehow first to grasp and then to render.” Clifford Geertz, Thick Description: Toward an Interpretive Theory of Culture, in The Interpretation of Cultures 3, 10 (1973). That is, there are multiple levels of significance to any single action.

\textsuperscript{142} On the difficulties of doing exactly this, see Delgado & Stefancic, supra note 35. The problem lies not just in the the lawyer’s ability to translate the client’s story, but also in the law itself. While much of lawyering does involve translation, see Cunningham, supra note 7, and interpretation, it requires some responsiveness, some similarity of concepts, between the law and the original speaker. These concepts simply may not exist.
A. Reasonable Person Standard

One solution, in accord with sameness theory, is to give meaning to the "reasonable person" standard. The reasonable person would not become simply a linguistic substitute for the reasonable man; rather, it would be "premised squarely on an androgynous rather than a male prototype." This androgynous creature would combine gendered male and female attributes, and would transcend the characteristics of each sex. It would embody a standard that could be universally applied. To develop a new conception of the reasonable person standard requires taking the "male tilt" out of its existing application so that it truly establishes a new standard.

The reasonable person standard has the advantage of simplicity and custom. We are accustomed to evaluating reasonableness. Indeed, the reasonable person appears to provide a neutral and abstract standard so that the law is not interpreted according to the whims of individual judges or juries, but instead is based on a societal consensus. Reasonableness protects against the extremes of the egg-shell plaintiff and the sledge-hammer defendant by setting out a mediating middle ground with seemingly determinate standards. In addition to providing neutral norms, a reasonable person standard, rather than a reasonable woman standard, prevents gender-attributed characteristics from controlling the appropriate legal standard.

Nonetheless, the standard may be impractical in implementation, as well as undesirable in theory. It is subject to the same criticisms as traditional conceptions of sameness feminism. Use of the reasonable person construct has not meant sudden equality for women, it has meant applying a male standard under a different name. Theoretically, we may be confining ourselves and our cli-

---


144 Wendy Williams argues that feminists must challenge "in court a male defined set of structures and institutions ... [using, among others] a doctrinal tool with which to begin to squeeze the male tilt out of a purportedly neutral legal structure." Williams, supra note 143, at 331.

145 For analysis of the falseness of this consensus, see Ehrenreich, supra note 31, at 1204-07; see also Richard Delgado, Norms and Normal Science: Toward a Critique of Normality in Legal Thought, 139 U. Pa. L. Rev. 933, 944 (1991) ("We must preserve the fiction that normative principles are neutral authorities we consult, humbly and objectively.").

146 Senator DeConcini used a reasonable person standard, and drew on his experiences in deciding to believe Justice Thomas, rather than Professor Hill. See supra note 50. The Norman court stated that a reasonable person does not kill a sleeping spouse. See State v. Norman, 378 S.E.2d 8 (N.C. 1989).
ents if we adopt a reasonable person standard. Moreover, as with the reasonable woman, a reasonable person standard pretends that there is an objective neutral standard that can be applied appropriately to all facts. As Lucinda Finley notes, "the purportedly objective reasonable person standard may actually be subjective due to its failure to include a variety of perspectives and experiences and its use of biased stereotypes."147

B. Reasonable Woman Standard

The reasonable woman standard developed from the experiences of outsiders. As such, it provides valuable information about how the legal system has excluded women. It also forces lawyers to consider how existing standards are male-biased, and how they can be changed to become more inclusive. Yet it differs from a gender-neutral standard because of its explicit focus on women; it requires the fact-finder to think about the reasonable woman's reactions to a particular situation, rather than proceeding from the perspective of the reasonable man or reasonable (male-dominated) person.148

The reasonable woman is a powerful image because of its implicit critique of the reasonable man. Its very phrasing shows that the reasonable man is a gendered, exclusionary standard.

When we litigate, we need concrete strategies that show the inadequacy of existing standards. Using a reasonable woman standard in sexual harassment cases dramatizes why behavior that many men find acceptable constitutes harassment to women.149 In the rape context, a reasonable woman standard could explain why a woman failed to report her rape, perceived a man's behavior as threatening, or did not understand herself to have consented to sex.150 The reasonable woman standard is seductive because it not

---

147 Finley, supra note 26, at 63.
148 See Estrich, supra note 21, at 859 (noting that some courts are "ready to meet the challenge" of protecting women from sexual harassment by pointing to the adoption of the reasonable woman standard in Ellison v. Brady); see also Ehrenreich, supra note 31, at 1207.
149 See Abrams, supra note 3, at 1202-03.
150 For example, some states still require marital rape to be reported within a certain time period, or else there was, legally, no rape. In Virginia, marital rape must be reported within ten days. Va. Code Ann. § 18-2-61(B) (Michie 1988); see Cathleen M. Gillen, Violence in Marriage: A Comparison of the Legal System's Approach to Domestic Violence and Marital Rape, Am. Crim. L. Rev. (forthcoming 1992) (manuscript on file with Cornell Law Review).

As Kim Scheppele explains, "[a]dopting the 'reasonable woman' . . . allows women's views to have a strong impact on the outcome of rape trials while simultaneously putting men on notice that they must consider how women's perceptions of sexualized situations may be very different from their own." Kim L. Scheppele, The Reasonable Woman, The Responsive Community, Fall 1991, at 45.
only sounds like familiar language (the reasonable man or person), but unlike the traditional language, it explicitly includes women.

Nonetheless, as Clark Cunningham points out, when one speaks a particular language, its limitations seem so natural that they are invisible.\textsuperscript{151} The term “reasonable woman” is both legal language and feminist language; its very familiarity as legal language obscures its problems. It still assumes the possibility of defining the reasonable woman's perspective, both imagining the theoretical likelihood of a standard capable of general application to women, and pretending that, in practice, judges can apply the standard in a “neutral” fashion that will benefit women.\textsuperscript{152} Indeed, it tries to separate the process of applying the law from the substantive content of the law, which depoliticizes the law.\textsuperscript{153} That is, it does not recognize that the process of applying the law is interrelated with the actual content of the law.\textsuperscript{154}

Consequently, courts that use a reasonable woman standard can apply it in a manner that subordinates women just as easily as one that supports women. As with the reasonable person standard, a mere change in language does not, alas, mandate a change in application and result. The trial court judge in Rabidue v. Osceola Refinery Co.\textsuperscript{155} explicitly used an “average female employee” standard in support of its finding that no harassment had occurred.\textsuperscript{156} In rape cases, the reasonable woman standard—as currently developed and articulated (albeit not by feminists)—hurts women. When we leave the interpretation of substantive norms “to the sole discretion of judges, most of whom are upper—or middle—class white men,” they will naturally perpetuate their traditional white male viewpoint.\textsuperscript{157} On this perspective, women are subjected to a reasonable

\textsuperscript{151} Cunningham, \textit{Lawyer as Translator}, supra note 8 at 1319; see generally Delgado & Stefanic, \textit{supra} note 35 (racism and sexism maybe so imbedded in our culture as to obscure their existence).

\textsuperscript{152} See Finley, \textit{supra} note 26, at 64.


\textsuperscript{156} Id. at 493. The conduct that was not harassing included: “In common work areas plaintiff . . . [was] exposed daily to displays of nude or partially clad women belonging to a number of male employees . . .”; a male employee who “regularly spewed anti-female obscenity”; and a general exclusion in formalities that Ms. Rabidue (the only female manager) needed access to in order to to her job. \textit{Rabidue}, 805 F.2d at 623-34 (Kieth, J., dissenting).

woman standard that is again constructed with male bias.\textsuperscript{158} Indeed, the goal of making the reasonableness standard reflect the actual experiences of women may be too difficult because of this entrenched bias that prevents judges from analyzing conduct and circumstances from the perspective of a reasonable woman (rather than a reasonable man labelled a reasonable woman)\textsuperscript{159}.

Moreover, the reasonable woman standard establishes a standard for women that differs from the standard for men, incorporating and perpetuating stereotypes of women. This suggests that men are not harmed by conduct that a reasonable woman might find offensive. This conclusion is unjustified. Some men may be injured by the same harassing behaviors that subordinate women. Men can be harmed by a legal standard that tolerates domestic violence, not only by its affect on them as children, but also by its relationship to fostering violent and abusive behavior in other men.\textsuperscript{160} Moreover, the perpetuation of certain stereotypes of women can reinforce limiting stereotypes of men. For example, the image of women as sensitive, delicate, and needing protection in the workplace from conduct that men easily tolerate, reinforces the restrictive images of men as the necessary breadwinner and provider, thick-skinned and hardened.\textsuperscript{161} Finally, the actions of a reasonable woman may differ depending on whether she is black or white, rich or poor, a professional or unemployed. The reasonable woman standard does not include these multiple perspectives, generating instead a cookie-mold stereotype.\textsuperscript{162}

Having said all that, however, a reasonable woman standard may remains a better alternative than any other formulation based solely on reasonableness. The standard could be applied to both men and women, ensuring that one standard governs behavior.\textsuperscript{163} Indeed, it could even be applied to the behavior of the harasser-abuser-rapist to judge whether his behavior was reasonable.\textsuperscript{164} Its very language instructs courts to think from a different perspective than that of the reasonable man or person. Notwithstanding its capacity for misinterpretation, the reasonable woman standard en-

\textsuperscript{158} Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. Cal. L. Rev. 777, 809 (1988).
\textsuperscript{159} Id.
\textsuperscript{160} Cahn, supra note 128.
\textsuperscript{161} Williams, supra note 16.
\textsuperscript{162} The intent of the standard was actually different. Within the legal system, however, in the interest of ease of application, or in order to accommodate expectations about women's behavior, the standard has collapsed into itself.
\textsuperscript{163} Donna Lenhoff, General Counsel of the Women's Legal Defense Fund, suggested this as one solution to the practical quandary of litigating sexual harassment cases. Interview with Donna Lenhoff (Dec. 7, 1991).
\textsuperscript{164} Of course, this would mean a dramatic shift in how cases are structured.
courages judges and juries to recognize the impact of different gender ideologies on the actions of women, and on their own expectations.\textsuperscript{165} It can also help clients like Ms. Sims feel more “fluent” within the legal system by formulating legal rules in terms that are meaningful in her experience.

C. Towards a New Standard

Given the problems with both a reasonable woman and a reasonable person standard, we need to develop a new conception against which to understand and evaluate behavior. A new standard must recognize that reasonable men and women can and do disagree both within and across gender groups; yet it must also acknowledge that prevailing gender, race, class, and sexual orientation ideologies construct a different and subordinate role for (sometimes intersecting) groups. Such a new standard must reformulate reasonableness, not merely because of its indeterminacy but because it is a mirage. It is an illusion that promises objectivity but actually incorporates subjective beliefs, and an imaginary standard that does not describe how people such as Ms. Sims think about their actions. It also allows (encourages) lawyers to reshape their clients’ stories to conform to this objective standard. I envision a standard that is tailored to the experiences of individual litigants in a manner similar to that proposed by Lucie White for poor people’s hearings.\textsuperscript{166} As Professor White explains, in order to “shap[e] the law to respond to the needs of subordinated groups[,] the power to tailor must shift to those that the tailoring seeks to help. Those who have been diagnosed as different, as disabled, must assume the power to describe their own circumstances.”\textsuperscript{167}

Consequently, a new standard would presume that each woman’s experience be viewed according to how she experiences it.\textsuperscript{168} Rather than listening for a story that constructs one dominant image in the courtroom, we must develop ways to admit multiple voices and images. Instead of requiring a victim to conform to pre-existing images, a new standard would be contextual, focusing on the victim’s actual reactions.\textsuperscript{169} It would incorporate all the circum-

---

\textsuperscript{165} It might drastically alter the range and types of evidence admissible, as has already happened with respect to battered women syndrome. For other possible effects on evidence, see Kinports, \textit{supra} note 157.

\textsuperscript{166} See White, \textit{supra} note 103, at 877-87.

\textsuperscript{167} \textit{Id.} at 886-87.

\textsuperscript{168} \textit{But see} Rosemary J. Coombe, \textit{supra} note 6, at 80 (claiming that we cannot rely on a particular woman’s belief as to whether she has consented to intercourse because those beliefs are “invaded by social power and dominant notions.”); MacKINNON, \textit{supra} note 70, at 177 (“women are socialized to passive receptivity.”).

\textsuperscript{169} To some extent, this proposal is similar to a standard articulated by Kathryn Abrams. She suggests that the victim’s “description of the defendant’s sexually oriented
stances surrounding a woman’s actions. In the rape context, for example it would ask, Was the consent to sex mutual, neither economically nor physically pressured? If there was any form of pressure, when did it occur? How did the woman perceive the pressure? How did it make her feel at the time she “consented”? Such a standard subjectively considers the pressure on an individual who is a member of a community with explicit standards for her behavior.

This new standard could permit lawyers to return to the excitement of learning from our clients’ experiences in order to craft more effective and responsive legal theories. Such a standard must draw its strength from communities of disempowered people, while seeking to change prevailing community attitudes. Its application entails educating judges so that they better understand and respect victims’ perspectives.

This new contextual standard is justified because it responds to the texture of our clients’ lives and gives them space to speak their own words. While reshaping clients’ stories is certainly appropriate in some instances, both the lawyer and her client must acknowledge the lawyer’s role as intermediary, her role in translating the client’s (narrative) language into law language (rules). By recognizing the diverse nature of our clients’ stories, a new contextual standard allows for the diversity of real experiences, and recognizes the distortion imposed by any particular doctrinal standard. This may allow litigants to feel “counted” within the legal system, providing the recognition and validation that are important goals of many who seek legal relief. And it ensures the continuing responsiveness of legal doctrine to legal practice.

Of course, one major problem with such a standard is its subjectivity. It ignores the perpetrator’s intent, focusing instead on the victim’s context, resulting in broad indeterminacy of legally appropriate behavior. Given the importance of *mens rea* to our concepts

---

behavior and of the feelings of coercion or devaluation it produced would establish the plaintiff’s prima facie case.” Abrams, *supra* note 3, at 1209; see also Brief Amicus Curiae of Women’s Legal Defense Fund, *Robinson* (proposing standard that credits plaintiff’s credible allegations). The standard set out in this Article differs in its focus on the victim’s context and its attention to the attorney-client relationship.

Chamallas, supra note 158, at 837-39.

For suggestions, see Martha Minow, *Words and the Door to the Land of Change*, 43 *VAND. L. REV.* 1665 (1990).

See *infra* notes 200-02 and accompanying text.

See Cunningham, *Lawyers as Translator*, supra note 8; Cunningham, *Thinking About Law*, supra note 8; Cahn, supra note 27.


Many of us are suddenly concerned with line-drawing. Women I know report the same type of conversation with men about where to draw the line between appropriate and inappropriate sexual behavior. Indeed, some might argue that this is not “law” at all; rather it is a process of ad hoc authoritative exercises of discretion.
of responsibility and the importance of the presumption of innocence to our adjudicative system, we want to find deliberate, or at least reckless, disregard for the victim's rights or interests before we impose liability. We have rapists who claim, "I didn't intend to rape her—I thought she consented," or harassers who state, "I didn't know that my conduct was unwelcome to her," or batterers who stated (before they were killed), "I didn't intend to hurt her again." Can we ignore their understandings so that it is the victim's perspective that becomes dominant?

To some extent, the legal system has ignored the victim's perspective, focusing only on that of the perpetrator. That is, burdens of production and persuasion in the legal system are allocated to assume that the perpetrator's conduct was reasonable, asking only if the victim's conduct was reasonable according to the perpetrator. The "objective" reality of what happens in rape, sexual harassment, or domestic violence cases is how the man thinks about his conduct. This does not mean that we should make women's experiences the only reality; we must recognize that there are multiple realities. A new standard could recognize the multidimensional nature of disputes and experiences of reality. Instead of labelling the male reality the "objective" one, each reality is both objective and subjective for the participants. In the past, one reality has been dominant; both must be weighted more equitably within the legal

---

176 A recent survey of sex bias in criminal law teaching concluded that "[t]he central role of mens rea . . . in criminal responsibility is reflected in the almost universal coverage of the 'mistake of fact' defense [in rape cases]." Nancy Erickson & Mary Ann Lammanna, Sex-Bias Topics in the Criminal Law Course: A Survey of Criminal Law Courses, 24 U. Mich. J.L. Ref. 189, 208 (1990).

See Scheppelle, supra note 150, at 45 (noting that given the harshness of penalties and stigma for criminal conduct, "[t]o base criminal convictions on potentially idiosyncratic perceptions of victims is unfair to those accused.").


178 The possibility of asking whether the reasonable woman (man or person) would have acted as did the perpetrator adds another dimension to this picture. The reasonable woman makes more explicit the existing focus on whether she acted reasonably, given his conduct; perhaps we should focus on whether he acted reasonably, given her conduct. See id.

179 MacKinnon, supra note 70, at 180.

180 See Brenda Danet, Language in the Legal Process, 14 Law & Soc. Rev. 445, 509 & n.32 (1980) (noting that while disputes constitute two different versions of reality, each advocated with all the resources—linguistic and nonlinguistic, substantive and formal—the parties can muster, [i]n fact there are likely to be more than two versions of reality since even witnesses on the same side may vary considerably in their versions of events.).
system.\textsuperscript{181} Even with a presumption of innocence, one could infer intent from the victim's perceptions and the perpetrator's actions. In this way, the facts that had previously been "discounted" would be heard in a new way.\textsuperscript{182}

A second problem with a more subjective standard is that in its focus on the victim's perspective, it requires that she expose her feelings. The reality is that this already happens: when a victim comes forward, she is put on trial. Under a standard of conduct that respected her reality, she could explain her experiences in a supportive, or at least nonjudgmental, environment rather than a critical one. For example, the notion of "imminence" in self-defense law would be flexible enough to accommodate the genuine perceptions of a woman who viewed her sleeping batterer as a threat (unlike the person with "ordinary firmness"). In employment discrimination cases, the law could acknowledge the influence of power relationships in the workplace so that a woman could explain why she did not complain loudly and often about harassment. In rape cases, the concept of consent would be transformed to one of real, affirmative consent, so that a woman could explain why, notwithstanding her past sexual activity, forced intercourse with a social acquaintance was still rape: she knows when sex is consensual and when it is not.

Finally, a new context-based standard may not always be appropriate in all cases. We may need "broader" norms, at least in some cases.\textsuperscript{183} But this, too, is a context specific inquiry, which recognizes that setting out one standard is sometimes, but not always, reasonable.

To see how this standard would work in practice, I suggest some reforms within the attorney-client relationship that would transform traditional standards to take account of different experiences, without setting out a separate standard for each gender.

\textsuperscript{181} See Abrams, \textit{supra} note 50, at 979 (many lawyers believe that the "truth" can best be established by a "neutral decisionmaker with the task of discovering it.").

\textsuperscript{182} Finley, \textit{supra} note 26, at 64-65.

\textsuperscript{183} See Fechner, \textit{supra} note 70, at 487.
D. Transforming the Attorney-Client Relationship

Phyllis Goldfarb has pointed out that feminists have much to learn from legal clinicians about the nature of the legal system, client stories, and the attorney-client relationship. In addition, feminists have much to learn from practicing lawyers and clients. Some feminists have begun this process by examining the legal methods that we use in challenging the law's exclusion of women's perspectives and the different claims of truth implicit in those methods. Others examine women's relationships to other actors in the effort to produce social change. I too ask how feminists have used the legal system to produce change, but also ask how do we think about feminists as litigators? What changes must we make in our methods in order to practice feminist representation of our clients? What happens when a particular theoretical construct is used in practice? What about when a practical construct is transformed, through court decisions or scholarly commentary, into legal theory?

While there are many theoretical perspectives from which to explore answers to these questions, any answers must include an examination of the representation process and the attorney-client relationship. It is not enough simply to develop theory; we must be concerned about what happens when it is implemented.

Underlying this problem of implementation is a concern with power issues in the surrounding society as well as within the attorney-client relationship. A complicating factor is the existence of many distinct power issues in the attorney-client relationship in the

---

184 Goldfarb, supra note 3, at 1689-90.
185 Abrams, supra note 2; Bartlett, supra note 154.
186 Representation is a complex process and has multiple strands, including: 1) the client's representations to herself concerning the nature of her problem and her use of the legal system; 2) the client's representations to her lawyer; 3) the lawyer's representation of the client to the world outside of the attorney-client relationship; 4) the lawyer's representations to the client within the attorney-client relationship; and 5) the lawyer's representations to herself concerning her client. This Article has focused on the last three aspects because they are the ones to which I, as a lawyer, have easy access. It is easy to see how the reasonable woman standard affects these three levels by allowing for the creation of a comfortable yet novel image such that these three forms of representation are in accord.

Awareness and understanding of these different levels of representation can help in rebuilding the attorney-client relationship. See Goldfarb, supra note 3, at 1675-1687 (suggesting how to reshape the attorney-client relationship into a method that joins personal and professional ethics).

