

LAWYERS, CLIENTS, AND THE “THIRD PERSON IN THE ROOM”

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INTRODUCTION

Muneer Ahmad’s *Interpreting Communities: Lawyering Across Language Difference*¹ succeeds admirably on two levels. First, Ahmad presents a careful analysis of a much neglected topic, the role of interpreters in mediating the relationship between a lawyer and a client who must overcome the most fundamental of communication barriers—language difference. He challenges the uninformed view of a mechanical, black box ideal of interpretation, in which the role of the interpreter is to translate “exactly” the words of lawyer and client, as both impossible and undesirable. He then goes on to consider other possible ideal roles for interpreters before arriving at his preferred choice: the interpreter as linguistic and cultural expert. This conception fits neatly with a notion that has taken shape within the community of practicing interpreters and the academic field of interpreter studies: community interpreting. Ahmad describes this practice as “an interstitial enterprise that inhabits the many points of more routine contact between minority-language speakers and majority-language institutions, service providers, and power brokers.”² “Community interpreting,” he explains, “blurs the boundaries of traditional interpreters, frequently embracing cultural brokering, advocacy and conciliation as part of the interpreters’ project.”³ Ahmad’s analysis

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1. Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007).

2. *Id.* at 1066.

3. *Id.* (citing Roda P. Roberts, *Community Interpreting Today and Tomorrow*, in THE CRITICAL LINK: INTERPRETERS IN THE COMMUNITY (Silvana E. Carr et al. eds., 1995)).

of the problem of interpretation in lawyering is a substantial contribution to the literature on lawyering theory. But the contributions of the piece to lawyering theory go further.

Ahmad's second significant contribution to lawyering theory is his use of interpretation as a metaphor and the setting of interpretation as a source of analogies that might illuminate for reexamination conceptions of collaborative lawyering. He observes:

The interpreter visibly marks outside influences, considerations, and concerns that animate all lawyer-client relationships. She literally embodies the third person who, by virtue of her effect on both the lawyer and the client, shapes and alters the content and form of lawyer-client communication. But even when the lawyer and client speak the same language, even when there is no interpreter present, *there is always a third person in the room*. Absent an interpreter, both lawyers and clients still draw upon or are otherwise influenced by actors and forces that, while not physically manifested in the interview room, profoundly affect the lawyer-client relationship.⁴

Ahmad has several suggestions that derive from this analysis. First, lawyers must go beyond understanding literal translation of words to develop greater cultural competence and pay increased attention to the cultural contexts in which client problems are embedded. Second, the example of community interpreters provides a useful analog for considering more robust relationships with third parties who may bring different and complementary expertise to the problem-solving enterprise. Third, the limitations of interpretation suggest additional reasons for lawyers themselves to acquire facility with the language and the culture of the communities in which they practice—a facility that cannot be outsourced and can only truly be acquired through immersion.

The further value of the lawyer-interpreter-client triad analog and of the metaphor of “the room” in which the interaction takes place depends on context. Every encounter between two or more people is, of course, affected by others not present either in the space or at the time. But using the source analog and the metaphor also can help reveal some issues that are often obscured in adjectives such as client-centered,⁵ rebellious,⁶

4. *Id.* at 1003.

5. David A. Binder & Susan C. Price, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

6. Gerald P. López, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

transformative,⁷ reconstructive,⁸ collaborative,⁹ and community¹⁰ lawyering. I discuss below some of these issues and the questions suggested by extending the metaphor of linguistic and cultural interpretation. My aim is not to critique Ahmad's piece, but to demonstrate how his framing of interpretation can help sharpen some issues that have engaged scholars of lawyering for disempowered clients and communities for decades.

I. WHAT ROOM?

Ahmad points out the limitations of conceiving of the space of the lawyer-client interaction as the interview room, which he describes as representing a "domesticated lawyer-client relationship."¹¹ "Breaching the client interview room and liberating the lawyer-client relationship from it," he continues, "frees us to imagine new configurations of lawyers, clients, and communities. Such a crowd could never fit in the traditional interview room."¹² Certainly, the interpreters and other third parties have roles to play beyond the interview room or the lawyer's office. But having breached this boundary, should we set others? Who should set them?

