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Stances

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STANCES

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

INTRODUCTION

The literature of lawyering is far reaching, encompassing doctrine, ethics, institutions, and advocacy. In recent years, scholars intent on bridging the divide between theory and practice have enriched this literature by drawing on interdisciplinary work in anthropology, linguistics, and sociology. This integration has opened up new visions of lawyer/client discourse, interpretation, and practice. The visions reflect the postmodern turn to contest, contingency, exclusion, hierarchy, multiplicity, partiality, and plasticity.[1] This turn has begun to reveal a sociolegal world of lawyer/client discourse—voices, narratives, stories—that is contested. In this world, lawyer knowledge is partial; lawyer interpretation is contingent upon multiple categories of age, class, disability, ethnicity, gender, race, and sexual orientation; and lawyer/client relations are configured by a dominant-subordinate hierarchy of exclusion. Accordingly, the practices of lawyering—interviewing, counseling, negotiation, litigation—appear not as the neutral conventions of a

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** Adrienne Rich, *Here is a map of our country*, *in* AN ATLAS OF THE DIFFICULT WORLD: POEMS 1988-1991 at 6 (1991).

1 For lucid explications of postmodernism, see Marie Ashe, *Inventing Choreographies: Feminism and Deconstruction*, 90 COLUM. L. REV. 1123 (1990); Drucilla Cornell, *Toward A Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985); Pierre Schlag, *"Le Hors de Texte, C'est Moi"—The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990); Steven Winter, Painless Postmodernism (Dec. 1991) (unpublished manuscript, on file with the *Cornell Law Review*).

skilled craft, but rather as unstable interpersonal and institutional contexts for the play of lawyer power and client resistance.

This postmodern analysis has begun to erode the modernist foundations of lawyering.[2] These foundations embody commitments to express historical forms of lawyer/client discourse, interpretation, and practice. The forms construct a modernist aesthetic marked by a devotion to craft, reason, understanding, and text. Carried on by tradition, craft invests normative value in the professional skills and attitudes of lawyering. Reason includes logic and pragmatism in that value system. Understanding adds the norms of empathy and self-reflection.

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

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

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

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2 For an incisive analysis of the evolution of the modernist postition, see Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1209-20 (1989). *See also* Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 262-79 (1992).

At the outset, I confess that I may have erred towards the overbroad and unambiguous in distinguishing these thematic stances. Like all dichotomies, the modern/postmodern dichotomy may overextend and underappreciate the insights of an inchoate and perhaps irresolvable body of scholarship. At best, the thematics may prove to be a useful heuristic device to guide future inquiry. For this initial inquiry, the Essay is divided into two parts. In Part I, I address the modernist stances garnered from the writings of Clark Cunningham,[3] James Boyd White,[4] and Naomi Cahn.[5] In Part II, I consider the postmodernist stances gleaned from the writings of William Felstiner and Austin Sarat,[6] Richard Delgado and Jean Stefancic,[7] and Lucie White.[8]

I
MODERN STANCES

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

A. Translation

Clark Cunningham explicitly adopts the stance of storyteller to disclose the linguistic and institutional forces of subordination permeating the process of legal representation.[9] To frame his story, he proposes the metaphor of the "lawyer as translator," invoking an image of " 'speaking for another' that is not *inherently* silencing of that other."[10] By means of this metaphor, Cunningham straddles the modern/postmodern dilemma—simultaneously asserting the efficacy of translation and the false necessity of silencing. For Cunningham, a translator consenually amplifies and alters the voice of

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

4 James B. White, *Translation as a Mode of Thought*, 77 CORNELL L. REV. 1388 (1992).

5 Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992).

6 William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992).

7 Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

8 Lucie E. White, *Seeking "... the Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499 (1992).

9 Cunningham, *supra* note 3, at 1299-1300.

10 *Id.* at 2 (quote is in an original draft, on file with author) (emphasis added).

the other, thereby transforming her meaning.[11] The postmodern quandary is whether silencing must be an *inherent* aspect of that transformation.