187 Michael Foucault identified the importance of deconstructing power issues. See, e.g., Michael Foucault, Truth and Power, in THE FOCAULT READER 51 (Paul Rabinow ed., 1984). Robin West disagrees with Foucault, arguing that power is not a creative force because women are silenced and unable to develop their own discourse under patriarchal power. Robin West, Feminism, Critical Social Theory and Law, 1989 U. Chi. L. FORUM 59, 59-65. She points out that we must look at the violence inflicted by this power, rather than the structures it has constructed. Id.
cases discussed in this Article. One is women’s powerless position in a male-dominated society, which breaks down further into white women’s positions relative to white men and “minority” women’s position with respect to white men and women and “minority” men. A second is clients’ relationship to their lawyers, which can, in turn, be seen as the result of the inherently distorting nature of legal doctrine—when lawyers translate clients’ stories into the law, the resulting story is always different\(^8\) and the problematic nature of the representation process itself.\(^9\) Because of these inherent power structures, lawyers must be careful to respect their clients and to ameliorate, or at least avoid aggravating, the pre-existing power structures in the attorney client relationship. The most meaningful strategies in legal representation have emerged as lawyers learn from their clients. Others have suggested some strategies that lawyers can use to work with their clients. Gerald Lopez suggests a rebellious style of lawyering that requires lawyers to work with, not merely for, their clients.\(^10\) This involves an understanding of the context and complexity in which legal issues arise,\(^11\) as well as a willingness to work with other professionals who are similarly committed to confronting subordination.\(^12\) Tony Alfieri suggests strategies that allow lawyers to break out of client stereotypes by reinterpreting client stories.\(^13\) Lucie White focuses on how lawyers shape their clients’ stories.\(^14\) Underlying these practices is a need for the lawyer to be critically aware of her motivations. She must

\(^{18}\) As Brenda Danet points out, “the ‘facts’ of a case do not preexist but are constructed through interaction.” Danet, supra note 180, at 509 (citing Thomas J. Scheff, Negotiating Reality: Notes on Power in the Assessment of Responsibility, 16 Soc. Prob. 1 (1968)). Lawyer client talk helps to construct the facts; indeed, lawyers need to appreciate that “language is not only a tool they use but a cultural artifact that subtly channels . . . .” Lawrence Rosen, A Consumer’s Guide to Law and the Social Sciences, 100 Yale L.J. 531, 537 (1990) (book review).

\(^{19}\) Of course, not all women are subordinated to all men. Issues of race, class, and sexual orientation are intertwined in women’s relationship to men. Similarly, in many situations clients are not subordinated to lawyers. E.g., Robert L. Nelson, Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm, 37 Stan. L. Rev. 503 (1985) (showing the dominance of client interests in large law firms); see William L.F. Felstiner & Austin Sarat, Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions, 77 Cornell L. Rev. 144 (1992).

\(^{20}\) See Lopez, supra note 8, at 1608; see also Gerald Lopez, Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education, 91 W. Va. L. Rev. 305, 358-60 (1989) [hereinafter Lopez, Training Future Lawyers] (suggesting changes in legal education to prepare students to engage in this rebellious style of lawyering); Gerald Lopez, The Work We Know So Little About, 42 Stan. L. Rev. 1 (1985) (pointing out that modern legal education does not seek to address, much less to understand, the concerns of low-income women of color).

\(^{21}\) See Lopez, Training Future Lawyers, supra note 190, at 381-82.

\(^{22}\) See Lopez, supra note 8, at 1608-09.

\(^{23}\) Alfieri, supra note 10.

\(^{24}\) White, supra note 119.
REASONABLE WOMAN STANDARD

understand when she is using others' images, rather than her client's, for what she sees as her client's advantage.

Three other aspects of this mode of lawyering lead to a contextualized approach to lawyering. First, a client-centered representation recognizes clients' varied goals—to win, to tell their stories, to feel respected by the legal system (including their lawyers)—and attempts to translate these goals into the legal system. Second, a representation process must also respect that a lawyer herself is not completely neutral and objective. Third, there needs to be a recognition of the importance of explicit examination of the doctrine and practice interconnection.

First, a client-centered representation recognizes that clients come to lawyers for many reasons. They may seek access to the legal system because they have no other choice, they want the legal system to validate their claims, they seek to tell their stories to a judge, or they want a particular legal result. As lawyers, we must understand our clients' needs, and then use doctrine accordingly. This means listening to our clients. For the client who wants to win, it may be appropriate to reshape her narrative and fit it into a stock story, rather than risking a more innovative turn to narrative strategy. For a client who wants both to win and to tell her story to a judge, we need to explore her willingness to take the risk of losing, especially if her story does not conform to prevailing norms of reasonableness. A client like Ms. Sims wants to use the legal system to send a message to her abuser that his behavior is illegal, and that the law, at least, gives her some power over him.

195 These suggestions assume that lawyers and clients want to use the legal system so that clients can tell their stories. However, I am not here proposing an immediate overthrow of the legal system, and the construction of a new system in which all clients could tell their stories. See Kathryn Ahrams, Lawyers and Social Change Lawbreaking: Confronting a Plural Bar, 52 U. Pitt. L. Rev. 753, 783 (1991) (exploring different motivations of lawyers with respect to working within and outside of the legal system).


197 See CONLEY & O'BARR, supra note 174 (although they discuss unrepresented litigants, their conclusions about the motivations of parties apply as well to represented litigants).

198 A study of physicians found that empathetic doctors who listen to their patients are more satisfied with their work and have patients who are more satisfied with their medical care. Daniel Goleman, All Too Often, The Doctor isn't Listening, Studies Show, N.Y. TIMES, Nov. 14, 1991, at C1, C15.


199 See MERRY, supra note 22 (concluding that this was one reason that women in abusive relationships sought court protection).
As lawyers, we need to help clients clarify their goals, and explore the risks of different strategies.

This is particularly important given the diversity of client stories and objectives. Not all clients tell sympathetic stories; lawyers do not (and should not) represent only those clients who initially relate legally "winnable" tales. For these "unwinnable" clients, we may be obligated, ethically and morally, to transform their unsympathetic stories into compelling ones that will prevent further beatings or harassment. Indeed, we can contextualize their stories in ways that they might not be able to do themselves in court, or that a judge might otherwise be unable to do. For example, a battered woman who "abandons" her children when she leaves the batterer may have left the children because she was fleeing for her life. Alone in court she might not explain the history of violence, how it made her feel, how she felt her options were restricted, or how scared she was of assault at separation. A woman who was sexually harassed may not, without the aid of an attorney, be able to explain why she did not leave her work situation after she was sexually harassed, why she needed to continue at the job, why the contacts and references she established were helpful. This additional information might be overlooked unless her lawyer tries to understand and appreciate her client's context, without judging her client's actions.

Second, many feminist lawyers undertake representation because of their commitment to legal reform. Lawyers may choose to represent particular clients to achieve larger goals that benefit all women, and can choose to use their own experiences to inform

---


201 See Mahoney, *supra* note 101, at 79-80:

   The idea that the woman should have left the relationship and especially the idea that she failed to leave, shapes the court's analyses of many aspects of self-defense cases, including the reasonableness of the woman's perceptions and reactions, the imminence of the threat of death or threat of bodily harm and her duty to retreat from the confrontation.

202 See F. Lee Bailey, *Where Was the Crucible? The Cross Examination that Wasn't*, A.B.A. J. 46-49 (Jan. 1992) (pointing out that Anita Hill did not have any lawyers who were her advocates).

203 See Burns, *supra* note 114, at 191 (addressing the importance of challenging "forces that obscure women's interests" as "[o]ur first duty to ourselves as litigators and to our clients"); Cahn, *supra* note 3, at 12-14 (discussing work of ACLU Women's Rights Project); Ruth Cowan, *Women's Rights through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976*, 8 *COLUM. HUMAN RTS. L. REV.* 373, 374 (1976) (acknowledging that the Project resulted in a "blurring of the distinction between litigant and advocate"); see also Abrams, *supra* note 195 (exploring motivation of lawyers in representing socially subordinated groups).
the representation process. They thus empathize with the particular goals of their clients, and place the particular representation in the context of a larger effort to challenge women's subordination.

Consequently, there is a danger that the lawyer will impose her feminist theories on the client without listening to her. To some extent, this danger is unavoidable. All lawyers have a particular philosophy that they impose on the attorney-client relationship. For example, the professional responsibility rules for lawyers, which control the ethics of representation, are not neutral. The values they elevate—professional neutrality—e.g., zealous advocacy—may conflict with feminist goals of empowered representation because feminists do not advocate professional neutrality and may want to redefine the meaning of zealous advocacy. Therefore, it is important to ensure that one's perspective is explicit to oneself and to one's clients; and to question how it affects client narrative.

Accordingly, lawyers must remember that it is not their ideals but the client who is being represented. This means ensuring that clients are involved in the representation process. Although the rules of professional ethics tacitly permit lawyers to control every-

204 For examples of personal experiences informing litigation, see, e.g., Cahn, supra note 3, at 14; Katrina Grider, Hair Salons and Racial Stereotypes: The Impermissible Use of Racially Discriminatory Pricing Schemes, 12 HARV. WOMEN'S L.J. 75 (1989); Schneider, supra note 112.

205 I observe this tension in many different situations. For example, when Ms. Sims did not want to go forward with the contempt proceeding, I was torn: feminist theory argues that prosecution may be in the woman's best interest. See Naomi R. Cahn & Lisa G. Lerman, Prosecuting Woman Abuse, in WOMAN BATTERING: POLICY RESPONSES 95 (Michael Steinman ed., 1991); LISA G. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE (1981); Kathleen Waits, The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions, 60 WASH. L. REV. 267 (1985). I did not want to manipulate her, but I did want the violence to stop. I had to step away from theory and respond to my client's objectives. (This is, of course, a simplification of the issues presented and ignores issues of false consciousness).


207 Cahn, supra note 125.

Some have critiqued the system because it is self-serving, protecting lawyers at the expense (literally and metaphorically) of their clients. See Thomas Morgan, The Evolving Concept of Professional Responsibility, 90 HARV. L. REV. 702 (1977); see also Richard Abel, Why Does the ABA Promulgate Ethical Rules?, 59 TEX. L. REV. 639 (1981) (suggesting the answer is to legitimize the legal profession). Others have critiqued the system for ignoring the interests of third parties who are affected by any particular client's decisions. See Peter Margulies, "Who Are You To Tell Me That?" Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests to Nonclients, 68 N.C.L. REV. 213 (1990).

208 See, e.g., JACK & JACK, supra note 88, at 92 (describing a lawyer who used an ethic of care to resolve his case and "flirted" dangerously with violating the conflict of interest and disclosure rules).

thing but the underlying "objectives" of the representation, requiring only that "[i]n questions of means, the lawyer should assume responsibility for technical and legal tactical issues," representation can and should be more of a collaborative process. Even though true collabration is extremely difficult (some suggest impossible), it is an appropriate goal. In attempting to approach this goal through a critical self-awareness, we can improve existing relationships.

Third, a new type of lawyering must consider the influence and effects of doctrine on practice. Much of the distortion (and even the "rhetorical violence") that occurs in the attorney-client relationship results from the limits of doctrine. We shape our clients into reasonable women because only they can win. But at least in some circumstances, we must challenge the effect those stereotypes have on client relationships, as well as in the courtroom. Theories such as the reasonable woman do not develop in a practice-free vacuum; they are based on the realities of practice, or at least on cases and laws that result from someone's practice. But theoretical insights must maintain a continuing dialogue, and dialectic, with practice.

We can begin to implement this changed form of practice by sharing information, power, and empathy. For me, a telling example of this need is my experience with doctors. With their knowledge, jargon, and instruments, they intimidate me. I know that through them, I can gain access to a whole new embodied world, if only I cooperate. Once they begin talking to me, I forget any questions I had, or else I do not ask them for fear of being labeled troublesome. I am ready to take whatever advice they give me, even if I

210 Model Rules of Professional Conduct Rule 1.2 cmt. 1 (1983). The Rules acknowledge that it may be difficult to distinguish between the objectives of representation (over which the client has control) and the means of representation, and that "in many cases the client-lawyer relationship partakes of a joint undertaking." Id. Nonetheless, the rules do not require this type of undertaking.

211 See Andrew D. Gitlin, Educative Research, Voice and Social Change, 60 Harv. Educ. Rev. 443 (1990). Even in a collaborative process there is a risk of manipulation, of the lawyer redefining the client's goals and problems. See Stacey, supra note 8 (pointing out these problems with ethnographic study itself).

212 See Marilyn Strathern, An Awkward Relationship: The Case of Feminism and Anthropology, 12 Signs 276, 290 (1987) (arguing that feminists believe that the anthropological ideal of a truly collaborative process is a "delusion" given the underlying power relationships).

213 See White, supra note 7.

214 For example, a significant impetus to the development of the battered woman syndrome resulted from Lenore Walker's studies of battered women, and from the need in cases to explain battered women's actions. Battered Woman, supra note 94; Schneider, supra note 20; Walker, supra note 94.

215 This is not an obvious point, as Elizabeth Schneider emphasizes as well. See Schneider, supra note 2; Schneider, supra note 25; Schneider, supra note 45; Schneider, supra note 112.
have little or no understanding of my diagnosis or treatment. I feel
disempowered and unrespected. It is only with great effort that I
can overcome my own paralysis. From this experience, I can only
begin to imagine what it feels like to be a client.

There remains an issue of "meta"-manipulation. By sharing in-
formation and power, I am manipulating my client so that she be-
comes my image of an appropriate client. I want a client who will
collaborate with me in any manner she can, just as I want to collabo-
rate with her in the ways I can. Is imposing this image on my
client just as violent as imposing a reasonable woman standard on
her? Perhaps. As Tony Alfieri perceptively points out, I am con-
fronting contradictions between "client-centered decisionmaking
and lawyer authority . . . ." These contradictions are further rein-
forced by doctrine. Even though I know that these contradictions
may never be resolved and that lawyers by themselves will never
overcome them, I believe it is important to recognize and to chal-
lenge them. I thus accept that there are some images of the attor-
ney-client relationship which are better than others, and fostering
new forms of that relationship is appropriate.

CONCLUSION

Much of feminist theory has emerged from feelings and experi-
ences of exclusion. The practical reality of confronting stan-
dards that explicitly and implicitly exclude women's experiences has

216 See Goleman, supra note 198.
217 Such empathy, however, can be dangerous. See Trina Grillo & Stephanie
Wildman, Obscuring the Importance of Race: The Implications of Making Comparisons between
Racism and Sexism, 1991 DUKE L.J. 397; see also Geertz, supra note 139, at 59 (describing
the need to move beyond Western conceptions of empathy to see others' experience in
their own framework).
218 As such, this differs from the family law lawyers studied by Sarat and Felstiner,
who shared knowledge and demystified the legal system, but only in an attempt to bol-
ster their own authority and better maintain client control. Sarat & Felstiner, supra note
209.
220 While I am not claiming access to a universalized truth, I am claiming that, from
my standpoint, I can imagine that there are less manipulative types of attorney-client
relationships. Postmodernism has shown the dangers of universalized narratives; see,
e.g., Fraser & Nicholson, supra note 64. But feminists have critiqued postmodernism for
not acknowledging its own point of view(s) on the impact on women of power struc-
tures, and the need for some type of grounding. See e.g., Bordo, supra note 32, at 140; see
also Drucilla Cornell, The Doubly-Prized World: Myth, Allegory and the Feminine, 75 CORNELL
L. REV. 644, 681-682 (1990) (choosing between competing interpretations requires
"ethical and political" criteria) Joan Williams, supra note 129, at 134, 153-154 (noting
the importance for pragmatists of looking at patterns of oppression to — their theories).
221 See, e.g., Menkel-Meadow, supra note 131; Regina Austin, Sapphire Bound!, 1989
Wis. L. REV. 539.
encouraged theory. Indeed, feminist theorists continually acknowledge their debt to practice. Yet in this role, practice merely serves as a predicate, as a stepping-stone, to theory. Theory is the goal, practice merely a method to help achieve that goal. A more appropriate sequence is to view theory and practice as a continuous iterative process, with adjustments in one prompting refinements in the other. It is not sufficient to draw upon practice when we develop theories; our theories must return to practice.

That has been my goal in this Article: to show how theory and practice must be intertwined and how concepts of practice must extend to the attorney-client relationship. At times, it is easier to do one or the other: in practice, we may be too focused on the multitudes of clients who need our help to think about theory; as theoreticians, we may never represent a client and thus may never be forced to grapple with the need to develop concrete strategies that either will change the law as it is interpreted or will help real clients win. In theory, we can abstract the actual violence that occurs in women's lives, and overlook the physical damage inflicted.

The reasonable woman standard has emerged from practice, and it accords with some strands of feminist theory. As theory and practice learn from each other, however, we see the dangers of the standard, as well as the difficulties of developing new standards that reflect women's (sometimes different) experiences and yet do not confine women in male norms. As theory remains grounded in practice and ethnographic, localized study, not only of courts, but also of what happens in the attorney-client relationship, we can truly begin to construct new images of women in law and in practice.

---

222 Cahn, supra note 3, at 3-5, 8-10.
223 E.g., Littleton, supra note 12, at 18.
224 See Finley, supra note 89, at 891; Schneider, supra note 2, at 610; see also Elizabeth M. Schneider et al., "Feminist Jurisprudence"—The 1990 Myra Bradwell Day Panel, 1 COLUM. J. GENDER & L. 5 (1991) (noting perspectives on the relationship between feminist theory and practice); Fineman, supra note 9.
ENACTMENTS OF POWER: NEGOTIATING REALITY AND RESPONSIBILITY IN LAWYER-CLIENT INTERACTIONS

William L.F. Felstiner & Austin Sarat

CONTENTS

Introduction ................................................ 1447

I. Conventional Views of Power in Lawyer-Client Relations .............................................. 1451

II. Enactments of Power in Divorce Cases ................................................................. 1454

III. Enactments of Power and the Negotiation of Reality ........................................... 1459

IV. Enactments of Power and the Negotiation of Responsibility ..................................... 1466

V. The Case of the "Unsupported Wife" ............................................................................. 1472
First Lawyer-Client Conference .......................................................... 1473
First Interview with Client .............................................................................. 1475
First Interview with Lawyer .............................................................................. 1476
Second Interview with Client ............................................................................. 1478
Third Interview with Client .............................................................................. 1479
Fourth Interview with Client ............................................................................. 1480
Second Lawyer-Client Conference .......................................................... 1480
Third Lawyer-Client Conference .......................................................... 1482
Fourth Lawyer-Client Conference .......................................................... 1487
Second Interview with Lawyer ............................................................................. 1491
Fifth Interview with Client .............................................................................. 1492
The Denouement .............................................................................. 1494
Third Interview with Lawyer ............................................................................. 1494
Conclusion .............................................................................. 1495

INTRODUCTION

The view that social relations are constructed and power is exercised through complex processes of negotiation is now widely

† Distinguished Research Fellow, American Bar Foundation; Visiting Professor of Sociology, University of California, Santa Barbara.

†† William Nelson Cromwell Professor of Jurisprudence and Political Science, Amherst College.

* The authors are grateful for the helpful comments of Tom Dumm, Wendy Espeland, Katherine Hall, Joel Handler, Geoffrey Hazard, Mindie Lazarus-Black, Stewart Macaulay, Elizabeth Mertz and Deborah Rhode.
shared. While the dynamics of power and negotiation are always uncertain and difficult to chart, most contemporary theorists no longer assert either that "society is ... an association of self-determining individuals" or that social action is epiphenomenal and determined by underlying structural realities. They realize that power is always "involved institutionally in processes of interaction." In the past the effort to understand power oscillated between the antinomies of structure and action. Today, every variety of theory recognizes that "notions of action and structure presuppose one another."

Social structure is no more than patterns of behavior generated and re-generated through negotiations in people's daily lives. However it may appear to people subject to it, social structure is produced and maintained through human action. Neither social structure nor the power associated with it can be external to human interaction or abstracted from the practices of everyday life. To the contrary, both are encoded in seemingly uneventful and routinized

---


4 Anthony Giddens, Central Problems in Social Theory 88 (1979). Giddens adds, "[e]ven a casual survey of the massive literature concerned with the concept of power and its implementation in social science indicates that the study of power reflects the same dualism of action and structure that I have diagnosed in approaches to social theory generally." Id.; see also Stephen Lukes, Power, a Radical View 21-23 (1974) (arguing that other conceptions of power are inadequate because of their "association of power with actual, observable conflict.").

5 Giddens describes these antithetical views: "Social systems are produced as transactions between agents, and can be analysed as such on the level of strategic conduct. ... Institutional analysis, on the other hand, brackets action, concentrating upon the modalities as the media of the reproduction of social systems." Giddens, supra note 4, at 95.

6 Id. at 53. Giddens defines action "as involving a 'stream of actual or contemplated causal interventions of corporeal beings in the ongoing process of events-in-the-world....'" Id. at 55. In contrast, "'structure' refers to 'structural property,' or more exactly, to 'structuring property,' structuring properties providing the 'binding' of time and space in social systems. Structures exist paradigmatically, as an absent set of differences, temporally 'present' only in their instantiation, in the constituting moments of social systems." Id. at 64.

7 For an interesting case study of this process, see Lawrence Rosen, Bargaining for Reality: The Construction of Social Relations in a Muslim Community 165-69 (1984).
experiences.\textsuperscript{8} It is because of this presence in every social situation that structure and power are vulnerable to major changes of practice.