For example, in the case of an individual client facing eviction, should the lawyer inquire into every possible sphere in which a client may operate: her family and friends, her neighbors, her social network, her employer, and her workplace support systems? Perhaps. Certainly, this inquiry might help break the narrow frame of eviction law and the immediate circumstance of an eviction complaint requiring a response. This inquiry could help the lawyer ascertain if the eviction follows nonpayment of rent following either an illegal firing or a termination from government benefits that might be remedied. Maybe the fact that family or neighbors can accommodate the client for a short time will change the lawyer's calculation of prospects for a settlement. Possibly the landlord in question is a notorious slumlord and the subject of organizing by a group

7. Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. MIAMI L. REV. 983, 992 (1994).

8. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

9. Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths From Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994); see also Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 441 (2000).

10. Christine Zuni Cruz, *[On The] Road Back in: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999).

11. Ahmad, *supra* note 1, at 1078.

12. *Id.*

of tenants—a fact that will make proving a habitability defense in this case much easier, and could provide a form of social solidarity of which the client may have been unaware.

Who should decide these boundary questions? Too often they are set by the institutional framework, often itself the product of unequal access to legal services. A high-volume eviction defense office will tend to parse every case down to the same essentials, regarding everything unrelated to the eviction else as extraneous.¹³ Only the wealthy or the very lucky can find lawyers willing to explore all the dimensions of a case, of which the immediate legal dimension is always but one. Of course, this observation assumes that a client desires something more from the lawyer than attending to the immediate legal problem at hand. As much as the aspiring collaborative lawyer might want to see herself as a fully engaged multidimensional problem-solver, even as a friend, this aspiration may be frustrated. As Ahmad writes, “[i]t is one thing to say that the lawyer-client relationship is a dialogical one; it is quite another to assume that both parties are equally interested or invested in it.”¹⁴ Perhaps the best any lawyer can do is to ask whether these are areas the client would like to consider exploring together, without suggesting that the unwilling client is somehow insufficiently lawyer-centric.

II. WHO IS INVITED INTO THE ROOM, AND FOR HOW LONG?

Most lawyers will agree, and the rules of professional conduct¹⁵ mandate, that the client controls who may have access to lawyer-client communications. It is, of course, possible that a collaboration can emerge among lawyer, client, and third parties mutually agreed upon that does not depend on the disclosure of lawyer-client communications. Clearly, permissible disclosure would make the project more truly collaborative. At the same time, overextending the analogy beyond the linguistic interpreter can lead to serious practical legal problems. While an interpreter or other person “serving as an agent of either attorney or client to facilitate communication,”¹⁶ is generally within the protection of the

13. I base this observation on my experience as a legal aid lawyer who cofounded an eviction defense office in Los Angeles that handled about 10,000 cases per year and as an academic who went back to evaluate the institution some years later.

14. Ahmad, *supra* note 1, at 1077.

15. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007).

16. *People v. Osorio*, 75 N.Y.2d 80, 84 (1989).

lawyer-client privilege,¹⁷ the presence of arguably inessential third parties risks waiver of that privilege.¹⁸ Thus, once a lawyer-client relationship is established, the degree of collaboration, and with whom, are plainly subject to veto by the client, who controls the flow of otherwise privileged communications.

But can a lawyer who privileges collaborative lawyering impose collaboration as a condition of the representation in the first place? There is some irony in refusing legal assistance to clients who are insufficiently collaboration-centric. From a different perspective, this may be seen as turning away clients who are insufficiently lawyer-centric to meet the lawyer's standards or priorities. We can imagine a client saying, "Look, I appreciate your willingness to do more and your suggestions about getting involved with my neighbors, but I have other urgent matters to attend to and what I really need from you is to keep me and my family from being put on the street on Thursday." To which a dedicated collaborative lawyer might respond, "I'm sorry, but we cannot represent everyone, so we have chosen to represent those who will work with others with the same problems, because it allows us to help more people with our limited resources." Certainly, very thoughtful progressive practitioners and scholars have advocated conditioning the provision of legal services on a client's willingness to do more than be the passive recipient of services.¹⁹ This notion seems less harsh and contradictory when the context is one in which other clients from subordinated groups are already engaged in the struggles around some of the same issues and are, in effect, already "in the room." In this sense, it is not the lawyer who is turning away an insufficiently collaborative prospective client, but those past or present clients who already have decided to collaborate, and to whom the dedicated collaborative lawyer seeks to be accountable.

17. See, e.g., *Allied Irish Banks v. Bank of Am.*, 240 F.R.D. 96, 103 (S.D.N.Y. 2007) (interpreters); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (accountant); *City & County of San Francisco v. Superior Court*, 231 P.2d 26 (Cal. 1951) (physician).