Cunningham offers the metaphor of lawyering as translation to demonstrate "that one can understand at least some of the silencing of the client's voice as the lawyer's failure to recognize and implement the art and ethic of the good translator . . . ."[12] By his definition, the good translator is one "who shows conscious awareness of shifts in meaning and who collaborates with the speaker in managing these changes."[13] Borrowing from the discursive methods of legal ethnography, Cunningham argnes that translation "can be an effective way of recognizing the difference of 'the other' and expanding imagination sufficiently to have some understanding of the other's story."[14] Collaboratively executed, therefore, translation may alleviate much of the client silencing produced by lawyer discourse. Full understanding of the client-other apparently is unnecessary to accomplish that reduction.

To test this thesis, Cunningham recounts a story of a mishandled translation centering on his representation of M. Dujon Johnson, a black graduate student arrested by state police and charged with disorderly conduct. The miscarried translation began with Cunningham's first reading of the police report. From this reading, Cunningham initially concluded that police troopers unlawfully stopped and searched Johnson, and then converted the illegal stop into a pretextual disorderly conduct arrest when Johnson protested their misconduct.[15] Building his case theory on this conclusion, Cunningham pursued a Fourth Amendment defense strategy. Accordingly, he filed a pretrial motion to suppress evidence of Johnson's alleged disorderly conduct.[16] To Cunningham's surprise, the county judge denied the motion and declared the incident an "attitude arrest."[17] Cunningham recalls: the "opinion jolted me out of thinking about what happened only in Fourth Amendment terms."[18]

Although dismayed by the denial of his motion, Cunningham explains that the judge's characterization of the arrest suggested an alternative reading of Johnson's narrative that had been silenced by Cunningham's own Fourth Amendment strategy. On this reading, the arrest symbolized "an escalating clash of conflicting attitudes:

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11 *Id.* at 1300.
12 *Id.* at 1301.
13 *Id.*
14 *Id.* at 1302
15 *Id.* at 1303-10.
16 *Id.* at 1311-13.
17 *Id.* at 1320.
18 *Id.* at 1322.

Johnson's demand for respect and [the police trooper]'s show of authority."[19]

The revision of Johnson's case to portray the struggle of a black man to preserve his individual dignity and identity in the face of state violence disrupted Cunningham's representation. Recognizing his misreading, Cunningham moved to refashion the process of representation itself. For the modernist lawyer, the discovery of a narrative misreading requires a new strategic intervention, such as a new case theory. For the postmodernist, the same discovery evinces absence and negation, and thus provides the occasion for a new vision of the lawyer/client relation to enable increased collaboration in constructing the discursive meanings of representation. Cunningham opted for both. He sought to redescribe the arrest incident and to reformulate Johnson's claim for relief. Furthermore, spurred by Johnson's refusal to plea bargain and his demands for the restoration of his dignity and the vindication of his rights, Cunningham proposed that Johnson himself cross-examine the arresting trooper at trial.[20]

Cunningham conceived of the cross-examination not only as a means to satisfy Johnson's dignity interest and meet his demand for procedural justice, but also as a "bridging experience" to communicate Johnson's experience of indignity to the jury and ensure the convergence of procedural justice and substantive relief.[21] Cunningham presumed that this dual translation would decrease the likelihood that Johnson would be again silenced. Cunningham notes: "[b]y thinking of the cross-examination, rather than the verdict, as the relief, . . . we could make available a legally enabled experience that shared structural and substantive elements with the experience of harm."[22] But, before Cunningham implemented his trial strategy of translation, the county prosecutor dismissed the complaint against Johnson. In granting the dismissal, the judge reiterated:

> "I think this was an attitude ticket. We see a lot of attitude tickets and um, no question about it."[23]

To Cunningham's surprise,[24] Johnson reacted with outrage, castigating the outcome as "patronizing, patronizing!"[25]

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19 *Id.* at 1325.

20 *Id.* at 1326-28.

21 *Id.* at 1327-28.