Although structure and power are created through ordinary action in ordinary circumstances, past practice as it is embedded in history and habit limits the choices that can be made. While people work out the terms of their interactions daily, they do not begin with a clean slate each day or in each situation; within any setting there is a limited number of available moves. Consider the situation of teacher and student or employer and employee at the beginning of any ordinary day. Hierarchical relationships, routine divisions of labor, and parochial practices will generally dictate who exercises what kinds of authority over what kinds of matters, who will do what and how each of the participants will feel about the day’s tasks. The student will not question the lesson plan or the teacher’s prerogative to evaluate student performance; the employee will not openly resist the day’s assignment or the employer’s prerogative to say when a job is ready for delivery to a customer.

However, over long stretches of time these exercises of hierarchical control may be resented and resisted in minor and subtle ways. Or in an abrupt fashion they may be overtly and definitively challenged. When we next examine these relationships, if we find that lesson plans are negotiated and teacher performance is evaluated by students and that employees have control over work assignments as long as certain end goals are met, we see that structure has changed and power is reallocated although no revolution has been proclaimed and no general notice may have been taken.\textsuperscript{9}

Whatever the form of these interactions, the social phenomena that occur are negotiated. If this negotiation is not explicit, it is carried on through the exercise of power and attempts at resistance and subversion.\textsuperscript{10} Surprisingly, a review of the empirical literature on the lawyer-client relationship hardly suggests that lawyers and clients negotiate relationships, or that they enact the structure and meaning of professionalism and professional power through negotiation. The literature portrays professional practice as dominated by the lawyer or the client, depending on who has superior status or resources, or as split into rigidly defined spheres of influence, with

---

\textsuperscript{8} “Analysis shows that a relation (always social) determines its terms, and not the reverse, and that each individual is a locus in which an incoherent (and often contradictory) plurality of such relational determinations interact.” \textsc{Michel de Certeau, The Practice of Everyday Life} xi (1984).

\textsuperscript{9} \textsc{Erving Goffman, The Presentation of Self in Everyday Life} (1959).

\textsuperscript{10} \textit{See} \textsc{Jean Comaroff, Body of Power, Spirit of Resistance: The Culture and History of a South African People} (1985); \textsc{James C. Scott, Domination and the Arts of Resistance} (1990).
clients autonomously defining goals and lawyers determining the means to achieve them.¹¹

In this paper we challenge these views. After studying the enactments of power in lawyer-client interactions in divorce,¹² we find that these interactions run with the great tide of social life rather than counter to it. Power in these interactions is a complicated phenomenon that, over time, is constructed and reconstructed so that its possession is neither necessarily obvious nor rigidly determined. Indeed, it is probably more accurate to say that power is not possessed at all. Power is mobile and volatile, and it circulates such that both lawyer and client can be considered more or less powerful, even at the same time.¹³ Even to describe power as an "it" implies more of an independent existence than we intend. It is better, perhaps, to view it as a dimension of relationships rather than a resource under someone's control.

In the traditional ideology of professionalism, professionals maintain control over the production of services.¹⁴ But in the cases that we observed, the delivery of professional service instead involved complex processes of negotiation between lawyer and client; processes in which we saw resistance as well as acquiescence, contest as well as cooperation, suspicion as well as commitment. These cases indicate that the services provided by lawyers to clients are contested and negotiated in the stream of interactions that constitute the professional relationship, and that the content and contours of the interaction vary considerably from case to case, and from moment to moment within cases.¹⁵

In this article we first discuss conventional views of power in lawyer-client relations. We then summarize our contrasting view of

¹¹ See infra notes 16–21 and accompanying text.
¹² In the research on which we base our analysis, we observed divorces over a period of thirty-three months in two sites, one in Massachusetts and one in California. We followed one side in forty cases, ideally from the first lawyer-client interview until the divorce was final. We followed those cases by observing and tape-recording lawyer-client sessions, attending court and mediation hearings and trials, and interviewing both lawyers and clients about those events. We observed one hundred fifteen lawyer-client conferences and conducted an equivalent number of interviews. For a more complete description of the research strategy, see Austin Sarat & William L.F. Felstiner, Law and Strategy in the Divorce Lawyer's Office, 20 Law & Soc'y Rev. 93, 94–99 (1986).
¹³ We think this is one lesson that can be drawn from Lucie White's analysis of the case of Mrs. G. See Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1 (1990).
¹⁵ Our view of power differs significantly from the view prevailing in most literature on the legal profession. Heinz, for example, believes that the crucial distinction in the lawyer-client relationship is whether lawyers have the power to modify their clients' goals and that the lawyer's control over tactics and techniques is both assumed and irrelevant. See John P. Heinz, The Power of Lawyers, 17 Geo. L. Rev. 891, 897 (1983).
power, which we illustrate through divorce cases. We develop our view in two important arenas of lawyer-client negotiation: what we call the “negotiation of reality,” or the search for goals; and the “negotiation of responsibility,” or the search for control over case progress and division of labor. Next, we describe the enactment of power in both of these areas through analysis of an illustrative case history. Finally, we estimate the extent to which our view of the negotiation of power in divorce cases is relevant to more technical and rule-centered areas of legal practice.

I

CONVENTIONAL VIEWS OF POWER IN LAWYER-CLIENT RELATIONS

The predominant image of the lawyer-client relationship is one of professional dominance and lay passivity. The lawyer governs the relationship, defines the terms of the interaction, and is responsible for the service provided. The client, in contrast, is the consumer of a service whose quality is difficult to evaluate. Studies of a wide range of legal situations and types of legal practices bolster this image. For example, Hunting and Neuwirth, writing more than thirty years ago, found that the majority of litigants in automobile accident claims in New York City had no idea what their lawyers were doing in their cases and had no say in when to settle or how much to accept. Legal services lawyers studied by Hosticka rarely even asked their clients what they wanted them to do. Such lawyers habitually engage in maneuvers that “exploit and reinforce client dependency on the lawyer’s specialized knowledge and technical skill.” Kritzer’s review of a national survey of lawyers and clients


17 On the idea of client as consumer, see Rick S. Carlson, Measuring the Quality of Legal Services: An Idea Whose Time Has Not Come, 11 Law & Soc’y Rev. 287 (1976); Ralph Nader, Consumerism and Legal Services: The Merging of Movements, 11 Law & Soc’y Rev. 247 (1976); see also John Griffiths, What Do Dutch Lawyers Actually Do In Divorce Cases?, 20 Law & Soc’y Rev. 135, 155 (1986) (finding that “clients make a fairly passive impression, asking few questions, showing little interest in the procedural and legal aspects of their divorce, and manifesting little inclination to use legal strategies in their conflict with their spouse.”).


in litigated cases found low client involvement in case development and strategy.\textsuperscript{21} From these studies one might think that contemporary lawyers fulfill Bakunin’s 19th century prediction about scientific intelligence, namely, that it would lead to an aristocratic, despotic, arrogant and elitist regime.\textsuperscript{22}

Indeed, even where clients are involved in the management of their own cases, their involvement often is limited. Thus, Rosenthal’s notion of a high level of client participation in personal injury litigation is confined in its interactive dimensions to expressing special concerns and making follow-up demands for attention.\textsuperscript{23} Lawyers resent and resist the few clients who take an active role in their cases, considering them hostile and problematic rather than helpful and persistent.\textsuperscript{24} In the conventional wisdom, people have “problems” and experts have “solutions.”\textsuperscript{25}

There is, however, a less polemical view, one that is more reliable as a general view of the profession because it is more sensitive to context.\textsuperscript{26} Spangler, for example, reports that private practitioners and corporate counsel are less likely to dictate action to their clients than are legal services lawyers.\textsuperscript{27} Heinz and Laumann recognize that there is considerable variation, by area of law, in the practice characteristic they term “freedom of action,”\textsuperscript{28} a notion reflecting the lawyer’s unilateral power to decide on strategy and operate free of close client supervision.\textsuperscript{29}

While these scholars see variation in enactments of power by area of practice, others have found it on a case-by-case basis.\textsuperscript{30} Still

\textsuperscript{24} See Hosticka, supra note 19, at 607.
\textsuperscript{25} Ivan Illich, Disabling Professions 11 (1978).
\textsuperscript{27} See Eve Spangler, Lawyers For Hire 166-67, 170 (1986).
\textsuperscript{29} See id. at 104. The comparative aspect of the Heinz and Laumann findings must be treated with some care, since the data are two steps removed from actual behavior. Heinz and Laumann did not observe lawyers exercising “freedom of action”; nor did they interview lawyers or their clients about what went on between them. Instead they used a panel of law professors and social researchers to rate this characteristic for thirty fields of service. See id. at 30.
\textsuperscript{30} See Maureen Cain, The General Practice Lawyer and the Client, 7 Int’l J. Soc. Law 331 (1979). Cain notes that the array of power between lawyer and client varies from client to client: the solicitors she observed adopted their clients’ goals as the given agenda unless they had a conflict of interest or the clients exhibited unreal expectations. Id. at 342-51. Macaulay’s careful analysis of the range of transformative effects that lawyers have on clients’ goals contrasts with the picture presented by Cain. See Stewart Macau-
other researchers find power distributed between lawyer and client according to task. Finally, other analysts suggest that power in the professional relationship directly reflects control over resources. Thus Flood, having observed the history of two lawsuits in his ethnographic study of a large Chicago law firm, suggests that the allocation of power between lawyer and client depends on whether clients are likely to produce repeat business or pay fees that command attention. Abel is perhaps the strongest proponent of this view. He argues that corporate clients are typically the “dominant”

lay, Lawyers and Consumer Protection Laws, 14 LAW & Soc’y REV. 115 (1979). It is unclear whether the difference reflects differences in American and British practice or differences in the sensitivity of legally trained and lay observers. The low frequency of clients exhibiting “inappropriate” behavior in Cain’s data suggests that the cases she observed were considerably more straightforward than those generally encountered by American lawyers. In the same vein, Bottoms and McClean find that the extent of participation of criminal defendants in their cases varies by culture, personality and ideology. See Anthony E. Bottoms & J.D. McClean, Defendants in the Criminal Process 69, 232 (1976).

O’Gorman’s role division into counselors and advocates implies a correlative active or passive part in devising client goals and tactics. See O’Gorman, supra note 26, at 132, 134. He sees a causal relationship, dependent on degree of specialization, between professional security and tolerance of client direction. The less secure the lawyer, the greater the control he (almost all of his subjects were men) is willing to cede to the client. Id. at 145.

31 Reminiscent of Johnson’s distinction between defining needs and the manner of fulfilling them, work on large law firms indicates that even though corporations set goals and policy independent of lawyer influence, lawyers have a major say in tactical matters. Moreover, Rueschemeyer believes that American lawyers are more closely in tune with their clients’ orientations than are continental lawyers whose roles are explicitly defined and whose personal contact with clients is less frequent. See Johnson, supra note 16, at 46-47; Robert L. Nelson, Partners with Power 264 (1988); Spangler, supra note 27, at 60-61, 64. See also Dietrich Rueschemeyer, Lawyers and Their Society 112 (1973).

actors in lawyer-client relationships, while solo and small-firm practitioners “dominate” their clients.  

Two things should be noted about conventional views of power in lawyer-client relationships. First, these views are basically structural: they suggest that power varies by status, economic resources, field of law, or the vagaries of particular clients. Second, they treat power as a “thing” possessed at one time or another by one of the parties to a lawyer-client relationship. As we see it, power in lawyer-client interactions is less stable, predictable, and clear-cut than the conventional view holds. Power is not a “thing” to be possessed; it is continuously enacted and re-enacted, constituted and reconstituted. The enactments and constitution are subtle and shifting; they can be observed only through close attention to the microdynamics of individual lawyer-client encounters.

II

Enactments of Power in Divorce Cases

In the divorce lawyer’s office two worlds come together: the legal world for which the lawyer speaks and to which he provides access and the social world of the client, beset with urgent emotional demands, complex and changing relationships, and unmet financial needs. Just as the legal world appears arcane and ritualized to the uninitiated, the world of the client is one to which the lawyer has access in only a limited, very mediated way. When lawyer and client interact, each confronts, in the world the other inhabits, something new and opaque, yet something of indisputable relevance to their relationship.

To each, the hidden world of the other becomes known mostly through reciprocal accounts. This means that lawyer-client interaction is a process of story-telling and interrogation in which law-

33 See Richard Abel, American Lawyers 204 (1989).

34 The picture of client participation is composed of conflicting as well as convergent strands for two very different reasons. The people whose behavior is analyzed are very different personally, demographically, and institutionally from each other. The other reason that the picture of lawyer-client interaction is so varied is that the data come from such different sources. The ability to identify and comprehend the content of dyadic relationships like those between lawyers and clients varies widely when the information is secured through national surveys, structured interviews, open-ended interviews, telephone interviews, mail questionnaires, case studies, file reviews, participant-observation, or longitudinal observation.

35 See Griffiths, supra note 17, at 152-55.


39 For an interesting discussion of the value of attending to stories in the legal process, see Kim L. Scheppelle, Foreword, Symposium of Legal Storytelling, 87 Mich. L. Rev.
yer and client seek to produce for each other a satisfying rendition of her distinctive world. What each accepts as "real" in the these accounts is negotiated, implicitly as well as explicitly, and frequently transformed over the course of their interaction. Negotiating a version that overlaps and is treated as a joint product is essential if lawyers and clients are to construct a mutually tolerable story that is likely to be persuasive to the other side or to a judge.

Making a landfall in the treacherous waters of each other's world can be a threatening experience for both lawyers and clients. In the world of law, unknown rules and people operating in forbidding surroundings and through alien processes can influence or decide matters of great moment to clients: child custody, the rights of a non-custodial parent, the disposition of the family home, the division of property and income. In the social world of the client, the lawyer's professional skills may be severely tested by the client's guilt about marriage failure, unresolved feelings for the spouse, continuing and often irritating disputes over children and money, or by a new relationship whose relevance to the divorce may not be acknowledged. Even when the lawyer tries to keep it at bay, the social world of the client is continually present.

For both lawyer and client the stakes are high in what the other knows and reveals. While the client must rely on the lawyer's legal experience, the lawyer is largely dependent on the client's interpretations of her social world. For both, motives, goals and data may be suppressed by plan or inadvertence. Each may consciously adopt a narrative style and rules of relevance that limit what the other can assimilate. They may each say both more and less than they intend as they explain what they want the other to know.

Although lawyers and clients are highly dependent on each other, the stories they tell about their interactions are tales of suspicion and doubt. Clients are suspicious about the depth of commitment lawyers bring to their cases and their own ability to control the content and timing of their lawyers' actions. They worry about lawyers who are too busy to attend fully to the idiosyncracies of their cases, and about divided loyalties, competence, judgment and per-

2073 (1989); see also LANCE BENNETT & MARTHA FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM 3 (1981).

42 Sarat & Felstiner, supra note 40, at 744-52.
43 Erving Goffman, The Nature of Deference and Demeanor, 50 AM. ANTHROPOLOGIST 473 (1956); SCOTT, supra note 10, at 4-5.
44 See Cunningham, supra note 16, at 2491; White, supra note 13, at 21-32.
sonality. Lawyers, on the other hand, are concerned because they have to deal with and depend on people who are likely to be emotionally agitated, in the midst of a profound personal crisis, ambivalent about divorce, determined to hurt their spouse, and misguided about what they can expect from the divorce process.45

These concerns lead to responses that themselves produce secondary problems. Lawyers worried about the emotional instability of their clients often appear hyper-rational, detached, disloyal, and callous.46 Clients, put off and alienated by such appearances, appear even more unstable and unpredictable to their lawyers. Lawyers worry about distortions introduced into client accounts and attempt to test client stories without expressing overt skepticism.

Recognizing this combination of mutual dependency and suspicion has enormous, and previously unexamined, consequences for the way scholars understand the exercise of power in lawyer-client relations. In the standard analysis of the profession, lawyers are presented either as agents moving tactically toward their clients' clearly expressed goals, as principals paternalistically operating in accordance with their sense of the clients' best interests, or as opportunists using the clients' cases to work out their own agendas.47 Given these very different images of lawyers, it is natural to pose Rosenthal's well-known question, "Who's In Charge?"48 However, asking "who's in charge" implies both that a single, stable answer can be provided, and that the possessor of power can be clearly identified.

We think that neither is the case. Both lawyers and clients are sometimes frustrated by feelings of powerlessness in dealing with the other,49 and such feelings must be taken seriously. Often no one may be in charge. Interactions between lawyers and clients involve as much drift and uncertainty as they do direction and clarity of purpose. It may be difficult, at any one moment, to determine who, if anyone, is defining the objectives, determining strategy, or devising tactics.

Power in lawyer-client relationships would not be so ambiguous if it were just an attribute of position, or if it could be captured by attending simply to offices, roles and forms. Whether in lawyer-client interactions or elsewhere, however, power does not exist outside of particular social interactions. It is always generated from

45 See Sarat & Felstiner, supra note 12, at 105-07, 117-20.
46 See Griffiths, supra note 17, at 148-49.
47 For two different images, see Jonathan Casper, Lawyers Before the Warren Court: Civil Liberties and Civil Rights, 1957-66 at 194 (1972); Derber et al., supra note 22, at 140.
48 See Rosenthal, supra note 23.
49 See White, supra note 13.
the inside in a continuing series of situated assertions and rejoinders, by claims and responses to those claims, and by particular gestures and the resistance those gestures provoke. It is not like a tool sitting on a shelf, waiting to be picked up and applied to the task at hand. Power, rather, is enacted and constituted moment-by-moment. It is seen in indirect moves and sleights-of-hand, in ruptures and ellipses, and in what is left unsaid and unacknowledged as well as in forceful, continuous and overt assertion.

Power is continuously produced in the regular and apparently uneventful routines and practices that comprise most social interactions. But it is also conditioned by the cultural resources that particular lawyers and clients bring to their relationships. Even when it seems robust and irresistible, power may be fragile and contested. Each of the social interactions through which power is constituted has its own distinctive history and its own particular future. In this sense power is always created anew and, like any newborn, its progress and outcome is uncertain.

The malleability of power, however, does not mean that the respective positions of lawyer and client are decided by a coin toss, or that they are open to limitless development at the start of every session. Lawyer-client interaction always occurs in the space of law. For the lawyer, this means that interaction takes place in a familiar space, a space of privilege. The books on the lawyer's shelves are books the lawyer has read or knows how to read; the language spoken is a language in which lawyers are trained and with which they are comfortable; the rituals performed give special place to the lawyer even as they are forbidding and unwelcoming to the uninitiated. Thus, following de Certeau's formulation, lawyers are able to act "strategically" in relation to their clients; that is, they act "in a place that can be circumscribed as proper and thus serve as the basis for generating relations with an exterior distinct from it."

For the client, on the other hand, the space of law is unfamiliar and forbidding. In such a space the client's enactments of power are, in de Certeau's sense, "tactical."

---

50 See de Certeau, supra note 8, at xvii-xx.
51 See Scott, supra note 10, at ch. 2.
52 See Raymond Williams, Marxism and Literature 112 (1977). Williams argues that power "does not exist passively as a form of dominance. It has continually to be renewed, recreated, defended, and modified. It is also continually resisted, limited, altered, challenged by pressures not all its own."
53 For an interesting exploration of this spatial metaphor, see Thomas L. Dumm, Fear of Law, 10 STUD. IN L., Pol. & Soc. 29, 34 (1990).
54 de Certeau, supra note 8, at xix.
55 A tactic insinuates itself into the other's place, fragmentarily, without taking it over in its entirety, without being able to keep it at a distance. It has
Here, as in each moment and location in society, there is a limited reservoir of possibility defined by history and habit. The possible enactments of power are situationally and organizationally circumscribed in ways that advantage some people or groups and disadvantage others.56 To understand these limits, and the patterns with which they are associated, we must attend to the nature of professional projects and privileges, as well as to their connections to legal institutions, the meaning of divorce in society and the prerogatives of class, race and gender. Yet the lawyer is never solely in control of the production of legal services, and the client is never simply a timid consumer. Consumption of legal services is itself another domain of production.57 As a result, the particular evolution of any lawyer-client interaction in divorce must be situated in the history and culture from which both parties draw when they enact their specific plays of power.58

Power has many dimensions and is enacted in many domains. It involves interpreting the past, defining the present, and setting an agenda for the future. It is enacted in the domain of knowledge and understanding, in crafting definitions of situations and assigning meanings to them, as well as in the domain of action and behavior.59 In legal affairs, the conceptual domain may be as important as the behavioral. As a consequence, we chose to illustrate enactments of power in both domains. In the next section we report how lawyers and clients negotiate a working definition of "reality." We consider, in particular, the strategies and tactics employed as they identify and settle on the goals that will be their joint objectives in the legal process of divorce. In a later section, we describe strategic and tactical enactments of power as lawyers and clients negotiate responsibility, and we examine struggles about who is going to do what in the case, and who is responsible for keeping it moving.

56 For a useful example, see Barbara Yngvesson, Making Law At the Doorway: The Clerk, the Court and the Construction of Community in a New England Town, 22 LAW & SOC'Y REV. 409 (1988).

57 As de Certeau argues, "The latter is devious, it is dispersed, but it insinuates itself everywhere, silently and almost invisibly . . . through its ways of using products. . . ." DE CERTEAU, supra note 8, at xii-xiii.