18. See, e.g., CAL. EVID. CODE § 912(a) (West 2007) (privilege waived if holder of privilege "without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone"); CAL. EVID. CODE § 912(d) (disclosure does not waive privilege "when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted"); FED. R. EVID. 511 ("A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication.").

19. For example, the Workplace Project on Long Island, about which Jennifer Gordon has written so compellingly, required those receiving help with wage and hour claims to also complete a Workers' Course. JENNIFER GORDON, *SUBURBAN SWEATSHOPS* 114 (2005).

III. WHO IS IN THE ROOM ALREADY?

Recasting the metaphor from one in which the lawyer and the client together decide who to invite into the room for collaboration to one in which a potential client seeks entry into a room already occupied by lawyers and their client-collaborators may be helpful. But only to a point. Ahmad writes in a tradition of critique of a particular practice: legal services and poverty law as it emerged in the 1970s. Critics like Tony Alfieri,²⁰ Jerry López,²¹ and Lucie White²² demonstrated to the satisfaction of just about everyone that a particular style of poverty lawyering—what López called “regnant” lawyering²³—was flawed by elitism that could create lawyer-client relationships that only further subordinated and disempowered clients.²⁴ Ironically, in all of this critical literature, the focus is on lawyers and how they choose to practice—and, more specifically, whom they invite into the collaborative space. With the lawyer out of the room, this literature would be about something else, like organizing, politics, general theories of representation and democracy, or when it makes sense to invite lawyers into the process.

When legal services are dispensed as a service to which the rules of the market apply—as in the representation of corporations and wealthy individuals—lawyers are called in as needed, and for purposes specified by the client. It is certainly true that once this happens, the client (and the other third parties that the client has determined are relevant to the enterprise) may lose a degree of control. But at least the decision to allow a lawyer into “the room” is unilaterally that of the client: the opposite of the prototypical legal services context.

There are, of course, some situations in which poor people are organized into unions, community organizations, churches, or other entities able to pool resources to hire lawyers. Labor-side lawyers, including those representing unions comprised exclusively of low-wage workers and members of subordinated groups, are not accustomed to having much voice in deciding matters of collaboration. As with their employer-side counterpart attorneys, they generally do what they are asked to do by their clients and with the collaborators selected by the clients.

20. Alfieri, *supra* note 8.

21. López, *supra* note 6.

22. White, *supra* note 9.

23. López, *supra* note 6, at 23–24.

24. *Id.*

This emphatically does not mean that issues of misplaced power and subordination simply disappear in the context of workers, unions, and lawyers. Rather, the same questions are simply transposed to another set of relationships. The danger becomes not one of subordination of client by lawyer, but of subordination of members by union leaders or organizers, who may also be far removed from the situations of ordinary workers and even less likely than poverty lawyers to listen to the voices of the working poor. A lawyer taking direction from union leadership in a nondemocratic union may in fact be further from representing the actual interests of poor union members than the legal aid lawyer to whom the same people may turn for help with their other legal problems.

The risks and tensions that arise in labor law also exist in law and organizing approaches beyond the labor context. Appearances of democracy are often deceiving. A poverty lawyer collaborating with a community organization may feel or appear either rebellious or collaborative, but may in fact rarely interact with grassroots members. Indeed, some would see too much interaction as a necessary feature of collaboration with organizations in order to avoid undermining legitimate community leadership. As a result, the lawyer may have little way of knowing that the leadership with whom she interacts really only represents a tiny clique with narrow interests that conflict with those of the organization's membership and the broader community.²⁵ A principled collaborative lawyer might make a point to find out something about the internal dynamics of the organization and the communities it purports to represent. And then that same principled collaborative lawyer might impose a condition that inverts the more usual demand that clients work with an organization: The lawyer might refuse to work with organizations that do not agree to actually collaborate with and truly represent their own members. Just as this approach only works with poor people, however, it also only works with poor organizations, unable to afford the alternative of a lawyer with different principles.