22 *Id.* at 1328.

23 *Id.*at 1329.

24 *Id.*

25 *Id.*

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

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

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

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

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26 *See* Kelly Oliver, *Fractal Politics: How to Use "the Subject"*, 11 PRAXIS INT'L 178, 190-92 (1991).

27 Cunningham, *supra* note 3, at 1330 (footnote omitted).

28 *Id.* at 1331.

29 *Id.* at 1338.

30 *Id.*

31 *Id.* at 1339.

32 *Id.* at 1348.

They are a constitutive part of that relation—open to resistance, but not disinterment.

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

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

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

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33 *Id.* at 1349.

34 *Id.* at 1362.

35 *Id.* at 1363-66.

36 *Id.* at 1326 n.48. Cunningham states: "I was the first to raise the idea [of cross-examination], but Johnson immediately responded that he had been thinking about asking us if he could participate in cross-examining [the arresting trooper]." *Id.*

37 *Id.* at 1366-68.

spect" was a crucial part of Johnson's "story of racial oppression"—a lack of respect may be a constitutive part of translation.[38]

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

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

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

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

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38 *Id.* at 1368.

39 *Id.* at 1370-71.

40 In this respect, Johnson comments: "The judge wasn't interested in a translation of what I had to say; he was interested simply in justifying the actions of the troopers. You are assuming that the judge—the system—was interested in a translation." *Id.* at n.250.

41 *Id.* at 1372.

42 *Id.* at 1377.

43 For a discussion of interpretive violence, see Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2125-30 (1991).

44 On the interpenetration of interpretive and material forms of violence, see Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992).

of representation, or of state agents. In the modernist lawyer canon, who would have believed him anyway?[45]

B. Tragedy

James Boyd White turns the modernist stance into an admission of tragedy. Evaluating representation as a form of translation[46] and a method of creating meaning, he urges lawyers to honor rather than appropriate legal texts: "we must make [their] terms our own, and give them meanings of our own making."[47] This arguably is proper when the text is composed of constitutional, statutory or common law rules, but what of the living texts of lawyer practice? Is it possible to honor the living text of the client-other? Is it possible to honor a client's story while displacing its narrative terms and meanings?

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

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

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

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

47 White, *supra* note 4, at 1390.

48 *Id.* at 1391-93.

49 *Id.* at 1394-95.

50 *Id.* at 1395.

C. Empathy

Feminist stances purport to challenge the theory/practice dichotomy underlying conventional lawyering.[51] Yet, Naomi Cahn observes that feminist stances are often "divorced" from practice.[52] Cahn attributes this decoupling to a practical failure to translate theoretical insights into "substantive and methodological ways of helping women."[53] Her objective is to facilitate that translation, to return theory to practice.[54] She writes that "[a]s theory remains grounded in practice and ethnographic, localized study, not only of courts, but also of what happens in the attorney-client relationship . . . ."[55]

For Cahn, theory and practice are intertwined. To illustrate this thesis, Cahn tells "a story of representation."[56] The story describes representation as a complex process of constructing and valuing multiple legal narratives.[57] Cahn focuses on several aspects of that process, including: "1) the client's representations to herself concerning the nature of her problem and her use of the legal system; 2) the client's representations to her lawyer; 3) the lawyer's representation of the client to the world outside of the attorney-client relationship . . . ."[58]

To explicate the multiple dimensions of representation, Cahn employs the methodology of the theoretics of practice movement.[59] Thus, she examines the intersection of theory and practice in specific lawyer/client situations, here involving sexual violence against women.[60] Her text is the language of the reasonable man encoded in the law of sexual harassment, battered women, and rape.[61]

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

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51 *See, e.g.*, Phyllis Goldfarb, *The Theory-Practice Spiral: Insights from Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

52 Cahn, *supra* note 5, at 1 (in original draft, on file with author).

53 *Id.* at 1 (quote in an original draft, on file with author).

54 Cahn admits to reservations "about whether the legal process can meaningfully address women's needs." *Id.* at 1398.

55 *Id.* at 1446.

