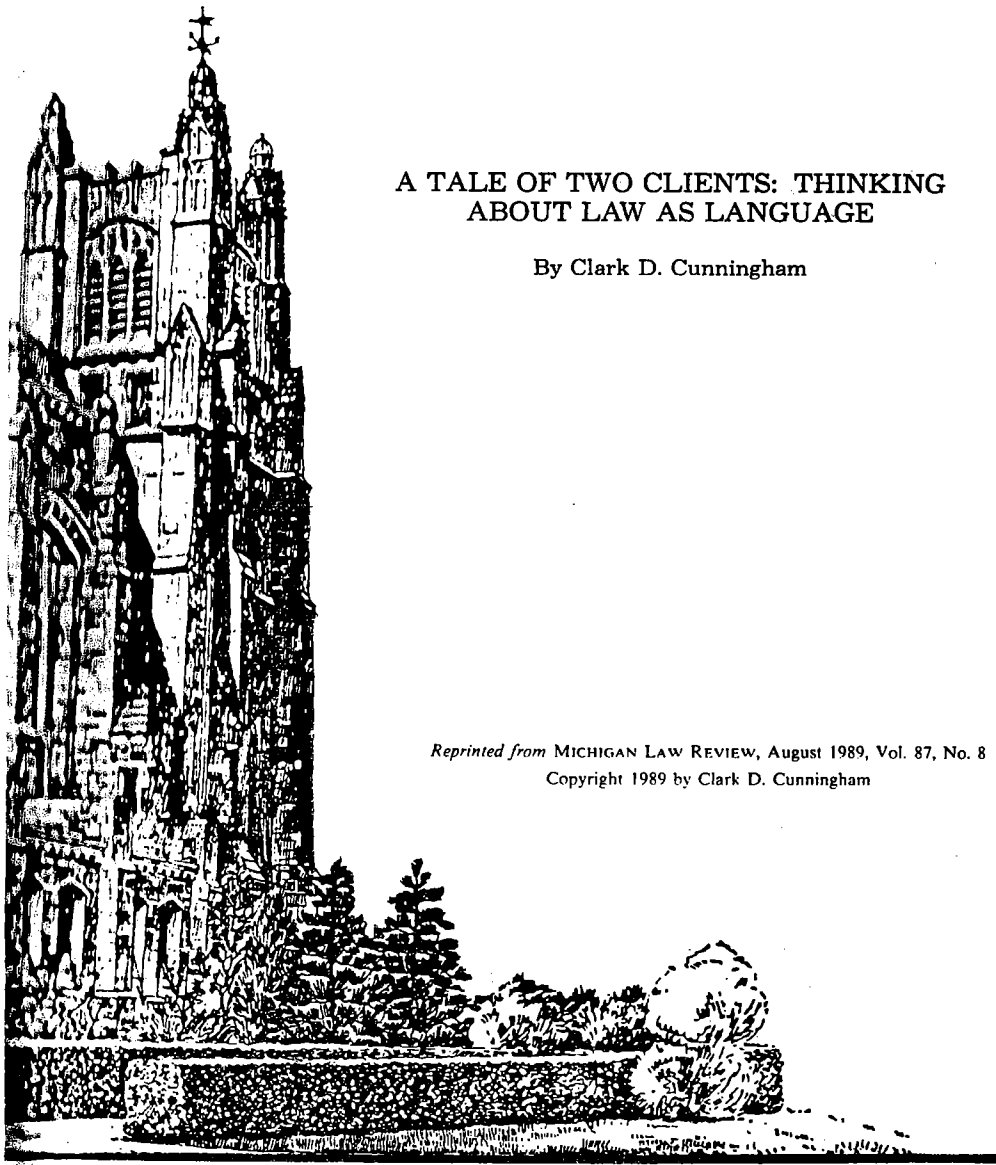


# Michigan Law Review

## A TALE OF TWO CLIENTS: THINKING ABOUT LAW AS LANGUAGE

By Clark D. Cunningham

Reprinted from MICHIGAN LAW REVIEW, August 1989, Vol. 87, No. 8  
Copyright 1989 by Clark D. Cunningham



## A TALE OF TWO CLIENTS: THINKING ABOUT LAW AS LANGUAGE

Clark D. Cunningham\*

### I. PROLOGUE: THINKING ABOUT STORIES AND TALKING ABOUT TALES

#### A. *True Stories*

This is a true story. It is actually three true stories. The article taken as a whole tells a story of my personal search for a new way of talking about the experience of being a lawyer, a quest which is leading me to think more and more about law as a kind of language and lawyering as a form of translation. Rather like a medieval romance, embedded within this story of a quest are two tales, about clients I have represented in the course of my clinical teaching.

As much as possible, both levels of narrative are presented in chronological order. At the level of the embedded tales, each case is presented as it developed. At the level of the story of my quest, I recount how this article was written. In creating this structure, combining embedded tales with passages of conceptual discourse, I try to recreate the dynamic relation between my lawyering experiences and my efforts to understand and talk about what they "meant."

The storytelling aspect of the article is thus intended to enact the model of mental activity presented in the conceptual passages: that concepts are constituted out of experience through the use of symbolic forms of representation, of which language is the most important, and, through language, can be altered in response to new experience. The concept of lawyering as translation is thus presented as rising out of my actual experiences as a lawyer and being tested through a process of talking about those experiences which requires a dynamic alternation between the evocation of experience and the imposition of a conceptual structure.

\* Associate Professor, Washington University School of Law. B.A. 1975, Dartmouth; J.D. 1981, Wayne State University. — Ed. Helpful comments and advice on this article have been received from James Boyd White, Frederick Schauer, Richard O. Lempert, Paul D. Reingold, M. Susan Carlson, William C. Jones, Stephen H. Legomsky, Ronald M. Levin, Charles R. McManis, Roy D. Simon, Daniel L. Keating, Milner S. Ball, Derrick Bell, David Gray Carlson, Steven L. Winter, Timothy A. Mahoney, Kim Lane Scheppelle, and Suellyn Scarnecchia. Many of the ideas expressed herein have been substantially influenced by the work of James Boyd White, and in particular his forthcoming book, *Justice as Translation*.

Because my quest is continuing, its true story continues as you read this article and, hopefully, write or call me in response. I am trying to come to know my own complex experience and to communicate with you about that experience. The act of communication is itself the central aspect of the knowing. As I speak, over and over again, to different audiences, and hear responses to my words, my own understanding changes and grows.

My quest begins by exploring the familiar phrase, "lawyering as representation." The central activity of lawyering is generally described as representing clients.<sup>1</sup> But I have found myself struggling to find a word other than "representation" to describe my work as a lawyer because the word is both overly familiar and deeply ambiguous.<sup>2</sup>

The word "represent" comes to English from Latin by way of the French language and originally seemed to mean simply to "re-present," to present again.<sup>3</sup> The slang description of a lawyer as a "mouthpiece" seems to capture this sense of "represent," by indicating that a lawyer merely re-presents what the client has told her. Yet obviously what the lawyer presents is rarely just a repetition of the client's words. Some kind of transformation occurs, but what kind? Represent can also be used to describe the transforming work of the artist. Can we think of the lawyer as an artist who creates a "representation" of the client in the same way that a sculptor creates a representation of a human body or a novelist creates a representation of a human life? This meaning of representation fails to capture at least my own feeling about being a lawyer because my practice requires me to assert that my representation of the client *is* the client in a way that the statue or the novel cannot be the human it portrays. Indeed, the strong sense of identity between client and lawyer is suggested by a third meaning of represent: to take the place of or to act the part of another person.<sup>4</sup>

The very familiarity of the phrase "representing a client" prevents us from recognizing the profound ambiguities created by describing lawyering as representation. In Parts II and III, I tell two true stories

1. According to Webster's Dictionary, "lawyer" applies to anyone in the law "profession" while "attorney . . . strictly applies to one transacting legal business for a client." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 478 (1967) [hereinafter WEBSTER'S].

2. Although the dictionary lists "advocate" as a synonym for "represent," other suggestive meanings are also included in the definition: (1) "to portray or exhibit [as in] art," (2) "to serve as the counterpart or image of," (3) "to act the part or role of," (4) "to take the place of in some respect," (5) "to act in the place of," (6) "to form an image of in the mind," or (7) "to apprehend by means of an idea." WEBSTER'S, *supra* note 1, at 728.

3. The Latin root is *repraesentare* from "re- + praesentare, to present." *Id.* at 728.

4. *Id.* at 728.

from my experience of representing clients. As I suggest in the titles of these stories, in one case the lawyer's work was reduced to mere "re-presentation," while in the other "the representation" of the client that "appeared" in court seemed to be an autonomous creation unconnected to the client's own words. Although both stories are therefore about "representation," in neither tale does the lawyer achieve the kind of identity with his client that seems to me to be at the core of what it means to be a lawyer: the achievement of two persons somehow speaking with one voice. Instead, in one story the client is struck mute while in the other the lawyer is silenced.

In Part IV, I tell how these two cases influenced my thinking and talking about the meaning of being a lawyer. I recount how these experiences forced me to try to relate language to the basic ways in which knowledge and experience interact, as explained in Part V. The final Part uses these ideas about language, experience, and knowledge to develop a concept of translation that can be used to rethink what it means to represent a client, for two persons to speak with one voice.

#### B. What Makes a Story True?

Before I begin telling my true stories, I want to linger a few moments over the phrase "true story." The concept of a "true story" seems intimately bound up with the activity of representing a client. Implicitly, every complaint, every brief, every opening argument, even every negotiation begins with the assertion, "this is a true story."<sup>5</sup> What the lawyer says is admittedly a story, shaped and crafted, but it is still *true*.<sup>6</sup> Indeed, much of what drew me to the practice of law in the first place — the dedication of intellect and imagination to creativity that takes place *in the world*, that arises directly from the world, and that could even change the world — might be thought of as the opportunity to tell stories which yet are true.<sup>7</sup>

Originally *all* stories were true because in the early Middle Ages the word "story" itself meant "[a] narrative, true or presumed to be true."<sup>8</sup> Story was used as we today use the word "history," which is

5. See FED. R. CIV. P. 11 ("The signature of an attorney . . . constitutes a certificate by the signer that . . . the pleading . . . is well grounded in fact . . .").

6. The enduring appeal of plays, movies, and television programs that either take place or climax in a courtroom probably arises from the popular sense that a trial reveals the inherent drama in "real life."