IV. INTERPRETING SILENCE, GIBBERISH, AND CACOPHONY

Theories of practice that emerged from critiques of poverty law practice bear the limitations of historical context. Most poverty law practice has been based on the geography of access. The Legal Services Corporation, for

25. Michael Diamond & Aaron O'Toole, *Leaders, Followers, and Free Riders: The Community Lawyer's Dilemma When Representing Non-Democratic Client Organizations*, 31 *FORDHAM URB. L.J.* 481 (2004).

example, provides funding to organizations that have “service areas” that are as precisely defined as any census tract, voting precinct, or school district.²⁶ Progressive critiques of poverty law practice have generally made the same implicit assumption about the locations of people with whom lawyers might work: a geographically contiguous community one can see on a map. Similarly, progressive critiques have most often been concerned with those practices that effectively silence client voices that are otherwise not difficult to hear. But what if the communities are ones of common interest but not of geography, or if those whose voices that should be heard cannot speak with sufficient clarity or volume to be understood?

The definition of “public interest law” for the Epstein Program in Public Law and Policy at the UCLA School of Law includes the representation of future generations.²⁷ Presumably, most people would agree that legal work that contributes to reducing particular harms of global warming falls within the ambit, even if many of those harms will not be seen in this century. The same might be said of work to protect animals from suffering or the preservation of endangered species. Of course, theoreticians of collaborative lawyering might set these aside as outliers. All theories, even Newton’s physics, are limited to some context.

But consider other examples more directly related to the desire to help improve the lives of poor and subordinated people: foster children across a state whose fates are linked by being determined largely by actions and inactions in the state capitol;²⁸ prisoners with serious and chronic mental illness and addiction diseases deprived of basic health and mental health care throughout a state’s correctional system; people with severe mental disorders who are homeless and unable to obtain the meager public benefits to which they are potentially entitled because of bureaucratic barriers that pose a hurdle equivalent to that of a staircase to a paraplegic. All of these people are very poor; the vast majority are people of color and members of other subordinated groups. And all of these examples are real.²⁹ What

26. 45 C.F.R. 1634.3(d).

27. David J. Epstein Program in Public Interest Law & Policy: Admissions, <http://www.law.ucla.edu/home/index.asp?page=2642> (last visited Mar. 18, 2008).

28. See Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children’s Class-Action Cases*, 64 *FORDHAM L. REV.* 1435 (1996).

29. *Angela R. v. Clinton*, LRC-91-415 (E.D. Ark. filed July 3, 1991), *consent decree vacated*, 999 F.2d 320 (8th Cir. 1993), *settlement approved*, LRC-91-415 (E.D. Ark. Oct. 14, 1994), *cited in Matthews, supra* note 28, (class action on behalf of children in allegedly substandard foster care in Arkansas against then Governor of Arkansas); *Plata v. Schwarzenegger*, C01-1351 THE, N.D. Cal., and *Coleman v. Schwarzenegger*, E.D. Cal. (class actions against California

do the critiques of traditional poverty law practices and alternative visions of rebellious, collaborative, community lawyering have to offer a lawyer confronting such situations? Not much, at least not directly. To be sure, one can try to extend the principles at work behind these critiques, including their valorizing of important values and goals of client autonomy, antisubordination, empowerment, collaboration, and building community. But this extension, or even the need for it, receives little attention from the critics themselves. In fact, it was this incompleteness I saw in works by Alfieri, Lopez, and White that motivated me to write my first academic piece after leaving a practice devoted primarily to representing homeless people in Los Angeles.³⁰ Unfortunately, limitations of the author and the piece itself resulted in that article being seen as opposing the critiques of some versions of poverty law practice, rather than as a complaint about the incompleteness of both the critiques and the alternatives proposed.³¹

Ahmad's article and the metaphor from interpretation provide an opportunity to rethink these fundamental questions of how lawyers and others can be true to their antisubordination principles in hard cases. These principles require attention to at least two dangers when lawyers (and organizers or community leaders) interact with people with regard to whom lawyers have unwarranted relative power. The first danger is that lawyers will, consciously or unconsciously, pursue their own goals rather than those of clients who are unable to hold their own, even when the lawyer invites dialog. The second danger is that lawyers will act on seriously incomplete information about what might constitute progress for the client's case because they are insufficiently informed about contexts or consequences. When it comes to problems of legal work with and on behalf of collections of people for whom the prototype of community organizing is difficult to apply or even imagine, the standard critiques of poverty law simply avoid the question of what to do. Some purists might even suggest that these marginalized clients' situations are not appropriate realms for progressive

on behalf of state prisoners denied adequate health care and mental health care, respectively); *Rensch v. Board of Supervisors*, Los Angeles Superior Court No. C595155 (representative taxpayer action on behalf of mentally and developmentally disabled applicants for welfare under county program of general assistance).

