

HEARING VOICES: WHY THE ACADEMY NEEDS CLINICAL SCHOLARSHIP

CLARK D. CUNNINGHAM*

IN MEMORY OF MAJOR ROBERT GREGORY

...

Soldier, scholar, horsemen, he,
And yet he had the intensity
To have published all to be a world's delight.

...

Soldier, scholar, horseman, he,
And all he did done perfectly
As though he had but that one trade alone.
Some burn damp faggots, others may consume
The entire combustible world in one small room
As though dried straw, and if we turn about
The bare chimney is gone black out
Because the work had finished in that flare.

William Butler Yeats (1919)

PREFACE

In the famous science fiction novel *The Left Hand of Darkness* by Ursula K. LeGuin,¹ the narrator, an envoy from Earth to a winter-bound planet called Gethen, visits a Gethenian monastery in order to receive a Foretelling, a prediction of the future produced by nine Foretellers gathered in a contemplative circle. He is startled to find that two of the Foretellers were insane: "Goss [the abbot] called them 'time-dividers,' which may mean schizophrenics."² The narrator asked Goss why these two Foretellers had not been cured of their insanity. Goss replied: "Would you cure a singer of his voice?"³

* Professor of Law, Washington University. A.B., Dartmouth College, 1975; J.D., Wayne State University, 1981.

1. URSULA K. LEGUIN, *THE LEFT HAND OF DARKNESS* (1969).

2. *Id.* at 46.

3. *Id.*

The term *schizophrenia* was coined in 1911 by Eugen Bleuler to emphasize the way in which persons afflicted with this mental illness live in the “split” between an outer and inner world.⁴ For example, the person “hears voices” as if spoken in the outer world, although actually originating in the person’s mind.

The following essay is a lightly edited transcript of remarks made on October 14, 1995 at the annual meeting of the Central States Law School Association at St. Louis University School of Law. A few hours before my presentation, I learned that Herbert Eastman, director of clinical education at St. Louis University, had died. Herb had been diagnosed with cancer a few months earlier; he was forty-four when he died. Although Herb was unfailingly genial and seemingly mild-mannered, he was, in fact, driven by a fierce passion for justice. He had suffered from painful acid reflux for many years that may have brought on the esophageal cancer that killed him, or at least masked the symptoms so that the diagnosis came too late. I imagine the burning pain in Herb’s chest as a metaphor for the intense anger and frustration about injustice he kept bottled up inside him.

Shortly before his death, the *Yale Law Journal* published Herb’s extraordinary article, *Speaking Truth to Power: The Language of Civil Rights Litigators*.⁵ At the beginning of the article, Herb explained that it “springs from the recurring disappointment and frustration I have felt after consultation with clients in cases presenting outrages that . . . cried out to heaven.”⁶ Herb was haunted by the feeling that his representation of those clients (usually quite successful by the standards of civil rights litigators) had prevented those “cries to heaven” from being heard on earth, by judges, lawyers and the other parties. His article made the provocative suggestion that civil rights complaints should include direct client quotes, exemplary stories and even photographs to emulate the success of journalists and historians in bringing injustice to life on the written page.

I have borrowed Yeats’ eulogy to his friend Robert Gregory; it applies well to Herb Eastman. Teacher, scholar, advocate—exemplary in each field as if he had but that one trade alone.⁷ Herb lived in the split between the academy and the outside world, but moved in the opposite direction of schizophrenia. The voices he heard in the outer world were projected with

4. See THOMAS STEDMAN, STEDMAN’S MEDICAL DICTIONARY 1390 (25th ed. 1990) (“schizophrenia”).

5. Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995).

6. *Id.* at 766.

7. See *infra* 91-94.

great force into the inner world of mind. Perhaps the intensity with which he taught, advocated and wrote might have seemed a bit crazed, yet he would have not chosen to live differently even if the reward was a longer life span. And perhaps with those heaven-bound cries forever in his ears, he could not have chosen differently.