7. The meaning of "the world" in this sentence is problematic because it suggests that "the world" exists independent of the individual mind and yet can interact with the mind. See *infra* text accompanying note 31; see generally Part V.

8. 15 OXFORD ENGLISH DICTIONARY 797 (2d ed. 1989) [hereinafter OXFORD]. It is interesting to note that the earliest examples of this use given in the Oxford English Dictionary (1225 A.D.) are of "stories" from the Bible, which in the Middle Ages were thought to be the "truest"

not surprising since "story" is adapted from the Old French word "es-toire," which was in turn derived from the Latin word "*historia*." Its meaning then made a subtle shift to "[a] recital of events that have or are *alleged to* have happened."<sup>9</sup> This shift suggests a heightened awareness of the shaping hand of the narrator and emphasis on the narrator's credibility as the source of veracity. The next historical shift in meaning reversed the initial presumption of truth: "A narrative of real or, *more usually*, fictitious events, . . . a tale."<sup>10</sup> Finally, in colloquial use, the presumption of untruth became an assumption: "A euphemism for: A lie."<sup>11</sup> Thus, while "true story" would have seemed redundant to our medieval predecessors, the phrase now almost sounds like a contradiction in terms, an intriguingly paradoxical assertion.

The shifting meanings of the word "story" are mirrored in the changing fortunes of its twin, "history." In its earliest English usage, "history" meant simply narrative, tale, or story: a "relation of incidents . . . *either true or imaginary*."<sup>12</sup> It was only later that a "history" was "professedly true" and then came to mean specifically a "written narrative constituting a continuous, methodical record, in order of time, of important or public events."<sup>13</sup>

If we look to the common ancestor of both words, we may understand better why in the beginning there seemed to be no distinction between story and history. The Latin "*historia*" is adopted from a Greek word for "know" — "*ιστορια*," which means "a learning by inquiry . . . an account of one's inquiries, a narrative."<sup>14</sup> The ancient Greek writer, Herodotus, who is usually acclaimed as the first historian in the Western tradition, called his famous account of the relations between Persia and Greece a "History" because it set forth his personal investigations and inquiries.<sup>15</sup> The Greek word, *ιστορια*, thus merged our modern divergent notions of story and history into a single term defined as the product of an inquiring mind, seeking to create not "truth" but understanding. Therefore, this article, as a per-

narratives told, although in the modern era many are considered to be lacking in historical accuracy.

9. *Id.* (emphasis added). (first usage in 1375).

10. *Id.* at 798 (emphasis added) (first usage circa 1500).

11. *Id.* (first usage in 1697).

12. 6 OXFORD, *supra* note 8, at 261 (emphasis added) (first usage in 1390).

13. *Id.* (first usage in 1485). It appears that the methodological rigor of composition gave the contemporary meaning of history its presumptive veracity.

14. H. RIDDELL & R. SCOTT, GREEK-ENGLISH LEXICON 385 (7th ed. 1959).

15. I am indebted to J.B. White's superior knowledge of Greek language and literature for some of the information in this paragraph.

sonal account of my striving to create meaning out of experience, attempts to be a story in this most archetypal sense.

If I find "story" to be such an apt description of this article, why then have I called this a tale rather than a story? Originally, I was attracted to the alliterative rhythm of the title, and its echo of Dickens' famous novel. But, when I turned to the *Oxford English Dictionary* to look up "tale," I found it a fitting alternative to "story."

Unlike "story" and "history," which were brought into English by the French-speaking Norman invaders, "tale" is an older, Anglo-Saxon word related to "talk." A tale was originally simply "[t]he action of telling" or "[t]hat which one tells."<sup>16</sup> Tale then became "[a] story or narrative, true or fictitious."<sup>17</sup> It was only as "story" became severed from "history" that "tale" came to mean "a mere story, as opposed to a narrative of fact; a fiction, an *idle* tale; [and finally] a falsehood."<sup>18</sup>

By using "tale" instead of "story" for my title, I recall and emphasize the importance of language; of "talking" ("tale") as a way of "knowing by inquiry" ("historia"). Because my quest explores the complex relationship among experience, knowledge, and language, I have chosen in the title of this article to deliberately juxtapose talking about experience, "a tale," with thinking (about law as language) in a parallel construction to suggest a relationship between the two without explication. Like many of the other authors in this symposium, I turn to storytelling to say what I mean; indeed, I tell these stories to try to know what I mean.

## II. CREATING A REPRESENTATION OF A CLIENT: THE CASE OF THE SILENCED CLIENT

My clinical students, who work in teams of two, usually interview a prospective client without my being present in order to establish from the outset their primacy as the client's lawyers and to eliminate the distorting effects of my presence.<sup>19</sup> However, if the client consents, we videotape the interview. After the intake interview the student lawyers make a brief presentation to me describing the client and the "case" as they understand it, along with their recommendation as to

16. 17 OXFORD, *supra* note 8, at 579 (first usage in 1060). *Cf.* Dutch "*taal*" (speech), Old Norse "*tal*" (talk, speech, tale), Danish "tale" (speech, discourse). *Id.*

17. *Id.* (first usage circa 1200).

18. *Id.* (see usage dated 1529: "it is but a tale.").

19. Both this case and the one discussed in Part III come from my prior teaching experience at the University of Michigan Law School. The clinic procedures described are those followed in General Clinic I at that school.

whether we should represent the person. If we decide to take the case, soon afterwards we review the videotape to analyze the students' interviewing techniques and to check their initial impressions of the client and his story against a verbatim record.

In the "Case of the Silenced Client," our client was charged with the misdemeanor of Operating a Vehicle While Under the Influence of Liquor ("OUIL") and a companion per se violation of operating a vehicle with a blood-alcohol level in excess of 0.10%. When the students presented the case to me after the intake interview, they reported that the client admitted that he was guilty. They therefore assumed that the representation would involve routine plea bargaining with most of our energy focused on sentencing and obtaining a restricted driver's license.

The representation had an unusual complicating factor: the client's native language was Spanish and his ability to speak English was limited. Accordingly, we had arranged for a law student fluent in Spanish to attend the intake interview as a translator. As we reviewed the video tape, I noted that when the students asked the client, "What happened?" his first response was "*Yo soy culpable.*" The translator paused for a moment and then said, for the client, "I'm guilty."<sup>20</sup> The students confirmed that this exchange was the basis for their report that the client "admitted" he was guilty.

I was curious to find out why the client's words were translated as "I'm guilty," and so I sought out the translating law student. The translator confirmed my suspicion that the Spanish word used by our client, "culpable," was a close cognate of the English word bearing the same form. As a result, the client's statement could have also been translated: "I am culpable" or "I am blameworthy." Thus the client could have been saying something more like, "I feel bad about what I did," or "I accept personal responsibility for the consequences of my action." If the client's words had been given these latter possible translations, the students might well have reached a different conclusion about his admission of "guilt."

I first met our client myself a few days later when we went to court for his arraignment. The court file did not contain the police report or the results of the breathalyzer test our client told us he was given at the police station. The test results were important because different

20. Here, and throughout the remainder of this article, citations to the actual case file, pleadings, and other documents are omitted. I do this both because the relevant materials are, as a result of the attorney-client privilege, inaccessible for independent verification; and, further, because I believe that the formalities of law review citations to the facts cited in these tales would be inconsistent with the narrative style of the tales.

levels of blood alcohol bring into play both different statutory presumptions and different plea bargaining positions under the operating policies of the local prosecutor's office. We were also eager to see whether the police report corroborated our client's story that the test was administered despite his indicating to the police that he did not speak English. Because administration of the breathalyzer test requires consent, the police must read a *Miranda*-type statement of "chemical test rights" before giving the test. We thought there might be a good argument for suppressing the test results on the theory that our client did not give an informed consent.

We decided that our lack of necessary information made plea negotiations at the arraignment unwise. We therefore told our client, through the law student interpreter, that we recommended a plea of "not guilty." Our client said he did not understand and insisted that he was "guilty." At that point our case was called and we advised our client to "stand mute," which he did. When we told the judge that our client was "standing mute," he entered a plea of not guilty "on behalf of" the defendant, as is customary. It is because our client was thus "struck mute" in court that I call this the "Case of the Silenced Client."

Even though the client was silent, the judge, in effect, put words into his mouth: according to the record, he "pled" not guilty. The court (with our tacit connivance) "made up" a defendant who took the proper adversarial position so that the case could proceed. In this sense, the defendant who "appeared" in court was indeed only a "representation," an image projected by the institutional needs of the judge and lawyers.

I was intrigued and troubled by the gap between ourselves and our client over the word "guilty." On what authority, with what justifications, could we proceed to "represent" him if we did not understand what he meant by "culpable" and he did not understand what we meant by "not guilty"? It was while this experience was fresh in my mind that the next story took place.

### III. RE-PRESENTING A CLIENT: THE CASE OF THE SILENCED LAWYER

One day a local federal magistrate called our clinic to ask whether we would represent a prisoner who had a civil rights case ready to go to trial. The prisoner had litigated this federal lawsuit himself for several years, surviving two summary judgment motions brought by the defending prison officials. Early in the litigation he had filed a motion for appointment of counsel, but later fired the appointed counsel for

reasons not entirely clear from the record. On the day of trial, the judge had concluded the prisoner needed the assistance of counsel, adjourned the case, and asked the magistrate to contact us.

We accepted the appointment only after receiving and reviewing the extensive record, which included the transcript of an evidentiary hearing and several opinions on the summary judgment motions. Upon acceptance, we filed an appearance before meeting with our prospective client, contrary to our usual practice. Communication with the prisoner was difficult because he had been placed in solitary confinement in a high-security prison.

By the time we filed our appearance, a deadline was fast approaching for a hearing on the defendants' third motion for summary judgment. I discussed with the team of students whether we should try to meet with our client before filing a supplemental brief on the motion. The students understandably felt that filing the brief was the more urgent task and plausibly suggested that our first meeting with the client might go better if we had the finished brief to show him.

Our plan of action seemed for a time to work well. When the students met with the client for the first time, they gave him a copy of the brief and he seemed pleased with them and their work. However, at the next meeting, in court for the summary judgment hearing, the client showed the students a page in the brief where he had written "Wrong!" in the margin next to a sentence that stated: "Plaintiff's claim is that he was placed in segregation and deprived of good-time credits based on false misconduct reports and hearings of which he received no notice and was not permitted to attend." Several days after the hearing, our client mailed to the court a handwritten motion invoking the right of self-representation and asking the court to terminate our appointment to represent him. The stated ground for the motion was that "false/wrong claim and/or statement of fact has been advanced/made" by the appointed counsel, specifically citing the one sentence in the brief.

