in a ruler's residence to one of the key functions once performed in such a space.

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

The translation metaphor suggests that the introduction of a "new word" (typically by expanding the meaning of an existing word by using it in a novel way) can dramatically affect a person's understanding of experience. Indeed, by discussing lawyering as a kind of translation, I am myself using "translation" as a "new word" in an effort to expand my understanding of my experience of practicing law. As linguist George Lakoff and philosopher Mark Johnson have suggested, a novel metaphor can "defin[e] reality"[75] by making "coherent a large and diverse range of experiences."[76] The process they describe by which a metaphor "defines reality" by highlighting "certain aspects of our experience" and blocking others[77] resembles the model of mental activity discussed above. More recently, Lakoff has suggested that metaphors create meaning primarily by "mapping" from one domain of experience to a corresponding conceptual structure in another domain of experience.[78] For example, the American in my story "mapped" the domain of experience from appearance in a royal court onto the domain of the courtroom by taking advantage of structural and other similarities between the two domains.

The translator's ethic compels a continuing cycle in which the translator must continually confront the flaws of the expression he is creating in the second language, return to the "other" in the first language, and then begin the endeavor anew.[79] For White, this cycle impels the translator toward a high art he terms: "integration: putting two things together in such a way as to make a third, a new thing with meaning of its own . . . not to merge the two elements or

75 George Lakoff & Mark Johnson, *Conceptual Metaphor in Everyday Language*, 77 J. PHIL. 453 (1980). This article summarized ideas which are developed more thoroughly in a book by the same authors, METAPHORS WE LIVE BY (1980).

76 *Id.* at 484, 485.

77 *Id.* at 484.

78 GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 114 (1987).

79 This cycle resembles the "theory-practice spiral" discussed by Goldfarb, *supra* note 63.



blur the distinctions between them, but to sharpen the sense we have of each, and of the differences that play between them."[80] This art must be constantly "remade afresh, in new forms."[81]

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

## III
## STUDYING TEXTS OF THE REPRESENTATION OF A CLIENT

### A. The Roots of Ethnography in Cultural Anthropology

The metaphor of the lawyer as translator would seem to lead naturally to the metaphor of "representation as text" if the client's story is viewed as a text for the lawyer to translate for legal audiences. "Text" also suggests an analogy to literary interpretation, which is the primary disciplinary cross-fertilization that gives rise to use of the translation metaphor by James Boyd White.[82] Although the methods of literary interpretation do influence this approach, they are brought to bear through a circuitous route that begins in cultural anthropology—and in the remote islands of Indonesia.

In thinking of my representation of Johnson as a text, I am taking as my model the practice of ethnography,[83] initially developed in cultural anthropology and since applied in a number of sociological methodologies. A cultural anthropologist traditionally created an ethnography by living in a foreign (usually exotic) society for an extended period. This "field work" involved becoming a "participant-observer," participating in the daily life of the society as much as

80 WHITE, *supra* note 65, at 263.

81 For me the translator's art of integration can be a useful metaphor for the kind of multiple consciousness advocated by critical race theorists. *See* Delgado, *supra* note 14; Matsuda, *supra* note 14; Patricia Williams, *The Obliging Shell*, 87 MICH. L. REV. 2128, 2151 ("It is this perspective, the ambi-valent, multivalent way of seeing that is, I think, at the heart of what is called critical theory, feminist theory, and the so-called minority critique. It has to do with a fluid positioning that sees back and forth across boundary. . . . Nothing is simple. Each day is a new labor.").

82 Besides being a law professor, White is also a professor of English Literature.

83 Translating its Greek components literally, ethnography means "nation writing" (ethnos—nation; graphein—to write) in the same way that geography means "earth writing." A geography of a country describes (writes down) its terrain and other physical features; an ethnography of a country describes the people who live there.

possible, sometimes by laboring in a specific indigenous work role, while simultaneously observing all that was taking place around her. A constant dialogue with co-operating members of the society, usually termed (unfortunately) "informants," supplemented these observations and clarified their significance.