58 Id.

In the world of no-fault divorce, the legal process formally has limited functions—dividing assets and future income, fixing custody and visitation, and, occasionally, protecting physical safety and property.\(^6^0\) Lawyers must understand their client's objectives concerning these issues. But determination of clients' interests is a known quagmire.\(^6^1\) Clients may not know what they want or may not want what they ought to want. They may change their minds in unpredictable ways, or they may not change their minds when they ought to do so. Clients may be insufficiently self-conscious, or plagued by false consciousness. Moreover, they may find it difficult to distinguish between lawyers who are trying to impose their vision of client needs on clients and lawyers who are trying to get clients to share a vision of those needs that is not controlled by the power of the lawyer's professional position.\(^6^2\)

When it comes to defining goals, lawyers generally are permissive. That is, they are intensely concerned that the client adopt "reasonable" goals, but within the rather broad parameters of that notion, lawyers are not directive.\(^6^3\) For divorce lawyers and their clients, the realm of "reality" is the realm of the possible. Within that realm, the final choice is generally left to the client.\(^6^4\) However, before that choice can be made, considerable energy is devoted to the construction of a mutually acceptable account of the reality of divorce. Defining and identifying "realistic" goals, and orienting and reconciling clients to the world of the legally possible, occurs


\(^6^2\) See William H. Simon, Visions of Practice in Legal Thought, 36 Stan. L. Rev. 469 (1984). These difficulties, at first glance rather straightforward, have been built by Simon into an elegant set of distinctions between conservative, liberal and critical "visions of practice".

\(^6^3\) Lawyers frequently exert considerable pressure on their own clients to be reasonable. When possible they cooperate with the lawyer for the other party in seeking to get their respective clients to agree to a reasonable settlement. They use all sorts of ad hoc tactics to try to bring about a 'reasonable divorce.' But the key to their role is a common strategy from which they seldom diverge: the maintenance of a stance of relative neutrality.

Griffiths, supra note 17, at 166.

during complex negotiations in which struggle, if not overt conflict, is frequent.

The mutual construction of reality takes two forms in divorce cases. On the one hand, lawyer and client may develop, over time, a set of goals and tactics that capitalize on the lawyer's knowledge of the legal world and the client's knowledge of her own social world. The final version of what is real is not dictated by one or the other, but built by them together without the need for either to alter the other's view in many important respects. On the other hand, lawyer and client may not see reality in converging terms and each may seek to defend and/or advance his particular vision. Developing a mutually satisfying sense of what reasonably can be expected or achieved is at the heart of the complex lawyer-client interactions we observed. Yet that sense is not so concrete and tangible that, once achieved, it can be taken for granted and easily maintained. It is always in danger of slipping away as events from the client's social world intrude into the deliberations, and as lawyer and client together gather information about the goals, expectations and strategies of their adversaries.

In examining the ongoing and fragile negotiation of reality between lawyers and clients, we focus first on the factors that "distort" reality for lawyers and clients, and then on the strategies and tactics employed to promote particular versions of reality. Clients, of course, have greater difficulty than lawyers in becoming oriented to the world of the legally possible. Some of the difficulty is obvious. Emotionally off-balance, angry, depressed, anxious or agitated, they may have trouble understanding what they are told, believing the information that they get and focusing on the alternatives that are presented to them. They may be impelled to strike at or "pay back" their spouse in ways that are inconsistent with reality and even, by altering the posture of the other side, make their goals more difficult to attain.

Second, clients may expect more of the legal system than it can deliver under even the best of circumstances. Unrealistic expecta-

65 Often this clash of views is not made explicit. See White, supra note 13, at 46-48.
67 See KENNETH MANN, DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK ch.3 (1985); Blumberg, supra note 32, at 32; Macaulay, supra note 30, at 159-60.
68 See JOHNSTON & CAMPBELL, supra note 41, at chs.4-5.
69 On the nature of citizen expectations of the legal system, see SALLY MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 179 (1990).
tions may range from saving the marriage to transforming the spouse, but they are most likely to be centered on financial affairs. Clients tend to reason up from needs, rather than down from resources, and they have great difficulty in dealing with the gap between the two. Additionally, clients are slow to realize that many legal entitlements are not self-executing.\footnote{See Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 23 (1974).} The judge at the hearing on temporary support may say that the client is entitled to $100 a week, but that does not guarantee that the client will receive anything. Many clients are naive about their own financial needs, and may have to be patiently educated by their lawyers. Some clients have difficulty grasping the limits of what is possible because they cannot believe that the law actually is as it actually is. Finally, clients are slow to understand the costs of achieving their objectives. Vindication, the last dollar of support, meticulous estimates of property value, a neat and precise division of property, a visitation scheme that covers a very wide range of contingencies, and equitable arrangements that govern the future as well as the present may be theoretically possible, but even approximations require extensive services that middle-class clients generally cannot afford.

Lawyers, of course, are less encumbered on the legal side in developing a view of reality in particular cases. Nevertheless, it is not all clear sailing for them. There are, for instance, three kinds of information problems. In order to form a view of the possible they may need to know things that clients sometimes cannot tell them. These include client goals\footnote{For a discussion of the rationales for imputing goals to clients who do not, or cannot, articulate them, see David Luban, Paternalism and the Legal Professional, 1981 Wis. L. Rev. 454.} as well as things that clients sometimes will not tell them, such as their feelings. In addition, there are things that clients sometimes try to tell lawyers that lawyers do not recognize or understand.\footnote{See Simon, supra note 62, at 221; see also Alfieri, supra note 20, at 2123-24; Cunningham, supra note 16, at 2464-65.} For example, in a case that we previously analyzed at some length, the client could not decide whether she wanted to settle or litigate, and could not make the lawyer understand that she had great difficulty in negotiating a settlement with her spouse because she could not trust him to fulfill any commitments that he made.\footnote{Sarat & Felstiner, supra note 12, at 111, 121.}

It would, however, be a mistake when thinking about divorce cases to assume that clients are emotional cripples and that the personalities, problems and politics of lawyers do not interfere with their ability to define reality and/or respond to their clients' defini-
Lawyers may not be astute, attentive or experienced enough to catch the client's message. In addition, they may be so overworked or so worn down by practice that they do not have the patience or stamina to negotiate effectively with their clients.

However serious the distortions in the lawyer's grasp of the legally possible, the difficulties they face in determining social reality, in determining what is socially possible, are more serious. The lawyer's ability to interpret the social world of the client depends on the raw information they receive from clients, the interpretations that clients present, and the interpretations or re-interpretations that lawyers themselves make. All of these steps are complicated and pose difficulties for lawyers. Occasionally, information is presented without an overt interpretation. For example, a client may simply state, "He did not give me money for tuition." More often, however, the information the client does provide is reconstituted through the client's experience and perception of self into highly interpreted material: "He had no interest at all in furthering my education." Often the client's presentations are influenced by emotional and financial stakes, or are incomplete or conflicted. The nature of client communications means that lawyers must continually sift through and evaluate the social world presented by the client in order to reconstruct a picture of the world that they can effectively use in promoting the client's interests. In this effort they may, from time to time, be assisted by information that comes from other sources, such as opposing counsel or relevant documents. For the most part, however, lawyers must depend on their own experience and judgment.

Lawyers use an array of strategies to try to persuade their clients to adopt a particular definition of reality. Of course, their knowledge of legal rules and process, and the information that they have about specific players, such as other lawyers, judges and mediators, provide powerful arguments. Unless they have been

---

74 Some lawyers may be so committed to a particular political perspective on divorce that they do not easily recognize clients who are uneasy about or reluctant to endorse such a program. Alfieri calls this phenomena "pre-understanding." See Alfieri, supra note 20, 2123-24. "Pre-understanding is a method of social construction that operates by applying a standard narrative reading to a client's story." Id. at 2123.


76 See Alfieri, supra note 20, at 2131-45 (describing techniques that lawyers can use to get a fuller grasp of the client's social world).

77 See id.; see also Cunningham, supra note 16, at 2482-83. For a discussion of the techniques of sifting, see DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 104-23 (1977).

78 See Alfieri, supra note 20, at 2131.

through the process before, clients' only sources of information about the nature and limits of divorce law are their own lawyer and anecdotes related by their family and friends. In addition to their feel for the legal system and for the *dramatis personae*, lawyers, particularly specialists in family law, benefit from their experiences in prior cases. Having "heard it all before," they frequently interpret the behavior of the spouse and his or her lawyer with some accuracy, looking beyond words and positions articulated to more fundamental concerns.\(^{80}\)

Still, many divorce lawyers use their knowledge and experience in a manipulative way.\(^{81}\) The most common technique is to engage in what we call "law talk."\(^{82}\) Law talk consists of the conversations that lawyers and clients have about the legal system, legal process, rules, hearings, trials, judges, other lawyers and the other lawyer in the case. In general, we have found law talk to be a form of cynical realism through which the legal system and its actors are trashed on various accounts, frequently in an exaggerated fashion. The purpose of this rhetorical style is usually to convince the client that the legal process is risky business, that legal justice is different from social justice, and that clients can only achieve reasonable certainty at a reasonable cost, and maintain some control over a divorce, by negotiating a settlement with the other side.

Even when it takes the form of hyperbole, law talk is not commonly introduced into lawyer-client conversations in an aggressive way. Lawyers often join with their clients' positions and appear, at least initially, to be sympathetic. They introduce their clients to reality by invoking their own understanding of legal norms and their own expectations about what courts would do were they to go before a judge.\(^{83}\) Clients are told that it does not make sense to "insist on something that is far out of line from what a court would do."

Lawyers use delay and circular conversation to convey messages about what is legally realistic. They engage in a form of passive resistance, maintaining the form of the agency relationship while subtly altering its substance. Rarely are expectations overtly branded as unrealistic in a judgmental sense; instead, most lawyers patiently, but insistently, remind their clients of the constraints that

\(^{80}\) Luban, *supra* note 71, at 454.

\(^{81}\) For similar observations in a different context, see Alfieri, *supra* note 20, at 2123-30.

\(^{82}\) Sarat & Felstiner, *supra* note 36, at 1671.

\(^{83}\) See Simon, *supra* note 64, at 214-16.
the law imposes on both of them, that is, of law’s definition of reality. 84

The behavior of clients mirrors that of their lawyers. Expectations about lawyer performance are generally not made explicit. Clients rarely specify what they want their lawyers to do or how they want their lawyers to behave. 85 In fact, one of the chief difficulties with which lawyers and clients must contend is their mutual aversion to confrontation. In the face of continued client demands for the unreasonable, lawyers restate technical or strategic difficulties, try to recast reasonable goals into acceptable outcomes, or simply change the subject. They do not, however, directly tell their clients that they are being unreasonable. 86

In the face of lawyers’ insistence that they accommodate themselves to the reality of what the law allows, clients generally persist, at least initially, in expounding their needs, explaining their notions of justice, or reiterating their objectives. But rarely do they insist that their lawyer make a particular demand, argue a particular position, or even endorse their view. Where dissatisfaction is great, the usual client response is exit rather than voice. 87

Although law talk is the divorce lawyer’s basic device in efforts to reorient her clients’ views of reality, others include rhetorical flourishes, technical language and role manipulation. Perhaps proceeding from experience in the law school classroom, some lawyers conjure up a “parade of horribles.” In this scenario, clients are informed that if they continue to seek one goal or another, they will suffer a series of negative consequences of continuing and mounting severity. Alternatively, lawyers tell stories about other clients who have persisted in similar courses of action, pursued understandable but unrealistic objectives, and suffered disastrous results.

While technical language is rarely used as a strategy to confuse a client or make him feel dependent on professional expertise, clients report to us that it has this effect nonetheless. Some lawyers invest, or try to invest, their views with added persuasive authority by puffing up their status in the legal community. They cast themselves as the “dean” of the divorce bar, or as one of its most experienced and astute practitioners, or as an insider with special access

84 See Griffiths, supra note 17, at 160:

     Lawyers rarely present something as their own opinion. Their steering of the discussion and persuading of clients are largely presented in terms of the formal and practical margins set by the legal system, by the law and more particularly by the decisions that can be expected from the local court.

85 See Simon, supra note 64, at 215; see also White, supra note 13, at 46-48.

86 See Griffiths, supra note 17, at 160.

to the judge and other functionaries. A rather striking example of the latter comes from a Massachusetts case:

Now I think I have a good reputation with the Registrar of Probate here. Judge Murdoch is married to, no, what am I saying, Judge Murdoch's sister is married to Bob's wife. My God, try again. His sister is Bob's wife. They talk all the time. Bob likes me very, very much. We get along very, very well. And I have a good reputation in this court and I think it is going to get through to the Judge.

In addition, most lawyers keep their clients at a social distance. Particularly in California, where we found that clients often consult a therapist as well as a lawyer during divorce, lawyers work hard to restrict their efforts to the legal side of divorce and leave the personal difficulties to someone else. The exceptions, however, are striking. One lawyer in Massachusetts routinely engages in behavior common among friends, but rare in lawyer-client interaction. She reveals extraordinary biographical detail to her clients, talking at length about her own divorce, health, finances, housing and the eating habits of her children. This lawyer violates the standard understandings of professional distance, becoming friend and therapist as well as legal adviser. These multiple roles enable the lawyer who adopts them to use therapeutic moves and appeals to friendship to shape her clients' definitions of reality and blunt any critique of her performance.

Clients are more limited in the resources that they can mobilize to persuade lawyers to accept their view of reality. Their inherent advantage is their knowledge of their spouse and generally superior ability to estimate the spouse's reaction to offers or demands. Lawyers are sensitive to this comparative advantage and often try to exploit it. As one lawyer put it in speaking with one of his clients:

Let me ask you this, because you know him a lot better. Which do you think he'd be more likely to give a good response to? Something that's in writing, that he needs to respond to in writing, or something oral?

Or, as another stated,

That's what I'm inclined to do here, unless you're of the opinion you would rather start at sixty-forty. I mean, you know Joan and you know how she would react.

In the latter instance the lawyer is even prepared to alter her favored pattern of negotiation in the face of the client's superior

---

88 For a discussion of various roles that lawyers play in divorce, see O'GORMAN, supra note 26, at ch.6.
knowledge. For that instant, the social world of the client, rather than the world of law and legal experience, defines the parameters of the reasonable.

In addition to deploying their knowledge of their own social world, clients frequently assert their views, or resist their lawyers', through repetition and denial. Lawyers may talk about the unreasonable or the unobtainable, they may predict this or that outcome, but clients need not, and frequently do not, acquiesce. Rather, clients may become quiet or change the subject, only to reintroduce the same topic later. What may seem to the observer to be wasted motion and circularity, may really be a tactic in an ongoing negotiation. Finally, clients on occasion fight back by withholding information, sometimes explicitly, sometimes not. They use this tactic when they want to exclude the lawyer from some field of inquiry, often because they consider an issue out of bounds or would be embarrassed by some disclosure.

The negotiation of reality between lawyer and client is time-consuming and repetitive, yet often incomplete or unclear in its results. Whose definition of reality prevails is often impossible to determine. Even as decisions are made and documents are filed, how those decisions and documents relate to lawyer-client conversations about goals and expectations can be mysterious. It is, however, precisely by attending to this mystery that one can understand enactments of power and tactics of resistance.

IV
ENACTMENTS OF POWER AND THE NEGOTIATION OF RESPONSIBILITY

Unlike the effort to define reasonable and attainable goals, the task of securing the client's objectives initially appears to be neither opaque nor ambiguous. The steps that must be taken to get on with the case are routine. Particular, well-defined procedural requirements must be satisfied to secure various kinds of court assistance. Knowing and executing the necessary steps are conventionally regarded as the lawyer's responsibility. Many involve details of procedure beyond the experience of even the most sophisticated client.

90 Other work emphasizes the way client stories are silenced in lawyer-client interaction. Our observations suggest that clients resist the definitions of reality their lawyers provide through persistent and recurring assertion.
91 See White, supra note 13, at 48-52.
Most of the remaining steps involve various kinds of negotiations with the other side. Where the lawyer believes tasks are more easily or more cheaply carried out by the client himself, such an assignment ought to be straightforward. Some activities are clearly the exclusive preserve of the lawyer—preparing the pleadings, conducting hearings and trials, for example. However, other aspects of divorce that can be shared or assigned to the client often are not.

In general, lawyers try to maintain control over negotiations with the other side, except in discussions about personal property. They do this by insisting that these negotiations take place on a lawyer-to-lawyer basis. To lawyers, these professional exchanges are a core element of legal services in divorce, an arena in which their professional experience and competence are more nearly actualized than in helping clients comprehend the legal process or figure out their financial prospects. Nevertheless, some clients, perhaps fearful that their interests will not be adequately represented, want to negotiate directly with their spouse.

But whatever the explicit assignments of responsibility, divorce cases are not self-executing. It is not always clear what needs to be done, who is going to do it, and who is responsible for assuring that it gets done. Either lawyer or client might not take the steps that they ought to take, have agreed to take, or been urged to take. In this context, enactments of power, either in assuming or assigning responsibility, are, like those in the negotiation of reality, often unclear or confused.

One reason legal action in divorce does not proceed in a clear and orderly way is simply that individual and organizational agendas are beyond the control of any single party to the case. However, the divorces that we observed suggest that the fundamental reason cases do not proceed steadily or smoothly is that lawyers and clients on the same side encounter, from each other, various levels of procrastination, vacillation, disapproval, withdrawal, repression, and information problems that delay, distort and jeopardize what they are trying to accomplish. These moves involve indirect enactments of power and indirect tactics of resistance. Rarely do lawyers or clients acknowledge that they are not going to do what they said they would do, or that they are repressing their inclination to say some-

---

95 In the literature on client counselling and interviewing these phenomena are treated as symptoms of client misbehavior rather than recognized as tactics of resistance. See David A. Binder, et al., Lawyers As Counselors: A Client-Centered Approach 237-56 (1991).
96 See Scott, supra note 10, at 29-33.
thing they are not going to say. The effect of these covert enactments of power becomes manifest only after a price has been paid, and these enactments are more powerful on that account.97

One of the surprising aspects of the lawyer-client relationship in divorce proceedings is the rarity of the imperative mode. Put quite starkly, clients almost never say to their lawyers something on the order of "I am the client, I am paying the bill, now do this."98 This finding is not a comment about a form of speech. It is not that clients just find a more diplomatic way of issuing a command. Rather, in the face of disagreement, clients do not assert their prerogative to tell the lawyer what to do. Such a finding would not be so remarkable if the professional in question possessed scientific or technological expertise, such that a lay person would be out of order were he to issue commands against the professional's technical judgment. However, in the context of divorce, many of the judgments over which conflicts occur do not reflect technical considerations; rather, they are questions of timing, motive and interpretation for which the lawyer may have no comparative advantage. Indeed, insofar as the resolution of those questions depends upon a feel for the behavior of the spouse, the client's qualifications may well be superior.

Lawyers are no more inclined to command than are their clients.99 They may urge, cajole, flatter, use rhetorical tricks, provide unqualified or contingent advice, predict harm, discomfort, frustration or catastrophe, but they almost never say, "I am the professional, I am the expert, now do this." Furthermore, although lawyers frequently fail to act, they rarely invoke their knowledge and experience as grounds for refusing to act.

The avoidance of imperative modes suggests that the expressive forms used are intuitively sound. Both lawyers and clients apparently recognize that, were they to behave as if they were hierarchically empowered, they would undermine the legitimacy of what is generally considered to be a cooperative enterprise.100 But sound as the conventional forms may be for defining the limits of overt power, an unwillingness to issue commands opens a wide territory for subtle and latent maneuver.

97 Id. at 202-03.
98 This is, of course, the case where the client is not paying the bill, as in the legal services context. We were surprised that it was also true in the fee-for-service context.
100 Some scholars argue that the prevailing cultural form is hierarchical. See, e.g., Simon, supra note 62, at 485.
As in many human endeavors in which progress is not externally imposed or organized, procrastination in divorce cases is frequently the weapon of choice. Almost all of the actions that need to be taken to move a case from initiation to conclusion can easily be avoided. Procrastination may occur when neither lawyer nor client does anything, although each thinks that the other is committed to action, and it may occur when the action not taken is concrete and bounded. Procrastination's effects may be increased by the haze that eventually settles over the question of who had responsibility in the first place.

Procrastination may be purposeful and self-conscious. It may also be structural, built into the way that lawyers organize their practice. Lawyers in small and medium-sized practices are extremely reluctant to turn prospective clients away. As a consequence, they frequently order their workloads in some form of queue. In the doctor's office one waits in line to see the doctor. In legal matters, the wait is not to see the lawyer, but once having seen him, to have him attend to your case. The outcome of such a regime is clients who press their lawyers to keep their cases moving, or clients who are frustrated and angry at the lack of progress.

Additionally, lawyers sometimes lose interest in cases, especially when the other side is intransigent over settlement and the client does not have the resources to pay for full-scale adjudication. Just such a stalemate led a California client to tell us:

I'm hung up over the matter that it's not wound up yet. And nobody is eager to wind it up . . . all the sympathy, but yet on the other hand they are not concerned about finishing the deal, closing the book. And I just find that really bizarre for lawyers to be like that and let it linger on and on. It's like it's stashed in another pile and I can't figure out why they are not doing anything.

