

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

CLARK D. CUNNINGHAM

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

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† 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, Suellyn Scarnecchia, Anthony V. Alfieri, Roy D. Simon, Patricia Williams, Norman L. Rosenberg, Lewis Henry LaRue, Austin Sarat, Richard Delgado, Naomi Cahn, Jean Koh Peters, and many who attended and participated in the above-mentioned presentations.

PROLOGUE

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.¹ 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."² 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.³ 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

UCLA L. REV. 697 (1992); and William Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980).

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).

⁶ See Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 11-13 (1981).

⁷ A good, brief survey of the empirical literature on attorney-client relations appears in the article by William L.F. Felstiner and Austin Sarat in this symposium issue. See William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1454-58 (1992).

"their" stories.⁸ 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.⁹ 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."¹⁰ 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.¹¹ Litigant discontent is pervasive and notably independent of outcome; "winners" are as critical as "losers."¹²

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

⁸ Anthony V. Alfieri, *Reconciling Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991) [hereinafter *Speaking Out of Turn*]; Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-1988); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); *Paradox of Lawyering*, supra note 1; Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) [hereinafter *Sunday Shoes*].

⁹ Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC'Y REV. 737, 742 (1988) [hereinafter Sarat & Felstiner, *Vocabularies of Motive*].

¹⁰ JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* 177 (1990).

¹¹ Austin W. Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1687 (1989).

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.¹³ 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.¹⁴

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.

¹³ 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.

¹⁴ 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.

I
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

L. J. Bros. & Co. Kalamazoo, MI 49001		Original Complainant - Court Warrant - Court	2nd Complainant - Prosecution 3rd Complainant - Court
Prosecuted, SCAO	STATE OF MICHIGAN 148 JUDICIAL DISTRICT JUDICIAL CIRCUIT	COMPLAINT MISDEMEANOR	CASE NO.
District Court ORI:	Court address		
MI:	Defendant name and address		Victim or complainant
<input type="checkbox"/> THE PEOPLE OF <input type="checkbox"/> The State of Michigan	v. H. DUJON JOHNSON		Complainant's basis: <u>Unsettled</u> Information & belief
<input type="checkbox"/> Co-defendant(s)			Date of complaint 9-5-88
City/Town/Village: Hewitt at Washtenaw, Ypsilanti Twp. Washtenaw	County in Michigan	Defendant's PIN	Arresting Officer 4-25-59
Police agency report no. 4901-88	Charge DISTURBING THE PEACE	Maximum penalty 90 days and/or \$100	
Witness			

STATE OF MICHIGAN, COUNTY OF WASHTENAW

The complaining witness says that on the date and at the location described, the defendant committed the following

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

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

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

Warrant authorized on _____ by: _____
Date _____
Prosecuting Official _____

Complaining witness signature
Subscribed and sworn to before me on 10-24-88
Date
Debra A. Duro
District Judge/Court Clerk/Clerk of Court/Magistrate signature

4-10961REV 11-84
 ORIGINAL INCIDENT
 REPORT

ORIGINAL DATE SEP 05, 1988	INCIDENT NO. 026 - 4901-88
TIME RECEIVED	FILE CLASS 5300

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 drivers 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 ifate actions. with Driver stating that this wasnt 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 Drivers 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 drivers 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 "Harrassed" 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 cant 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

PAGE 2	INVESTIGATED BY TFR: HRAZ, FRANK KISER, WAYNE	REPORTED BY <i>C. W. [Signature]</i>	REVIEWED BY
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EXHIBIT B, p. 2 of 4

4-10961REV 11-84
 ORIGINAL INCIDENT
 REPORT

ORIGINAL DATE SEP 05, 1988	INCIDENT NO. 026 - 4901-88
TIME RECEIVED	FILE CLASS 5300

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 dispall the possibility of him having any weapons.

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 Kothe reference Drivers 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:

M DUJON-JOHNSON B/M 04/25/59 of: 800 W Huron St Apt. #5, Ann Arbor, MI, OLN # 252 566 000 318. SS# 381 74 1577. Employed: U of M Medical Records Section/also Student UofM. 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 Kothe 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.

PAGE 3	INVESTIGATED BY TFR: KISER, FRANK	REPORTED BY <i>C. W. [Signature]</i>	REVIEWED BY
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EXHIBIT B, p. 3 of 4

ment requirements for conducting searches, that arrest is termed by most commentators as a pretext arrest.²⁴

In our case, it seemed clear to me, the troopers arrested our client on the pretext that he was "a disorderly person."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.

²⁴ This substantive Fourth Amendment law is discussed *infra* at notes 162-91 and accompanying text.

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. *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").²⁶

As I viewed the tape, I noted four major inconsistencies between the police report and Johnson's story of what happened that night.²⁷ 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.

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.³¹ 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,³² 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,³³ 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]³⁴

Like I said before, I treat them like everyone is armed and dangerous, I don't relax.³⁵

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.³⁶

³³ In fact the arrest took place on September 5. We never pointed out this inconsistency to Mraz or the judge.

³⁴ 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.

³⁵ *Id.* at 5-6.

³⁶ 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?

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.

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 earlier 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*.)⁴¹ 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,⁴² 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 lawyering as translation, but as a shared opportunity with the other symposium 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 several times the following portion in which Johnson described "what happened" after he exited his car at the gas station:⁴³

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

⁴¹ See Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1987).

⁴² The Law Review editors who organized the symposium had designed an admirable format. For the first day of the conference, symposium authors, editors, and conference 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: Telling Stories*, 87 MICH. L. REV. 2073, 2076-77 (1989) (describing symposium format).

⁴³ I produced this and later transcriptions from the videotaped interview by recording 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" indicates 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!?

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,⁴⁷ 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.⁴⁸ 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 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.

paying you, that fact alone means that I'm in the back-seat.⁵² Even today during court this morning, I'm in the back-seat.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?"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.⁵⁵ All the power is vested in you. I think you may go too far, assuming that you would know the answer.

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.

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.

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.

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.⁵⁶ After the symposium, but before the trial date I had thought of changing that earlier article into *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 *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.

II

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.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 *constituted* out of sense

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.

⁵⁷ See I ERNST CASSIRER, *PHILOSOPHY OF SYMBOLIC FORMS* 100-01 (Ralph Manheim trans., 1953).