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

The approach to ethnography I am taking as my model is that practiced and explicated by Clifford Geertz, one of our most influential (and eloquent) contemporary cultural anthropologists. Geertz starts with the premise that "[t]he ability of anthropologists to get us to take what they say seriously . . . [is primarily due to] their capacity to convince us that what they say is a result of their having actually penetrated . . . another form of life, of having . . . truly 'been there.' "[84] The requirement that anthropological research be based on field work gets the anthropologist "there"; the participant-observer method ensures that she is intensively "being" while there. But how can such a stranger in a strange land presume to "penetrate" the very foreign life being lived around her?

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

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

84 CLIFFORD GEERTZ, WORKS AND LIVES: THE ANTHROPOLOGIST AS AUTHOR 4-5 (1988).

85 CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 58 (1983) (emphasis added).

86 CLIFFORD GEERTZ, *Deep Play: Notes on the Balinese Cockfight*, *in* THE INTERPRETATION OF CULTURES 412 (1973).



of Bali. After carefully describing cockfighting as a sport—inventorying its rules, strategies and techniques—and its role in the social economy through the complex systems of gambling that surround such fights, Geertz moves to a consideration of the cockfight as an art form, comparable to a play or poem.[87] He assumes that by participating in a cockfight, the Balinese are saying something, about themselves to themselves.[88] Thus, interpreting the cockfight need not be an imposition of the anthropologist's foreign concepts because the cockfight is *already* inherently meaningful. "To put the matter this way . . . shifts the analysis of cultural forms from an endeavor in general parallel to dissecting an organism, diagnosing a symptom, deciphering a code, or ordering a system . . . to one in general parallel with penetrating a literary text."[89] Geertz thus imagines culture itself as an "ensemble of texts . . . which the anthropologist strains to read over the shoulders of those to whom they properly belong."[90]

The twin metaphors—culture as text and ethnography as literary interpretation—inform ethnographic methodology as described by Geertz. For him, the "graphic," i.e. the "writing," aspect of ethnography is key: "What does the ethnographer do?—he writes."[91] It is not sufficient simply to observe and participate in the events "there"; by meticulously recording these cultural events, the ethnographer transforms their figurative texts into literal texts that can be given the close and recurrent attention needed for the interpretive process.

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

87 *Id.* at 445, 450.

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

89 *Id.* at 448.

90 *Id.* at 452.

91 CLIFFORD GEERTZ, *Thick Description*, *in* THE INTERPRETATION OF CULTURES 3, 19 (1973).

> the "said" of such discourse from its perishing occasions and fix it in perusable terms . . . [and]; it is microscopic.[92]

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

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

Although ethnographic methodology was developed to describe cultures alien to the ethnographer and her audience, social scientists have increasingly applied its techniques to their own societies. As Geertz explains, participant-observation of exotic cultures

> is essentially a device for displacing the dulling sense of familiarity with which the mysteriousness of our own ability to relate perceptively to another is concealed from us. Looking at the ordinary in places where it takes unaccustomed forms brings out . . . the degree to which meaning varies according to the pattern of life by which it is informed.[97]

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

92 *Id.* at 20-21.
93 *Id.* at 23.
94 *Id.*
95 "Cultural analysis is intrinsically incomplete [and] the more deeply it goes the less complete it is. . . . [Its] most telling assertions are its most tremulously based." *Id.* at 29.
96 "[T]he aim of anthropology is the enlargement of the universe of human discourse." *Id.* at 14. "To write ethnography . . . [is to] enlarge the sense of how life can go." GEERTZ, *supra* note 84, at 139.
97 *Id.* at 14.
98 GEERTZ, *supra* note 85, at 57.