On many occasions, rationalizations for inaction are offered that may simply excuse poor organization, inattention or bad work habits. Matters do not receive attention because the lawyer is concerned about provoking the other side, is trying to conserve the client's money, or is trying to get the client to take more responsibility for his own life.

Competing loyalties are another reason for procrastination. Blumberg's well-known paper, The Practice of Law as a Confidence Game, dramatically alerted us to the influence of the work context on lawyer allegiances. But his theory was developed in the organiza-

---

101 Power, as is now widely recognized, is exercised in the refusal to act just as surely as it is involved in assertion. See Lukes, supra note 4, at 23; see also Peter Bachrach & Morton S. Baratz, Power and Poverty: Theory and Practice 43-46 (1970).

102 Blumberg, supra note 32.
tionally tight confines of a lower criminal court, where defense lawyers are highly dependent on their continuing relations with judges and prosecutors. These kinds of continuing relations are inherently less important in the divorce context. Divorce lawyers in the sites we studied are most often general practitioners; they practice in many courts and deal with a shifting cast of actors. Nonetheless, many of these lawyers went to great lengths to stay on good terms with the lawyer on the other side, even if this meant not prosecuting their client's case to the extent they had promised.\(^{103}\)

However, procrastination can originate in sound strategy. Lawyers frequently do not do what they have agreed to do, or implied they would do, because they disapprove of their client's agenda, disagree over questions of timing, or are deterred by cost. In these circumstances divorce lawyers are especially affected by their view of their client's emotional situation. Are the client's emotions under control? Is he able to function as a reasonable litigant? Has the psychic divorce kept pace with the legal proceedings, or ought the latter be delayed until the client achieves a more stable emotional perspective?\(^{104}\)

Clients also may have sound reasons to procrastinate. While they frequently do not agree with their lawyers, they may not want to contest the issue with them directly.\(^{105}\) A client may be in this posture because of information she is unwilling to share with the lawyer, because she may be embarrassed by her own ambivalence, or because she may be inclined to trust her own, rather than her lawyer's, judgment or intuition.\(^{106}\) Client procrastination may relate to major as well as minor matters. We observed a client decline to tell his spouse that he intended to seek a divorce after he assured his lawyer that he would; another client refused, without explanation, to authorize service of a divorce petition on the spouse from whom she repeatedly claimed she wished to be divorced; and a third client successfully evaded her lawyer's entreaties to agree to a medical examination to determine whether she was fit to hold a job.

Moving from procrastination to other strategies and tactics in the negotiation of responsibility leads, as it were, from the core to the periphery, from routine practice to more exceptional activities. For instance, repression, or the failure to state goals or views of which one is very much aware, is not at all unusual.\(^{107}\) In addition,

\(^{103}\) See Griffiths, supra note 17, at 165.

\(^{104}\) Id. at 166 ("Lawyers' control over the legal procedure makes available various techniques for cooling off conflict. Simple delay is often used to this end.").

\(^{105}\) See White, supra note 13, at 45.

\(^{106}\) Id. at 47.

\(^{107}\) For an argument about how lawyers should respond, see Luban, supra note 71, at 491.
we encountered vacillation and indecision in three different sets of circumstances: first, when both negotiations and adjudication appeared seriously flawed; second, when either the lawyer or the client viewed the other as unstable or unpredictable; and third, when one or the other apparently lacked the ability to order and rank alternatives. These occasions do not involve overt assertions of power; rather, they are power drifts, instances where context or personality disables lawyers and/or their clients from grasping the reins of power.

In the abstract, the lawyers we studied espoused an ideology of shared responsibility. They said that they try to divide the labor with their clients such that, once they provide the client with the capacity to understand the technical requirements and with the relevant distillation of their professional experience, lawyer and client together can set overall strategy and plan tactical moves. Sometimes behavior conforms to this ideology; most of the time it does not. As one lawyer told us,

[The client] seems willing [to] . . . take my advice . . . . I would say, "... [W]e've got an agreement . . . . This is as good as you're going to get in court, and I think it's not worth the risk of going to court." And I think she would say, "OK, fine." On the other hand, if I said, "Look, I think you can do better in court, and I think it is worth the ordeal," which it will be, to go in there, and I think "OK let's go in there and let the judge decide." She would agree to that, too.

This is not joint consultation. These are the words of an "expert" who assumes his advice will be heeded. This language can be interpreted as a reflection of power derived from professional structure, power that lawyers have because they are lawyers. It is, however, unclear what precise claim the lawyer is making—that the client will do as he says because he is a lawyer, or that she will do as he says because, being a lawyer, he has the knowledge and experience to warrant her reliance on him. In either case, the client is on foreign terrain, terrain where the deployment of knowledge and experience may be resisted in various ways. That resistance complicates and enriches the enactment of power in lawyer-client relations even as it makes difficult, for both lawyer and client, to determine who is responsible for what.

In the following section we examine enactments of power in the negotiation of reality and responsibility within a single case. By attending to a single case, we hope to demonstrate the forms that power and resistance take in lawyer-client interaction, to show how

---

clients re-make the advice they receive as they consume professional services, and to illustrate changes over time in the enactments and dynamics of power.

V
THE CASE OF THE "UNSUPPORTED WIFE"

The narrative that follows involves the divorce of Kathy, a client whose case we followed, and Nick. Kathy has retained Wendy, a solo practitioner, and Durr, Wendy's paralegal. When our observations began, Kathy had already conferred once each with Wendy and Durr. We observed four conferences between Kathy and Wendy and one between Kathy and Durr. In addition, we conducted five interviews with Kathy and three with Wendy.109

Kathy is a housewife and part-time secretary living in California. She had been married for 28 years when Nick, a local government official, initiated divorce proceedings. They had four grown children, one of whom was living at home. Kathy tried for many months, without success, to bring about a reconciliation with Nick.110 Beside the family house, where Kathy lived throughout the divorce proceedings, the couple's assets consisted of their pensions, modest collections of sculpture and rugs, two small savings accounts, two vehicles, and assorted personal property.

Wendy began her legal career in 1963, a time when women lawyers in her community were rare.111 Throughout her career she has been primarily involved in family law, first working for the government, then in a firm, and now alone. Although she says she has an unusual understanding of the emotional dimensions of divorce, particularly with respect to women, she is nonetheless ambivalent about this practice:

I kept getting these family law cases and I really kept fighting it and I really didn't think I wanted to be a family lawyer because it is really a miserable business. But one day I woke up and I thought, "Well, I've been through it myself and I really know what these people are going through and how they are hurting and somebody had to do it."

Wendy believes she has a distinctive way of practicing family law. Her theory is that, in addition to possessing all the expertise of

109 All conferences and interviews were audio-recorded. Nick and Durr attended part of the first lawyer-client conference that we observed.
110 At the time we entered the case Kathy was clearly still trying to hold onto the marriage. She was psychologically unwilling or unable to accept the idea of being rejected. For an insightful picture of the psychological dynamics of separation, see DIANE VAUGHAN, UNCOUPLING (1972).
111 This was typical of the situation of the profession as a whole. See CYNTHIA F. EPSTEIN, WOMEN IN LAW 79-95 (1981).
a certified family law specialist, she provides superior service because she can recognize and validate the emotional trauma typically experienced by people in divorce. She is able to provide this service because she had been divorced herself, because she is a woman and thereby naturally empathizes with the situation of rejected women, and because in Durr she has a superior support structure, available at all hours, willing to listen to anything, and knowledgeable about the intricacies of law enforcement and social service resources.

To illustrate the dynamics and trajectories of power in the negotiation of reality and responsibility between lawyers and clients, we present this case chronologically, beginning with our first observation.

**First Lawyer-Client Conference.** The first conference we observed was unusual because of the presence of Nick, who had not yet retained a lawyer. The stated reason for the conference was to discuss the division of marital property. Wendy opens the meeting by asking Nick what his thoughts are concerning the property division: “Did you have a proposal for how you wanted to divide it or did you want . . . .” Nick responds in a disarming way:

> To me it's real simple. I mean, if she's going to ask for whatever, I'm not contesting anything. I don't care about what happens with that. I've given her the car, half the house, if it ever sells, whatever part of my retirement or whatever part I own, she can have it. I'm not trying to keep anything from her. To me it's simple. Just come up with whatever you feel is right and that's it.

This response is both passive—Nick says he is willing to do whatever Wendy feels is fair—and, at the same time, hostile. He talks about Kathy as if she were not present, and acts as if there really is nothing to discuss; everything is already settled. He appears both in control and ready to settle on whatever basis Wendy proposes.

Wendy all-too-readily accepts this posture and moves quickly to discuss how to determine the worth of the assets. In so doing she too largely ignores Kathy. She suggests that Nick obtain an evaluation of the pensions. Later, she delegates to Kathy the tasks of determining the value of their life insurance and of finding an appraiser for the sculptures. These tasks are, in her words, “little executory things.” Kathy accepts her assignment without comment.

But signs of trouble quickly emerge as Wendy and Nick discuss various items of personal property. While Nick acknowledges that rugs exchanged in barter for his labor during the marriage are community property, he nevertheless feels that he has a privileged claim to them because he had to hold two jobs to obtain them. Before Nick leaves the conference, Wendy reminds him and Kathy of the nature of the process that they are embarking on. “Most divorces
nowadays," she says, "although there are a lot of emotions involved with it, and you know, 'he said' and 'she did,' and things like that, it really comes down to an accounting problem."

We see here the beginning of the negotiation of reality, of what the legal process of divorce can do for the participants. The reality that Wendy represents undervalues emotions, although she presents herself as a lawyer who cares, a lawyer who understands the emotional trauma of divorce. Even for a lawyer purportedly as emotionally sensitive as Wendy, everything must be assigned a value or else it is of no consequence. There is little explicit resistance—neither Nick nor Kathy openly contest the version of legal reality that Wendy presents. Yet as soon as Nick leaves, Wendy predicts that Nick will "collapse" when he realizes the net difference between his and Kathy's pensions, and "scream bloody murder and hit the ceiling" when Kathy and Wendy make a comprehensive property proposal to him. Her warning that the legal process is really about accounting, not emotions, begins to have some bite.

Kathy responds by acknowledging that Nick has a temper problem. Yet the conference closes with Kathy defending Nick. She says that Nick is really "a nice man," and she expresses her hope that the divorce process will not "take that away from him." Wendy again tries to introduce a note of reality based on her experience with the legal process of divorce: "I hope we can do it with a minimum of animosity. But there's bound to be a little resentment." The reality of the divorce process is not just that it is an accounting problem, but that the best that one can hope for is a "minimum of animosity" and "a little resentment." While Kathy says she understands what Wendy is saying, she nonetheless insists that the reality of the legal divorce is not, and will not be, her reality. "I hate it," she says, "I hate the whole thing" (the divorce and the divorce process).

Thus, almost before this case begins, reality and responsibility are on the table. In the domain of responsibility, the lawyer tries to get the client and her husband to do the drudge work, ostensibly to save money. In the domain of reality, Nick's feelings about moonlighting, the reality of his hard work—i.e., that the first job is to support his family and the second is for himself—are at war with his recognition that the law draws no such distinction. And Wendy warns the pair that they can indulge their emotions as they wish, but in the end emotions must give way to the "accounting problem."

Yet Wendy also recognizes that legal reality does not square easily with the social reality that both Kathy and Nick experience.

---

112 For an extended discussion of this version of the reality of divorce, see Sarat & Felstiner, supra note 12, at 93, 116-25.
She knows that displacing emotions is not easy and predicts that Nick's volatility will take over when he comes face to face with the economic reality of divorce.\textsuperscript{113} In making this prediction, Wendy claims to know Kathy's social reality in a way that Kathy cannot claim to know Wendy's legal and experiential reality. Thus lawyer and client together paint the picture of a spouse whose first reactions to new developments are likely to be extreme. The client's contribution to this joint effort is based on first-hand experience with her husband's temperament, the lawyer's more cynical and pragmatic view is based on what she has seen in similar cases. Together, they lay part of the mosaic of reality.

In her final comments about Nick and the divorce process, Kathy resists and distances herself from the adversarial reality that Wendy represents. Power slips away; Wendy will not be able to dictate a single, uncomplicated reality. There is no easy acquiescence; for Kathy the negotiation of the reality of her divorce has just begun. Yet Kathy herself recognizes that she is now in an alien space where the procedures and traditions that will govern her divorce are not freely chosen. Whatever the possibilities for movement within this space, the legal divorce is legal precisely because it is law's to give. Entering the divorce process, she encounters rules that, while self-evident and taken for granted by others, are not of her own making. She must deal with professionals with well-established routines, no matter how foreign she finds these routines and no matter how hard she resists. Her freedom of action, though considerable, is constrained. Her resistance, however resourceful, will only become meaningful as a reaction to the hierarchically structured legal world.

\textbf{FIRST INTERVIEW WITH CLIENT (4 days later).} Kathy speaks easily to the interviewer about the breakdown of her marriage. She believes that counselling might have saved her marriage, but says that Nick would not take part. She only found out that Nick had filed for divorce when a friend noticed the announcement in the local newspaper. Nevertheless she admits that she still "has a glimmer of hope that maybe he will come to his senses."

Kathy consulted a lawyer (not Wendy) reluctantly:

Kathy: So I went to the lawyer and I waited and waited and waited and I thought, "Boy, it's sure taking him a long time to do something about this." So I called him one day.

\textsuperscript{113} At another point in this conference we observe the first hint of how the lawyer tries to keep the conversation focused on financial matters: when the client starts to talk about her struggle to help her "kid through his drug problem," the lawyer successfully changes the subject to the house and car payments. That part of the client's social world relating to her child's problems is not to be part of the "reality" of this case.
Interviewer: You mean this is waiting for your lawyer to do something?
Kathy: Yeah, to do something. Like three months had passed and I thought I surely should have heard something by now. Well, he says: “Oh, I just found this sitting on my desk and the papers were there.”
Interviewer: You mean he had forgotten completely about the whole thing?
Kathy: Yes.

Kathy chooses “exit” and switches to Wendy, who has a reputation as “a go-getter” and someone who will “really fight for her clients.” Moreover, Wendy makes available to her a person, Durr, who seems to guarantee she will not be just another lost file.

This interview provides both a graphic illustration of a failure in responsibility for case progress with the first lawyer, and intimations of difficulties with the current lawyer in defining reality and assigning responsibility. Kathy tells the interviewer that she wants to get her “fair share,” which to her translates into the house, the opportunity to escape from her dead-end secretarial job, and something to even out their incomes. Yet she has not been asked to make her goals clear to her lawyer. Given Wendy’s previously demonstrated tendency to extrapolate from her experiences with other cases to the reality of Kathy’s case, Wendy may assume she does not need to ask in order to know what her client wants.

In any event, assuming rather than asking is an exercise of power by indirection. Power here consists in what is not being said, with the burden then shifted to the client, contrary to the picture of lawyer-client relations in which lawyers are portrayed as agents of their clients. But for the client, silence is its own kind of power and protection. Not stating one’s goals means that they cannot be labelled unreasonable and dismissed.

Another silence involves the division of labor between lawyer and paralegal. Wendy has told Kathy that much of her case will be processed by the paralegal, even though the paralegal’s training and functions have not been defined. Had Wendy explained the role of the paralegal, Kathy might not have accepted that level of participation. The lawyer again exercises power by taking action without consultation, rather than through an explicit decision.

FIRST INTERVIEW WITH LAWYER (6 weeks after the first conference). To Wendy, gender is the touchstone to tactics and strategy, and explains her acute interest in power.

114 HIRSCHMANN, supra note 87, at 21.
115 On the power of silence as a strategy of power and resistance, see SCOTT, supra note 10, at 17-18.
Interviewer: Do you see a difference in your role with women clients?
Wendy: ... The women have a problem. All of a sudden their career is threatened. They've been a housewife all these years .... When the other attorney starts pushing a woman who's been a housewife for 20 years ... [to] go out and get a job, it really angers me because they have to realize that if they were suddenly told they could no longer practice law ... it would really be just devastating .... I'm very protective of these women, especially because I feel they are going to make a career change which is going to affect them the rest of their lives, and as a result I want them to take their time .... I mean I don't want them making any rash decisions when they are under such an emotional strain. So I will cover for my clients. I will drag. I will delay.

Wendy either seeks to exercise maternal power over, and on behalf of, her clients, or likes to think of herself as doing so. She seeks to protect them from aggressive lawyers who underestimate what women go through during a divorce. In addition, by controlling the pace of the divorce, she serves interests that the client, in a rush to closure, does not know she has.

Interviewer: What if a woman is married for 20 years, so she's in her middle forties, [and her] kids are off in high school?
Wendy: The courts here feel she should become a useful, productive member of society. I don't agree with them. I think that a woman who has been a career mother and wife all these years has put in her time. If she had been in the army she'd be retired. But they don't look at it from that standpoint.

At this point the lawyer's view of what is desirable departs from the reality of law itself. Wendy presents herself as powerful because she knows both the reality of the everyday world of law and the reality of the everyday lives of women.

Interviewer: What kind of expectations do these women come to you with?
Wendy: Well, I think most of them see in the movies or read the books where the husband is going to pay for the divorce, and they are going to get alimony and they are going to get the house.

Wendy thinks of her clients as living in a world of fiction, as resisting the harsh realities of husbands who refuse to pay alimony and houses that get sold as just another piece of community property. She has struck at the core of the procrastination dilemma. Clients may not be emotionally ready to face legal and economic realities. The supportive lawyer ought then be prepared to "cover,

---

116 For a discussion of the impact of divorce on the economic status of women, see WEITZMAN, supra note 60, at 323-56.
drag and delay." But for how long? And who is to decide how long is long enough?

At the same time as they expose the ambiguous nature of delay, Wendy's actions show the indirect and elusive nature of some enactments of power. Interrogatories had been served on this lawyer and yet she has not looked at them. Have they been ignored as part of a conscious strategy of delay, or have they been shunted aside because of other, more pressing work? It is, moreover, unlikely that Wendy has told Kathy about the interrogatories. Is this a lawyer's self-protective move, or a deliberate decision to let the client heal emotionally before she is dragged back into the minutiae of the case? Has the lawyer focused on the situation of this client, who has by this time been separated from her husband for nearly three years, or does she assume that all similarly situated middle-age women should be treated alike? Is this an instance of benevolent maternalism or simple neglect, of an enactment of power or the power of inattention?

SECOND INTERVIEW WITH CLIENT (11 weeks after the first conference). Kathy begins by saying, "I don't know what's going on. Not a heck of a lot is going on. We're just getting paperwork done." Although the required attention to financial detail was "a pain in the neck ... you sure know where you stand when you are finished." When asked about her attitude toward the pace of the case, Kathy said:

I think I'm reaching a point now where I either want to get it over with or something else better happen ... I just can't stand this any more .... I just feel like I'm floating around in space .... I don't care if I clean my house ..... I don't care about anything. I'm not normally like this.

Despite her sense of urgency, Kathy had not said anything to either Wendy or Durr about "the pace at which things get done." She believes that Nick is also anxious to get the case going, especially because his living conditions are "terrible." Yet at the same time that Kathy wants the marriage to be over, she continues to be upset by its breakup.

I have a feeling that if we could have had counselling together that this is a marriage that could have been saved because it was a good marriage, it was a strong marriage, and I just feel like God, why are you doing this. But it is a need in Nick. I can really see that .... But I haven't changed the way I feel. I really miss him very much .... It's [the feelings about rejection] the worst thing I've ever dealt with in my life.

117 It is as if we were being given access to the kind of "hidden transcript" that Scott argues is constructed to resist dominant power. See SCOTT, supra note 10, at 4-5.
At this point, the social world of the client and the legal world of the lawyer appear to overlap, at least in terms of determining the client's financial needs. But in the more important matter of the client's emotional posture and whether or not to prosecute the case, there does not appear to be any connection between lawyer and client. It is not that the lawyer has prevailed in a contest over timing and progress and is now simply "in charge." Instead, the question of timing and progress is an unexplored, unaddressed irritant—a weakness, not a strength, for a lawyer who imagines herself as mother-protector.

Kathy wants to go in two directions at once. The status quo is intolerable. She wants her husband back and she desperately awaits the miracle that will return him to her life. But she fears this will not happen and is consequently resigned to getting on with the case. The problem in constructing a joint reality between lawyer and client is that, while the client tells this all to the interviewer, she fails to tell the lawyer. As a result, the case hardly moves at all.

**Third Interview with Client (23 weeks after the first conference).** In a short interview, Kathy several times expresses her belief that substantial progress should have been made in her case, and disappointment that it had not:

I expected a lot to happen before I went on vacation, and I thought, "Nothing is happening," so I paid my bill and I went on my vacation and came back and still nothing has happened... I expect it to be final pretty soon or something... but there's been nothing from a lawyer... I really have not talked to those people for a good, I don't know, five months maybe.

Although she still seems bothered that progress in the case would carry her further away from marriage, she is increasingly reconciled to the fact that there is no alternative:

I don't really want [things to get going], I mean I have mixed feelings about the whole thing, but when I talk to my kids, they say, "Mom, just don't hold out any false hopes, so why don't you just get it over with." And I think, "Ok, they are right. It's time to stop this stuff."