30. See Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063 (1994) and Piomelli, *supra* note 9 (correctly observing that I had incorrectly ascribed some of Tony Alfieri's affinity for postmodernism to Jerry Lopez and Lucie White).

31. See, e.g., Trubek, *supra* note 7, at 993.

lawyering, leaving these foster children, prisoners, and homeless people with severe mental disabilities to hope for other sources of change.

But perhaps most would suggest that there are still lessons from the standard critique worth applying. For example, leaving aside for now the unborn, animals, and the environment, it is nearly always possible to help give voice to people, whatever the circumstance. Plainly, lawyers should try to enable voices to which they can listen. Foster children, prisoners, and homeless people know better than any intermediary what they want to change in their own situations. They may have deep insights into some of the institutional arrangements that contribute to the harms they experience, and the kinds of remedies that would make a difference. But, depending on individual capacity, in general or at particular points in time, people may not have empirically correct information about what changes are required at what levels of various systems in which they are ensnared in order to get what they want. Foster children know a lot about the value of keeping siblings together, but not as much about the effect of caseloads on social workers. Prisoners may see as more important that more prisons be built to reduce their overcrowded conditions than to reform a parole system that sends thousands of parolees back to prison for technical parole violations (thus greatly both prison overcrowding and their own risks of reincarceration after their release). Homeless people may want to sue the welfare worker who turned them away and do not fully comprehend that the welfare worker was required to apply nondiscretionary rules adopted by bureaucrats who never see homeless people. Actual consultation and collaboration to the maximum feasible extent is essential, but rarely sufficient, to protect in these cases against the twin risks of the lawyer's self-interest and ignorance.

Ahmad's piece suggests a further step of involving more broadly defined community interpreters.³² If interpreters bring linguistic and cultural expertise, surely there are other experts whose collaboration should be valued, and not only those with advanced degrees (social workers, doctors, teachers), but also those whose expertise comes from other sources, including community and labor organizers or religious leaders. Ahmad points out the similarities to "multidisciplinary," "holistic," and "community" lawyering more generally.³³ Certainly, these notions are not new to practitioners. I do not know any public interests lawyers who would consider taking on a project involving foster children, prisoners, or homeless people without

32. See Ahmad, *supra* note 1, at 1082–84.

33. *Id.* at 1082.

engaging the help of others with expertise whom they judge to privilege in a real way the best interests of the putative client group. True, this effort may often be for the limited purpose of securing expert testimony for litigation or legislative advocacy. But many lawyers go much further. They assume that there are others closer to the nuances of the problem than they ever can be. Some may even be consciously aware of the risks of lawyerly self-interest intruding into decisions about remedies to pursue or settlements to accept and, therefore, seek out people who can, at least to a degree, function as surrogates for those the lawyer seeks to represent. In litigating large-scale cases and seeking administrative remedies for homeless people with severe mental illnesses, I sought out people with a track record not only of service to but also of solidarity with the members of the putative class. I preferred people who worked directly with those affected rather than leaders of organizations or advocacy groups more removed from the client's actual situation. I sometimes asked them to join a case as co-plaintiffs (permitted under California's unique statute granting standing to taxpayers to challenge government action³⁴). Of course, there are no perfect surrogates. I could only be certain that these individuals would, over the long haul and at the moments of decision, be better positioned than I and other lawyers to make the right decisions. Which brings us back to the earlier question: Who gets invited into "the room" with the lawyer and the client, and according to what principles?

In the case of interpreters, Ahmad suggests applying the rules applicable to traditional experts in legal settings.³⁵ But this proposal is not entirely satisfying. Clearly, a lawyer wants to know that a collaborator or potential partial surrogate has adequate knowledge of the matters at hand. But the main risk with such third parties is not that they cannot solve the lawyer's problem of ignorance, but that they cannot solve the other major problems—the intrusion of self-interest and the difficulty of achieving solidarity with clients with whom one cannot literally collaborate. Here, there is much more work to be done, work that would build on the foundational work by progressive legal scholars and critics of poverty law practice to suggest how to be true in practice to antisubordination principles when faced with hard cases. Among the many contributions of Ahmad's work in *Interpreting Communities* are his suggestions for how we might proceed.

34. CAL. CIV. PROC. CODE § 526a (West Supp. 2008).

35. Ahmad, *supra* note 1, at 1059.