such concepts are so "near" to people, they tend not to be consciously aware of their complex conceptual nature. "People use experience-near concepts spontaneously, unself-consciously . . . . That is what experience-near means—that ideas and the realities they inform are naturally and indissolubly bound up together."[99]

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

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

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

99 *Id.* at 58.
100 *See supra* text accompanying note 88.
101 GEERTZ, *supra* note 85, at 59-68.
102 For example, see Geertz's comparative description of what "law" means in Morocco, Java, and Bali. *Id.* at 184-214.
103 In attempting to translate words that are so complexly bound to their cultural context as to seemingly defy translation, Geertz is demonstrating for us the translator's art and ethic.
104 John J. Gumperz, *Introduction*, *in* DIRECTIONS IN SOCIOLINGUISTICS: THE ETHNOGRAPHY OF COMMUNICATION 6 (John J. Gumperz & Dell Hymes, eds., 1972).
105 *Id.*
106 Recurrent differences in grammatical usage between two groups who speak the "same" language signal the existence of different dialects, not linguistic incompetence

Nonetheless, the descriptive linguists learned to make effective use of speakers' competence through a variety of interactive techniques in which the linguist would first guess at a rule from an apparent pattern in his recorded observance and then test it by generating a new utterance according to that rule and asking a native speaker whether it was well-formed. Many native "informants" developed sophisticated insights into their own languages through this interactive process and could increasingly assist the linguist in determining why apparent exceptions to the hypothesized rules led the way to a deeper consistency.[107] The linguist's work was constantly driven by the expectation that even seemingly arbitrary speech patterns reflect inherent, meaningful structure of which speaker competence was both evidence and product.

The resulting linguistic descriptions were not simply "found" in either the empirical speech data observed or the conscious knowledge systems of the native speakers. They were constructed by the intellectual collaboration of linguist and native informant, yet they arose from and were testable against empirical speech events. Thus, the accomplishments of descriptive linguistics are a powerful example of the dynamic interaction between experience and concepts assumed by the model of mental activity described above.[108]

Linguists generally believe that semantic structure is product of the same kind of unreflective speaker competence as phonetics (pronunciation) and syntax (grammar).[109] Recording and studying different uses of what appears to be the same "word" and testing inductive guesses by interaction with a native speaker may make explicit a complex system of meaning that the speaker can manage but not necessarily articulate unaided. Geertz's thick descriptions can be viewed as an extension of this technique: elaborate and eloquent semantic descriptions of the key words—the experience-near concepts—by which members of a society express themselves.[110]

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

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

108 *See supra* text accompanying notes 57-81.

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

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



### B. From Ethnography to Ethnomethodology

The recent application of ethnographic methods to the study of American and British legal discourse owes much to the blend of linguistics and ethnography known as ethnomethodology.[111] Ethnomethodology extends the techniques of descriptive linguistics to speech events such as conversations or group decisionmaking which are more complex than single utterances on the assumption that the social categories that produce and manage such interactions are in essence semantic categories.[112] These larger units of speech are often termed "discourse." For some, entire ways of talking that characterize a profession or discipline can be analyzed as a unitary form of discourse.[113]

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

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

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

113 *See* CONLEY & O'BARR, *supra* note 10, at 2; SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 110-15 (1990); Naomi R. Cahn, *Speaking Differences: The Rules and Relationships of Litigants' Discourses*, 90 MICH. L. REV. 1705 (1992) (book review); Susan V. Philips, *The Social Organization of Questions and Answers in Courtroom Discourse: A Study of Changes of Plea in an Arizona Court*, 4 TEXT 225, 226 (1984).

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

The student of ethnomethodology renders the mundane "strange" by applying the same techniques used by the ethnographer of the exotic: meticulous recording of naturally occurring events and microscopic analysis of the resulting "text." This "microanalysis"[115] operates on an assumption similar to that which underlies both linguistic and ethnographic description: the activity studied has an inherent order that is created by the participants and can be revealed by close and repeated examination, even though the participants themselves may not be aware of this order. Thus, this method paradoxically treats the commonplace as strange in order to make it explicable.