This interview shows that the silence over case progress persists. The client's views are clear to us, if not to the lawyer. She wants to get on with the case unless her husband is coming back, which she understands is not really going to happen. But the lawyer is doing nothing to push the case along.

For Kathy the experience is mysterious; she does not confront the reality of a lawyer who is not paying attention to her case. Instead, in the face of her own inability, or unwillingness, to do more than pay her bill and hope that something will happen, of her inabil-
ity and unwillingness to enact the power of the principal to command her agent, there is the ambiguity of inaction.

Is Kathy's case again lost in her lawyer's office, out of sight and off the agenda? Or is Wendy acting on a theory that the best indicator of this type of client's readiness to proceed is when she affirmatively asks the lawyer to get on with it? Both alternatives would be passive enactments of power by the lawyer: the difference between them is that the first is about responsibility (the lawyer is not doing what the client wants because it does not suit her), the latter about reality (the lawyer knows the state a client must be in before progress is feasible and knows how to identify it).

FOURTH INTERVIEW WITH CLIENT (25 weeks after the first conference). This interview occurred in a brief interlude before the second lawyer-client conference. Kathy reports that she and Nick "were never going to be able to talk to each other again if something did not happen pretty fast," so she made an appointment with Wendy. She says that she hated the process of haggling over small amounts of money or items of property: "it's just so picky." At this point, the harmony of the earlier conversation between Wendy, Nick, and Kathy has disappeared. As Kathy feared, the divorce process is bringing out the worst in Nick. The legal reality is fast contaminating her social world. Despite the fact that she is paying the bill, she feels powerless to make things happen.

While the social world has finally signalled Kathy that she must take responsibility for getting the process going, in another domain the world of divorce has yet to make an imprint. While most people are generally quite concerned with style, since it is one of the common ways to draw social boundaries, Kathy has what might be called an unusually severe case of bourgeois manners. Arguing over small amounts of money is distasteful. But divorce, in its entirety, is in bad taste and the full range of its unattractiveness is not yet clear to Kathy. Although the lawyer appears to think that she comprehends the social world of the client, she has not fully initiated the client into the reality of the legal world.

SECOND LAWYER-CLIENT CONFERENCE (25 weeks after the first conference).

Wendy: Okay, from what I understand, Kathy, you want to get going on this again.
Kathy: I do. Nick is getting to the point where he would hardly talk to me and I don't want that to happen. I still would like to remain friends if we can.

Wendy's opening comment shifts the blame for the lack of progress in the case from lawyer to client. Yet Kathy chooses not to hear or feel the blame. Her "I do" resonates with what she hopes to
preserve from the marriage by moving forward to end it.118 Her wishes are finally made clear; what had been until now unspoken is finally put into words.

Yet the conference does not actually focus on how to get the case moving. Instead, attention shifts to financial detail. Discussion turns to the net value of the house, the value of other significant items, and the relationship of spousal support to property division. Kathy’s fleeting assertion of power is quickly lost in “accounting.”

Wendy: I can’t see that we can come up with enough to offset your equity in the house unless he’s willing to take a note or something to that effect. Have you discussed this with him at all? Kathy: . . . At one time he said that he might be willing to go along, but this was about two months ago.

. . . Wendy: I think you have to give him a note for $24,000.
Kathy: That’s a tremendous amount.
. . .
Wendy: Maybe we can get him to keep on making the house payments?
Kathy: I doubt it very much. I think he’s really sick of it.
. . .
Wendy: You’ve had a long marriage and you should be entitled to some support because he does make a lot more money than you do . . . . So that’s something we have to consider.
. . . [You could sell the house and get a condominium or] buy a mobile home.
Kathy: I would prefer to keep my house if I could.
. . .
Wendy: The only way we can get this part resolved is by getting that little loose end tied [the value of some sculptures]. We have all the figures on everything else . . . . I can write her [Nick’s lawyer] a comprehensive letter saying I think we should do it this way. I don’t think your husband is going to agree to it, but I think at least . . . we will get things moving again.

There is one important diversion in this conversation:

Kathy: [The youngest child is] my cross to bear.
Wendy: The baby, huh? Doesn’t want to leave. They must call that nesting now.
Kathy: Yes. I’m afraid that’s what it is.
Wendy: And he’s all settled in.
Kathy: Well, he’s going to have to unsettle himself because I’ve told him . . . .

118 “I do” is also an eerie reminder of the marriage vow; “Do you take . . . ?” “I do.”
Wendy: Now, what about the sculptures? We still haven't touched on those. We have the furniture divided, right?

The conference has begun on a by now familiar and ambiguous note. The plain meaning of Wendy's introductory remarks is that the client is responsible for the hiatus in case progress and has now decided to get things going again. Since we know that is not the case, Wendy is either smoothly shifting blame for the dead time to Kathy or trying to get a fix on her client's emotional readiness to get on with the case. But the language used is rather roundabout for a lawyer interested in the client's emotional condition.

Wendy quickly gets to what is for her the heart of the case. How can Kathy keep her house? Wendy is not optimistic about the house, and is rather cavalier in suggesting a move to a mobile home. Given Kathy's age, low income, and skill level, the question of spousal support would seem to be as important as the house, yet it is only raised as an item for future negotiation. Wendy is not ready to confront this aspect of reality and Kathy rather passively follows her lawyer's lead.

Wendy interrupts Kathy's attempt to explain how she is going to kick her youngest child out of the house with a question about the sculptures. This interchange repeats a sequence in the first conference and reflects Wendy's unwillingness to give her client's non-financial personal problems a place on the agenda. Although those problems have no legal standing, they are not explicitly ruled out of order; rather, they are shunted aside by a change in subject.

THIRD LAWYER-CLIENT CONFERENCE (31 weeks after the first conference). This conference is the defining moment in negotiations over both reality and responsibility. The agenda proves to be focused on three questions: who is going to conduct the negotiations; what are the lawyer's and client's goals concerning the house and support; and, if the goals are not clear, how they are to be determined. Kathy begins with a report of her discussions with Nick about the house. She had presented him with four scenarios:

1 - Sell the house.
2 - Sell the house in two years when they would be eligible for favorable tax treatment.
3 - Buy him out.
4 - Trade the house for two condos.

After a discussion of all the asset values, Wendy tells Kathy that it would take about $20,000 to buy out Nick's share:

Wendy: So what we tell them, I don't know whether you want to tell him, because you seem to be negotiating fine, or I can call his attorney and say, "Well look, we have certain costs of sale and everything when you do sell the house. Because you will be sell-
ing it eventually. Therefore we figure the net equity is so much, and in adding the items that you should get versus what I should get and everything, I figure that $20,000 is approximately”—I’ll be glad to make a copy of this for you, in fact, so that you can take it along and show him if you wish. Kathy: Yes.

... Kathy: And this way you [imagining what she will say to Nick] don’t have to pay any support. Wendy: All right. Well, whatever, however you want to do that. But shouldn’t you be getting support from him? Are you getting support from him? Kathy: He’s paying the house payment. Wendy: Well, I think even after you get divorced you are going to need some continued help from him. If he’s making the house payment now and you are going to have a $20,000 second to pay on it, to him, how are you going to do that? ... You know a little practicality around here won’t hurt. You’ve had a long marriage and therefore you are entitled to support and obviously you can’t make enough on your own to support yourself and become self-supporting. Now you can rent out rooms, take in laundry and things like that, but let’s look at it from a practical standpoint. Kathy: No, I threw my iron away.

... Wendy: You know, as I have told you, whatever you take out of this marriage has got to last you the rest of your life. Prince Charming just has not been known to come along and sweep up my clients ... It is a practical matter that we have to figure out. ... Wendy: This is really your best opportunity to keep this one [house] if you can. As you said, you are probably going to have to rent out a room or take a second job, if you want to do that, or turn to robbing banks ... Your husband is just going to have to get used to the fact that you are his forever insofar as responsibility for support is concerned. I mean, he may get rid of the body, but he ain’t going to get rid of the responsibility. You are going to have to get support from him. You just don’t make enough money. Kathy: He’s not going to want to hear that. Wendy: Well, he’s not going to want to hear it because people don’t hear what they don’t want to hear ... But it doesn’t work that way. He is stuck with you.

The question of who will do the negotiating surfaces early in this conference. It is rather clear that this lawyer, unlike most, does not want to do it. She compliments Kathy on her performance to date, even though that performance has produced no concrete results. Then she says she could talk to the other lawyer, but in the
middle of the imaginary conversation that she would have with the lawyer she switches to the voice of her client—"in adding the items that you should get versus what I should get"—indicating, at least indirectly, that she is not really going to have any such discussion with the other lawyer.

The focus then shifts from the house to support. Kathy does not think that her husband will agree to pay support. Still, Wendy does not accept that picture of the future. Regardless of the disposition of the house, Kathy cannot support herself and should not delude herself that someone ("Prince Charming") is going to come to her rescue. Reality is again juxtaposed to fantasy, the world of the legally possible to the world of dreams and fairy-tales.

Wendy asserts that their job is to convince Nick that he cannot evade his responsibility simply through denial. Despite the force of both the argument and the language in which it is expressed, this enactment of power misses its mark, is evaded, and left unaddressed. Kathy does not contradict Wendy on the issue of need, but she never agrees that support is a fixed objective.

In a sense, two static versions of reality are at war with one another. Both Wendy and Kathy agree that Kathy needs support. Kathy does not think that Nick will agree to provide it, but she does not express this view forcefully enough to make her lawyer explain how to go about getting it. Again, no one seems in charge. This case, like most of the cases we observed, does not move in a linear fashion. Important questions are raised, discussed, but then left hanging; positions are advocated to an audience which seems all-too-able to tune them out.

This condition is most clearly reflected in the discussion concerning the disposition of the house. The conference began with Kathy talking about four different schemes that the client and her husband had discussed. In response, Wendy presents a series of alternatives, some of them intelligible, some of them not.

[1] The nice thing would be if you could buy him out and then, eventually, if you sell it you’ll have the rollover by yourself.

[2] Another alternative would be taking spousal support of whatever your house payment is, $400 something a month, and saying, okay I’ll give you a note for $20,000 and what you do is [just give it back to him].

[3] Now you might also work out some kind of agreement with him that you will owe him $20,000 from the house that you will pay him when you sell the house or die, whichever comes first.

[4] Do we divide it up then [the time of sale] and figure out your [husband’s] equity based on what is the actual price of the house or do you take your chances with me and hope it goes up in value, or if it goes down in value, you get less money?
What we can do is put something to the effect that you’ll keep the house, the house will be sold no later than or listed for sale no later than such-and-such a date, that upon the close of the house, that within 60 days thereafter, either one of you may put on a cap under the issue of support for the court to determine what your needs are at that time.

[You could waive support in exchange for his interest in the house]. I really think that you would be giving up far more than you would be getting in a case like that because you are talking about $400 a month is $4800 a year and in four years he would have paid you $20,000. If in that four year period of time you were to get injured and could not work, you may need to have the support continued. If you waive it for now and forever more, then if you get sick in two years, you may end up having to sell the house and live off that and go on welfare eventually because you have no recourse to have him help you. So it’s one of those things you have to decide.

Another possibility is the two of you refinance the house and he gets his $20,000 out that way, and then you have a bigger house payment and guess who is going to help with that too?

Of course, we talked about the possibility of using the renter to pay off the $20,000.

Also you could arrange with your husband for interest only, payable at the end of five years or something and negotiable, renegotiable at that time.

Maybe he’d also work out something where he’ll only have to pay half the support and he’ll waive, he’ll give you the house. I mean, that’s another thing to look at. Say “Look, I’ll agree to take only $200 a month support in exchange and even make it nonmodifiable or something.”

These alternatives were neither generated logically from some set of empirical and normative assumptions nor presented all at once; rather, they seemed to be the product of Wendy’s stream of consciousness engagement with the problems of the house and support. That Kathy, even if she took notes, could keep much of it straight as she set off to deal with her husband, is doubtful. In mid-stream she confessed that the conference “gives me ideas, but I get totally confused when I thought I really knew what I was doing. I mean I really thought I had that thing [the house question] wired.”

Despite the rather haphazard presentation of alternatives, we see in the following exchanges that Wendy does have a negotiation strategy in mind, however unusual it appears to be:

Wendy: You may need to talk to him some more before you come up with a conclusion or something and see if he’s interested in any of these.

Kathy: That sounds like quite a few alternatives.
Wendy: Quite a shopping list right there that you can go over with him and kick around. Maybe one of these will be acceptable.
Kathy: Yeah, maybe.
Wendy: And if it is then we can work things out.

... Wendy: Well, anyway, do some talking and see what you come up with and if you want me to step in and talk to the attorney I think

... Kathy: I may have to.
Wendy: I'd be glad to.
Kathy: Because, as I say, I'm not that knowledgeable and I just hope that I can [interrupted].

While there is considerable confusion and circularity, there is also some forward movement. But it is still not a directed movement and neither Wendy nor Kathy seems to have the case in hand. Power drifts. Wendy extends a half-hearted offer of help, yet Kathy is re-assigned the responsibility to negotiate even as she admits that she is not sure what she is doing. Wendy and Kathy seem to agree that without spousal support Kathy has no income security. But Kathy still does not believe that her husband will agree to provide support. Despite Wendy's pressing concerns about the risks of life without at least the possibility of support, she gives Kathy carte blanche to relinquish such a claim, a remarkable position for a lawyer who, as we will see, believes her professional role is to stiffen the "backbone and spine" of her women clients. This negotiation about the reality of goals is, from Wendy's perspective, a negative enactment of power: the major theme seems to be that it is the client's life, hers to mess up if she pleases.

Wendy provides virtually no professional contribution, no explicit direction, despite her decades of family law practice. All she can do is list alternatives, as if to say, "Here is a set of outcomes that are technically feasible; see if your husband will buy any of them." Perhaps this is a subtle way to ascertain Nick's opening position, but it sounds more like an invitation to consider anything that he finds acceptable.

Wendy sends Kathy out to negotiate with Nick without any advice about psychology, structure, stakes, moves, tactics, or order of alternatives, and without any background about what a judge would be likely to do if a settlement is not achieved. Moreover, Wendy offers no justification for her abdication. Why, the client might wonder, does my lawyer exclude herself from negotiations with the other side?

This phase of the case is difficult to interpret. Have we encountered a lawyer who speaks the language of a politically correct professional woman, but whose behavior is in fact disorganized and
ineffective? Or is she, to the contrary, deftly sending Kathy out to negotiate with Nick, knowing that little will be accomplished, but believing that only these frustrating encounters with him will lead her to redefine their relationship in realistic terms, which then will form the basis for sound negotiations?

There is no point in searching for some positivist reality that drives out alternative meanings. This text is simply our reproduction of their production. But the truth of what is going on in Wendy's mind, if there is any one authentic version, does not make any difference to our larger point about the nature of power in professional relationships. Whether Wendy is a very poor, or a very crafty, lawyer does not affect the proposition that lawyers and clients are not fully conversant with each others' agendas, that their interactions are in the form of negotiations, and that direction and influence flow back and forth between them, and even away from them both.

Fourth Lawyer-Client Conference (37 weeks after the first conference). This conference may be viewed as something of a corrective to the preceding one. Wendy takes a strong position about goals, reinforces her view by describing a court's likely attitude, and establishes a practical plan for conducting the next stage of negotiations. However, because of Wendy's lack of preparation, the conference gets off to a bad start:

Wendy: Okay. Let's see. Where's your file, do I have it here? What are we here for?
Kathy: I wish I knew what I was here for.
Wendy: ... You were going to go back and talk to your husband, I believe.
Kathy: Yes, I did .... He just said anything I wanted to do, do it.
Wendy: ... What can we do. There are several alternatives ... I'm trying to remember because this was November 3rd, so it's been six weeks.
Kathy: You mean you can't remember that long?
Wendy: I don't understand.
Kathy: Gee, I can.

The image in this initial dialogue is not of a lawyer who has taken charge, but rather of one still unable to grasp the reality of the client's pressing needs. Those needs are indicated when Kathy says she wishes she knew what she was "here for." Wendy hears that comment as if Kathy had forgotten something, rather than understanding it as a general statement of Kathy's continuing doubts and disorientation. Moreover, Wendy quickly becomes the disoriented one, unable to grasp why the client would care that she remember the earlier meeting.
The conference moves on to review the conversations that Kathy has been having with Nick:

Wendy: And so you haven't told him the sad facts of life that you are going to have to continue to have money?
Kathy: I have not told him anything like that. I figured the less I said the better.
Wendy: [Whether you sell the house or not] you'll probably be entitled to some support . . . . What do you want to do?
Kathy: I don't know what the best thing to do is. I honestly don't, just listening to you. That's where I'm at a total loss. I do not know what the best thing to do is.

For the first time in their interaction, Wendy asks Kathy directly what she wants to do. Power is shifted; the client is invited to assume the directive role. But Kathy does not take up the invitation and substitutes the question of what is "best" for the question of what she wants. Any reality that she may want to construct seems to demand knowledge that she does not possess.

In Kathy, Wendy confronts a client unable to articulate goals despite the negotiations she has been conducting with her husband for months. Wendy responds by upping the ante:

Wendy: Well, it's really your decision because you have to live with it for the rest of your life.
Kathy: I know.
Wendy: If I make that decision and later on you are unhappy about it you are going to say, "Well, why did she choose this road to go." I think probably, unless you let him know he's going to have to pay support, you may be working on a false assumption. He's going to have to know that whether you keep the house or sell the house or whatever, he's going to have to pay you support.
Kathy: . . . I really wish that I didn't have to take anything.
Wendy: I understand that. But let's be practical . . . . You have all these basic expenses that there is nothing you can do about. You cannot meet them. You cannot make enough money to do so.
Kathy: You know I'm just a wimp.
Wendy: If you were a brain surgeon I'd tell you to tell him to go buzz off and waive it. But you can't do that. You don't make enough money, and I'm really concerned about how are we going to take care of you. You have to have income from him too. There is just no other way that you are going to get around it.

Once past the formulaic lines about whose decision counts, Wendy goes beyond the "we could do this or we could do that" stance that she took in the previous conference, insisting that the client demand the necessary spousal support. The world of the client's wishes is now vividly contrasted with that of practicality. Wendy insists that the client face a reality that, from her lawyer's
experience in divorce, she knows best. As the lawyer becomes more strident, the client's seems to lose all decisiveness—she has no idea what to do, and refers to herself as a "wimp." This apparent indecision may reflect resignation rather than weakness, a paralysis induced by knowledge that she will not get that which she requires. In Wendy's insistence that there are no alternatives, what might look like a power grab seems more like the hard sell.\footnote{119}

The negotiation of goals and the allocation of responsibility between Wendy and Kathy take on new dimensions when recent financial experience is reviewed:

Wendy: So what he's paying you is certainly a fair amount . . . based on his income. But I still think you need more on top of that. Didn't I tell you you needed a couple of hundred dollars more than he's giving you already . . . . Is he paying the taxes and insurance or are you paying them?
Kathy: No, I'm paying it.
Wendy: So he's paying about $400 a month.
Kathy: Uh-huh.
Wendy: Oh, he's not. That's ridiculous. Here we go again. He should be paying more now.
Kathy: . . . I know I've gone through the savings account almost.
Wendy: . . . Why have you let him get away with this all this time?

Conscious or not, Wendy is engaging in classic scapegoating: "why have you let him get away with this all this time?" Unappealing as this behavior may be, it is a forceful attempt to shake the client out of her reluctance to ask for support. Thus, in negotiating the reality of the client's post-divorce financial situation, Wendy now appears ready to employ whatever tools it takes to get her message across.

In the following exchange we see the reality that lawyer and client are trying to negotiate. That reality again involves a juxtaposition of Wendy's self-proclaimed practicality with Kathy's increasing willingness to play the role that Wendy is assigning to her.

Wendy: What do you do if the roof falls down? You have to have a new roof put on.
Kathy: I don't know.
Wendy: Well, you have to think about this. It's a very practical situation.
Kathy: I'm not, see, I've never really given much thought to me.
Wendy: Well, I understand that and we've already talked about being number five and now you are number one. You really have to start thinking about what's going to, what's best for Kathy. What are you going to do. And I'm really awfully concerned.

\footnote{119 On the dilemmas of such a position, see Simon, \textit{supra} note 64, at 217.}
Kathy: Well, I will, I'll tell him. I can hear it now.

Matters of real significance are contained in this brief exchange. Kathy appeals to Wendy to take care of her by suggesting that she has never been able to take care of herself. Wendy seems to acknowledge that Kathy's difficulties spring from her view of herself and the world, as well as from simple naivete about the hard realities of living by herself. Kathy needs help to look out for herself, and if she cannot muster the courage to confront her husband about his responsibilities, her financial future will be bleak. The client initially resists: she cannot think about the confrontation without cringing. Yet, in the end, she imagines herself doing what Wendy has asked her to do, while fearing Nick's expected outrage.

A concrete proposal and a plan for negotiations is then worked out for the first time.