This essay endeavors to show why the legal academy needs clinical scholars like Herb Eastman.

I. WHAT MAKES SCHOLARSHIP CLINICAL?

Before I began speaking, I distributed a two-page handout called *A Sampler of Clinical Scholarship*. The first question posed to the audience was: what do the selected articles have in common? The most obvious common connection was that they were all written by people primarily engaged in clinical education. By *clinical education* I refer to the kind of teaching in which professors are actually involved in the representation of clients in collaboration with their students, as distinguished from other important forms of related education, such as simulation (which I also do) and externship supervision. Yet beyond the common occupational background of the authors, I suggested that these articles had more significant things in common.

First, these samples of clinical scholarship all looked at different locations in the legal system than those brought into view by most law review articles. While traditional legal scholars tend to focus on what happens in the appellate courts, clinical scholarship typically looks at what goes on in trial courts or, perhaps more importantly, at activities occurring in the halls outside the trial courts, in the lawyer's office and in the streets. Consider this analogy:⁸ imagine having to learn about the game of baseball by sitting in front of a television set that only focused on the umpire. For two or three hours you would see the umpire make gestures, and occasionally something would whiz past him in a blur.⁹ Obviously you would not have the remotest idea what the game of baseball was from this image alone. To learn the basics of baseball you would have to look at everything going on around the field. Some of the activity on the field would be regulated by the umpires, but most of the activity would not.

The second thing that the articles I distributed had in common was that

8. I am modifying a metaphor I learned from Professor Paul Reingold while teaching with him at the University of Michigan General Civil Clinic.

9. This narrow focus on the home plate umpire is my metaphor for exclusive study of appellate decisions.

they were interdisciplinary. There has been a debate in law reviews over the last several years about whether legal scholarship is now too interdisciplinary.¹⁰ The critique assumes that interdisciplinary scholarship is also abstract and impractical. This critique certainly does not apply to the kind of interdisciplinary work done in clinical scholarship. The interdisciplinary approach found in contemporary clinical scholarship arises out of an effort to understand what goes on in such settings as negotiations, conversations with clients and high volume trial courts. Because the tools that we bring to our work from traditional legal education are inadequate to explain what we find happening in these settings, clinical scholars have turned to sociology, anthropology, linguistics, feminist theory and other disciplines to enhance our ability to try to figure out what is really going on.

A third feature characteristic of clinical scholarship is that the subject matter of our scholarship talks back to us. The feed back I receive on my non-clinical scholarship comes from the voices of other legal scholars who comment on it, either when it is in draft form or after it is published. In contrast, in clinical scholarship, it is the very material itself that talks back to us. We write while we are in the throes of practice. As we write, we hope to learn how to improve upon our practice. Our writing is a kind of dialogue with our clients and our students. The following are two rather detailed examples.

II. WHEN THE SUBJECT TALKS BACK

One article listed in the "sampler," entitled *The Lawyer As Translator, Representation as Text*,¹¹ I wrote based on a case I handled while teaching at the University of Michigan. It was a misdemeanor case. To some, it might seem strange that anyone could find enough in a misdemeanor case to write ninety pages about. The client's name was Dujon Johnson. The article uses his real name, as well as the real names of all of the other people involved, at Mr. Johnson's request.

At the time that my clinic students and I were representing Mr. Johnson, I was working on another article about the concept of the lawyer as translator.¹² This metaphor, strongly influenced by the work of my then-

10. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Law School and Law Practice*, 91 MICH. L. REV. 34 (1992) and Symposium: *Legal Education*, 91 MICH. L. REV. 1921-2219 (1993) (essays responding to Edwards' 1992 article).

11. Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992).

12. See Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989).

colleague at Michigan, James Boyd White,¹³ seemed meaningful to me as a way of thinking about how to involve clients during the course of the litigation so that what is of significance to the client is translated into the language that the lawyer speaks on the client's behalf to the court.