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

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

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

114 Pomerantz & Atkinson, *supra* note 111, at 287.

115 *See* DOUGLAS W. MAYNARD, INSIDE PLEA BARGAINING 11, 199-200 (1984).

116 *See, e.g.*, Emanuel A. Schegloff, *Sequencing in Conversational Openings*, *in* DIRECTIONS IN SOCIOLINGUISTICS, supra note 104, at 346.

117 Pomerantz & Atkinson, *supra* note 111, at 286-87.



popularized version entitled *You Just Don't Understand*.[118] She succeeds in making what might seem most familiar, the speech of one's own spouse, "anthropologically strange." Her meticulous examination of apparently thousands of male-female conversations persuasively reveals that American men and women speak in sufficiently different ways which she terms "genderlects."[119]

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

118 DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990).

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

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

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

120 *Id.* at 18.

121 *Id.* at 16.

nonlinguistic factors influencing male-female domination, Tannen offers a partial diagnosis and remedy for unintended domination. By using the metaphor of cross-cultural, even cross-language communication, Tannen avoids attribution of blame and keeps open the possibility of mutual change and mutual growth:

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

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

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

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

122 *Id.* at 47-48.

123 *Id.* at 296, 297.



assume that the client's account had its own inherent order and complex interlocking meanings worthy of rapt and disciplined attention. In particular the lawyer would search for key words that might reveal the particularities of the client's world view as focused in this account.

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

### C. Ethnographic Methodologies for Studying Legal Discourse

Recent sociolinguistic studies of legal discourse tend to fall into two categories.[124] One type tends to be quantitative: researchers code and count recurrent formal speech features across a wide sample of recorded discourse and then correlate the results either to identify features distinctive from everyday discourse or to test hypotheses regarding the social effect of formal speech forms.[125] The second type is more qualitative, showing the influence of ethnography and ethnomethodology: a smaller set of recorded discourse—sometimes only one speech event—is read closely and repeatedly to identify features apparently significant to the speakers rather than to a researcher's pre-existing theory.[126] Features cannot be coded because the researcher does not know which features are significant or recurrent before coming to the text and because her theoretical un-

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

125 *See, e.g.*, WILLIAM M. O'BARR, LINGUISTIC EVIDENCE (1982); John M. Conley et al., *The Power of Language*, 1978 DUKE L.J. 1375; Brenda Danet & Bryna Bogoch, *Fixed Fight or Free-for-All? An Empirical Study of Combativeness in the Adversary System of Justice*, 7 BRITISH J. L. & SOC'Y 36 (1980); Philips, *supra* note 113.

126 *See, e.g.*, Michael H. Agar, *Political Talk*, *in* POWER THROUGH DISCOURSE (Leah Kedar ed., 1987); J. MAXWELL ATKINSON & PAUL DREW, ORDER IN COURT: THE ORGANISATION OF VERBAL INTERACTION IN JUDICIAL SETTINGS (1979); CONLEY & O'BARR, *supra* note 10; Dunstan, *supra* note 124; Tamar Liebes-Plesner, *Rhetoric in the Service of Justice*, 4 TEXT 173 (1984); MAYNARD, *supra* note 115; MERRY, *supra* note 113; Beatrice Caesar-Wolf, *The Construction of "Adjudicable" Evidence in a West German Civil Hearing*, 4 TEXT 193 (1984); Pomerantz & Atkinson, *supra* note 111; Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93 (1986).

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

The latter approach is not unlike the "moving classification system" of common law reasoning:

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

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

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

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

127 *See* CONLEY & O'BARR, *supra* note 10, at xiii; MAYNARD, *supra* note 115, at 4-13, 18-21; Dunstan, *supra* note 124.