Wendy: What we will give him, no interest, $22,000 payable in five years out of the sale of the house, and it would be secured by a second trust deed on the house. But at least if we make this kind of offer, now, if you like I can instead write a letter to his attorney making this offer. Generally, this is the way people do it, involving the attorney. But I know the two of you have been trying to keep the costs down and have been able to negotiate. So if the two of you can do it, that's just fine.

Kathy: Well, I will go back to him and tell him exactly as it's here.

Wendy: This way you've at least made an offer, so you've gotten things moving a bit; I mean this thing is really kind of mired down and it's silly for us every six weeks to get together and go over the same figures again and the same conversation.

Kathy: I know. And I'm such a dunce when it comes to anything like this, I just . . . . I can remember that.

Wendy: Okay, give him a $20,000 note payable in five years, secured, and that you need support of a minimum of $500 a month. It should be more than that. Tell him that I said that's rock bottom . . . and I'm appalled that you haven't been getting more.

This climactic exchange is both clarifying and confusing. It is clarifying in that the lawyer and client have been able to negotiate a proposal and have agreed on a definite plan for its delivery. They have settled on reality and responsibility simultaneously. However, the exchange is confusing because they discuss two very different versions of the proposal. The first version includes a $22,000 transfer, to be made from the proceeds of a sale; there is no mention of support. The second version involves a $20,000 transfer, no sale, and includes support. Kathy says that she can remember "that," but which "that" is she to remember?

The exchange also suggests that Wendy's supposed interest in minimizing Kathy's legal fees, manifested in the assignment of ne-
gitations to Kathy, is based on a lack of commitment to the case, a
certain laziness about really getting involved. Wendy is well aware
of both the inefficiency of Kathy's past efforts at negotiations and of
the repetitive and circular nature of their exchanges. She acknowl-
edges that it would be routine at this point to send the demand in
writing to the other lawyer. But rather than make that effort, she
makes only a half-hearted offer to take over the negotiations.

Is Kathy just a helpless victim of a lazy lawyer or, even now, are
circularity and repetition her way of exercising power? At some
level is she aware that, as long as she keeps the divorce process from
reaching closure the possibility of reconciliation with Nick remains?
Who is "using" whom and for what purpose? Is Kathy a passive
consumer, or an agent whose apparent passivity produces an in-
tended circularity and repetitiveness that Wendy now recognizes?

At the end of the conference, it is apparent that Kathy is still
unconvinced that there will be any spousal support in her future.

Wendy: Once he finds out that you have to get spousal support,
he may say "You'll rot in hell before I'll give you a nickel," which
you can tell him, "Well heck, my attorney's heard that one before,
umpteen hundred times." But that's not true. You will get
money from him. There's just no question.
Kathy: I'm sure of that. I mean, I'm sure he's not sure of it.
Wendy: Right. But I'm just telling you if we go to court, you are
getting money from him. You will probably get more. He's been
getting away with murder and we've been letting him do it, but no
more Ms. Nice Guy . . . . Too many people have lived to regret
the fact that they wanted to get along with their ex-husband. If
getting along with him means you live at the poverty level and he
lives on Easy Street, how long are you going to get along with him
before you start resenting it?
Kathy: Not very long, I'm afraid. I'm afraid that's very true.

In this exchange, Wendy mobilizes the conventional authori-
ties, "what the court will do" and "what other clients have exper-
enced," in an effort to persuade Kathy to accept the legal view of
reality. She should receive support because a court would grant
support; 120 she will regret the day she bargains for privation, as have
other women. The client leaves and will talk to her husband—but
what will she say? Neither lawyer nor client really know.

SECOND INTERVIEW WITH LAWYER (immediately following the
previous conference). The interview focuses on Wendy's view of
Kathy as a negotiator and the court's probable attitude toward
support:

---

120 This claim is a vivid example of the "bargaining in the shadow of the law" that
takes place between lawyer and client. See Mnookin & Kornhauser, supra note 66.
Interviewer: Did you expect her, the last time that she talked [to the husband] to say the things that she's now going back to talk to him about?
Wendy: Yeah, I really thought that, well that was November 3rd, I really figured at that point she would take it to him and we would have it wrapped up . . . . It's not really a terribly satisfactory thing having her negotiate it like this . . . because she is not getting her fair share. And if she had said, "OK, you can handle it," she'd be getting quite a bit more than she's going to be settling for . . . . If I had it my way, we'd have been in court six months ago with an order to show cause to get a little more spousal support.

Interviewer: Do you think it's possible that she thinks if she sort of lives with this situation and behaves in a nice fashion, that he'll give up the idea of the divorce?
Wendy: No. But I think a lot of women delude themselves into feeling that if they are nice and fair that if they run into financial trouble, their ex-husbands will help them financially. And I try to get across to them that that is not going to happen.

In this conversation, Wendy initially portrays herself as the powerless victim of a client who will not let her act: if Wendy were able to act, Kathy would receive more spousal support. But Wendy still refuses to recognize that what Kathy wants from Nick is emotional rather than financial support. Thus, Wendy quickly dismisses the suggestion that Kathy may actually know what she is doing, that she has a clear purpose in mind. The reality on which Wendy focuses is not the reality of the continuing emotional tie between Kathy and Nick. Instead, Wendy is now in full "accounting" mode.

Interviewer: What do you think a judge's attitude would be about spousal support?
Wendy: There's no question. She's been married to him for a long, long time. He's making much more money than she is . . . . She's established her ability to earn an income and established a need. So there's no question a judge would order her support. And she would easily get $500 a month.

The reality against which Wendy evaluates the posture of the case is shaped by her view of what the court would do. This reality places her in the unpleasant position of having to admit that their negotiating strategy is not working. As Wendy puts it, "I just don't think I'm going to get her enough money. But is there ever enough?" Yet Wendy seems helpless to change the strategy.

Fifth Interview with Client (43 weeks after the first conference). Kathy had come to the office to see Durr, but also spoke to the interviewer about Nick's response to the support proposal and her reaction to that.
Kathy: Wendy wanted me to go back and tell him [Nick] that I wanted to stay there two years or something and that I needed x dollars a month.

Interviewer: Did he have a specific reaction to that?
Kathy: Do you really want to know what he said?
Interviewer: Yeah, what did he say?
Kathy: He said, “Christ, I’m not going to do that.” And I said, “Well, I’m just telling you what the lawyer said.”

Kathy’s response is as telling as her husband’s. She did not argue for support on the merits. She puts all responsibility for the demand on her lawyer. She is not asking for this arrangement that infuriates her husband; she is simply a messenger relaying information from a professional. The reality that her lawyer thought she had finally negotiated with Kathy was, in Kathy’s presentation to Nick, only an expedient, a way to end an unpleasant conversation.

That Kathy’s social world was highly conflicted was made clear by this interview and by the conversation with the paralegal.

Interviewer: Do you think he is trying to push you to the wall?
Kathy: Well, I don’t. I told him one time, I said I’m really scared. I am scared because I’ve been a wife and mother for a heck of a long time and all of a sudden I’m thrust out there. And he’s always made fun of my stupid little jobs, as he called it. Now, all of a sudden, my stupid little jobs have got to be my livelihood.

Interviewer: Right.
Kathy: And I’m scared. I’m really scared.
Interviewer: And is he sympathetic, do you think, to that?
Kathy: Oh, I think so. He says, why should you be. You are intelligent. But intelligence has nothing to do with it.

This picture is one side of her reality—a vulnerable, untrained worker in a tough job market, with no prospects for improvement and no second line of defense. But despite her worry about the future, Kathy’s definitive position seems to be: “You know, I’m not going to ask for the money. I really am not.”

Throughout the case Wendy has been inconsistent, inattentive, and too late in her efforts at the joint construction of the social and legal world that make up the reality of her client’s future. In the defining enactment of power, Wendy gave Kathy more responsibility than Kathy could carry, and she did this despite her misgivings about Kathy’s ability to realistically imagine the future and confront its difficulties.121

121 At this point in the case the client asked that we stop observing conferences and not interview her further. She did not give a reason for withdrawing from the study. Her withdrawal paralleled the way clients react to the accumulation of unstated dissatisfaction with lawyers. See infra text accompanying note 87. The exit without explanation marked the limits of her tolerance for the social science strategy in which everything
THE DENOUEMENT. The marriage was eventually dissolved and a settlement agreement incorporated into the judgment one year and seven months after the first conference. Kathy kept the house. Her share of community property was stated to be worth $27,000 more than Nick's. In consideration of Nick's foregoing any claim based on this unequal distribution, Kathy irrevocably waived any claim to spousal support.

THIRD INTERVIEW WITH LAWYER (14 months after judgment was entered). This interview was, for the most part, devoted to securing background information about Wendy's education, career, and her goals in divorce practice. The latter have a distinctly therapeutic, if not political, cast, yet they were hardly apparent in Kathy's case:

Wendy: Nobody wins. It's not a question of winning in this. It's how much can you take out with your sanity and dignity intact. I try to encourage them that living well is the best revenge and that they can't look back over their shoulders and worry about what he's doing with whom. They have to go on. And I guess the major satisfaction we've gotten out of it is to see some of these women come in who are just, I mean you have to scoop them up in a basket, they are just so awful. I mean, the women who come in here say: "Give him everything. He's going to kill me if I don't." Or the husband tells them "You are not going to get anything after all because the kids are grown and you don't deserve any support." And who believe their husbands because they have been conditioned to. And how we can bring them in here and they are absolutely spineless creatures that are just spread all over the floor and build them back into something with a spine and a backbone and finally realize, I'm a human being and I have rights, and they learn to stand up for themselves. It really is a real sense of accomplishment.

This program has two dimensions, one empirical and one rehabilitative. Wendy often acts for women who have been intimidated or conditioned by their husbands to accept less in divorce than the law would secure for them. Transmitting this technical information to such clients is not enough. Rather, their self-identity must be reconstituted so that they understand that they deserve that to which they are entitled. In the end, Wendy imagines that she produces not only optimal outcomes, she also produces new women.

Did she believe that she had wrought this transformation in Kathy's case?

becomes a subject of inquiry. It was both a gesture of resistance and an assertion that no more questions would be answered, not even that of why she was withdrawing. In a domain where clients become subjects, it was a striking enactment of her power in relation to us.
Interviewer: Did you find her an easy client, a hard client, to work with? Sort of typical or not typical?
Wendy: I would say the biggest problem with that case was that it was one of those hurry up and wait. There would be a lot of activity and then there was nothing.
Interviewer: Why do you think that was? Do you think she was ambivalent about the divorce?
Wendy: Yes. I think that they still kind of cared for each other quite a bit and I think that there was a lot of trouble letting go. And a lot of hurt. And I used to hurt her feelings so much because I called her Kitty all the time because she struck me as a Kitty... A very soft person and to me that's a Kitty. And I mean I would often call her Kitty and she would look so crushed—"My own lawyer doesn't even know my name." I do know your name, but you are just a Kitty to me. So I tried to be really careful and call her Kathy. Kathy is harsher and to me she was just such a very sweet person. I really felt very sad about that case because I liked her so much as a person. So it was kind of sad the way it worked out. But I think she was happy with the results in the long run... I get some cases where I just wish they would go away and get somebody else because this is costing them too much for what they are getting.

The gap between programmatic objectives and actuality in this case is obvious. To remake clients requires powers no divorce lawyer possesses. And Kathy was by no means remade into a new woman. In fact, Wendy candidly admits to compounding the client's difficulty of self-assertion.

**Conclusion**

We began this paper by arguing that power in lawyer-client interaction is not the straightforward phenomenon generally depicted in the literature, but a more subtle and complicated construct enacted through often ambiguous and conflicted behavior.\(^{122}\) Some of the more important respects in which power in lawyer-client relations differs from the conventional picture are that it is enacted through implicit negotiation as well as overt action; that motives, goals and data are often deliberately concealed; that power can be elusive, even to the point of disappearing; that assertions of power may be resisted openly or covertly;\(^{123}\) that the locus and nature of power changes over time; and that lawyer-client differences, even on matters of great moment in a client's affairs, rarely result in open confrontation.

\(^{122}\) See *supra* text accompanying notes 4-6, 10-92.
\(^{123}\) *Scott,* *supra* note 10, at 136-38.
We illustrated each of these attributes of power in the Case of the Unsupported Wife. There was implicit negotiation in the continuing silence over case progress and in the ambiguity over who, and under what circumstances, would control the critical decision about spousal support. Concealed motives and goals were reflected in the client's hopes about her husband's return, the lawyers' abdication of an active role in negotiations, the lawyer's failure to raise the support issue at an early date, and her interest in personality transformation. The insubstantiality of power is found in salient issues with which no one connected, such as taking the support issue to court or controlling the pace of case progress.

In addition, both Wendy and Kathy overtly as well as covertly resisted efforts by the other to exercise power. Wendy resisted her client's implicit attribution of responsibility for delay. Kathy resisted her lawyer's insistence that she ask for support: even as Kathy made the demand, she disowned it. Kathy resisted the notion that the costs of maintaining good relations with her husband were too high.

Avoidance of confrontation where there were differences about important issues was also common. Though Kathy was upset with the pace of progress, she did not complain about it to Wendy. While she did not think that her husband would ever agree to pay support, she did not confront her lawyer with her belief. Wendy, in turn, believed that her client might well be headed for the welfare rolls, but let her go her way without a fight.

In all of this we saw changes over time in the play of power and resistance. But those changes were by no means linear. Subjects would appear and disappear quite unpredictably from the negotiating agendas of lawyer and client. Indeed, in some sense Kathy and Wendy traveled along different, and separate, trajectories throughout the case. Power was enacted and performed, yet it was often difficult to say who, if anyone, was "in charge," who, if anyone, was directing the case. Power was at once shaped and reshaped, taken and lost, present and absent.

When power is considered to be dynamic and fluid rather than solid, stable and centralized, the subtle negotiations over reality and responsibility that we see in the Case of the Unsupported Wife are to be expected. Roughly comparable negotiations occur in all cases we observed. This view of the nature of power in the professional relationship does not, however, predict two dimensions of lawyer-client interaction that we also observed—the avoidance of confrontation even in the fact of disagreement over important issues and the reliance by clients on exit, rather than confrontation, as a response to dissatisfaction.
Divorce clients are typically weaker parties in their relationship with their lawyers. The weaker party in a relationship that reflects a major disparity in power does not often directly confront the stronger. Slaves, prisoners, students, and wives subjected to patriarchal hegemony have realized that effective resistance, even effective symbolic resistance, must be indirect, subtle, elusive and ambiguous. In divorce, lawyer and client negotiate power, but they do so on uneven terms. We have pointed out the entrenched position of lawyers—their turf, their rules, their vernacular—and the enhanced vulnerability of clients—high stakes, high affect, and inadequate resources. Avoidance and exit become the ultimate recognition of legal hierarchy, the final expression of a structurally-inferior person who cannot fight, but will not surrender.

But what can we learn from the reluctance of lawyers to insist that clients accept their professional opinion, from their disinclination to insist on action that incorporates their professional judgment? We interpret this behavior as a signal that the relationship between lawyer and client is hierarchically complex; that although it is not symmetrical, it is two-sided. The lawyers' position reflects professional power, but clients have two sources of structural power of their own—they pay the bills and they make the ultimate decisions to settle or fight, to accept the deal or not. Lawyers almost always want to retain clients on whose cases they have worked, and they almost always want to be paid. Since clients who come into direct and explicit conflict with their lawyers may conclude that their only recourse is exit, lawyers who engage in explicit confrontation, who draw lines in the sand rather than maneuver around impasses, jeopardize both these objectives. Thus, our model, like any analysis of the negotiation of power in human interaction, must take structural realities as well as individual initiatives into consideration.

To what extent is our view of the enactment of power in the negotiation of reality and responsibility limited to the divorce cases from which it is derived? Divorce practice is different from most other legal practice. Divorce, more than most litigation, originates in personal failure and rejection. The number of clients in divorce who are experiencing some form of personal crisis is high, probably higher than in parallel fields such as criminal law, personal injury, worker compensation, landlord and tenant, consumer, and bankruptcy. As a consequence, the negotiation of reality may be more difficult and salient in divorce. And because divorce law lies at the discretion end of the rules-discretion continuum, the opportunity for creativity in interpreting the legally possible is

---

124 For a discussion of those differences, see O'GORMAN, supra note 26, at 61-64.
greater than where rules narrow the scope of interim maneuvers and acceptable outcomes. Perhaps most importantly, the relative social status and economic power of divorce lawyers and their clients, rather than conforming to a single pattern, (as may be the case in fields as diverse as criminal and corporate law), is more varied, since the status of clients reflects the population at large. Thus, divorce lawyers tend to encounter clients of diverse social and economic status and, as a result, are less likely to develop patterns of domination and control than lawyers whose social position, relative to that of their clients, is more consistent.\(^\text{125}\)

On the other hand, many of the enactments of power in negotiations of reality and responsibility between divorce lawyers and their clients do occur in other areas of practice. Lawyers and clients must always negotiate a consistent version of events, an account of the client's situation and interactions with the other side. They must negotiate a fit between the client's goals and expectations and the results achievable through legal process. They must negotiate the timing of action to be taken in pursuit of the client's goals, and the division of labor between them. In each of these areas, whether the area of law be commercial or criminal, power is neither stable nor static.

Only on rare occasions, then, does interaction between lawyers and clients resemble a straightforward provision of technical services to a generally complacent, dependent and weak laity. The interaction is more often complex, shifting, frequently conflicted, and negotiated. In the relationship between lawyer and client, the professional, like it or not, shares power and resources with the client. It is a relationship where the knowledge and experience of each may be challenged by the other; where the economic investment of the lawyer in any particular client may equal or out-strip the client's investment in the lawyer; where lawyers have conflicts of interest that clients seek to identify and protect against; and where the humanity of each may be constantly under the scrutiny of the other. Thus, the nature of lawyer-client relationships beyond the context of divorce cannot be captured by simple models of professional or lay dominance, or by simple estimates of lawyer and client resources. Power in those relationships is, like power everywhere, deeply embedded in complex and changing processes of negotiation.

\(^{125}\) The importance of client status in determining the nature of lawyer-client interaction is highlighted in HEINZ & LAUMANN, supra note 28, at 59-64.
SEEKING "... THE FACES OF OTHERNESS ...": A RESPONSE TO PROFESSORS SARAT, FELSTINER, AND CAHN

Lucie E. White†

This comment addresses Naomi Cahn's *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice,*2 and William Felstiner and Austin Sarat's *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions.*3 I will begin with a recollection about my own education. I will then turn to "meta-theory," or, more simply, the images we use to frame our thinking about the social world.4 I conclude with a brief story from my current work.

I

THE RECOLLECTION

When I went to college, our intellectual gurus—in addition to Timothy Leary and John Lennon—were people like Noam Chomsky and Claude Levi-Strauss. Their theories talked about boxes, bipolar oppositions, exchanges (usually of women, it seemed), and law-ruled transformations.5 Their intellectual maps were geometric and symmetrical, and covered the entire social world, as we then imagined it. Although there was a lot of movement within their paradigms, that movement resembled a military drill more than a


† B.A. Radcliffe College, J.D. Harvard Law School.


\[4\] It is difficult to discuss “meta-theory” without losing touch with solid ground. There is a parallel risk, however, in failing to interrogate the assumptions that frame our understandings of the world. See Cahn, supra note 2, at 1410 n.64 (citing Nancy Fraser and Linda Nicholson’s discussion of “quasi-metanarratives” in Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism, 19, 27, in Feminism/Postmodernism (Linda J. Nicholson ed., 1990)).

dance. Those days, the late 1960s, were the salad days of what we now disparagingly call "structuralism."

I remember reading during those years an essay by a young anthropologist named Clifford Geertz.\(^6\) This essay used the technocratic talk of the times, but its message was out of synch with the positivism that such talk often assumed. The essay made reference to a new "meta-concept" that Geertz called "terminal screens."\(^7\) This term is a wonderful reminder of how the words we use are inevitably colored by the historical moment in which we write. Clifford Geertz does not talk about "terminal screens" any more. Instead, he writes about "thick descriptions,"\(^8\) and works and lives.\(^9\)

By "terminal screens," Geertz meant something similar to what one might describe, in the lingo of the 1990s, by reference to the array of designer "shades" that one can buy in places like Los Angeles, to color the world different tints for one's varying moods.\(^10\) Geertz used "terminal screens" to point out that one can view the same social "reality" through a range of different conceptual or theoretical screens or filters. Depending on the screen one looks through—the matrix of terms or concepts through which one filters what one sees—the same event can take on many different appearances.

In the days when structuralism was still in vogue, this was a marginal, though by no means novel, idea. Since then, it has entered the intellectual mainstream. Many people now talk of the partiality—or inevitably interpretive nature—of all of the "discourses," "paradigms," or "lenses" through which we make sense of our human world, and in turn constitute ourselves. Many scholars now teach us how our understandings of the world both reflect and define the positions from which we view it.\(^13\)

\(^6\) Clifford Geertz, *Person, Time and Conduct in Bali* (Yale Southeast Asia Program, Cultural Report Series No. 14, 1966), in *The Interpretation of Cultures* 360 (1973). Professor James Boyd White points out that the concept of "terminological screens" was first introduced into the discourses of social criticism by Kenneth Burke.

\(^7\) See Geertz, supra note 6.