Because of the timing of our entry into the case, in preparing the brief and our trial strategy we had relied largely on the court's previous opinions as defining the factual and legal issues. "The case" as we thus understood it centered on our client's claim that several prison disciplinary hearings had been conducted in his absence. The key factual dispute was whether he had received notice of these hearings and refused to attend, as the prison officials claimed, or whether, as he contended, he learned of the hearings only afterwards when discipline was imposed. The sentence our client had marked as "wrong" in the brief reflected this understanding of "the case." I have placed "the

case" in quotation marks because, as we soon learned, "the case" that our client had in mind was different from "the case" we learned about by reading the court's opinions.

Of course, when we received the motion, the students and I went back out to the prison. Because another faculty member had supervised the summary judgment hearing, it was my first face-to-face encounter with our client.

We met in a kind of cage between the prison control center and the solitary confinement wing. The only chairs were welded together in a straight line, so I ended up squatting against the wall in order to look at my client while we spoke. Without the security of a desk and armchair, I felt somewhat naked and no doubt looked a bit foolish. It was, in retrospect, perhaps an appropriate posture for an unusual interview.

I found myself looking slightly upwards into the eyes of a very intense and determined man. He began by insisting that there was no need for a trial because there were "no factual issues." He kept saying that the defendant officials had "violated the eighth and fourteenth amendments" by disciplining him without legal authority. As we talked it became increasingly clear to me that he viewed "his case" not as a complaint about lack of notice but as an assertion that the entire prison disciplinary system was illegal. His central point seemed to be that the disciplinary system was not authorized by specific state statutes and regulations but was only based on administratively adopted policy statements and operating procedures. Although he agreed that he had said in his complaint (and still insisted) that he had received no notice of the hearings, he saw no need for a trial on that disputed fact issue in light of his more systemic attack on the legitimacy of the prison's entire disciplinary system.

We tried to accommodate his vision of the case with our trial strategy by suggesting that ours was simply an alternate theory of liability: even if the court would not accept his sweeping attack on the system, he might still prevail by showing that the defendants had failed to follow due process in his particular case by not notifying him of the hearings and by conducting them in his absence. He would have none of it. He did not want us to assert *our* theory of "the case" precisely because that theory was not *his* case, even though the events described in his *pro se* complaint gave rise to the claim both we and the court had assumed he was making.

My interview ended on a somber note. I asked the prisoner what he wanted us to do at this point. His terse reply: "Don't show up in court."

We did show up in court because the judge asked us to withdraw formally on the record, on the morning of trial. Our client reaffirmed in open court his desire to represent himself, but before the judge granted his request the judge attempted to review with our client what the issues would be for trial. He was surprised to hear our client assert that there was no need for trial but, despite admirable patience, the judge was unable to get our client to explain clearly the position disclosed in our interview with him.

At that point I felt placed in a very peculiar position. My client had told me in no uncertain terms that he did not want me to represent him, yet I felt a desire to help him make himself clear to the judge. But without a client to "speak for," it was I who "stood mute" in the courtroom. I realized that without a client I had no identity in that court, in that case. Nonetheless, I decided to speak.

I rose to my feet, but first addressed not the court but my erstwhile client. Turning to him, I explained how I felt, that I knew he did not want me to "speak for him" yet I thought it would help if I shared with the judge my understanding of what he had said in our interview. I told him to feel free to stop me at any point and asked him to listen carefully so that he could correct anything I said when I was done. I then faced the judge and stated my understanding of how my client's idea of his claim differed from the claim described in the court's earlier opinions and our brief, carefully choosing my words in an effort to make sure that my client could understand everything I said. It was a challenging experience, this effort to speak to the court in my client's voice rather than my own. At the conclusion, I turned to my client and asked him if what I had said was a fair statement of his claim. He looked slightly surprised but pleased and said, "yes, that's about right."

The judge then granted the request for self-representation and the student attorneys and I left.

By silencing his lawyers, our former client gained the right to speak for himself in court but, ultimately, he still did not feel he was heard. I am told that after we left the judge continued the dialogue with the plaintiff and eventually allowed him to proceed on his claim that the disciplinary policies were without legal authority.<sup>21</sup> Although the trial resulted in a judgment for the defendants, the judge did not treat the claim of systemic illegality as frivolous. In fact, the court

21. In the court's Memorandum Opinion and Order following the trial, the judge noted that the plaintiff "only clearly defined his claims when the trial began." Although this Memorandum Opinion and Order is a public record, I have omitted full citation to the case because that would reveal the identity of the client and thus potentially violate the attorney-client privilege.

noted that the challenged prison disciplinary policy had been invalidated by the state supreme court three years earlier<sup>22</sup> because it had not been promulgated through formal rulemaking in accordance with the state's Administrative Procedures Act.<sup>23</sup> Unfortunately for the plaintiff, the state supreme court's declaration of invalidity was not given retroactive effect<sup>24</sup> and plaintiff's claim related to discipline imposed before the state supreme court decision.

The plaintiff filed a motion for new trial. The "Argument" section of his brief stated: "The court has misconstru(ed)cted [sic] the facts in [the] complaint and the claims presented by plaintiff and too plainly failed to adjudicate same." Later in the brief he asserted: "For whatever reasons the [c]ourt obviously fail[ed]/refused to recognize the 8th and 14th Amend[ment] claims clearly stated in [the] complaint, [and] reiterated throughout Plaintiff[s] pleadings . . . and again in open court immediately after appointed counsel was dismissed for misrepresentation of Plaintiff's claims . . ." The judge responded by denying the motion, saying that he had "addressed the claims [plaintiff] stated at trial he wished to present."

Why did the prisoner doggedly insist even after my "re-presentation" and the trial that his claims were never heard? Did he simply fail to understand that the judge *did* hear his claims but rejected them? Or did both the judge and I still fail to understand what he was claiming? Whatever the reason, as at the conclusion of the first tale, a seemingly unbridgeable gap seemed to separate the judge and lawyers on one side and the client on the other.

#### IV. MIND THE GAP

##### A. *Living in Two Worlds*

The events described in these two tales occurred within the same thirty-day period at the beginning of 1989, the same thirty-day period during which I wrote the first draft of this article. The theoretical section of this article which follows was largely composed in the hours around dawn during that month. Indeed, parts were probably written on some of the same days that I consulted with students, met with clients, and went to court on these two cases. At the time, my life seemed split between two utterly different worlds: one silent, solitary, bounded by a sphere of lamplight with the world beyond barely visible in hushed shades of gray, and the other so hectic, so full of sound and

22. *Martin v. Michigan Dept. of Corrections*, 424 Mich. 553, 384 N.W. 2d 392 (1986).

23. MICH. COMP. LAWS §§ 24.201-.315 (1979).

24. *Martin v. Michigan Dept. of Corrections*, 168 Mich. App. 647, 425 N.W. 2d 205 (1988).

glare as to make my monastic contemplations of a few hours earlier fade like a dream. This article is quite literally my effort to connect these worlds: to make my contemplative life relevant to my life as a lawyer and to make my lawyering meaningful. My story of writing this article — in which my written words shuttled back and forth in my mind to weave a relationship between my hours of contemplation and action — could be seen as a metaphor for the theory described below of the dynamic relation between experience and knowledge, in which language plays a central role. Or perhaps the theoretical model set forth below is a metaphor for my life during those thirty days, attractive to me because it offers a way to unite those divided selves.

I did not at first see a connection between these cases and my early morning writing. Indeed, as I write this sentence several months and several drafts later, I still do not fully understand the relation between these cases and this article. As a storyteller, I am uncomfortable with the titles I have chosen for these tales and with the epilogues that appear at the end of each, uncomfortable because the titles and epilogues seem to reduce the significance of the stories by purporting to say "what they mean." The titles and epilogues treat these tales as if they were simple sketches to illustrate the conceptual discussions which precede and follow them. But these are true stories, and thus have greater vitality and richness than my efforts to categorize and characterize the persons and events I experienced.

### B. Redefining Reality

The titles and epilogues to these two tales represent my retrospective interpretation of the events in the two cases. At the time, during the thirty-day period, I was primarily aware simply of the gap between lawyer and client and, as a result, between court and client. The traveler on the London subway, the "Tube" or "Underground," hears a warning whenever a train pulls into a stop: "MIND THE GAP," intones a forbidding, mechanical voice. The warning causes the traveler to notice that the platform and threshold of the train car are not a continuous surface, that a narrow but potentially perilous gap separates the two. The tales of the mute client and the silenced lawyer served for me as such a warning; like the busy and preoccupied Tube traveler, I needed to be reminded that a deep gap can sever client from lawyer.

This kind of gap seems a common feature of lawyer-client relationships. Austin Sarat and William Felstiner are in the process of publishing the results of a monumental study of lawyer-client conversations. Their data consist of 115 tape-recorded conversations

taken from forty divorce cases observed over thirty-three months, in two sites from different states.<sup>25</sup> Their detailed study of these conversations shows a consistent pattern:

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.<sup>26</sup>

Indeed Sarat and Felstiner go so far as to suggest that the lawyers and clients seem to be dealing with two different divorces.<sup>27</sup>

Although I was not familiar with Sarat and Felstiner's study at the time of the two cases, almost the same point had come to mind when a sentence surfaced in my mind from the depths of my memory: "We don't care about what happened; we only care about what is going to happen." This sentence seemed to describe the arraignment in the Case of the Silenced Client: although the plea appeared to be a statement about what had happened (whether our client had committed a crime), as lawyers we only seemed to care about what was going to happen as a result of the plea. "Not guilty" was not a faithful description of our client's culpability, but rather only a rhetorical move in a verbal game in which the client was silent and largely powerless.

I recalled the sentence as the title of an article I had assigned for reading several years earlier to a class in legal ethics.<sup>28</sup> I then reread the article, which was based on a nine-month study by social scientist Carl Hosticka of lawyer-client interactions in two different law offices. The title was a direct quote from a conversation between Hosticka and one of the attorneys studied.<sup>29</sup> Hosticka concluded that the lawyers

25. Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC. REV. 93 (1986).