56 *Id.* at 1429 n.138.

57 *Id.* at 1438 n.181.

58 *Id.* at 1439 n.186.

59 *See, e.g.*, Alfieri, *supra* note 43; Clark Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); Gerald Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Symposium, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992).

60 Cahn, *supra* note 5, at 1400.

61 *Id.*

the standard operates to subordinate and engender violence against women.[62] To halt such physical and interpretive violence, Cahn proposes reforming conventional theories and methods of representation. She offers the reasonable woman standard as creating the possibility of change.[63]

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

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

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

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62 *Id.* at 1404.
63 *Id.* at 1400, 1444.
64 *Id.* at 1409-10.
65 *Id.* at 1415-17.
66 *Id.* at 1417-18 n.104.
67 *Id.* at 1418-19.
68 *Id.* at 1420.
69 *Id.* at 1421.
70 *Id.* at 1422.
71 *Id.*
72 *Id.* (emphasis added).

Vesting the power to name[73] women in lawyer discourse reproduces the essentialization and marginalization that Cahn protests. Cahn points out these results, observing that women's stories which do not fit neatly within conventional discourse will be excluded.[74] Women, she laments, "must still accommodate their experience to someone else's reasonableness standard."[75]

Paradoxically, Cahn both challenges and ratifies instrumental accommodation in representation. This is the paradox of modern practice and postmodern theory. The study culled from her domestic violence practice, the case of Arlene Sims, reveals this opposition and the ensuing tension of irreconciliation. Cahn introduces Arlene Sims as a victim of spouse-inflicted domestic violence struggling to enforce a court issued order of protection against her husband.[76] Investigating the case to establish evidence for a contempt proceeding, Cahn highlights two incidents of abuse in violation of the court's order of protection. In the first incident, Sims's husband beat her with a chair.[77] In the second incident, Sims stabbed her husband with a knife to fend off another attack.[78]

Cahn is troubled by this second incident, especially by the "inconsistencies" in Sims's story.[79] To comprehend the incidents, Cahn develops alternative case theories based on "reasonable woman" and "victim" stories. In the reasonable woman story,[80] Sims is "confused about when exactly she had stabbed [her husband] with the knife."[81] In the victim story, Sims is "stuck in an abusive situation . . . unable to step out of a cycle of violence with her husband."[82]

Cahn asserts that both theories and stories are true.[83] Because of the relative truth content of each version, Cahn adopts an instrumental calculus to determine her strategy of representation at the contempt proceeding. On this calculus, the question becomes "whether [Sims] would have a better chance at winning a contempt proceeding if she appeared to be a victim or a reasonable

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73 By naming, I mean the act of describing and classifying women in terms of certain essentialist characteristics. *See* ELIZABETH V. SPELMAN, INESSENTIAL WOMAN 177 (1988) (showing "how fundamental assumptions of feminist theory help to disguise the conflation of the situation of one group of women with the situation of all women.").

74 Cahn, *supra* note 5, at 1422-23.

75 *Id.* at 1423.

76 *Id.* at 1424-30.

77 *Id.* at 1424.

78 *Id.* at 1426-27.

79 *Id.* at 1427.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.* at 1428.

woman."[84] Cahn selects "the reasonable woman approach because it allowed Ms. Sims some dignity in telling her story to the judge and in front of her husband."[85]

Significantly, on the date of trial, Sims declined to proceed, withdrawing the complaint against her husband.[86] Although denied the opportunity to test her strategy in practice, Cahn concludes that "[i]t did work to make Ms. Sims feel that she could tell her story in court."[87] According to Cahn, a reasonable woman standard enables clients to "feel more 'fluent' within the legal system . . . ."[88] Cahn, however, presents little support for these conclusions. Without backing, they seem more ideological than real.