128 EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949).

129 O'Barr is on the anthropology faculty at Duke University; Conley teaches at the University of North Carolina Law School and has a PhD in anthropology as well as a law degree. In addition to their own extensive work, Conley and O'Barr edit a new series of publications from the University of Chicago Press entitled *Law and Legal Discourse*.

130 They also attempted to conduct pretrial interviews with defendants but were generally unsuccessful because the defendants did not have to come to court before trial and were generally unreceptive to interviews at home. *Id.* at x-xi.

131 *See* William M. O'Barr & John M. Conley, *Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives*, *in* LANGUAGE IN THE JUDICIAL PROCESS 97, 108 n.9 (Judith N. Levi & Anne Graffam Walker eds., 1990).



the speaker on the tape. They would then present these observations in a roundtable discussion. The entire process typically lasted two hours.[132]

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

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

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

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

132 CONLEY & O'BARR, *supra* note 10, at xii, 35; *see id.* at 108.

133 *Id.* at xi.

134 Conley & O'Barr, *supra* note 131, at 109.

135 CONLEY & O'BARR, *supra* note 10, at xii.

136 *Id.* "In listening to litigants' accounts, we have concentrated on what they say and how they say it rather than trying to impose predetermined structures and categories on the data." *Id.* at xi.

137 *Id.* at x.

138 *Id.*

139 *Id.* at xi-xii.

share with ethnographers an emphasis on careful, detailed observation and inductive analysis, Conley & O'Barr differ from traditional ethnographers in that they observe and analyze language use as the object of their study, while most ethnographers view language as a window through which to view cultural attitudes. Although Conley and O'Barr draw on the techniques developed by conversation analysts, they are interested in more than the accomplishment of conversational interchange. Rather, they study entire accounts in order to learn how language use shapes and constructs social reality.[140]

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

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

140 *Id.* at xi; O'Barr & Conley, *supra* note 131, at 109.

141 *See infra* text accompanying notes 162-80.

142 These audiences included my students, colleagues, and participants in the various conferences listed *supra* note 1. These audiences typically reviewed at least the judge's bench opinion and Johnson's initial interview description of the stop and arrest; they watched the actual interview videotape and a re-enactment of the bench opinion while following the text displayed by an overhead projector. Many also read the other texts which appear in this Article. Most, however, did not repeatedly review these texts before commenting, unlike the group participants in the Conley and O'Barr research project.

143 I also hope that readers' independent interpretations of these facts will provide a check against my bias as a participant in the events, a bias not present in the Conley and O'Barr research.

144 Caesar-Wolf, *supra* note 126.

145 *See id.* at 195.



hearing to "extensive and exhaustive content analysis with regard to the . . . largely latent meaning structures, which may not necessarily be intended subjectively by the parties involved."[146] In addition to micro-analysis of this text itself, she reconstructed its context by reviewing the legal processing of the case prior to the hearing, including all available documents, a procedure similar to my account of the history of the Attitude Problem Case.[147] In her view, this method

> both generates and tests theoretical propositions about legal reality construction in court hearings. It is predicated on the assumption that social interactions, even strictly individuated ones, are not determined purely idiosyncratically, but at the same time express general structures. These structures are manifested in the objective meaning contents generated in the course of the communication process; as such, they may be reconstructed only hermeneutically.[148]

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

> Thematic analysis begins with a careful reading of a text to get a sense of recurrent topics which indicate high-level content areas significant for the speaker(s). The analyst selects one of the topics, goes through the text, and pulls out all topic-relevant passages. These passages are then used, together with whatever else the analyst knows, to develop knowledge that enables an outsider to comprehend them. Some parts of the knowledge so developed will be recurrently useful in understanding; these parts are the "themes."[149]

These recurrent, significant topics seem akin to what I term key words; their "high level content . . . signals differences between worlds."[150] For Agar such textual analysis

> serves as an occasion for the organization of the wide-ranging knowledge that comes from participant observation and theoretical interest. Constructing and interpreting the themes allows one . . . to pull together scattered knowledge from readings, interviews, and participant observation in a way that was both motivated and constrained by the text at hand.[151]

146 *Id.* at 196.