26. Sarat & Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC. REV. 737, 742 (1988) (footnote omitted).

27. Sarat and Felstiner make this suggestion by quoting a study by John Griffiths of Dutch divorce lawyers in which Griffiths observed:

[L]awyers and clients are in effect largely occupied with two different divorces: lawyers with a legal divorce, clients with a social and emotional divorce. The lawyers orient themselves toward legal norms and institutional practices, the clients toward the social norms of their environment. Clients go to lawyers because it is otherwise impossible to secure a divorce, not because they want to invoke the legal system as a regulatory and conflict-resolving institution.

Sarat & Felstiner, *supra* note 26, at 764 (quoting Griffiths, *What Do Dutch Lawyers Actually Do in Divorce Cases*, 20 LAW & SOC. REV. 135, 155 (1986)).

28. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOCIAL PROBS. 599 (1979).

29. *Id.* at 608.

studied often redefined "what happened" to their clients in order to change "what is going to happen":

"[W]hat happened" is not immutably fixed in an objective reality, but is a social construction based on experience and interaction. . . . [T]he primary issue may not be what happened to the client, nor what kind of trouble the client is in, but who has the power to say what happened and to define the kind of trouble. Indeed the power to define the client's problem is one tool professionals may use to induce client cooperation with their prescription of appropriate behavior. . . .

This control over the interaction is reflected in the official definition of reality that results from the interaction. . . . [P]ower is exercised through the definition of reality. . . .<sup>30</sup>

I found myself uncomfortable with Hosticka's assumption that lawyers are autonomous creators of meaning, not bound in any way to the client's account of "what happened." Nonetheless, both of my cases seemed to authenticate Hosticka's view: in the Case of the Silenced Client, by instructing our client to stand mute knowing that a not guilty plea would be entered, we "re-defined" our client's reality, to control what was going to happen; in the Case of the Silenced Lawyer, the client realized that the only way he could regain control over "his case" was to deprive his lawyers of the power to define "what happened."

I found myself focusing on Hosticka's initial premise: that "what happened" is not "fixed in an objective reality" but is rather "a social construction." The subtitle of his article, "Lawyer-Client Negotiations of Reality," is based upon this premise. The assertion that "reality" is socially constructed, negotiable, although familiar in the academic world,<sup>31</sup> would be startling to many of our clients. Indeed, the gap in both tales seems related to this point. The silenced client stood mute because in his view he was "really" guilty and it would be a lie to plead not guilty. My other client silenced me, claiming I had literally misrepresented his case. By constructing a different legal claim than his out of the same facts, I made a "false" statement.<sup>32</sup>

30. *Id.* at 599-600 (citations omitted).

31. Hosticka, in using the phrase, refers to P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966). Sarat and Felstiner use similar terminology. See Sarat & Felstiner, *supra* note 25, at 116-25 (referring to the "legal construction of the client"); Sarat & Felstiner, *supra* note 26, at 738 ("the idea of negotiating reality"). A similar assumption underlies some other contributions to this symposium. See, e.g., Delgado, *Storytelling for Opponents and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2415 (1989); Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2131-32, 2151 (1989); cf. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2229 (1989) (rejecting the view that meaning is simply social convention or results from unconstrained subjectivity).

32. Actually, the way that my prisoner-client wrote his own pleadings, although probably attributable to a kind of jailhouse "lawyerese," suggested an intriguing ambiguity. He repeatedly

Neither client seemed to think that "reality" was something that could be "negotiated" between him and his lawyer or with the court. "Something" really did happen and when their lawyer's story, told on their behalf to the court, failed to correspond to that reality, the lawyer ceased to "represent" them.

Yet the lawyer's work for a client cannot be limited to mere representation. New meaning is given to the "reality" the client brings to the lawyer and in some way that "reality" is altered. But how can the lawyer explain to the client, and to himself or herself, this process of creation and alteration without losing a sense that something really happened? How can the lawyer continue to care about what happened while creating what is going to happen? How can the lawyer tell a story that is nonetheless true?<sup>33</sup>

In trying to answer these questions I turned to thinking about the relationship between experience and knowledge and the relationship of language to both.

## V. THINKING ABOUT THE RELATIONSHIP BETWEEN EXPERIENCE AND KNOWLEDGE

### A. A Model of Mental Activity

For many years, my ideas about the nature of language and its relation to mental activity have been influenced by the theories of a neo-Kantian philosopher, Ernst Cassirer, and of linguist Jerrold Katz. What follows should still be read as part of a story, not as assertive discourse claiming that their theories must be accepted by the legal community so as to mandate a rethinking of the nature of law and lawyering. Nor is it even necessary to assert that these theories are authoritative as a matter of philosophy or linguistics.<sup>34</sup> I ask the

used an "and/or" construction which seemed to equivocate over the distinction between deliberate falsity and mere error, and between fact and legal theory. In his motion for self-representation he asserted that the sentence in the brief was a "false/wrong claim and/or statement of fact." Did he mean by this construction that my statement of what his case "was about" was a false statement of fact or merely a mistaken interpretation of legal theory? Even more intriguing was his creative spelling of "misconstrued" in his motion for new trial: "the court has misconstrued the facts in complaint and the claims presented by plaintiff." "Misconstrued" suggests simple misinterpretation of the facts and claims but his "alternate" word, "misconstructed" seems to accuse the court of *changing*, reconstructing, his facts and claims.

33. Hosticka's view of reality seems to deny the possibility of telling "true stories." The very definition of "true" assumes that there is an objective reality "out there": "true: . . . in accordance with the actual state of affairs." WEBSTER'S, *supra* note 1, at 952. But if "what happened" is mutable or negotiable, then "true story" collapses simply into "story" because there would be no "actual state of affairs" against which the story could be verified.

34. For example, the cognitive theories described by linguist George Lakoff in G. LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987), challenge and provide very interesting alternatives to the model discussed *infra*. See, e.g., *id.* at 205 (critiquing the use of "semantic markers" to represent meaning).



reader to judge this theoretical section, if at all, in the same way that any part of a story might be judged: is it understandable in its own terms, does it illuminate other parts of the story, and is it meaningful in terms of the reader's own experience?<sup>35</sup>

From Cassirer I have learned about 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 pulses from the sense organs. This is the lowest level of animate being; pure sensation can evoke 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. This space in turn possesses a coherent unity that cannot possibly be the mere sum of the visual, motor, and tactile sensations presented at that particular instant.<sup>36</sup>

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 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, then formalizes and stabilizes them. If we "call" something "blue," even in our mind, we select one element out of the complex of perceptual experience (focusing on hue rather than intensity or pattern) and identify it as the same element experienced in relation to other objects.<sup>37</sup>

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 ob-

35. One of the attractions of narrative as compared to traditional academic discourse is its noncoercive character; the narrator invites the reader to share and independently evaluate an experience instead of insisting that the reader agree with her assertions. See Delgado, *supra* note 31, at 2415, 2434-35, 2439 n.83; White, *What Can a Lawyer Learn from Literature* (Book Review), 102 HARV. L. REV. 2014, 2018 (1989).

36. E. CASSIRER, *I PHILOSOPHY OF SYMBOLIC FORMS* 100-01 (R. Manheim trans. 1953).

37. *Id.* at 281.

jectifying 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 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. Under this model, "reality," as we know it, is neither simply "out there" nor merely a social construction.<sup>38</sup>

### B. *Seeing Through the Lens of Language*

A recent experiment by a team composed of linguist Paul Kay and anthropologist Willett Kempton vividly demonstrates how something as seemingly "real" as the perception of color can be affected by language.<sup>39</sup> English has eleven basic<sup>40</sup> color terms: black, white, red, yel-

38. My rather simple epistemological model resembles in many ways Steven Winter's experientialist approach, which I find very congenial. See Winter, *supra* note 31, at 2230-55; Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989) [hereinafter *Transcendental Nonsense*]. Although Winter agrees that "acquisition of a particular language mediates further interactions with one's world," *id.* at 1141, his approach emphasizes, instead of language, the idea of "idealized cognitive models," which are often grounded in pre-linguistic bodily experiences, as the primary means of creating and organizing concepts, including legal concepts. *Id.* at 1152-59.

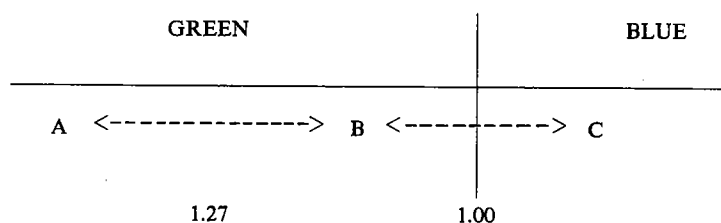
39. See Kay & Kempton, *What Is the Sapir-Whorf Hypothesis?*, 86 AM. ANTHROPOLOGIST 65 (1984) (discussed in G. LAKOFF, *supra* note 34, at 330-34). In relying on the Kay-Kempton experiment as an example of my model, I am departing from my practice of telling the story of the writing of this article in the sequence in which the writing took place. Steven Winter introduced me to this very interesting data both by sharing with me a draft of his article, *Transcendental Nonsense*, *supra* note 38, at 1136-41, and by drawing my attention to the Kay-Kempton experiment during the first day of the symposium conference. In an earlier draft of this article prepared for the conference, I had used as my example at this point an account by anthropologist Godfrey Lienhardt about the Dinka, a cattle-herding people of the Sudan. According to Lienhardt, the Dinka have developed a highly elaborate vocabulary to describe the various color configurations found in the hides of the cattle around which their daily existence revolves. This vocabulary unifies pattern, color, and shade in a way very different from English. The Dinka then use the words that describe their cattle for other visual phenomena such as the appearance of the night sky. Lienhardt concludes:

The Dinkas' very perception of colour, light, and shade in the world around them is in these ways inextricably connected with their recognition of colour-configurations in their cattle. If their cattle-colour vocabulary were taken away, they would have scarcely any way of describing visual experience in terms of colour, light and darkness. G. LIENHARDT, *DIVINITY AND EXPERIENCE* 12-13 (1961). Although Lienhardt's description also illustrates my model, the Kay-Kempton experiment makes use of more recent cognitive theory and has the virtue of experimental validation.