\(^8\) See Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *The Interpretation of Cultures*, supra note 6, at 3. Naomi Cahn reports that Geertz borrowed this term from Gilbert Ryle. See Cahn, supra note 2, at 1430 n.141.


\(^10\) I have heard Professor Kimberlé Crenshaw, for example, use such an image in several informal presentations to Los Angeles audiences.


\(^12\) See Thomas Kuhn, *The Structure of Scientific Revolutions* (1970).

\(^13\) For particularly compelling elaborations on this insight, see Renato Rosaldo, *Culture and Truth: the Remaking of Social Analysis* (1989); Elizabeth U. Spelman,
II
Meta-Theory

At the same time that Clifford Geertz’s star was rising in the world of social theory, Noam Chomsky’s was falling: structuralism was overtaken by new “post-structuralist” ways of thinking. The intellectual leader of this movement was Michel Foucault. Foucault, with a little posthumous coaching from Nietzsche, was indisputably a genius, a paradigm smasher. He, more than any other single figure, moved us beyond the “conventional,” structural understanding of power that Professors Sarat and Felstiner describe in their essay. In this conventional view, power is a thing that people have and wield over others, usually on the basis of their roles in stable institutional hierarchies. Foucault gave us a new meta-theory of power—one that was so intriguing, so fitting for the uncertain times of the 1970s, that many other theorists—sociologists, linguists, and historians—took up the joint project of filling in its details, and of using it, lens-like, to sharpen their view of social life.

According to this new meta-theory, power is not a tool. Rather, like an evanescent fluid, it takes unpredictable shapes as it flows into the most subtle spaces in our interpersonal world. In this picture, we no longer see distinct “persons” controlling power’s flow. Indeed, we cannot really separate the agents of the movement from the movement itself. Sometimes we may think we see more or less familiar human actors, who seem to guide the fluid, like children might make giant soap bubbles in a park. Yet at other moments, these familiar “persons” disappear, and we see only the patterns that linger as the bubbles dance.

Power is lyrically described in Professors Felstiner and Sarat’s essay. It is “mobile and volatile, and it circulates . . . it is a complicated resource that is constructed and reconstructed so that its possession is neither necessarily obvious nor rigidly determined.”14 It is “continually enacted and re-enacted, constituted and re-constituted . . . shaped and reshaped . . . taken and lost . . . present and

---

Inessential Woman: Problems of Exclusion in Feminist Thought (1988). If there is currently a serious debate about this notion, it is not about whether each of us sees the world from behind a particular, contingent “terminal screen.” Rather, the debate is about whether we have any power to shape the screens through which we see, or to shift between them—either by authoring our own moral, political, or intellectual identities, or by expanding the language that we use—or whether our perspectives on the world are dictated by matters of fate, be they our genes, our life fortunes, the circuits wired into our brains, or the categories inscribed into our native tongues. For a short but elegant exploration of some of these themes, see Maria Lugones, Playfulness, World- Travelling and Loving Perception, 2 Hypatia 3 (1987).

14 Felstiner & Sarat, supra note 3, passim (quotes are in an original draft, on file with author).
absent . . . shifting, deeply embedded in complex processes of contestation and negotiation."15

This theory of power offers a very interesting lens through which to view social interactions, including interactions between lawyers and their clients. Professors Felstiner and Sarat demonstrate this. Their picture of power works like one of those infrared periscopes that military tank crews might use to render a desert landscape visible in the dark. Through their lens, Professors Felstiner and Sarat are able to see and study, in astonishing topographical detail, the interactions of Wendy, a well-meaning but probably lazy divorce lawyer, and Kitty, or rather Kathy, her excessively well-mannered client. Their lens enables Felstiner and Sarat to see in the interactions of these two women subtle enactments of power that other spectators, using a more conventional structural lens, for instance, would miss.

Felstiner and Sarat's work is part of a larger collective project undertaken by several legal scholars. Sally Merry, for instance, has recently used Foucault's lens to produce a detailed account of how working class people interact with the courts.16 Regina Austin has applied the lens to the workplace.17 Others are producing similar work.18 Of this new work, Gerald López's writings stand out. He uses the new conception of power to make visible complex interactions between groups of poor people and the professionals who try to help them.19 In this work, he shows how power is indeed very fluid, even across the formidable barriers of race and class identity.

This new meta-theory of power is especially important to progressive law teachers, scholars, and advocates for at least two reasons. First, this lens is bringing forth a new body of situated micro-descriptions of lawyering practice. For the first time, these descriptions give us a substantial base of data that we may use to reflect on our work. This new data enables us to see exactly how and when we deploy power within the routines of our own lawyering. With this new insight into what we do, we can begin to ask why we do it and how we might change. We can begin to envision different habits—

15 Id., passim (quotes are in an original draft, on file with author).
different ways of talking and paying attention—that may make our deployments of power less disruptive of our clients’ efforts to empower themselves. This kind of reflective reconstruction of our day-to-day lawyering routines can make our practice, as progressive lawyers, more consistent with our aspirations of greater social justice.20 Thus, the descriptive project undertaken by Felstiner and Sarat makes possible a new field of critical reflection on advocacy and pedagogy21—a “theoretics” of practice—the potential of which we are just beginning to explore.

The second reason that Foucault’s picture of power is so important to progressive advocates is that it has opened up new possibilities in the political practice of relatively disempowered groups. The conventional theory of power reveals a dichotomized world of domination and subordination; through such a lens, the hegemony of the dominant class is virtually absolute. Not only does that class confine the actions of the subordinated, but it also dictates their language, preferences, thoughts, dreams, and indeed most deeply held moral and political intuitions. In American legal scholarship, Catharine MacKinnon has used this dichotomized picture of power with great skill to challenge claims that women can experience authentic subjectivity in contemporary society.22

MacKinnon posed this challenge in an encounter with Carol Gilligan at Buffalo Law School in 1984.23 In that exchange, MacKinnon argued that values of “caring” and “connection” that Gilligan and other feminists sought to reclaim and celebrate are symptoms of women’s subordinate position in a closed system of power.24 According to MacKinnon, even women’s feelings of sexual pleasure are suspect; these feelings, like every other feature of Woman, de-

20 I use “we” because many legal scholars have expressed similar aspirations in their writing and practice. A recent symposium issue of the Hastings Law Journal on the Theoretics of Practice collects some of the most recent works to which I refer. See Symposium, Theoretics of Practice: The Integration of Progressive Thought and Action, 43 HASTINGS L.J. 717 (1992).
24 Id. at 73-76.
fine a colonized subject, a being whose essence has been shaped by
and for men.\textsuperscript{25}

Thus, as Angela Harris has demonstrated in her critique of
Catharine MacKinnon's work,\textsuperscript{26} a conventional understanding of
power locks women, and indeed every subordinated group, in a dis-
cursive "prison-house"\textsuperscript{27} from which there is no escape. Just as the
dominators can do nothing except wield their power, the
subordinated can speak nothing except their masters' will. No
change is possible in this universe; indeed, even the most creative
tactics of resistance or gestures of solidarity reinforce the bonds of
domination. This understanding of domination, designed to reveal
injustice, leads to two perverse results. First, it excuses those in the
dominant class from attempting to reflect on or change their own
conduct, or to ally themselves with subordinate groups. Second, it
reinforces in relatively disempowered groups the very doubts about
their feelings, capacities, and indeed human worth that subordina-
tion itself engenders.

Foucault's picture of power disrupts this closed circle of domi-
nation. By showing that the dominators do not "possess" power,
his picture makes possible a politics of resistance. It opens up space
for a self-directed, democratic politics among subordinated groups,
a politics that is neither vanguard-driven nor co-opted, as the polit-
ics of the colonized subject inevitably is. At the same time, and of
more immediate relevance to lawyers, this new picture of power
makes possible a self-reflective politics of alliance and collaboration
between professionals and subordinated groups. Given the new
theaters of political action that Foucault's theory of power has
opened up, it is not surprising that it has stolen the stage in histori-
cal, cultural, and finally legal studies from those who speak of power
in more conventional terms. The Foucaultian picture of power
makes insurgent politics interesting again; it brings possibility back
into focus, even in apparently quiescent times when resistance is vis-
able only in the microdynamics of everyday life.

Yet with the power of this new lens comes a risk. With such an
instrument in our hands, it is easy to forget the lesson that Professor
Geertz taught. Any "terminal screen" gives us only a partial view of
the world: it enhances some features of reality—probably those that

\textsuperscript{25} These themes are developed throughout MacKinnon's writings. For one clear
early statement of the link between male domination and even "normal," ostensibly
noncoercive heterosexuality, see MACKINNON, FEMINISM UNMODIFIED, supra note 22, at
46.

\textsuperscript{26} Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV.

\textsuperscript{27} The allusion is to FREDRICK JAMESON, THE PRISON-HOUSE OF LANGUAGE: A CRIT-
ICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM (1972).
its inventors most wanted to see—while erasing or obscuring others. The risk for those who use Foucault's lens is that they will forget this lesson, and begin to think of their own meta-theory as the last word on how power "really" works—the terminal screen. Foucault's lens reveals such a longed-for landscape of possibility that it has begun to entrap our imagination, deluding us into thinking that with this lens we have finally seized the power to comprehend the world.

One consequence inevitably follows when we forget that our latest theories are not absolute. This is the risk that, in our own certainty, we will lose patience with those who do not share our faith. As Professor Delgado points out, such intolerance often reveals itself only after time renders our certainties obsolete, and thereby ridiculous.28 At least two further risks are specific to Foucault's lens.

The first risk has been identified by feminist scholars such as Nancy Fraser and Robin West.29 While the Foucaultian lens reveals the fluidity of power, it does not show how power can become congealed in social institutions in ways that sustain domination. It may be true that everyday interactions create and maintain social institutions, but this insight does not enable us to map those interactions against the institutional matrices they create. Nor does this insight show us how institutions constrain the circulation of power, channeling it to flow toward some social groups and away from others. In short, the Foucaultian lens does not move us toward a theoretics and a reconstructive politics of institutional design.

Without richer meta-theories—stronger lenses—that focus on institutional as well as interpersonal realities, we will remain bewildered by exactly how our actions reiterate what has been called "structural" or "institutional" subordination.30 We will remain unable to critique and repattern our actions, so that we enact more democratic institutions as we seek to live more ethical lives. These other lenses need not replace Foucault's; rather, they can provide a second filter on the same landscape, enabling us to study the geol-

ogy of the ocean floor as well as the action of the waves. Without these other lenses, the dynamics of systemic injustice—dynamics that stunt the life-chances of some social groups with more than random frequency—will remain invisible and therefore go unchallenged.

In divorce lawyering, Professors Felstiner and Sarat have studied an area in which systemic patterns of race and class privilege do not always figure in obvious ways. Therefore, in that setting it may be, as they suggest, that their theoretical framework does pick up much of what is interesting to see. However, we cannot tell what different lenses might show us until we try them out. The work of Martha Fineman,31 for instance, suggests that theories about gender and motherhood, as well as a Foucaultian theory of power, might help us make sense of Felstiner and Sarat’s story of the unsupported wife.32 And in areas of legal practice where hierarchies of race and class routinely figure, such as criminal law or social welfare law, the risk that a Foucaultian lens will unduly limit our vision is great. In those domains of practice, recurring patterns of domination will go uncharted unless lawyer-client interactions are studied through a lens that explicitly theorizes race and class.33

Getting stuck inside the Foucaultian worldview carries a second risk as well. In addition to stunting our ability to rethink institutions in emancipatory ways, this lens obscures our human capacity—or, more accurately, our longing—to realize ourselves in the world by feeling with other people, as well as by winning against them. Foucault’s lens defines and thereby reveals human interactions as strategic contests. Our personhood takes form in those moments when the contest shifts power our way. This lens does not pick up those moments when we feel the force of another’s emotions or the resolve behind her commitments. If such moments appear at all, they look like surges of the other’s power rather than images of the other’s face.

We must not discount the risks imposed by theories that make human connection seem too easy to attain. As Professor Cahn points out, such theories are very dangerous in our not-yet-postcolonial world.34 Such theories have typically sanctioned domina-

32 Felstiner & Sarat, supra note 3, at 1471.
34 See Cahn, supra note 2, at 1429 n.139; 1445 n.217; see also Gayatri Spivak, The Post-Colonial Critic: Interviews, Strategies, Dialogues (1990) [hereinafter Spivak,
tion of the most insidious kind, by encouraging the privileged to
name the feelings of less powerful others, without cautioning that to
name another's feelings is also to silence her voice.\textsuperscript{35} We cannot
give up Foucault's contest-focused theory to return to a simplistic,
imperialist version of humanism. At the same time, however, we
must recognize that Foucault's theory is ultimately—and indeed, in-
evitably—incomplete.\textsuperscript{36} For although Foucaultian power is always
in motion, it hovers outside of the other, circling in what is ulti-
mately a closed field. Foucault's theory does not make sense of our
yearning for, or our occasional movement toward, a more fully and
freely interconnected human world.

What if we seek to map the elusive moments of human connec-
tion as well as the endless currents of contest? What if we seek to
transform our practice and the institutions that practice enacts, not
merely so we will be more adept at manipulating power, but also
more present when others call our names? If we want to reflect on
our longing for connection as well as our zeal for contest, what the-
oretical lenses might we use?

There is no easy answer to this question. Nonetheless, Renato
Rosaldo, in an arresting essay in his recent book \textit{Culture and Truth},\textsuperscript{37}
offers some promising thoughts. He describes his effort to com-pre-
hend, in order to "translate," the ritual of headhunting among the
Ilongot group in the Philippines. He studied the practice exhaus-
tively, using the best methods academic ethnography had to offer.
After extensive conversation with local informants, he carefully
mapped out all of the features of the ritual. He then attempted to
interpret the practice—to translate its underlying cultural logic in
terms that would make sense to his own people. His informants had
explained that the ritual was their way of enacting the grief they felt
for loved ones who had died prematurely. Yet even with the benefit
of this explanation, Rosaldo could not fathom how the grotesque act
of beheading a member of a neighboring group and then eating his
flesh could be endorsed by any human beings as a sensible, let alone

\textsuperscript{35} This is the underlying paradox of "advocacy" for a less powerful other. \textit{See} Lucie
E. White, Goldberg v. Kelly on the Paradox of Lawyering for the Poor, 56 BROOK. L. REV. 861
(1990). Advocacy is inescapably—etymologically—a practice of translation, of carrying
the voice of the other into a new domain. \textit{Id.} at 861 n.3. Yet translation is also a re-
placement of the other's voice. Thus, Professor White appropriately raises the theme of
"tragedy" in his comment on Professor Cunningham's article. James B. White, \textit{Transla-

\textsuperscript{36} \textit{See} FRASER, \textit{Unruly Practices}, supra note 29.

\textsuperscript{37} \textit{See} ROSALDO, supra note 13.
sacred, act. For all of Rosaldo's anticolonial commitment, he felt that this practice came from a radically Other world.\textsuperscript{38}

It was only when Rosaldo witnessed his wife plunge down a gorge to her death that he finally felt for himself the rage that follows the loss of a loved one before her time. It was the force of this feeling that enabled him, for the first time, to imagine why the Ilongot might have acted out their own grief in the way that they did. When he recalled his informant's explanation in the context of his own experience, he finally began to comprehend the ritual's human sense.

Rosaldo does not fully elaborate a theory of empathy in his essay. Rather, he offers this story to suggest some themes on which such a theory might draw. He suggests that the force of one's own emotions may cast a moment's light on others' lives, revealing both irreducible difference and, paradoxically, common ground. Contrary to Professor Cahn's suggestion in her essay,\textsuperscript{39} Rosaldo suggests that we need not know all of the "facts" about the other in order for these moments to occur. Nor need we share all the features of the other's "identity," categorically defined. Indeed, as \textit{prerequisites} for empathy, both of these conditions are impossible to meet.

But there is also a deeper problem with the two conditions for empathy that Professor Cahn's essay identifies. This deeper problem is that these two paths toward empathy are also practices of domination. The advice that we must find out the "facts" of the other to feel empathy toward her counsels us to objectify that person, to confine her subjectivity in categories that we construct. And the idea that to feel empathy with the other person we must identify with her, along such dimensions as race, parental status, and class, dashes all hope of empathy in many settings. In those few circumstances where empathy remains possible, this view condones practices of perception and definition that "essentialize" the other, naming her as more "like" us than she may wish to be. These practices of collecting facts about the other or cataloguing similarities with her may indeed enable us to feel closer to the other person. At the same time, however, such practices effect interpersonal domination. Perhaps we \textit{must} take such steps, if we seek to understand the other. But we must also \textit{renounce} these practices, or at least our confidence that they can work, if we are to recognize the other as a fellow—unique—human being.

\textsuperscript{38} Cf. Spivak, \textit{The Post-Colonial Critic}, \textit{supra} note 34.

\textsuperscript{39} See Cahn, \textit{supra} note 2, at 1429.
Thus, the practice of empathy is a paradox. It takes place beyond the fields of interpersonal contestation, beyond our obsession to know exactly who we are and our maneuvers to name the other. The practice of empathy takes place beyond our certainty that, in listening to a battered woman who has fought back, that we, unlike her, "could never stab anyone."  

III
A Story

My present research involves the role of parents in two local Head Start programs. In doing this work, I have become acutely aware of our need for multiple theoretical lenses, lenses that focus on institutions, on moments of recognition, as well as on the ebbs and flows of interpersonal power. I felt this need with a particular urgency after conducting an interview with a seventy-two year old former sharecropper in rural North Carolina. This woman was the great-grandmother and legal guardian of a Head Start child. In the interview, she gave me a brief account of the highlights of her life. She told me of her father's defiance in sending his daughter to school when the white plantation bosses expected her to be working in the fields. She told of receiving a scholarship to an elite women's college, but turning it down because she could not afford a bus ticket to get there. She told of graduating from an African-American teacher's college and of teaching for fifty years in the public schools. She told me what it was like to teach before the schools were integrated, when her students were given text-books handed down from whites. She also told me what it was like to teach after integration, when white children asked, and were allowed, to transfer out of her class. She referred only in passing to the civil rights movement. I learned from others that she had been one of the movement's many local leaders in the rural counties of the south.

As I contemplated this story, comparing it to what others had told me about the record of racial violence in the county and the courage this woman had shown in combating it, two features stood out. First, throughout the story, she expressed inexhaustible patience, and indeed love, for the white people she had dealt with over the years. Second, although she recounted many injustices, her narrative carefully excluded the details of the violence she had en-

40 Id.
41 Head Start is a federally funded social program providing pre-school and other services to poor families. See Head Start Act, 42 U.S.C. §§ 9831-9858 (1991).
dured. I had noted similar themes in interviews with other African-American Head Start parents.\textsuperscript{42}

After the formal interview was completed and the tape recorder turned off, I casually inquired about the woman's older great-grandchild, who, like my own daughter, had recently started kindergarten. When I asked this question, my informant became visibly sad. She told me that when she had dropped this child off at school earlier that morning, a young white child had run up to take her hand. Just as her great-granddaughter reached back, however, a second white child came up to the first and yanked her hand away, explaining that white girls should not touch people who were black.

Then the woman looked hard at me, and said, "The white people will go to any lengths to keep us down, even if it means keeping themselves down as well. They're making Frankensteins of us all."

This encounter could be examined through a Foucaultian lens. Such an examination would reveal an important reality. It would reveal this woman's skillful maneuvers, designed to ensure that our mutual reality was negotiated on her terms. This lens would show a woman who was artful in controlling the pace and extent of her revelations, and in determining how the injuries she had suffered would be named. This lens would reveal a woman negotiating the power between us to shape an account that she wanted me to hear.

Yet this lens reveals only a partial reality. For when this woman told me of her child's morning at school, she was not merely controlling how that event would be interpreted, and thereby trumping my own power to do the same. She was also speaking to me as another person. Through her brief story, I "felt," for a moment, something of the impossible sadness that eluded our language game. At the same time, I picked up her astute reminder that as one of those whites, I dare not claim to have "felt" her pain.\textsuperscript{43}

The risk of domination is inextricable from every humanist practice. Yet we must still seek to listen when others speak to us,

\textsuperscript{42} See Judith Rollins, Between Women: Domestics and Their Employers (1985) (documenting interactions between African-American maids and their white employers); James Scott, Domination and the Arts of Resistance: Hidden Transcripts (1990) (describing ways in which systematically dominated groups conceal feelings and experiences in interactions with members of dominating groups).

\textsuperscript{43} In thinking about the (im)possibility and practice of empathy, I am guided by Jacques Derrida's reading of Emmanuel Levinas. See, e.g., Jacques Derrida, Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas, in Writing and Difference (Alan Bass trans., 1978); Derrida, Force of Law, supra note 1. In writing about justice, as distinguished from rule or law, Derrida seeks guidance from Levinas's "difficult" conception, which is centered in the paradox of empathy. According to Derrida, Levinas imagined justice as the "equitable honoring of faces ... the heteronomic relation to others, to the faces of otherness that govern me, whose infinity I cannot thematize and whose hostage I remain." Id. at 959.
and to be moved. We must still seek to hear in the words of others not just negotiations of power, but appeals to our most difficult memories and deepest emotions. We must seek, in our encounters with others, not just to map the power or read the text, but also to recognize, in all its alterity, the other's face.