Cahn's unwillingness to bolster her conclusions may be traced to her own postmodern doubt. Cahn concedes that doubt, remarking: "[e]ven to me, [Sims's] behavior initially seemed somewhat risky, not quite reasonable."[89] Cahn admits that her image of a reasonable woman is informed by her own experiences. Unlike Sims, she is "not a black mother of three who receives AFDC and has been battered by [her] husband."[90] To empathize with Sims's situation, Cahn seeks "to know as many facts about her life as possible . . . ."[91] Here, Cahn confronts the postmodern recognition of the partiality of knowledge. This inevitable partiality weakens her conclusions and limits her plea of thick description on behalf of Sims. Even if that plea could be fully mustered, it is unlikely to obtain a fair hearing in a legal process where the partiality of class, gender, and race are constant.[92]

This institutional partiality accounts for Cahn's contradictory stance of embracing a standard of reasonable conduct that simultaneously affirms and denigrates women's lives.[93] The contradiction is unsurprising; as Cahn mentions, "[t]he reasonable woman standard developed from the experiences of outsiders."[94] Differences of class, ethnicity, gender, race, and sexual orientation characterize those experiences.[95] Although the reasonable woman standard potentially includes a multiplicity of women's experiences, the legal

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84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.* at 30 (quote in an original draft, on file with author).
88 *Id.* at 1435.
89 *Id.* at 1429.
90 *Id.*
91 *Id.*
92 *Id.* at 1430.
93 *Id.*
94 *Id.* at 1432.
95 *Id.* at 1435.

process and, by extension, the act of representation, systematically exclude them.[96]

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

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

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

96 *Id.* at 1431-32.
97 *Id.* at 1436.
98 *Id.*.
99 *Id.* Cahn recommends changing prevailing community attitudes, though it is unclear how she intends to do so. *Id.*
100 *Id.*.
101 *Id.* at 42 (quote in an original draft, on file with author).
102 *Id.* at 1432.
103 *Id.* at 1440.
104 *Id.* at 1440-41.
105 *Id.*
106 *Id.* at 1439-40.
107 *Id.* at 1442.
108 *Id.* at 1443-44.
109 *Id.* at 1444.

and their clients; how well it accords with existing ethical norms; and how it affects client narrative."[110]

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

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

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110 *Id.* at 45 (quote in an original draft, on file with author).

111 For recent disputed accounts of paternalism, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 317-57 (1988); Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116 (1990) (book review); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004 (1990).

112 *See* Naomi R. Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L.J. 1 (1991).

113 Cahn, *supra* note 5, at 1443-44.

114 *Id.* at 1442-43.

115 *Id.* at 1444.

116 *See, e.g.*, Robert Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697 (1992); Robert Dinerstein, *Client Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990).

II
POSTMODERN STANCES

The works of Richard Delgado and Jean Stefancic, William Felstiner and Austin Sarat, and Lucie White proceed from a postmodern distrust of lawyering. Their common insight is the recognition of the power of the lawyer-subject: the power to speak, to negotiate, and to dominate. Yet, unlike other postmodern theorists who imprison human agency and reject intersubjectivity,[117] they affirm the possibility, however confined, of human emancipation and community.

A. Power and Speech

The postmodern stance of Richard Delgado and Jean Stefancic is animated by a focus on the relationship between power and speech in society.[118] Their thesis is that within the conventions of First Amendment doctrine, speech alone is ill-equipped to remedy broadly entrenched, systemic patterns of racism. They argue that the marketplace ideology of free speech limits the emergence of a "countervailing message" adequate to challenge racism in a historical context.[119] On their analysis, "free speech . . . is least helpful where we need it most."[120] To illustrate this point, they examine the demeaning historical depiction of four American minority subgroups of color: Mexicans, Blacks, Asians, and Native Americans.[121]

Delgado and Stefancic find parallels among the socially constructed "stock characters" and "stigma-pictures" depicting minority subgroups.[122] They question the belief that lawyers can simply "enlarge [their] sympathies [and reimagine these character portraits] through linguistic means alone."[123] Labelling this belief the "empathic fallacy," they challenge the presumption that lawyers "can . . . think, talk, read, and write [their] way out of bigotry and narrow-mindedness, out of [their] limitations of experience and perspective."[124] The modernist lawyer indulges this belief, invoking empathy as a nostrum, hence forgetting the situatedness of his own perspective.