40. Linguists define a basic color term as (1) consisting of only one morpheme ("green" vs. "dark green" or "grass-colored"), (2) referring to a color not contained within another color ("red" vs. "scarlet"), (3) not restricted to a small number of objects ("brown" vs. "blond"), and (4) commonly and generally known ("yellow" vs. "saffron"). G. LAKOFF, *supra* note 34, at 25.

low, green, blue, brown, purple, pink, orange, and gray.<sup>41</sup> Surprisingly, some languages have as few as two basic color terms; for example, the Dani, a people of New Guinea, use the single word "mili" (which might be translated "dark-cool") to describe what we call black, green, and blue and, "mola" ("light-warm") to describe white, red, and yellow.<sup>42</sup> The Kay-Kempton experiment focused on a language difference between English and Tarahumara, a language spoken in northern Mexico. English speakers consistently identify objects radiating light waves at a wavelength of 485 nanometers as "focal blue" (that is, the best example of the color "blue") and objects at a wavelength of 510 nanometers as "focal green" (the best example of green). Tarahumara does not have two different basic color terms for blue and green; instead, the single word *siyoname* can be applied to objects at wavelengths of both 485 and 510 nanometers.

The Kay-Kempton experiment was designed to test whether the fact that English and Tarahumara speakers *talked* about blue and green differently affected the way they *thought* about these colors. In the first part of the experiment, the subjects were shown different arrays of three color chips and asked to point out which of the three chips was most different in color from the other two. For example, the subjects were shown chips *A*, *B*, and *C*. *A* was closer to the focal green wavelength, *C* was closer to the focal blue wavelength, and *B* was in between *A* and *C* in terms of wavelength. When measured by the way the human eye senses wavelength differences, there was a greater color difference between *A* and *B* than between *B* and *C*. However, both *A* and *B* fell within the range of wavelengths that English speakers call "green" while *C* fell within the wavelength range for "blue." The chart below illustrates this relationship, taking the wavelength color distance between *B* and *C* as the standard measure = 1.00.



The Tarahumara speakers "correctly" identified *A* as the most different while the English speakers identified *C* as the most different. Tests

41. *Id.*

42. *Id.* at 40.

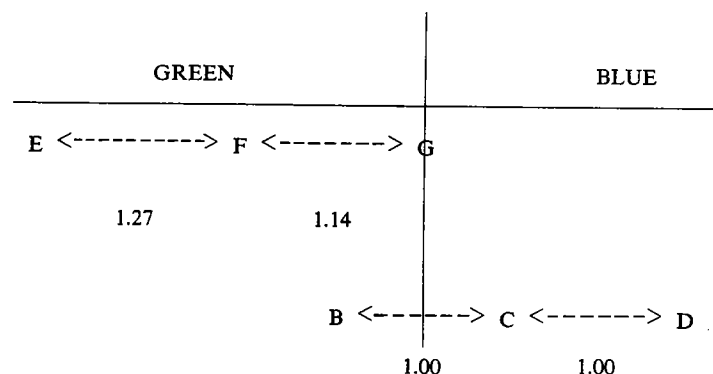
with other arrays verified that the English speakers consistently identified a chip as more "different" if it had a different basic color name in English even though it was actually closer in wavelength characteristics to the intermediate chip than was the third chip.<sup>43</sup>

The design of the Kay-Kempton experiment ruled out the possibility that the actual vision — at the sensation level — of the English-speaking subjects was distorted.<sup>44</sup> Kay and Kempton therefore hypothesized that the English speakers were using what they called "the name strategy." Faced with a difficult judgment to make among objects with subtle hue differentiations, the English speakers resorted to the difference in basic color name.<sup>45</sup> The Tarahumara speakers did not have this "name strategy" available to them because all three chips would be given the same basic color name in their language; hence, their judgments of color differences were not skewed.

Kay and Kempton found an interesting response when they discussed the name strategy explanation with their English-speaking subjects:

When we present the crucial triples of colors to sophisticated English-speaking subjects, describe the name strategy to them, and ask them to suppress any tendency to use this strategy, they make the same subjec-

43. Two other test arrays can be represented using the same chart format:



In the *E-F-G* array, the English speakers identified *G* as most different while the Tarahumara speakers "correctly" identified *E* as the chip most different from the other two. In the *B-C-D* array, the *B-C* and *C-D* distances were the same in wavelength characteristics, yet English speakers identified *B* as much more different. (Tarahumara speakers identified *B* as slightly more different; see Kay & Kempton, *supra* note 39, at 71 for an explanation of this result.)

44. *Id.* at 72.

45. Kay and Kempton portray this strategy as an internal conversation: "It's hard to decide here which one looks the most different. Are there any other kinds of clues I might use? Aha! *A* and *B* are both CALLED *green* while *C* is CALLED *blue*. That solves my problem; I'll pick *C* as most different." *Id.*

tive judgments as naive subjects; further, they report that the chip selected just "looks" the most different, regardless of the name. Thus, if the name strategy operates for English speakers, it operates at a level that is not only out of consciousness but cannot be easily brought under conscious control.<sup>46</sup>

Kay and Kempton did, however, develop a second test that seemed to verify the presence of something like their hypothesized name strategy. In the first test, subjects had been shown all three color chips at the same time without any suggestion from the tester as to the color of any of them. The second test differed in two respects. First, the array was placed in a box with a sliding cover that allowed, for example, the *A-B* and *B-C* combinations to be observed in separate compartments simultaneously while preventing a direct *A-C* comparison. Second, the tester engaged the English-speaking subjects in the following conversation during the testing:

Experimenter exposes pair (*A,B*). "You can see that this chip (points to *A*) is *greener* than this chip (points to *B*)." (All subjects readily agreed.) Experimenter then slides cover so that *A* is covered and *C* exposed along with *B*; that is, the pair (*B,C*) is now exposed. "You can see that this chip (points to *C*) is *bluer* than this chip (points to *B*)." (Again all subjects agreed without problems.) "Now," experimenter hands stimuli to subject, "you may slide the cover back and forth as often as you like. I'd like you to tell me which is bigger: the difference in *greenness* between the two chips on the left or the difference in *blueness* between the two chips on the right."<sup>47</sup>

In this test, the vast majority of the English-speaking subjects "correctly" identified the *A-B* difference as larger than the *B-C* difference, in contrast to the opposite result in the first test. The apparent explanation is that because the dialogue with the tester had already established in the subject's mind that chip *B* was *both* bluish *and* greenish, the subject was able to focus on the degree of difference with the greener chip, *A*, and the bluer chip, *C*, without being influenced by her linguistic "knowledge" that *A* and *B* were the "same" color.

The Kay-Kempton experiment has been taken as important empirical evidence to refute the common view that "language plays no cognitive role other than to provide labels for concepts" and to show, "if only for one small case, that language is part of real cognition."<sup>48</sup> For purposes of my story, it is not necessary to make this strong claim.<sup>49</sup>

46. *Id.* at 72-73.

47. *Id.* at 73 (emphasis added).

48. G. LAKOFF, *supra* note 34, at 333.

49. For example, it is not entirely clear to me how Kay and Kempton were able to distinguish the different mode of viewing the three chips (all at once in test one and only in *A-B* or *B-C* pairs in test two) from the linguistic cuing to reach their conclusion that they had successfully

It is enough that the Kay-Kempton experiment provides a very clear and simple illustration of how language can shape the concepts we have about experience and thus actually affect what we know.

The Kay-Kempton experiment also illustrates a key aspect of the Cassirerian model: that the constitution of knowledge out of experience (like the constitution of experience out of sensation) involves a selection and reduction process. Not all elements can be retained when a given content of experience is conceptualized. Thus the English speakers "lost" some of their perception of hue difference between color chips *A* and *B* when they "named" them both "green." The mind must develop a symbolic form to represent the objectified experience which can be retained in consciousness and applied to the next experience. Just as we cannot experience sensory input without first constituting it by use of the forms of intuition, we cannot know experience except by constituting it through use of symbolic forms of representation. The English speakers "knew" more about the difference between focal green and focal blue than the Tarahumara speakers because they could use two distinct basic color terms to think about the difference. Yet this greater conceptual sophistication blinded them to subtleties of perception that their vocabulary could not encompass. The price we pay for entering the realm of knowledge is that we must leave behind the rich particularity of experience.<sup>50</sup>

### C. Constituting Meaning Through Language

I found Cassirer's model of mental activity helpful in thinking about the semantic theory of Jerrold Katz.<sup>51</sup> In this theory, semantic analysis of meaning begins with the *sense* of a word consisting of a set of *semantic markers* which represent constituent concepts; this set is called the *reading*.

For example, a partial reading of the word "chair" could be represented as follows, where each pair of parentheses contains a semantic marker:

shown the influence of the "name strategy." However, because I am using their experiment only for illustrative value, I have not attempted to resolve this doubt.

50. See E. CASSIRER, *supra* note 36, at 108. ("Measured by the limitless richness and diversity of intuitive reality, all linguistic symbols would inevitably seem empty; measured by its individual concretion, they would inevitably seem abstract and vague. If language attempts to compete with sensation or intuition in *this* respect, it cannot but fall far behind."); see also *id.* at 113 ("[T]he richer the *symbolic content* of cognition . . . becomes, the more its *essential content* must diminish.")

51. For a more complete account of this semantic theory and an application of semantic analysis to a complex problem of legal interpretation, see Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 Iowa L. Rev. 541 (1988).

(Object), (Physical), (Non-living), (Artifact), (Furniture), (Portable), (Something with legs), (Something with a back), (Something with a seat), (Seat for one)<sup>52</sup>

The reading of a word also contains, in addition to semantic markers, features called *selection restrictions* that specify the conditions under which a word can be combined with other words to form a *derived reading*, the complete sense of a syntactically complex expression like a sentence. For example, the verb "yawn" contains in its reading the selection restriction <X is animate><sup>53</sup> where "X" represents the subject of the verb. This selection restriction prevents "chair" and "yawn" from combining to form a derived reading because "chair" does not contain the marker (animate). As a result, the expression "The chair yawned" is readily identified by a native speaker of English as "sounding wrong." By contrast, the expression "Throw me that chair" "sounds right" in part because "chair" does contain the semantic marker (object) which is required for combination with the verb "throw."

Selection restrictions do not merely block the formation of derived readings. They also can contribute to the meaning of an expression. For example, selection restrictions can *clarify* the meaning of an *ambiguous*<sup>54</sup> word, such as "school." In the expression "There is no school now," the hearer does not know whether a physical structure has disappeared or whether an educational program is simply not in session. However, the expression "The school burned down" does not suffer from such an ambiguity because a selection restriction in the verb "burn" selects "physical structure" and rejects "educational program," thus supplying an element of meaning absent in the first, ambiguous expression.