Mr. Johnson's misdemeanor case was dismissed by the prosecutor on the day of trial. We had the rest of the morning free, so I suggested that the two students and I go into an empty conference room at the courthouse and debrief the client. Although from a legal perspective it appeared that Johnson had won, he was furious: furious about how the case had gone, and very angry with us, his lawyers, including me personally.

While he spoke, I furiously took notes. At that moment I planned that Mr. Johnson's case would be the last section of my earlier article that was about to go to press. I quickly decided that it was not going to be part of that article, and instead I spent the next several years trying to determine what went wrong.

As I presented early drafts of *The Lawyer as Translator* to a variety of audiences, I usually included in my presentation a video tape of the initial interview between the clinic students and Mr. Johnson. Every time I showed that video tape to different audiences, I learned more about what was truly going on in the case. However, my article talked back to me in an even more literal way.

Three years after the case had concluded, I received a letter from Mr. Johnson asking if I had ever written a law review article about the case. I wrote back to him saying that I was so glad to hear from him, and that I was still working on the article. I sent him a draft of the article along with some specific questions, and he wrote back a very thoughtful letter. The last section of *The Lawyer as Translator* is really his letter accompanied by my questions interspersed with his comments.

His letter provided me with many insights that I had not obtained through reflecting on the material and discussing it with a variety of academic audiences. Perhaps the most significant insight dealt with how the issue of race was handled. Mr. Johnson was an African-American college student who was stopped by police at about four in the morning, allegedly for running a red light. During what the police claimed was a routine traffic stop, an altercation developed, which culminated in Mr. Johnson's arrest for disturbing the peace. At no point during our representation of Mr. Johnson did we allege that he was stopped by the police because he was black. We

13. See, e.g., JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990).

never alleged that the two officers treated him the way they did because he was black. I did suspect from the very outset that the officers (particularly the one named "Kiser") stopped him and mistreated him because of his race. However, we never used racial discrimination as one of the defense theories. One reason was that the racism claim presented substantial proof problems, and we thought we had several other defenses that would be easier to prove. Moreover, Mr. Johnson never alleged racial discrimination during his meetings with us.

When I presented the article in draft form, many people offered such comments as: how could you have silenced his voice in this way? How could you not see that this whole case was about racism? So in my correspondence I asked Mr. Johnson about this issue.

Cunningham's Letter

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's Responding Letter

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.¹⁴

In a subsequent telephone conversation, I followed up on this point and received the following further explanation from Mr. Johnson: "I didn't want to cloud the legal issues. I felt that I had enough rights in the legal realm to go on; there was a sound legal basis for what I did."¹⁵

14. Cunningham, *supra* note 11, at 1385.

15. *Id.* at 1385, n.248. (The "sound legal basis" was the Fourth Amendment. Mr. Johnson reported telling Officer Kiser that he could not be stopped and searched without a good reason unless

Thus, while I was berating myself for being insufficiently sensitive to the racial issues inherent in the arrest, and for failing to gain my client's trust, I failed to consider the possibility that Mr. Johnson's omission of a racial discrimination claim might have been his own strategic decision that he expected me to honor. This possibility was also not raised by any of the many legal scholars who gave me comments or participated in workshops regarding my article. Everyone who was concerned about the failure to allege racism seemed to assume that we, as his lawyers, were at fault for not arguing the issue. Accordingly, we all needed to hear Johnson's pointed comment in that same telephone conversation: "that which has not been said, hasn't been said; that would indicate that I didn't want to say it."¹⁶

I want to conclude my discussion of *The Lawyer As Translator* article with two comments from Johnson, taken first from our conversation the day his case was dismissed, and then from his letter to me after the case was over:

The Day the 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.

Johnson's Letter

[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.¹⁷

III. THE EXAMPLE SET BY HERB EASTMAN

What to me is most exciting about clinical scholarship and clinical

he was being arrested.)