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

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117 *See, e.g.*, CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) (espousing a structuralist theory of patriarchy).
118 Delgado & Stefancic, *supra* note 7, at 1258.
119 *Id.* at 1260.
120 *Id.* at 1259.
121 *Id.* at 1260.
122 *Id.*
123 *Id.* at 1261.
124 *Id.*

more limited version of intersubjectivity.[125] Consistent with his embrace of the empathic fallacy, the modernist lawyer proffers an expansive version of intersubjectivity. This version is instilled by a romantic humanism ungrounded in context. To clarify their more rooted contextual version, Delgado and Stefancic summarize the dominant forms and images of racially repressive speech.[126] The outgrowth of repression is disempowerment: "speech of the Indians—as well as that of African-Americans, Mexicans, and Asians—has been mangled, blunted and rendered inarticulate by whites who then became entitled to speak for them."[127]

For Delgado and Stefancic, stereotyping and its corollary disempowerment deny dominant and subordinate groups "the opportunity to interact with each other on anything like a complex, nuanced human level."[128] In place of interaction, there is an infliction of power.[129] The modernist lawyer is immersed in discourses and relations of power. The counter discourse of resistance contests but does not impede the infinite permutations of power: racism, sexism, homophobia, etc. Constructivist theory teaches that "countervailing speech" will not overcome the assaults of racism. To claim otherwise, according to Delgado and Stefancic, is to misunderstand "the relation between the subject, or self, and new narratives."[130]

Delgado and Stefancic contend that racism is embedded in cultural narratives and, therefore, is concealed from historical view. The modernist lawyer denies the cultural entrenchment of race. Without that denial, his own culturally-intertwined legal narratives dissolve into racially-privileged mystification. Because racism forms "part of the dominant narrative" that lawyers deploy to construct the social world, "speech [is] an ineffective tool to counter it."[131] Like narrative, speech is confined by the boundaries of dominant culture: "[w]ithin that general framework, only certain matters are open for discussion . . . ."[132] The modernist lawyer overlooks these cultural boundaries, mistaking self-regulated forms of client speech for full disclosure.

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

125 *Id.*
126 *Id.* at 1261-75.
127 *Id.* at 1270.
128 *Id.* at 1273.
129 *Id.* at 1276.
130 *Id.* at 1277.
131 *Id.* at 1279, 1278.
132 *Id.* at 1280.

are our current stock of narratives, and they us."[133] It is our own *living* narratives that "shape and determine *us*, who we are, what we see, how we select, reject, interpret and order subsequent reality."[134] In this way, racist narratives are self-perpetuating.

Delgado and Stefancic dismiss overblown claims to self-reconstitution. The modernist lawyer is prone to such illusory claims, deluding himself about the organic character of his sociolegal vision. These claims maintain that self-reconstitution is merely a matter of reformist education acquired through reading, talking, and writing.[135] Delgado and Stefancic regard such claims of "reform" as a repetition of the empathic fallacy.[136] The marketplace ideology pervading First Amendment doctrine fuels their skepticism. Because racism is a persistent and thereby "normal" facet of that market, they question the likelihood of speech-based correction.[137] Racism itself may be unsusceptible to such correction, for "racism contains features that render it relatively unamenable to redress through words."[138]

To identify covert and overt acts of racism, Delgado and Stefancic propose that "sympathizers" learn the "code-words" of race and "racial signalling."[139] Racism, they stress, "is often a matter of interpretation . . . ."[140] For the modernist lawyer, interpretation is unsullied by racism. Rightly applied, the interpretive cycle expels the tainted properties of class, gender, and race, gradually rendering the representation process an unalloyed medium of communication.