Selection restrictions can also *confer* meaning on *vague*<sup>55</sup> words, such as "thing." In the expression "I do not like that thing," the hearer cannot tell from the expression alone whether or not "thing" is a physical object. But in the expression "Throw me that thing," the hearer does know that "thing" is a physical object because the selec-

52. J. KATZ, SEMANTIC THEORY 40 (1972).

53. Parentheses — ( ) — identify semantic markers; angled brackets — < > — are used to identify selection restrictions.

54. In this semantic theory, ambiguity is defined as the presence of at least two distinct readings for the same word or expression. *Id.* at 49; see also J. HURFORD & B. HEASLEY, SEMANTICS: A COURSEBOOK 121 (1983).

55. A vague word or expression differs from an ambiguous one because the difficulty in understanding its meaning results from the absence of necessary semantic information in its reading rather than the problem of choosing between multiple possible readings. See G. DILLON, INTRODUCTION TO CONTEMPORARY LINGUISTIC SEMANTICS 123 (1977) (distinguishing vagueness from ambiguity).

tion restriction in the reading of "throw" imposes that semantic feature on "thing."

This semantic theory provides a way of describing how the form of language can constitute concepts out of experience.

Let us assume that a person who has never seen or heard of a chair is presented with a chair by a native speaker of English. She has a perceptual experience in which her various sense impressions are organized by the basic forms of intuition. Her resulting perception may be similar to that of the native speaker, but her knowledge is different. Unlike the native speaker, she does not *know* that she is seeing a chair. Even if she asks the native speaker, "What is this?", and is told that "This is a chair," she still lacks complete knowledge about the concept represented by the verbal symbol, "chair." This single experiential referent can only be the beginning of her knowledge of the meaning of "chair." Not only is she unable to distinguish a chair from a bench, couch, or stool, but more fundamentally she cannot know at what level of generality the word "chair" is tied to the experiential referent. How is she to know that "chair" is more specific than "object," "artifact," or "furniture"? In all likelihood, she will come to know what "chair" means by hearing and speaking the word in a variety of contexts. Her experience is constituted into knowledge by the operation of the form of language, most importantly the interaction of semantic markers and selection restrictions.

Each time selection restrictions block or create a derived reading, a complex interlocking of conceptual constructs<sup>56</sup> is generated. Just as selection restrictions can project meaning on a vague word like "thing," they will make an unfamiliar word (such as "chair" to our hypothetical inquirer) increasingly meaningful as it is used in varying contexts. Obviously, one must first have some semantic competence in the language being used for selection restrictions to function, but each use builds this general competence as well as knowledge of the conceptual structure of individual words.

It seemed to me that this semantic theory integrates well with Cassirer's model of the relation between experience and knowledge.<sup>57</sup> Se-

56. Each word used as a semantic marker could itself be given a reading that discloses further component concepts. Katz suggests an analysis of "Object" in almost Kantian terms: "an organization of parts that are spatio-temporally contiguous which form a stable whole having an orientation in space." J. KATZ, *supra* note 52, at 40.

57. Katz is a rationalist; he believes that the basic concepts which are the foundation for the markers are innate within the mind and simply awakened by the stimulus of sense experience. See J. KATZ, *supra* note 52, at 12-18; J. KATZ, THE PHILOSOPHY OF LANGUAGE 240-82 (1966). However, the process by which Katz tests the proposed reading is by using the word in a variety of contexts. By placing "chair" with a verb that requires an animate subject he verifies that one feature of "chair" is non-living. This process, because it can be verified against any sample of

lection restrictions both impose a conceptual structure on undifferentiated experience and reduce that experience by eliminating some aspects of the experience in order to constitute other aspects into a meaning. The process of learning the meaning of "chair" requires both the organization of perceptual experience according to highly abstract conceptual principles, such as whether the experiential referent is animate or an artifact, and the elimination of such parts of the experience as the color and texture of the perceived object, which are not among the semantic markers of "chair."

One significant result of the process of constituting meaning out of experience through the semantic form of language is that the sense of a word is necessarily less rich than its underlying experiential referents. Even the most complete reading for "chair" could not fully replicate any given experience of perceiving a chair. Just as a person who has seen a chair may not know what a "chair" is, a person who knows the meaning of "chair" has not thereby experienced the perception of a chair.

## VI. LAW AS LANGUAGE, LAWYERING AS TRANSLATION

### A. *Thinking About Translation*

This model, this way of talking about the relation between experience and knowledge, helped me to think about the representation of a client as a series of dialogues: both between the client and lawyer and between the lawyer and other legal actors such as opposing lawyers and a judge. Each dialogue replicates the internal mental dynamic between experience and knowledge in which language both constitutes concepts out of experience and reconstitutes experience by use of concepts. Thus, when a client and lawyer talk about "what happened," the client's initial knowledge of her own experience is shaped by the vocabulary she uses to express it. In trying to communicate her experience to her lawyer, the client typically is struggling herself to organize, structure, and relate that experience to other experiences she has *known* and thereby to understand herself what happened. Her inability to *speak* the language of the law prevents her from *knowing* her experience as a legal event. This desire for knowledge is often expressed in the question, "Do I have a case?" As the lawyer attempts to "make a case" out of the client's lay narrative, there is indeed a transformation of "reality," but only at one level, the level of knowledge. The lawyer cannot change the client's raw memories of the ex-

native speakers, provides an empirical base to his analysis. But from a Cassirerian perspective, the "testing" process can also be seen as the epistemological origin of the concept.

perience but can and indeed must alter the client's knowledge of "what happened" by reconstituting that experience into a different symbolic form.

If law is seen as a language, then the lawyer becomes a translator. Unlike "re-presentation" and "creating a representation," the idea of translation captures that elusive sense of two persons speaking with one voice. If language is intimately bound up with the way we think about experience, then talking about experience in a different language necessarily entails knowing that experience in a somewhat different way. Thus the translator must give new meaning in the process of translation, yet at the same time the translator strives to speak, not as herself, but as another. The translator is faced with the same kind of gap as the lawyer, a gap marked by language.

This idea of lawyering as translation developed out of a mix of experiences during that thirty-day period split between early morning philosophical musings and daytime lawyering. At the time I was reading a draft of the concluding chapter of James Boyd White's forthcoming book, *Justice As Translation*,<sup>58</sup> in which he suggested that the activity of translation is at the center of law.<sup>59</sup> I was suddenly struck by the way that the "Case of the Silenced Client" functioned as a powerful image of lawyering as translation. It occurred to me that the English-Spanish language barrier only highlighted a gap that would have existed even if our client spoke English. Just as we were not sure what our client meant when he said he was "culpable," he did not understand what we meant when we said he was "not guilty." In order to understand what we meant by "not guilty," the client would need at a minimum to know about the presumption of innocence, the procedural role of arraignment, the elements of the two different criminal charges against him, the possibility of suppressing key evidence, and the effect of such suppression on the state's ability to carry its

58. J.B. WHITE, *JUSTICE AS TRANSLATION* (forthcoming).

59. This thesis is most thoroughly developed in the final chapter of White's yet-to-be published book. *Id.* However, the metaphor of translation pervades White's earlier work. See, e.g., J.B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 36 (1985); White, *Thinking About Our Language*, 96 *YALE L.J.* 1960, 1979-83 (1987). Although my thinking about the law and lawyering has been significantly influenced by J.B. White, since my first year of law school when I wrote a paper entitled "The Language of Law" for a memorable seminar he taught, his views of law as language and lawyering as translation have rather different epistemological foundations than do mine. As discussed at length in his forthcoming book, White sees translation as, in an important sense, impossible. The translator thus must become a kind of poet, creating a new text in a second language, in response to the text in the first. He and I both agree that translators have a duty of fidelity to the original text, as lawyers have to their clients. However, for him there is no language-free reality and he resists a dichotomy of "concepts" and "experience." See *id.* at 1965-73. Therefore, he would evaluate a translation, like a representation, as to whether it "does justice" to the original, relying on moral and aesthetic values, whereas I would emphasize the constraints of experience, concepts, and language.

burden of proof. In many ways, when the lawyer says "not guilty," the lawyer is translating from ordinary English as much as our interpreter interpreted our client's Spanish "culpable" as "guilty" in English.

While the Case of the Silenced Client made me realize how meaning can be lost in translation, another experience during those thirty days revealed how meaning is also created by translation. I happened to see the English-subtitled version of an outstanding Indian film, *Salaam Bombay*, which tells the story of a kind of modern-day Oliver Twist surviving on the streets of Bombay. One scene shows an older boy fleecing an American tourist by selling some adulterated cocaine. As the seller recounts his successful scam to the admiring protagonist, he refers to the tourist scornfully as a "ferenghi," which the subtitle translates as "white boy." Thanks to several stays in India, I knew enough Hindi to be somewhat startled by this translation. "Ferenghi" is translated in the standard dictionary as "foreigner." But as I thought about the history and usage of "ferenghi" and the context of the film, "white boy" seemed a better translation. "Ferenghi" was the word used by the Indians to refer to the English when India was a British colony. "White boy" therefore seemed better than "foreigner" to express the feelings of a formerly oppressed people toward a representative example of their former oppressors. But as I thought even further, I realized how that translation had (literally) colored my impressions of the film. The translated subtitle led me to look at the experiences of street urchins in Bombay as if they were black children in New York, thus imposing on a very different culture and social setting the unique relationship between black and white Americans.

The subtitle writer for *Salaam Bombay* was forced to add and alter meaning because no English word means exactly what "ferenghi" means to an Indian. As a result, I saw a *different* movie than the original because the change in language changed the viewer's experience of the film, even though the "actual" sights and sounds remained unchanged.

As I thought about how seeing this movie revealed to me the subtlety and power of translation, I recalled that the textbook I used in the trial advocacy component of our clinical course suggests that a lawyer's presentation of a case in court be thought of as directing a film.<sup>60</sup> Like a director, the trial lawyer takes raw, unedited material and turns it into coherent and compelling narrative by organizing, editing, and focusing. This illustration, however, assumes that the trial

60. T. MAUET, FUNDAMENTAL OF TRIAL TECHNIQUES § 4.2 (2d ed. 1988).

lawyer is not also writing the script, for of course under conventional mores of practice the lawyer who "puts words" in the mouths of his witnesses deserves blame, not praise. But, I thought after seeing *Salaam Bombay*, what if we alter the metaphor and think of the lawyer as writing subtitles to a foreign film?

Although the subtitle writer of *Salaam Bombay* was forced to change meaning, this translator no doubt felt constrained among the choices of English words to use. If indeed the more novel choice of "white boy" was a "better" translation than "foreigner," that wise choice was made possible only because the translator not only knew Hindi and English well, but also understood both Indian and American urban street culture, and further understood a great deal about the characters as they "lived" in the film.