16. *Id.*

17. *Id.* at 1387.

teaching is the opportunity it provides for these kinds of voices to be heard within the academic walls. This is something that all of the articles I have selected have in common; I also think this is something the legal academy needs now more than ever.

I suspect that if a conference held ten years ago presented a topic called *Clinical Teachers Scholarship*, some people might privately have thought the phrase was an oxymoron. A decade ago most clinical teachers were in non-tenure track positions and not expected to produce legal scholarship. If they did write, their writing tended to be very practice-oriented or, perhaps, on theory related to teaching. There has been a dramatic change, mostly in the last five years. Many of the articles in *A Sampler of Clinical Scholarship* were published in what would be generally considered the top ten law reviews.

I had always intended to have one of Herb Eastman's articles in the bibliography I distributed, and I had intended to discuss it during my presentation. But when I learned that morning of his death, I decided to conclude my comments by talking a little bit more about Herb personally than I otherwise would have done. I decided to use Herb as an example for some points I hoped the conferees would carry back to their respective schools.

Herb was an extraordinary person in almost every respect; yet in some ways he was a typical example of a clinical teacher. His resume stated that he graduated from Notre Dame Law School in 1976. His resume just said "J.D."; it doesn't say "Law Review," and it doesn't say "Coif," so I assume that he did not serve on the law review, nor did he graduate at the top of his class. He went directly from law school to Land of Lincoln Legal Assistance, the legal aid program for southern Illinois. He worked in Cairo, Illinois from 1976 to 1982. While there, he brought a voting rights act case. From 1982 to 1983, he moved to St. Cloud, Minnesota, where he served as the deputy director of the area's legal aid program. In 1983, he returned to the St. Louis area, where he worked in private practice until 1985. He spent a year with the Equal Employment Opportunity Commission from 1985 to 1986. He was hired by St. Louis University School of Law in 1986 in a non-tenure track position. I was glad to see that in both the 1995 *American Association of Law Schools Directory* and in the Yale article, he was identified as "Professor of Law." The fact that he died without ever receiving tenure is not something that is disclosed in these public records. Many law schools that have a separate track for clinical teachers are scrupulous about making sure that the word "clinical" appears before the word "Professor," or otherwise designate their separate status.

Separate status for clinical teachers is something that seems to be

endlessly debated within legal academic circles. Among the reasons frequently offered for keeping clinical teachers off the tenure track are assumptions that they lack the capability to meet the scholarship standards of law schools today, that they lack the inclination to produce such scholarship, or that the demands of clinical teaching preclude them from producing the kind of scholarship required for tenure. Many schools seem to feel that they are doing clinical teachers a favor by creating a job status that does not require the same amount of writing that is otherwise required of full-time law teachers. Herb Eastman, with his resume, would probably not have been hired by St. Louis University or most other law schools as a tenure track professor, as he did not have a judicial clerkship or an outstanding academic record.

Herb's resume reveals that he actually did a great deal of law review writing during his career at St. Louis University School of Law, but most of his earlier writing fits the old stereotype of clinical law teacher writing: articles about substantive law issues affecting poor people published in practitioner journals or mid-range law reviews. The fact that his last article was published in the *Yale Law Journal*, however, seems to defy this stereotype.

Herb worked on *Speaking Truth To Power* for a long time, and he and I spent a lot of time discussing it. The article is more than one hundred pages long. Herb originally divided the article into two separate pieces and sent out both subdivided articles simultaneously. In a very short period of time, he received an offer from the *Notre Dame Law Review*. He was justifiably delighted with this offer and accepted it on the spot. The next day he received a telephone call from Yale offering to publish it. He called me and was sort of heartbroken. The problem is that Notre Dame wanted to publish both pieces as a single article, and so did Yale. He initially attempted to negotiate with Notre Dame and Yale for each to publish one of the subdivided articles, but Yale said they only wanted to publish the whole thing, or not at all. To Herb's credit, he never considered revoking his acceptance with Notre Dame. But what he did do, but only after strenuous urging (from me and other colleagues), was to call the editor at Notre Dame and ask to be released from his commitment. Herb confided to the Notre Dame editor how important it was for his own career to have the article placed with Yale and also (due to his colleagues' encouragement that overwhelmed Herb's natural modesty) how important it was for clinical scholarship to achieve the kind of recognition that publication in the *Yale Law Journal* carries. Notre Dame released him from the commitment and the whole article was published in the *Yale Law Journal*.