147 *Id.*

148 *Id.*

149 Agar, *supra* note 126, at 113.

150 *Id.* at 117. Compare "meaning structures" in Caesar-Wolf, *supra* note 126.

151 Agar, *supra* note 126, at 124.

One problem I face with applying any of the above studies is that in none of the cases studied was an attorney significantly involved: Conley and O'Barr studied pro se litigants in small claims courts, in the West German civil hearing all the questioning was conducted by the judge,[152] and in Agar's study the truckers apparently spoke for themselves without assistance of counsel. This absence of attorney discourse is actually typical of much of the research done to date, which uses data from small claims courts or informal mediation proceedings.[153] Even more rare are empirical studies of how attorneys talk with their clients in private; no doubt a major reason is the problem of attorney-client privilege.[154]

A notable exception is the research project undertaken by former American Bar Foundation Executive Director William Felstiner and political scientist Austin Sarat to record and study 115 lawyer-client conversations in forty divorce cases.[155] Their analysis documents a consistent failure by the divorce attorneys to translate—or even respond to—their clients' understanding of the significance of the events that brought them to a lawyer's office:

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

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

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

[155] The project is initially described in Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC. REV. 93 (1986). Various analyses of the data set, which Sarat and Felstiner collected over thirty-three months in two sites from different states, are reported in: *Vocabularies of Motive*, *supra* note 9; Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness*, 98 YALE L.J. 1663 (1989); Austin Sarat & William L.F. Felstiner, *Legal Realism in Lawyer-Client Communication*, in LANGUAGE IN THE JUDICIAL PROCESS, *supra* note 131; Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43 (1991); and their contribution to this symposium, Felstiner & Sarat, *supra* note 7. Sarat and Felstiner do not report using the group session technique employed by O'Barr and Conley; presumably their analyses are largely the product of their own collaborative review of the texts.



> Clients focus their interpretive energy in efforts to construct an explanation of the past and of their marriage's failure. Lawyers avoid responding to these interpretations because they do not consider that who did what to whom in the marriage is relevant to the legal task of dissolving it. In this domain clients largely talk past their lawyers, and interpretive activity proceeds without the generation and ratification of a shared understanding of reality.[156]

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

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

[156] Sarat & Felstiner, *Vocabularies of Motive*, *supra* note 9, at 742.

[157] In their article in this symposium issue, Felstiner and Sarat do report on interviews with both client and attorney about their understandings of what was happening in the relationship. Felstiner & Sarat, *supra* note 7, at 1475-81, 1491-95. It does not appear, however, that they discussed their own analyses with either participant. *Cf.* notes 154 and 155, *supra*.

[158] Geertz, for example, claims the Balinese have confirmed his interpretation of cockfighting as a complex dramatization of status relationships. GEERTZ, *supra* note 86, at 440. Indeed he derives from his conversation with the Balinese the metaphoric description of cockfighting as "playing with fire." *Id.* Geertz has been criticized, though, for imposing his own understandings from a privileged position in the guise of presenting the "native point of view" in the Balinese cockfight essay. *See* Vincent Crapanzano, *Hermes' Dilemma: The Masking of Subversion in Ethnographic Description*, *in* WRITING CULTURE 74 (James Clifford & George Marcus eds., 1986), *discussed in* Christine B. Harrington & Barbara Yngvesson, *Interpretive Sociolegal Research*, 15 LAW & SOC. INQUIRY 135, 145 (1990). Because "the authority of the anthropologist to portray the world of others is contingent on dialogue and engagement," *id.* at 145, ethnographers continue to strive for collaborative relations with the people studied. A striking example is a recent ethnographic film about Australian aboriginal life that was produced through a group decisionmaking process involving both Western ethnographers and native Australians. The film, entitled *Two Laws*, is discussed *id.* at 148.