But how did the translator of *Salaam Bombay* come to understand both what "ferenghi" meant to the film characters and what "white boy" would mean to the American audience, and how could he or she "know" that the meaning created by the translation was a "fair representation" of what was said in Hindi? These questions went to the center of my thinking and writing during the next several months. The metaphor of lawyering as translation seemed apt to me and to many who read the first two drafts of this article, but other readers did not find it helpful and almost all had difficulty understanding exactly how lawyering was like translation. This difficulty arose from my own problems articulating why the metaphor was apt. I finally decided that my idea of translation was too vague and abstract, which is not surprising since I have no personal experience as a translator. Therefore, to try to come to know better what I meant by translation, I returned to a kind of experience. I made up the following two stories about translation using as raw material the experiments of Kay and Kempton.

#### B. *The Stories of Yolanda*

Imagine the following story. Yolanda has just returned to New York from a trip to northern Mexico, where she bought three different tiles, each identical except for differing shades of color, ranging from green to blue (corresponding to color chips *A*, *B*, and *C* in the Kay-Kempton experiment). Her friend Jane greatly admires the tiles for their unusual colors and wants to order two dozen of one color for a house she is building. Yolanda offers to place a long-distance telephone call to Maria, the person in Mexico who sold her the tiles. Yolanda is fluent in English and Tarahumara. Maria speaks only Tarahumara and Jane only English.

*Yolanda:* Maria, good morning. Do you remember the three tiles you sold me last week?

*Maria:* Certainly, in fact I have my store samples of all three in front of me right now.

*Yolanda:* Great. Well I am with a friend, Jane, who would like to order some of your tiles.

*Maria:* Fine. Which types of the three tiles does she want and in what quantity?

*Yolanda:* Jane, which types of the three tiles do you want and in what quantity?

*Jane:* I want two dozen of the blue tile.

*Yolanda:* Maria, she wants two dozen of the, uh, *siyona* tile.

*Maria:* Yolanda, that doesn't tell me anything. All three tiles are *siyona*.

*Yolanda:* Jane, she needs more information. She says that all three tiles are, well, the same color.

*Jane:* That doesn't make any sense. Obviously one tile is blue and the other two are green. She must have a different set of tiles in front of her.

*Yolanda:* Jane, no, she told me she has three samples in front of her which are the same as these tiles here. You need to know that in Tarahumara, the language Maria speaks, the same word — *siyona* — is used for both blue and green.

*Jane:* Well, that's just a semantic difference. She still must know that one tile is clearly a different color than the other two.<sup>61</sup> Ask her if she sees that two of the tiles are more similar in color.

*Yolanda:* Maria, do you see that two of the tiles are more similar in color?

*Maria:* Yes.

*Yolanda:* Jane, she says yes.

*Jane:* Well, then I want two dozen of the other tile.

*Yolanda:* Maria, Jane wants two dozen of the other tile.

*Maria:* Fine, I'll send them right away.

If the behavior of Jane and Maria in this story conforms to that of the test subjects in the first Kay-Kempton experiment, then Maria will send to Jane two dozen tiles the color of chip *A* (the "greener" of the chips *A* and *B*) even though Jane thought she ordered tiles the color of chip *C* (the "blue" chip). Maria will have "correctly" perceived that

61. Jane's response corresponds to the statement of the English-speaking subjects of the first test in the Kay-Kempton experiment who insisted that chip *C* just looked the most different, even after being apprised of the "name strategy." See *supra* note 46 and accompanying text.

the two tiles which are "more similar in color" are those corresponding to *B* and *C* because her vocabulary has not led her to think of *B* and *C* as different colors; therefore she will have sent tile *A*. When Jane receives the two dozen tiles, she is likely to assume that: (1) Yolanda mistranslated what she said, (2) Maria misunderstood Yolanda's translation, or (3) Maria has poor color vision. If she behaves like the English speakers in the Kay-Kempton experiment, it will not occur to her that she might be "wrong" about which tiles are more similar in color.

This story seems to illustrate the same kind of gap as the two tales of the silenced client and the silenced lawyer. Jane and Maria each seemed trapped in their different languages and any effort by Yolanda to speak for either results in "misrepresentation." The outcome is blamed on a "language barrier."<sup>62</sup> Yolanda seemed to have been a "perfect" translator, re-presenting what each said in the language of the other. But what if Yolanda had viewed her translating role more broadly, thinking of the different languages as different ways of knowing the same experience? Perhaps a different story would then have developed as follows:

*Yolanda:* Jane, which types of the three tiles do you want and in what quantity?

*Jane:* I want two dozen of the blue tile.

*Yolanda:* Jane, I'm going to have a hard time translating what you just said because in Maria's language the same word, *siyona*, can refer to both green and blue. Therefore, if I just order two dozen of the "*siyona* tile" you might end up with one of the green tiles.

*Jane:* Well, isn't it still obvious to Maria that the blue tile is a different color from the two green tiles?

*Yolanda:* Jane, it may not be as obvious as you think. Speaking Tarahumara has made me realize that blue and green are not always such different colors. Think about the ocean. We usually talk about the blue sea, but sometimes the ocean looks green, and sometimes it's hard to tell whether it's blue or green.<sup>63</sup> If you look at this tile [indicating the tile the color of chip *B*] and just thought of it as "green-blue," like Maria would, it seems to me it's closer in blueness to the

62. Of course, it is a misnomer even in this story to see language as a barrier. Language is a bridge. Words are all that connect Jane and Maria; in these days of satellite and microwave transmissions, there is probably not even a continuous wire running between them.

63. According to Kay and Kempton, chip *G* in their experiment represents an equal mixture of green and blue; they call that chip "a perfect aqua." Kay & Kempton, *supra* note 39, at 68. Aqua is a variation of "aquamarine," which is derived from the Latin for "sea water." See "Aqua," WEBSTER'S, *supra* note 1, at 44.

blue tile than it is in greenness to the other green tile.<sup>64</sup>

*Jane:* Well, maybe you're right, it's not quite as obvious as I thought. But the only difference among the tiles is their color. How are we going to let Maria know which one I want?

*Yolanda:* Jane, let me discuss the problem with Maria.

Maria, I know that all three tiles are *siyoname*, but in English the color *siyoname* is divided into two categories, "green" and "blue." Jane would call one of the tiles "green" and one "blue" and the third would be in between. Looking at the tiles, does this make sense to you?

*Maria:* Well, that's a useful distinction. Of course, I can see that the tiles are different shades of *siyoname*, but it would be nice to have a way of labeling each shade that everyone could understand because the color is the only difference among them. I can see that one of the tiles is between the other two in terms of color. But which one is "blue" and which one is "green"?

*Yolanda:* Jane, she recognizes that this blue-green tile is between the other two in terms of color, but we need to figure out a way to identify to her the tile at one end as green and the other as blue.

*Jane:* Well, tell her that one tile is the color of the sky.<sup>65</sup>

*Yolanda:* Maria, the "blue" tile is a shade of *siyoname* that is like the color of the sky.

*Maria:* The color of the sky at what time of day and what kind of weather?

*Yolanda:* Jane, she wants to know the color of the sky at what time of day and what kind of weather.

*Jane:* A clear sky at mid-day.

*Yolanda:* Maria, the color of a clear sky at mid-day.

*Maria:* None of the tiles is really that color.

*Yolanda:* Jane, she says none of the tiles is really that color. You know, you should remember that a clear, mid-day sky in northern Mexico is probably a different color than here in New York. The altitude is higher, the humidity is much less; the color is probably a much deeper blue than that of this blue tile.

*Jane:* Well, ask her if she has any suggestions.

*Yolanda:* Maria, the color of the sky here is probably a little different than where you are because of altitude and climate. Can you think

64. In this passage, Yolanda uses a linguistic strategy similar to that employed in the second Kay-Kempton test. See *supra* note 47 and accompanying text.

65. *Webster's* defines "blue" as "a color whose hue is that of the clear sky." WEBSTER'S, *supra* note 1, at 92.

of something we are all familiar with that is similar in color to one of the tiles at either end?

*Maria:* I might say that one tile is *siyoname* like a leaf,<sup>66</sup> but we might run into the same problem as we did with "sky" since leaves may look different in our dry climate than they do in New York. I would say that the tile at one end is almost exactly the color of a turquoise. Is that helpful?

*Yolanda:* Jane, she says that the tile at one end is almost exactly the color of a turquoise.

*Jane:* Exactly! This tile we've been calling blue is really turquoise.<sup>67</sup> That will help me match the tile to paint and carpeting. Tell her I'll order two dozen of the turquoise tiles.

*Yolanda:* Maria, the tile Jane calls "blue" is the one that is the color of a turquoise. In fact she thinks turquoise is a better name for the color of that tile. She wants to order two dozen turquoise tiles.

*Maria:* Fine. If you need to order any of the other tiles you can tell me "green" for the tile at the other end from the turquoise-colored one and "the tile in between" for the third tile.

What was different about Yolanda's translation in the second story that enabled her to bridge the gap that separated Maria and Jane in the first story? She recognized, as a speaker of both languages, that English and Tarahumara imposed different conceptual structures on the same perceptual experience. Their different languages led Maria to think of the three tiles as shades of a single color while Jane sorted the tiles into two discrete categories. *Neither siyoname* nor "blue/green" fully represented the particularity of their experience. Reducing their perception to a form of knowledge that could be communicated, each "left out" different aspects of their experience. In order to translate, Yolanda enabled both Jane and Maria to rethink their perceptions and thereby enrich their knowledge with what was missing in their language and supplied by the other. She began with Jane, pointing out how blue-green could be thought of as a single color, thus enabling Jane to "see" what she had "missed" before: that one "green tile" (tile *B*) was closer in color to the "blue" tile than to the other green tile. Yolanda then turned to Maria and used the idea of two different categories of *siyoname* to organize her perception of

66. Kay and Kempton report that languages like Tarahumara that have a single word, such as "grue," for both green and blue, tend to contain fixed or semifixed expressions such as "grue like the sky / grue like the leaves" that roughly correspond to focal blue and green. Kay & Kempton, *supra* note 39, at 71.

67. "[T]urquoise: (1) "a mineral . . . consisting of a blue, bluish green, or greenish-gray . . . that takes a high polish and changes sometimes to a green tint but when sky blue is valued as a gem," (2) "a variable color averaging a light greenish blue." WEBSTER'S, *supra* note 1, at 958.