Delgado and Stefancic denounce the interpretive obliteration of racism: "[s]ociety generalizes the wrong lesson from the past, namely that racism has virtually disappeared."[141] The modernist lawyer tolerates this disappearance, approving a discourse in which racism survives unnamed. By contrast, Delgado and Stefancic point to the continuing presence of racism in public "pictures, images,

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133 *Id. See also* Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2245 (1989) ("[O]ur very ability to construct a world is already constrained by the cultural structures in which we are enmeshed.").

134 Delgado & Stefancic, *supra* note 7, at 1280.

135 For an indictment of these claims, see Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1497 (1990) ("[T]he naive faith in normative dialogue as a means to accomplish change begins to look like nothing so much as faith in a 'talking cure.' ").

136 Delgado & Stefancic, *supra* note 7, at 1281.

137 *Id.*

138 *Id.* at 1282.

139 *Id.* at 1283.

140 *Id.*

141 *Id.* at 1284.

narratives, plots, roles, and stories . . . ."[142] These predominantly "negative" images deform the perceptions of both majority and minority persons.[143] The internalization of subordinate stories, Delgado and Stefancic warn, "precludes the stigmatized from participating effectively in the marketplace of ideas."[144] They add: "even when minorities do speak they have little credibility."[145] Both Dujon Johnson and Arlene Sims, for example, experienced this debasement of credibility. Even when lawyers encourage public speech, as in the cases of Johnson and Sims, they harbor doubts about its effectiveness and veracity. This racial marginalization, Delgado and Stefancic argue, weighs so heavily on the character of the legal imagination and in the content of legal discourse that "more speech, more talking, more preaching, and more lecturing" is probably fruitless.[146] The modernist lawyer discounts this probability, remaining wedded to his reformist discourse.

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

B. Power and Negotiation

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

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

142 *Id.* at 1287.
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.* at 1288.
147 *Id.* at 1289.
148 Felstiner & Sarat, *supra* note 6, at 1447.
149 *Id.* at 1448-49.

patterns of historical practice constrain the range of reformist moves available to lawyers and clients. Nevertheless, Felstiner and Sarat assert "that structure and power are vulnerable to major changes of practice."[150] That sanguine assertion inspires their central thesis of deep-structure negotiation. This postmodern variant of structuralism suggests that social phenomena are negotiated overtly, in a manner fairly recognizable, as well as covertly, "through the exercise of power and attempts at resistance and subversion."[151]

Felstiner and Sarat's post-structuralist negotiation thesis permits wide latitude in the study of social structure and power, especially in the context of legal representation. To verify their thesis, they study the enactments of power specific to lawyer/client interactions during the divorce process. They find that such "power is not possessed at all," but rather circulates throughout the lawyer/client relationship exhibiting mobility and volatility.[152] The constant circulation of power molds the substance of that relationship within discrete cases and across fields of practice.[153]

Felstiner and Sarat's conception of the negotiated quality of power challenges more deterministic, conventional views of the nature of the lawyer/client relation in divorce representation. These views hold to a reductionist, lawyer-based conception in which power is one-dimensional and uncontested. Departing from this conception, Felstiner and Sarat establish two different types and associated arenas of lawyer/client power negotiation: negotiations of "reality" regarding the goals of representation and negotiations of "responsibility" concerning control over case management.[154]

To chart these overlapping forms and forums of negotiation, Felstiner and Sarat provide a case history taken from a female California lawyer's divorce practice. Here, they treat power not as a static property of constituent identities or fields, like a "thing" appended to status or a role, but as a shifting relation "continuously enacted and re-enacted, constituted and re-constituted."[155] Their investigation of this relation focuses on the "microdynamics" of lawyer/client encounters during the process of representation.[156]

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

150 *Id.* at 1449.
151 *Id.*
152 *Id.* at 1450-51.
153 *Id.* at 1451-52.
154 *Id.* at 1454-56.
155 *Id.* at 1454.
156 *Id.*

ings, both the lawyer and the client construct and exchange accounts of their respective social worlds. Felstiner and Sarat define this interaction as a "process of story-telling and interrogation in which lawyer and client seek to produce for each other a satisfying rendition of her distinctive world."[157] The process is both evasive and interdependent, characterized by moments of concealment, doubt, and suspicion, all of which limit the assimilation of knowledge.[158]