[159] By turning the ethnographic gaze onto the apparently mundane activities of the researcher's own culture, the ethnomethodological researcher becomes her own informant, assuming she has exactly the same competence to make sense of a studied event as

from existing studies of the reflective lay person—client or pro se litigant—as "informant" is even more serious. Conley and O'Barr are typical in asserting that whether their interpretations of recorded discourse are idiosyncratic can be tested against the reader's own assessment of the same texts. But the researcher and her audience are likely to be a rather small, homogenous group of privileged, academically trained persons, probably members of the same intellectual discipline. Thus the gap that these studies consistently reveal between client and lawyer, party and judge—a gap related at least in part to differences in ethnicity, class and education—could well be replicated between researcher and studied participant.[160] Lost is what seemed to be the major contribution of ethnography in the first place: the sense of encountering a mind distinctly different from your own and of thereby expanding your own imagination of how life can be lived and understood.

One could provide a partial answer by structuring research so that the interpretations produced by micro-analysis of texts are then

the participants themselves. However, it is likely that few of those researchers into legal discourse who are legally trained have practiced extensively in the settings studied; typically the cases represent areas of practice where the bar is quite specialized: misdemeanor defense, divorces, legal aid work. As Maynard persuasively showed in his study of misdemeanor plea bargaining, such practice settings have their own distinctive forms of discourse that have little to do with what most lawyers learned in law school. MAYNARD, *supra* note 115.

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

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

160 Conley and O'Barr provide incisive criticism of both traditional and critical legal studies for failing to systematically listen to and present the voices of those actually using and affected by the legal system. CONLEY & O'BARR, *supra* note 10, at 170. I agree that they provide a significant service by presenting substantial verbatim texts of the participants' actual speech rather than simply characterizing their discourse. Nevertheless, only the voice of the scholar is heard when that discourse is given significance through interpretation. The same criticism could have been made of this Article but for Johnson's initiative in contacting me last year that made possible the inclusion of his voice in the analysis of his case.



discussed with the lay participants themselves.[161] In earlier versions of this Article I spoke with deep regret about my inability to engage in such a dialogue with Dujon Johnson about my interpretations of what had happened during our representation of him because he was no longer my client. But last year I was delighted and surprised to receive a letter from Johnson, now living and going to school in Iowa, inquiring whether I had ever written that article about his case. I responded by sending him the current draft with a number of pointed questions. What followed was a long telephone conversation, a three page letter from Johnson, and a very pleasant meeting in Iowa City last fall (where I happened to be for a conference) during which I finally met his family and, I think, made the transition from attorney and researcher to friend. This fortuitous experience convinces me that involving the client in the interpretive process has great value, at least if the client is willing and doing so does not interfere otherwise with effective representation.

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

## IV

## INTERPRETING THE TEXTS OF THE ATTITUDE PROBLEM CASE

### A. The Police Report

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

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

Austin Sarat, in a recent ethnographic description of how nineteen welfare recipients discussed their experience in being represented by legal aid attorneys in welfare disputes, seems to have engaged in such discussions with at least one of his informants whom he identifies as "Spencer." Sarat takes his provocative title, *The Law is All Over*, directly from Spencer's own words and builds much of his analysis around this and other metaphoric key words and phrases used by Spencer and other informants to describe the meaning of their experience. Austin Sarat, "... *The Law is All Over*": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMANITIES 343 (1990). Further, Sarat reports a continuing dynamic engagement with Spencer during the entire two-month research period about Spencer's contention that Sarat "couldn't really understand" Spencer's experience, which at least suggests that he shared his provisional interpretations with Spencer. *Id.* at 350-51, 379; *see also id.* at 369 n.63 (Sarat questioning his own ability to comprehend his subjects' immediate material needs).