*siyoname*-colored tiles along a continuum with a tile at each end and one in the middle. This image of a color continuum thus bridged Jane's concept of two colors and Maria's understanding of blue-green and gave them a common ground to continue their dialogue.<sup>68</sup> Each speaker then activated other remembered experiences (beginning with the sky) and constituted them into words in an effort to provide more information and create more meaning. After several unsuccessful efforts, Maria then conceptualized a shade of *siyoname* by analogy to a familiar item in her experience, turquoise. When Yolanda translated "turquoise,"<sup>69</sup> Jane immediately understood what Maria meant and indeed found it a better, more precise name than her previous term, blue. They were then able to combine the image of the color continuum with a common reference point for one end of the continuum to organize a common system for identifying the three tiles. The task of translation expanded the linguistic resources of each, and thus enhanced each other's knowledge. Jane "knew" better what color the ordered tile was (turquoise, not just blue) and Maria had a new word borrowed from English, "green," to describe the color of the tile at the other end of the continuum.

In the first story, Yolanda merely re-presented what each person told her, and as a result ended up misrepresenting what was said. In the second story, Yolanda actively reshaped the way each "defined reality," but in doing so she did not become an autonomous creator of meaning, an artist making "a representation." Even though *siyoname* was, in one sense, untranslatable into English, she was not therefore free to give it any meaning, such as "red." Instead, as their translator, she represented both Jane and Maria in the third sense of taking their place. She first put herself into Maria's mindset and then, using her knowledge of English, guided Jane into understanding how Maria thought about the color of the three tiles. She then put herself in Jane's place and talked to Maria using her knowledge of Tarahumara. Yolanda did not substitute her own ideas for what either said. Rather, she helped each to say (and thus to know) more fully what they experienced. Language was the means by which both recognized the con-

68. Substantial empirical research suggests that there would be a common physiological basis for both Jane and Maria to think of the blue-green tile as "between" the blue and the green tiles. Focal green is perceived when one set of optic nerve cells fires above a base-rate stimulation, while focal blue is perceived when another set of cells fires above the base rate. Blue-green is perceived when both sets of cells are firing above the base rate. Physiologically, blue-green is actually a combination of, and thus "between," blue and green. G. LAKOFF, *supra* note 34, at 27.

69. Of course, my story ignores a possible ambiguity, since Maria's turquoise might refer to the unpolished stone, which tends to be more greenish, while Jane might have thought of the polished gem, which is more sky blue. Fortunately, both apparently had the polished gem "in mind."

ceptual difference that separated them. The recognition of difference made both aware of the limits of their linguistic resources, the ways in which language reduced their perceptions. The result was a dialogue that resulted in revitalized perception and out of which was constituted new knowledge, bridging the gap that separated them.

### C. *The Lawyer as Translator*

The stories of Yolanda are themselves intended to bridge my ideas about language and translation and my experiences of being a lawyer. Like more familiar forms of language, law creates knowledge by dividing up the spectrum of human experience into new basic categories.<sup>70</sup> But this new knowledge, like all forms of knowledge, involves a loss, a reduction of the particularity of experience and the perspectives of other understandings. (Because Jane knows that tiles *A* and *C* are different colors she loses what Maria still retains: the knowledge that *A* and *B* are more different in color than *B* and *C*.) By thinking of herself as a translator, the lawyer becomes aware of how, in the process of representing a client to others, meaning is created and lost. This change in meaning need not result in "misrepresentation," if, like Yolanda, the lawyer engages both the client and the law-speaking other party in dialogue that enables each to expand what they know so as to meet on common ground.

Obviously, a lawyer is not just a translator. The lawyer as advocate or counselor has her own agenda, which is both narrow and purposive, while the translator has no personal or professional stake other than the task of faithful and meaningful interpretation. (The Stories of Yolanda might become more closely analogous to lawyering if we imagine that she is not merely a mutual friend but a broker in tiles interested in procuring either a sale for Maria or a purchase for Jane.) Thus the metaphor of lawyering as translation cannot fully express the meaning of the lawyer's experience, but the metaphor *can* help us think through the apparent paradox of "representation" by both illuminating the gap and providing a bridge.

As the Stories of Yolanda illustrate, the lawyer as translator must creatively bridge at least two gaps. First, the lawyer must identify and cross the gap between what the client says and what can be said in the language of the law. Thus, in the Case of the Silenced Client, the potential ambiguity in the client's admission of "guilt" between moral

70. The language of law insists that human experience fit either inside or outside its basic categories: guilty or not guilty, a tort or not a tort. But within each category is a vast, varied range of experience. This categorization at first may be as incomprehensible to the client as the green/blue distinction is to Maria.

and legal responsibility is lost if the lawyer "translates" *yo soy culpable* into a guilty plea, just as *siyoname* cannot be automatically translated as either green or blue. And the lawyer must also deal with the gap in meaning in the other direction, from what is said by the judge or other lawyers back to the client. The metaphor of translation thus challenges the lawyer to a constant process of educating herself, her client, and the other legal actors to the ways in which both lay and legal language diminish and expand what we know about experience.

Good translation is a hard job. It is easier either to just re-present or to create your own representation. If the lawyer merely re-presents, then the client's experience may not gain legal significance. But if the lawyer "creates a representation," the legal significance may not be rooted in the client's own experience. Either way, both client and judge are poorly served because the failure of communication is a loss of potential new knowledge. In the second Yolanda story, Maria and Jane achieved more than a successful business transaction; by acquiring insight into the other's language, each came to understand more about their own knowledge systems and experience.

As illustrated by the Case of the Silenced Lawyer, it can be a mistake to assume that a client is interested only in "winning" the case rather than in understanding both "what happened" and what is happening. In that case, the student lawyers and I had made the common assumption that our client was interested only in an outcome measured by dollars and that he did not particularly care what route was used to reach that outcome. In fact, he cared very much what route was used, what story was told on his behalf. Words mattered very much to our client; one sentence in a brief submitted in his name made all the difference in our representation of him.

More than anything else, this client wanted to project his inner mental certainty onto the world in which he lived by asserting that the system that very literally constrained him was fundamentally unfair. He wanted to give his own meaning to the events that led to his solitary confinement and thereby control a world that had as its definitive quality the prisoner's utter lack of control. The case we planned to try would instead have reaffirmed the rules of the constraining system while giving him in return, at best, only money.

It was this insight that caused me to entitle the second tale the Case of the Client Who Knew His Own Mind when I added it to this article at the stage of the second draft. It was our failure to recognize his sense of self-knowledge that caused us to misrepresent him. We had attempted to give *our* meaning to *his* experience as if his only contributions to the case were "the facts" without regard for what *he*

thought his experience meant. Instead of acting like translators, we had behaved rather like Jane in the first Yolanda story. We had looked at "the facts" and seen that it was "obvious" what legal categories made those facts meaningful. We failed to "mind the gap" and plunged into its depths.

Failure to translate for the client not only risks a dissatisfied client; it also impoverishes the law. Like all forms of knowledge, law arises out of experience. Clients are the source of that experience. *Their* understanding of that experience is likely to retain elements lost in the legal understanding, elements that might enrich our legal knowledge. For example, the Sarat and Felstiner study raises interesting questions about the largely unquestioned wisdom of the modern trend toward no-fault divorce:

Throughout their meetings with their lawyers the question of marriage failure remains very much alive in the minds of clients. They talk about the marriage in terms of guilt (their spouse's) and innocence (their own). . . . Even though law reform makes such questions legally irrelevant, clients continue to think in fault terms and to attribute blame to their spouse. Clients use a vocabulary of personal responsibility to interpret the failed marriage, and they seem to want their lawyers to accept and use a similar vocabulary.

[M]ost of the time lawyers remain silent in the face of client attacks on their spouses. They refuse to explore the past and to participate in the construction of a shared vision of the social history of the marriage. . . . In this way they deflect what is, for many clients, a strong desire to achieve some moral vindication, even in a no-fault world.<sup>71</sup>

The lawyers could not readily translate their clients' talk of moral responsibility into the language of no-fault divorce law,<sup>72</sup> but the translator sees such a drastic loss of meaning as a challenge to expand the meaning potential of the second language. Yolanda ended up expanding vocabularies in both English and Tarahumara, enabling Maria to talk about the difference between green and blue and Jane to describe a green-blue color with a new term, turquoise. As a translator, she "knew better" than to say that the tiles were all the same color or that the two "green" tiles were the most similar.

If all attempts to talk about experience, to constitute it into a knowable form, result in reduction and incompleteness, then obviously this article must itself be incomplete. Thinking about law as language

71. Sarat & Felstiner, *supra* note 26, at 749-50, 764.

72. See Sarat & Felstiner, *supra* note 25, at 108 n.6 ("Under no-fault, the law retreats from moral issues and focuses instead on reaching agreements. Divorce settlements no longer lead to final vindication, the kind of official judgment of good and bad motives and behavior, that clients could once obtain through formal adjudication.")

and lawyering as translation will not bring me to a full understanding of my experience of being a lawyer nor fully communicate that experience to you. But it is a beginning. Tell tales to yourself and others about your own lawyering experiences and compare them to my own two tales. Then try on my model of experience and knowledge and apply the metaphor of translation; see if it "fits"; think about what meaning is added and left out. And then, consider writing to me so that this story may continue.<sup>73</sup>

---

73. My experience of writing this article as part of this symposium on legal storytelling leads me to hope that this concluding paragraph is more than a pious wish. As described in Kim Lane Scheppelle's introduction to this issue, Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2075-77 (1989), an unusually open and collegial format was created for this symposium. I was thus emboldened to present at my portion of the last session, not a summary of the article you have just read (or even an earlier draft), but instead a clinic case in which I was at that moment deeply involved, and which was scheduled for jury trial the following week. I presented to those assembled a wide variety of accounts of "what happened" taken from the police report, testimony at a suppression hearing, a bench opinion denying our motion to suppress, briefs, and the original videotaped interview with our client. I then asked for help in applying my model to change the way in which we had been representing our client so as to translate his understanding of what happened so that it would be heard by the judge and jury. The suggestions were varied and thought-provoking (including at least one comment that this new case demonstrated the inadequacy of the translation model). I then took what I had learned by talking about the case in the symposium and indeed changed the way we were representing the client. The case is now over and I am still reading transcripts and trying to understand "what happened" and what that experience means. But, as more experienced storytellers than I know to say at this point, that is another story . . . .