I think that had Herb lived he probably would have received tenure in the

next year or so. The delay in moving him to tenure was not, I think, due to any lack of respect for Herb on the part of his colleagues. In 1989, he simultaneously received the Faculty Member of the Year Award from the Student Bar Association and the Annual Award for Outstanding Scholarship awarded by an outside review committee. St. Louis University, like many schools, had made the decision to create a separate track for clinical teaching, and in this day of tight budgets, I think it was a difficult bureaucratic decision to determine how to give Herb tenure given the way the slot was created.

It was truly a loss that Herb had to do his wonderful scholarship against the stream. I think that had Herb been in a tenure track position, he would have written more work comparable to the Yale article sooner, and would have had more confidence that what he was writing would be recognized as important legal scholarship.

The theme of Herb's brilliant article is also about bringing the voice of our clients into the academy to be heard. I conclude by quoting Herb who in turn brought to his readers the words of one of his clients from his days as a legal aid lawyer in Cairo.

I once had a client named Hattie Kendrick. She was a woman and an African-American, a school teacher and a civil rights warrior, spit upon, arrested, and tossed out of restaurants and clothing stores that did not "cater to the colored trade." She marched and spoke out for integration and against oppression. Her school fired her, but not before she had taught generations of black children in Cairo, Illinois, that participation in American democracy was their right and their duty. In the 1940's, she sued to win equal pay for black teachers, with Thurgood Marshall as her lawyer. And in the 1970's, she was a named plaintiff in a class action asserting the voting rights of black citizens in Cairo against a city electoral system rigged to reduce the value of their votes to nothingness. All she wanted was to cast a meaningful vote in a democratic election before she died—she was in her nineties, growing blind and weak. Such a woman. Such a story. And such a voice. Listen to how she discerns the problems of her town: "Too long have the two races stood grinning in each other's faces, while they carry the fires of resentment and hate in their hearts, and with their hands hid behind their backs they carry the unsheathed sword." . . .

This Article springs from the recurring disappointment and frustration I have felt after consultation with clients in cases presenting outrages that, in a phrase loved by my mother, cried out to heaven. I have represented and continue to represent these clients in civil rights cases, broadly defined. These are my clients: a young woman,

sexually abused as a child, forced to undergo unjustified strip searches that aroused the nightmares of her childhood. A black laborer finding his lunch in the toilet and racist threats in his locker. A gay man staring death from AIDS in the face and denied the only available treatment because of bureaucratic indifference and homophobia. A recovering drug addict holding his addiction at bay with the support of a group home, yet in jeopardy of losing that home when fearful neighbors complained to a cowardly city government.

My frustration and disappointment began when I reviewed the pleadings I drafted for them. I could barely see over the chasm separating what those clients told me about their lives and what I wrote to the court as factual allegations in the complaint—sterile recitations of dates and events that lost so much in the translation. . . .

I wondered how we, as lawyers, could plead the horror of wrong done on a mass scale. In reviewing the pleadings in other famous civil rights class actions, I found similar failings. This Article explores why we fail and wonders whether we can do better.¹⁸

Herb's description of his client, Hattie Kendrick, is a fit description of Herb himself and a fit conclusion to this essay:

Such a man.
Such a story.
And such a voice.

18. Eastman, *supra* note 5, at 765-67.