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

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

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

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

157 *Id.* at 1454-55 (footnote omitted).
158 *Id.* at 1455-56.
159 *Id.* at 1456.
160 *Id.* at 1457.
161 *Id.* at 1458.

of what reasonably can be expected or achieved" in legal representation, they flounder amid the multiple, shifting constructions of the postmodern world.[162] As Sarat and Felstiner's case study indicates, the lawyer and client may be unable to negotiate a mutually satisfactory understanding of what is legally *and* socially possible. Sometimes dissatisfaction arises from client nondisclosure or lawyer misinterpretation.[163] And sometimes dissatisfaction lies chiefly with the lawyer's practices of manipulation[164] and self-deception.[165]

Two lessons of Felstiner and Sarat's postmodern power "play" are the intractability of lawyer self-deception and the ambiguity of client "exit."[166] Here, I use self-deception to refer to the lawyer's penchant for overestimating his power to negotiate the reality and responsibility of legal representation.[167] Felstiner and Sarat cite this tendency in summarizing the findings of their case study, noting its display in the conduct of the divorce lawyer.[168]

Felstiner and Sarat also mention, without elaboration, that the client featured in the study eventually "asked that [they] stop observing conferences and not interview her further."[169] Because they already have pointed out that the "usual client response" to profound lawyer dissatisfaction "is exit rather than voice,"[170] it is puzzling that Sarat and Felstiner decline to speculate on the reason behind the client's sudden exit. Perhaps the client enacted a form of displaced resistance against the few agents subject to her control. Perhaps exit, in its many rhetorical guises, is the only true power of clients.[171]

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

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162 *Id.* at 1460.

163 *Id.* at 1461.

164 *Id.* at 1462-66.

165 *Id.* at 1495 ("The gap between programmatic objectives and actuality in this case is obvious.").

166 *Id.* at 1464, 1466.

167 *Id.* at 1494 ("In the end, [the lawyer] Wendy *imagines* that she produces not only optimal outcomes, she also produces new women.") (emphasis added).

168 *Id.* at 1493-95.

169 *Id.* at 1493 n.121.

170 *Id.* at 1464.

171 On the ambiguity of exit, see Martha Mahoney, *EXIT: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283 (1992).

C. Power and Risk

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

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

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

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

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172 White, *supra* note 8, at 1500-01.
173 *Id.* at 1500.
174 *Id.* at 1501.
175 *Id.* at 1502.
176 *Id.* at 1503.
177 *Id.* at 1504.
178 *Id.*
179 *Id.*
180 *Id.* at 1505.

According to White, this deception is a byproduct of totalizing theory. It misleads lawyers in their analysis of the systematic domination of legal institutions.[181] Instead of concentrating on the institutional constraints impinging on the circulation of power, lawyers enamored with meta-theory rely upon crude, mechanistic descriptions of institutional power. White cites this misplaced reliance as a barrier to the development of a "theoretics and a reconstructive politics of *institutional* design."[182] The absence of a sophisticated institutional politics inhibits the comparison of "specific institutional forms of power against varying flows of power" as well as the explanation of "why some institutions congeal power more than others."[183]

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

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

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181 *Id.*

182 *Id.*

183 *Id.* at 10 (quotes are in an original draft, on file with author).

184 *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. (forthcoming 1992) (housing); Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992) (disability); William Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 58 BROOK. L. REV. 777 (1990) (public assistance); Lucie White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990) (public assistance). *Id.*

185 White, *supra* note 8, at 1506.

186 *Id.*

187 *Id.* at 12 (quote in an original draft, on file with author).

188 *Id.*

189 *Id.* at 1507.

client. Furthermore, she decries the view that empathy must rest on sameness, recalling the tendency to " 'essentialize' " the other.[190]

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

CONCLUSION

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

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